Dominion Law Reports

CITED "D.L.R."

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

ANNOTATED

Alphabetically Arranged Table of Annotations found in Vols. I-LXII. D.L.R.

VOL. 62

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT

RUSSEL S. SMART

ASSOCIATE EDITOR OF PATENT AND TRADE MARK CASES

and

A. P. GRIGG

ASSOCIATE EDITOR FOR QUEBEC

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

TORONTO:
CANADA LAW BOOK CO. LIMITED
84 BAY STREET
1922

CASES REPORTED

IN THIS VOLUME

TABLE OF ANNOTATIONS.

CONCISE BRIEFS OF THE LAW.

APPEARING IN VOLS. 1 TO 62 INCLUSIVE.

ANNOTATION.

Law of Divorce in Canada.

By C. S. McKee, of the Toronto Bar.

1. Early History of Divorce and the Development of English Divorce Law.
2. Jurisdiction. Provinces with Divorce Courts.
3. Jurisdiction. Parliamentary Divorce.
4. Declarations of Nullity.
5. Grounds for Divorce.
6. Defences in Divorce Cases.
7. Procedure.
8. Parliamentary or Judicial Divorce?
9. The Decree.

1. Early History of Divorce and the Development of English Divorce Law.

An examination of the records of early Babylonia, Egypt, Phoenicia, and Assyria would no doubt reveal the existence of divorce in some form even at such remote a period as 3000 or 4000 B.C. But, since in the writings of the Greeks and Romans and in the Bible, there are not only traces of the most remote antiquity, but also the ideas on which are founded the laws, both moral and legal, by which modern society is controlled, these may be taken as a starting point.

At the time of Plato (430-347 B.C.), the Greeks had given apparently a definitely recognized place in their civilization to the principle of divorce. In his treastise on the laws, Plato states that he would take away from parties interested the license of separation which had therctofore existed, and would place divorce under the control of State authorities. If, he says, through infelicity of character, a man and his wife cannot agree, let the case be put into the hands of 10 impartial guardians of the law, and of 10 of those women to whom the matter of marriage is committed; let them reconcile the parties if they can; if this cannot be done, let them act according to their best ability in providing them with new spouses.

The Romans in even their very earliest days recognized divorce. Plutarch in his Life of Romulus (735 B.C.) narrates: "Romulus also enacted some laws; amongst the rest, that severe one which forbids the wife in any case to leave her husband, but gives the husband power to divorce his wife in case of her poisoning his children, counterfeiting his keys, or being guilty of adultery. But if on any other occasion he put her away, she

ANNOTATION

was to have one moiety of his goods, and the other was to be consecrated to Ceres; and whoever put away his wife was to make an atonement to the gods of the earth." Later in Roman history, it is found that "divortium" ("dis"-apart, and "vertere"-to turn) was closely connected with the idea of "pater familias." The daughter passed to the son-in-law "in manus;" but, at one time, could be taken back even against the wishes of both. The even limited restrictions placed by Romulus on divorce was abolished, and complete freedom restored by the Twelve Tables (450 B.C.). However, public opinion is reported to have restrained the practice—even to the extent that for 500 years, there were no divorces. Divorce must have returned —with both its advantages and its disadvantages—for the "Lex Julia de adulteriis" (A.D. 193) recognised divorce both by the husband and the wife; the requirements were a bill ("libellus repudii") and public registration thereof; the Act was still purely one of the party performing it, no judicial decision being necessary; a pecuniary readjustment was a consequence, whether or not as a restriction on divorce is not clear. Later, the "Lex Julia" was extended, limiting the reasons for which divorce could be made without pecuniary forfeiture as well as the right to re-marry. Still later, both these matters were altered again, this time so as to allow greater freedom. It should be borne in mind that all through this period of Roman history marriage was regarded as a mere contract, and hence divorce was possible by mere consent.

During the age referred to in the last paragraph, the Hebrews were developing their theories of divorce. In the twenty-fourth chapter of Deuteronomy (1451 B.C.) it is written:

"1. When a man hath taken a wife, and married her, and it come to pass that she find no favour in his eyes, because he hath found some uncleanness in her, then let him write her a bill of divorcement, and give it in her hand, and send her out of his house.

2. And when she is departed out of his house, she may go and be another man's wife.

3. And if the latter husband hate her, and write her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house, or if the latter husband die, which took her to be his wife;

4. Her former husband, which sent her away, may not take her again to be his wife."

A new view point is introduced by Christ in his sermon on the Mount, when he said: (5 Matthew—A.D. 31).

"31. It hath been said, whosoever shall put away his wife,

let him give her a bill of divorcement:

32. But I say unto you, that whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery: and whosoever shall marry her that is divorced committeth adultery."

In 19 Matthew, 3-9, He again expressed the same views, adding that Moses had suffered the people to put away their wives only because of the low moral character of the period. But Christ went even farther than this, for in 10 Mark (A.D. 32) He said:—"12. And if a woman shall put away her husband, and be married to another, she committeth adultery."

After Christianity had exerted its influence over Rome, divorce by consent was forbidden except the husband was impotent, either party desired to enter a monastery, or either was in captivity for a long time. "Let at first by justifiable disrelish for the loose practices of the decaying heathen world, but afterwards hurried on by a passion of asceticism, the professors of the new faith looked with disfavour on a marital tie which was in fact the laxest the western world has seen." (Maine).

By the time the two powers of Roman Law and Christianity had definitely joined forces, and, in the form of the Roman Catholic Church, had started on their conquest of Western Europe, two forms of divorce were quite clearly established—both under the control, not of the State, but of the Church. One was known as divorce "a mensa et thoro," and amounted to what would be known to-day as merely a separation—e.g., there was no bar of dower nor any right to re-marry. The other was called divorce "a vinculo," and either annulled the marriage for causes occurring before the sacrament or dissolved it for causes occurring later. The Church in practice recognized only divorce "a mensa et thoro" and annulment of marriage for causes occurring before or at the time of the ceremony—this latter being not strictly divorce in its modern sense. The causes for annulment were more numerous before than after the Reformation (1500); after this time they were limited to relationship within forbidden degrees, previous marriage, corporeal imbecility, and mental incapacity; and as in these cases it was held that there was in fact no "vinculum," the Church of Rome was able to maintain its stand that marriage was a sacrament and indissoluble. The reformed church, however, refused to regard marriage as purely a sacrament, and in fact recognised it as a civil contract, requiring (in England at least) some religious solemnity. Once the aspect of a civil contract had appeared, the struggle between Church and State over the question of divorce had commenced—the struggle which colors all

ANNOTATION

the later history of British divorce, and which has had much to do with the development of the present status of the question in Canada.

This limitation of the cases to which annulment could apply and the recognition of marriage as a contract were the causes of Parliamentary Divorce. It would appear that Parliament first made itself active in the matter of divorce in the middle of the sixteenth century. Several divorce bills were passed in favour of Henry VIII, but were really declarations of nullity. About the year 1549 the Marquis of Northampton divorced "a mensa et thoro" his wife for adultery, re-married, and had this second marriage confirmed by Parliament—only to have the statute repealed in the next reign on the accession of Mary, a Roman Catholic. However, during the next 50 years, marriage was not as a fact held by the Church—and therefore not by the courts—to be indissoluble; but the first half of the seventeenth century saw the pendulum swing the other way again, saw the old theories of the Church in supremacy, debarring absolute divorce and re-marriage. Lord Roos having obtained a divorce "a mensa et thoro" (1666), an Act was passed permitting him to re-marry, the theory of the indissolubility of marriage being thereby distinctly negatived. The first example of an actual dissolution by Parliament was the *Macclesfield* case (about 1700) where the wife frustrated all attempts to obtain a divorce from the ecclesiastical courts, with the result that a special Act was passed. Up to this time, the few who had applied to Parliament had supported their claim by special reasons—such as the desirability of avoiding bastard children or of continuing the name. The first case in which Parliament was applied to as a matter of course and of right was in 1701, when there was passed "An Act to dissolve the marriage of Ralph Box with Elizabeth Eyre and to enable him to re-marry again," a wording which was followed down to 1858. In 1798 standing orders were framed for the House of Lords—there had first to be a divorce "a mensa et thoro" before the Ecclesiastical Courts, and an action against the adulterer for damages in a Civil Court. The cost of a non-contested application was from £700 to £800.

In 1853 a commission was appointed to examine into the question of divorce, and its report recommended: 1. The transfer of jurisdiction from Parliament to a Court. 2. That the Court should consist of three judges. 3. That the husband should be able to get a divorce merely on the grounds of his wife's adultery, but that this should not be a sufficient ground for the wife to obtain a divorce. 4. That the causes for

ANNOTATION

which a divorce should be allowed to a husband should be adultery, cruelty, or desertion. After several attempts, an Act embodying these recommendations was passed in 1857 (Imp.) ch. 85. The Court was established as the Court of Divorce and Matrimonial Causes, and by the Judicature Act (1873) the jurisdiction of both this Court and the Ecclesiastical Courts was transferred to the Probate and Divorce Division of the High Court of Justice. The jurisdiction is as follows:

1. Dissolution of marriage. 2. Nullity of marriage. 3. Judicial separation, prior to 1857, in the hands of the Ecclesiastical Courts. 4. Restitution of conjugal rights. 5. Jactitation of marriage. 6. Alimony in certain cases. 7. Custody of children. 8. Application of damages recovered from an adulterer. 9. Settlement of the property of the parties. 10. Protection of the wife's property. 11. Reversal of decree of judicial separation and decree "nisi" for divorce.

Since 1858, cases from Ireland and from colonies not having jurisdiction within Courts of their own have continued to be heard by Parliament—in theory by the whole House of Lords, but in practice by only the law lords. Although the right still exists for people domiciled in England to apply to Parliament for a divorce on grounds not covered by the Act, e.g., insanity —none have done so; and in the case of such an event happening, the attitude of Parliament would in all probability be not to grant the divorce; but, if convinced of the desirability of such an innovation, to amend the existing legislation so as to give the Probate and Divorce Division jurisdiction.

2. JURISDICTION. PROVINCES WITH DIVORCE COURTS.

At the commencement of the study of divorce jurisdiction in Canada, it must be borne in mind that prior to Confederation, Canada, as it now is known, did not exist; in its place were several separate colonies. Of these colonies, Prince Edward Island Nova Scotia, New Brunswick, and British Columbia had, and still have, Courts with jurisdiction in divorce cases. In view of recent decisions of the Privy Council, the position of the three Western Provinces is unique and will be dealt with separately.

Until 1857, applications in England for divorce were made to Parliament; it is, therefore, not surprising that a similar situation existed in the colonies named above. An Act passed in 1833 and amended by 5 Wm. IV. ch. 10 P.E.I., (1835—assented to 1836) enacted that in the colony of Prince Edward Island all questions of marriage and divorce should be heard by the Lieutenant-Governor and his Council. Then the Act went further;

ANNOTATION

and, probably in an effort to retain the analogy to the procedure in the House of Lords where divorces were usually disposed of by only the law lords, provided that the Lieutenant-Governor and five of his Council should constitute a Court for the disposal of divorce applications, and provided that the Governor would depute the Chief Justice of the Supreme Court to act in his place. No provision was made for appeal. Only one divorce has been granted—in 1913. The law of the Province remains as it was in 1836.

The Revised Statutes of Nova Scotia 3rd. Series (1864), ch. 126, established a Court of Marriage and Divorce consisting of the President, Vice President, and members of the Executive Council of the colony, and provided that the Vice-President and any two Councillors were sufficient to constitute the Court. By 1866, (N.S.), ch. 13 the style was changed to the Court for Divorce and Matrimonial Causes, the then Vice President to compose the Court and be called Judge in Ordinary. Any party dissatisfied as to findings of law or fact can within 14 days appeal to the Supreme Court of Nova Scotia, the appeal to be heard by three Judges of that Court and the Judge in Ordinary. This jurisdiction is now contained in R.S.N.S., (1900), vol. 2, p. 862.

1791, (N.B.,) ch. 5, established a similar Court in New Brunswick: all controversies in regard to marriage and divorce were to be determined by the Governor and Council, and the Governor and any 5 or more of the Council were constituted a Court. In 1834, ch. 30 the Council was divided into legislative and executive sections, and the Court made to consist of the Governor, Executive Council, and any Justices of the Supreme Court or Master of the Rolls. In 1860, (N.B.), ch. 37 enacted that all divorce jurisdiction was vested in the Court of Divorce and Matrimonial Causes, one Justice of the Supreme Court being commissioned the Justice of the Court. This jurisdiction is now contained in C.S.N.B. (1903), ch. 115 and 1917, (N.B.), ch. 45.

The establishment in British Columbia of a Divorce Court came about in a different manner. An ordinance passed March 6, 1867, by the Legislature of B.C. enacted that the laws of England as they existed on November 19, 1858, and so far as circumstances permitted should be in force save so far as they had been modified by legislation between 1853-67. Under this, jurisdiction to exercise the relief and powers given under the English Divorce Act (1857 (Imp.), ch. 85) has been assumed by the Supreme Court of British Columbia and is contained in R.S.

B.C. 1911, ch. 67. The jurisdiction of the Supreme Court of B.C. to grant divorce was questioned but upheld in *S.* v *S.* (1887), 1 B.C.R. 25. It was also upheld by the Privy Council in *Watts* v. *Watts*, [1908] A.C. 573, 77 L.J. (P.C.) 121. The cases are tried by one Judge. ANNOTATION

Such then was the situation in these 4 colonies when the B.N.A. Act was passed in 1867 (Imp.), ch. 3. The distribution of powers as between Dominion and the Provinces was provided for by secs. 91 and 92. Section 91 reads: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and the House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

26. Marriage and divorce.

27. The criminal law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the classes 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." Section 92 reads: "In each Province the Legislature may exclusively make laws in relation to the matters coming within the classes of subjects next hereinafter enumerated, that is to say,

12. The solemnization of marriage in the Province.

14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts.

16. Generally all matters of a merely local or private nature in the Province. . ."

Considerable discussion has taken place as to the distinction intended between 91-26 and 92-12. Clement, in The Canadian Constitution, points out that 91-26 refers to the question of status of husband, wife, and issue; and this interpretation would appear to be correct, for Solicitor General Langerrin in his speech during the debates on confederation at the Quebec Conference said: "The word 'marriage' has been placed in the

ANNOTATION

draft of the proposed constitution to invest the Federal Parliament with the right of declaring what marriages shall be held and deemed to be valid, throughout the whole extent of the Confederacy. . . .'' The law officers of the Crown in England in 1870 also pointed out that the Provincial Legislatures had power to legislate upon such subjects as the issue of marriage licenses, while the Dominion had power to legislate on all matters relating to the status of marriage—e.g., between what persons and under what circumstances it could be created. The same interpretation is supported by Lefroy in The Canadian Federal System when he points out that the Privy Council have held in *Re Marriage Law of Canada*, 7 D.L.R. 629, [1912] A.C. 880, that 92-12 is by way of exception to 91-26. The jurisdiction of the Dominion Parliament is well illustrated by R.S.C., c. 105, which enacts that a marriage shall not be invalid merely because the woman is the sister of a deceased wife, and by the Criminal Coda which defines bigamy and polygamy and constitutes it a crime to solemnise marriage contrary to the provincial law. The question of provincial powers in regard to legislating on marriage will be returned to in the chapter on annulment of marriages.

Another section of the B.N.A. Act indirectly concerned with the subject of divorce is 129: ''Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union and all Courts. . . existing therein at the Union, shall continue as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain . . .) to be repealed, abolished or altered by the Parliament of Canada, or by the Legislatures of the respective Provinces, according to the authority of the Parliament or of that Legislature under this Act.'' It is under this section that the Courts of Nova Scotia and New Brunswick get their authority to continue to deal with cases of divorce, no repeal of their prior authority having been made by the Dominion Parliament, which is clearly (91-26) the body having authority to alter or repeal jurisdiction in regard to divorce.

The last section of the B.N.A. Act which concerns divorce is section 146, which enacts that Prince Edward Island, British Columbia, Rupert's Land, and the North West Territories may be admitted into the Union upon terms and subject to the provisions of 1867 (Can.) ch. 3 and that the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of Great Britain. Under this section, B.C. was admitted in 1871, and P.E.I. in 1873, the

Orders in Council in each case providing for the continuance of the existing Courts with their then jurisdiction which in both cases as has been seen, included divorce. ANNOTATION

At this point the question naturally arises of where the power lies to amend the B.N.A. Act. There can be no doubt that the powers of the Canadian Parliament within the Act are plenary—i.e., complete and full—and as long as it keeps within the Act, Parliament can legislate as it sees fit. For example, it can say on what grounds if at all divorce shall be granted. But it could not deprive itself of all legislative jurisdiction over divorce and hand it over to the Provincial Legislatures; such action would amount to an amendment of the Act, and this can be done only by the Imperial Parliament. (*Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96.) It is obvious that for Parliament to give to a Court—Provincial or Dominion—jurisdiction to try divorce cases amounts to no such amendment, the legislative control would remain in the proper place.

The Maritime Provinces and British Columbia have had Courts exercising jurisdiction over divorce for many years; the three prairie Provinces have discovered only very recently that they too have this jurisdiction. Until 1917, the practice in these Provinces was to apply for divorce to the Senate. *Walker* v. *Walker* was an application brought in the Court of King's Bench of Manitoba (See (1918), 28 Man. L.R. 495 at p. 496) for a divorce on the grounds of impotency. The case came up for trial before Galt J., who found that the grounds on which the application was founded were sufficient if the Court had jurisdiction. As the case was the first of its kind to come before a Court of the Province, it was dismissed — so that it might be more fully argued by a higher Court. An appeal was made to the Court of Appeal for Manitoba (1918, 39 D.L.R. 731, 28 Man. L.R. 495); the Attorney General of the Province was represented, and a leading King's Counsel was asked to appear as though for the defendant, who up to this stage had not appeared. The appeal was heard in 1918, and allowed, the opinion of the Court being summed up in a very long and exhaustive judgment by Perdue, J.A. From this decision an appeal was made to the Privy Council, where the appeal was dismissed in July, 1919, 48 D.L.R. 1 (annotated), [1919], A.C. 947, it being held that the Provincial Court had jurisdiction. Section 146 of the B.N.A. Act had provided that Rupert's Land and the North West Territories could be admitted to Confederation, and in 1870 an Order in Council admitting them had been passed. Part of the former District of Assiniboia had become the Province of Manitoba. When the Hudson Bay Co.

ANNOTATION

came into existence it had taken over land, and with this had gone the laws as they existed in 1670 and the power to make new laws. The Council of Assiniboia by an ordinance passed in 1851 had provided that for the laws of England as existing in 1670 should be substituted the laws existing at the accession of Queen Victoria, and in 1864 there were substituted for the latter, all such laws of England of a subsequent date as should be applicable. 1869 (Can.), ch. 3, provided that on the admission (then contemplated) of Rupert's Land and the North West Territories, all laws then in force there and not inconsistent with the B.N.A. Act should remain in force until altered. By 1870 (Can.), ch. 3, Manitoba was formed out of part of Rupert's Land and the North West Territories, and to get over doubts which had arisen as to the power of the Dominion to make new Provinces, this was confirmed by 1871 (Imp.), ch. 28. In order to remove doubts which had arisen as the result of the decision in *Sinclair* v. *Mulligan* (1888), 5 Man. L.R. 17, the Dominion Parliament passed, 1888, (Can.), ch. 33. It provided that, with exceptions which do not concern divorce, the laws of England relating to matters within the jurisdiction of the Parliament of Canada, so far as the same existed in 1870, had been and from that date were in force in Manitoba, in so far as applicable to the Province and unrepealed by Imperial or Dominion legislation. On these grounds, especially the Act of 1888, the Judicial Committee of the Privy Council decided that the Court of King's Bench had jurisdiction to hear applications for divorce. The matter seems so very plain that it is surprising that it had not been settled in this way many, many years ago.

The next Province to venture into the new field was Alberta. *Board* v. *Board* (1918) 41 D.L.R. 286, 13 Alta. L.R. 362, affirmed 48 D.L.R. 13, [1919] A.C. 956, was a reference to the Appellate Division by Walsh J. of a motion to quash a petition for divorce on the ground of lack of jurisdiction. The motion was dismissed, Harvey C. J. dissenting. The opinion of the Court was exhaustively set out by Stuart J. It was pointed out that it was the first case of its kind, and that the mere fact that Parliament had entertained divorce applications from Alberta could not be treated as a legislative interpretation of the meaning of the Act of 1886. The Dominion Parliament by 1886 (Can.), ch. 25, sec. 3 (now sec. 11) had enacted: "Subject to the provisions of the next preceding section, the laws of England relating to civil and criminal matters as the same existed on the fifteenth day of July in the year of our Lord one thousand eight hundred and seventy shall be in force in the Territories . . .

ANNOTATION

and in so far as the same have not been or may not hereafter be repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories or of the Parliament of Canada or by any ordinance of the Lieutenant Governor in Council." The preceding sub-section contains nothing affecting the question involved. At the date mentioned, the Divorce Act was in force in England. Reference was made to *S.* v. *S.*, 1 B.C.R. 25 and to *Walker* v. *Walker*, 39 D.L.R. 731, 28 Man. L.R. 495. It was argued that the sections of the Act dealing with the establishment of the Supreme Court impliedly limit the meaning of sec. 3 because there is an omission of reference to the British Divorce Court in detailing the jurisdiction to be exercised by the Provincial Supreme Court. But, it was held that sec. 3 is perfectly clear, and should be taken to mean exactly what it says; and it was further held that it is a well established British principle that the law can come before the establishment of the Court which is to enforce it. The Alberta Act, 1905 (Can.), ch. 3 had continued the law of the Territories until it should be altered. Lastly, it was pointed out by Stuart J., that all jurisdiction—all law—must come before one or other of His Majesty's Courts; there can be no such thing as a law and no Court to enforce it; and the Supreme Court is the Court with jurisdiction in this case. When the case came before the Judicial Committee of the Privy Council, it was pointed out that an amendment in 1858, (Imp.) ch. 108 to the British Divorce Act provided that all Judges of the three Common Law Courts were to be Judges of the new Divorce Court. The committee also pointed out that the Act of 1907, ch. 3 had set up a Supreme Court, and that it is a rule as regards presumption of jurisdiction in such a Court that as stated by Willis J. in *Mayor, etc., of London* v. *Cox* (1867), L.R. 2 H. of L. 239, at p. 259, nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so. As the history of legislation for Saskatchewan runs parallel to that for Alberta, the decision of *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, is being followed in the former province.

Up to this point, the purpose of this chapter has been to trade the establishment of divorce jurisdiction in the Courts of 7 of the 9 Provinces. A later chapter will deal with procedure. Here, the law for these 7 Provinces in regard to the name of the Court, the number of Judges, trial by jury, and appeals might be summarized. In P.E.I., the Divorce Court is known as the Court of Divorce; in N. S. and N. B., it is the Court of Divorce and Matrimonial Causes; in the 4 Western Provinces, divorce

ANNOTATION

jurisdiction is exercised by the Supreme Court of the Province. The number of Judges required to hear the applications in P. E.I. is 6—not really Judges but members of Council; in the other Provinces applications are heard by one Judge.

In P.E.I., there is no provision for trial by jury. In N.S., questions of fact, except adultery, may be determined by a jury. In N.B., questions of fact, if the Judge deems it proper, may be determined by the verdict of a jury of 7, and either party may apply for a special jury, which consists of 14 chosen by a prescribed process of elimination from an original panel of 28. In the other 4 Provinces, either party may insist on having the contested matters of fact tried by a jury; and if the husband claims damages from the adulterer, these in all cases are to be assessed by a jury. From the Court of the Lt. Governor in Council in P.E.I., there is no appeal. In N.S., any party dissatisfied as to the findings of law or fact may appeal within 14 days to the Supreme Court of the Province, the appeal to be heard by 3 Judges of that Court and the Judge of the Divorce Court. In N.B., the Judge has the usual powers to set aside a verdict and order a new trial, and an appeal lies to the Supreme Court against any judgment allowing or refusing a new trial provided notice of such appeal is given within 20 days after judgment is pronounced. Further, any party dissatisfied with any decision of the Divorce Court may appeal to the Supreme Court of N.B., from whose decision a further appeal may be made direct to the Privy Council. In the other 4 Provinces where divorces are tried by the Supreme Courts of the Provinces, the rules as to appeals are as in other cases.

So far, jurisdiction has been considered only from the standpoint of the body which exercises it. Over whom is this jurisdiction exercised? In the first place, it should be noticed in passing that although the Roman Catholic Church recognises annulment of marriage—on the theory that no real marriage has ever existed—it persistently refuses to recognise divorce of two legally married people; it still clings to the old belief that marriage is a sacrament and indissoluble. So, although the Courts may grant divorces to Roman Catholics, their new legal status will not be recognised by the Church.

The second point to note is that the place of the marriage does not make any difference; the status need not have been created within nor according to the law of the jurisdiction. Of course to be a divorce, there must be a legal marriage; and the Court will enquire to see that the parties have complied with the proper law, a question concerned rather with the validity of marriage than with divorce, which starts from the basis of a

ANNOTATION

proper legal marriage. The validity of the marriage will depend on two facts: capacity of the contracting parties, and observance of the necessary formalities. Capacity is the legal power of doing an act which can legally be done by a person. The only logical grounds for incapacity are insanity and infancy, but several others in regard to religion and consanguinity have been added in many countries. By a number of leading cases, it has now been decided that the question of capacity is one to be determined by the *lex actus* together with the *lex domicilii* (as regards essentials as distinct from mere ceremonies in connection with the celebration) of both parties, except where the domicil of one party is British and the incapacity of the other party is not recognised by English Law: *Brook* v. *Brook*, (1861), 9 H. of L. Cas. 193, 11 E. R. 703, 7 Jur. (N.S.) 422, 9 W.R. 461, (prior to Deceased Wife's Sister Act 1907, (Imp.) ch. 47. This was marriage to deceased wife's sister; both parties were domiciled in England; ceremony was performed in Denmark where such a marriage would be valid. Held invalid in England. *Sottomayor* v. *De Barros* (1879), 5 P. & D. 94. Marriage in England of two Portuguese subjects, but domiciled in England. They were first cousins, and therefore incapable of contracting a valid marriage with each other in Portugal. Marriage held valid. *De Wilton* v. *Montefiore*, [1900] 2 Ch. 481, 69 L.J. (Ch.) 717, 48 W. R. 645. Similar to *Brook* v. *Brook*, except that in this case it was a marriage to a niece. *In re Bozelli*, [1902] 1 Ch. 751, 71 L.J. (Ch.) 505, 50 W. R. 447. In 1871, an Englishwoman domiciled in England married an Italian domiciled in Italy. After the death of her first husband being still domiciled in Italy, she married in 1880 the brother of her deceased husband, also an Italian domiciled in Italy. The required dispensation was obtained from the civil and ecclesiastical authorities, and the ceremony properly celebrated. The marriage was held to be valid in England.

Simonin v. *Mallac* (1860), 29 L.J. (Mat.) 97, 2 Sw. & Tr. 67, 164 E.R. 917, 6 Jur. (N.S.) 561. It was here held that the consents of and notices to parents or others held necessary by many laws to the validity of a marriage are considered merely as part of the form or ceremony of the marriage, and not a question of capacity. Here two French subjects were domiciled in France. The proposed husband could not get the necessary consent of his father to the marriage. The two went to England and were there married. The marriage was held valid by English Courts. *Ogden* v. *Ogden*, [1908] P. 46, 7 L.J. (P.) 34. Consent of father held to be question of form and not of capacity. The observance of the necessary formalities is of course

ANNOTATION

governed by the *lex actus*, with certain exceptions in regard to embassies, uncivilised countries, and as provided for by the British Foreign Marriage Act, 1892, (Imp.) ch. 23. Even though the *lex actus* and *lex dimicilii* have been complied with in all particulars, English law will not recognise, no matter where celebrated, marriages which are criminal or which are essentially of a type not recognised in general by Christendom —e.g., even the first of a series of polygamous marriages will not be recognised, because it is not "the voluntary union for life of one man and one woman to the exclusion of all others." *Hyde* v. *Hyde*, (1866), L.R. 1 P. & D. 130. Here the marriage had been made in Utah, according to Morman rites, but with the intention to contract a Mormon marriage, and the English Divorce Court refused to dissolve it, on the ground that no marriage had ever taken place.

Thirdly, the place of committment of the adultery or other offence is not a determining factor in establishing jurisdiction: *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435. Two people were domiciled and married in Scotland. The wife during the continuance of the Scottish domicile committed adultery in Scotland. The husband later acquired an English domicile, and sued for a divorce in England on the grounds of the adultery committed in Scotland. A decree was granted.

Lastly, the Courts of the various Provinces have jurisdiction to try only divorces of people domiciled at the commencement of the action in the Province concerned: *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, 64 L.J. (P.C.) 97. Parties had been married in England, and England was still their domicile, although they were resident in Ceylon. Application for a divorce made by husband to a Court in Ceylon. Held on appeal that as the husband's domicile was not Ceylon, the Court there had no jurisdiction. Domicile is not to be confused here with residence. *Goulder* v. *Goulder*, [1892] P. 240. A husband and wife were domiciled in England, but were residing in France; the wife committed adultery in Paris. It was held that the English Court had jurisdiction to entertain the husband's application for a divorce. Furthermore, jurisdiction is not determined by a person's allegiance—by what is popularly known as his nationality: *Niboyet* v. *Niboyet* (1878), 4 P. D. 1, 48 L.J. (P.) 1, 27 W.R. 203. Two French subjects domiciled in Manchester; held that the Court had jurisdiction. With an exception to be discussed presently, a married woman cannot acquire a domicile separate from her husband; she must therefore bring her application for a divorce in the Province wherein her husband is domiciled. Suppose, however, she brings

ANNOTATION

it in another Province, and the husband consents to the jurisdiction; does this give the Court jurisdiction? Ordinarily such a consent would give jurisdiction, but it has been held that it will not give jurisdiction in cases of divorce: *Armitage* v. *Atty-Gen'l*, [1906] P. 135, 75 L.J. (P.) 42). The husband was domiciled in New York State and the action was brought in South Dakota: the husband entered an appearance and thereby consented to the jurisdiction. It was held by an English Court that this had not given the Dakota Court jurisdiction. Sir Gorell Barnes, Pres. Probate Division at p. 140: "There is a passage in Mr. Dicey's book on domicile . . . where he appears to think that a party by appearing . . . may give the Court jurisdiction. . . That, I think, is not in accordance with the law of this country." The exception to this general rule is given by Dicey on Conflict of Laws at p. 363 as follows: "In the following circumstances, that is to say:—

(1) Where a husband has (a) deserted his wife; or (b) so conducted himself towards her that she is justified in living apart from him; and (2) That parties have up to the time of such desertion or justification been domiciled in England [the Province]; and (3) The husband has after such time acquired a domicile in a foreign country, but the wife has continued resident in England [the Province]; the Court (*semble*) has on the petition of the wife jurisdiction to grant a divorce." The exception was recognised in *Stathatos* v. *Stathatos*, [1913] P. 46, 82 L.J. (P.) 34. An undefended petition by a wife for divorce on the grounds of adultery and desertion. The petitioner had been married to a Greek in London. She had been deserted, the husband later getting a decree of nullity in Greece, and remarrying there. The grounds for the declaration of nullity were the absence from the marriage of a Greek priest, grounds recognised in Greece, but not in England. It was held that the Court had jurisdiction, it being pointed out that it would be absurd to hold that a deserted wife should be obliged to follow her husband around the world in an endeavor to catch up to him for the purpose of bringing an action for divorce in the jurisdiction of his domicile. Lastly, it should be noted that for a declaration of nullity of marriage, residence less than domicile is sufficient, in fact, jurisdiction then depends on where the marriage has been celebrated or where the respondent is more or less permanently resident. This is only reasonable, for the domicile of the woman may depend on the very point under consideration—the validity of the marriage. *Linke* v. *Van Aerde* (1894), 10 Times L.R. 426. A Dutch couple were married in England. It turned out that the husband had been pre-

ANNOTATION viously married to another woman still living. After both had ceased to be domiciled in England, the wife sued for a declaration of nullity. Held that the Court had jurisdiction.

3. JURISDICTION. PARLIAMENTARY DIVORCE.

From a study of the previous chapter, it will be apparent that to-day the only parts of Canada where Parliamentary divorce is still a necessity are Ontario and Quebec. Of course, the jurisdiction of Parliament over divorce in general, and it is open to persons domiciled in any Province to apply to Parliament for a divorce; but, in practice, applications have in the past been confined to persons domiciled in Quebec, Ontario, the three prairie provinces, and the Yukon. In the future, such applications will in all probability be confined to Ontario and Quebec.

In the early days, Prince Edward Island had adopted a compromise between Parliamentary divorce and a Divorce Court; the reference was to a Court, but one composed not of Judges but of the chief parliamentary dignitaries of the Province; as divorce never became an acute problem, there the matter rested until caught by Confederation. New Brunswick and Nova Scotia adopted similar arrangements; but, with the example of England before them, altered to real Divorce Courts before 1867; the situation has of course remained unaltered since the B.N.A. Act. The western Provinces, at a time after 1857, had adopted for them by the Dominion Parliament (except British Columbia, which did the legislating itself), British legislation; their population prior to Confederation was almost non-existent; and where such a situation exists, it is obvious that divorce is never a pressing problem. The absence of a Divorce Court in Quebec is hardly to be wondered at, when it is remembered that the Province is inhabitated largely by adherents of the Roman Catholic Church, which has always been firm in its stand against divorce under any circumstances—Italy, Spain, and Ireland have no divorce courts. "In Quebec, by virtue of the Quebec Act of 1774, the laws of Canada were made the laws of the Province as to all matters of controversy respecting property and civil rights. The laws of Canada had their basis in the old French law which prevailed in Canada during the French regime; but with the grant of the rights of self government, the former Province of Canada acquired the right to make laws for itself, among other things, within certain limitations, on the subject of marriage; and the Provincial Law of Quebec on the subject of marriage is now to be found in the Code Civil and Provincial Statutes passed since 1774 up to 1867." (Holmested). The laws of England in regard to property and civil rights as ex-

ANNOTATION

isting in 1792 were adopted in Upper Canada, and on the subsequent institution of the Courts of Common Law and Chancery their jurisdiction was limited to that possessed by the corresponding Courts in England, which at that time did not include divorces. Prior to the Act of Union in 1840, there was apparently very little need for the consideration in Upper Canada of the question of divorce, owing to the small population. This idea is supported by the fact that until 1837 there was no equity jurisdiction—e.g., in regard to trusts, specific performance, and foreclosure—that it took 10 years to get this equity jurisdiction established, a dispatch from the Secretary of State for the colonies drawing attention to the increase in the population and the necessity for greater jurisdiction having been sent to the Lieutenant-Governor of Upper Canada in 1827. The first record of divorce in the annals of the Province was in 1833, when a bill was introduced to provide for the establishment of a divorce court, but was later dropped. Two petitions for bills of divorce were presented in 1836, but no action appears to have been taken on them. The first divorce recorded is that of John Stuart which was passed by the Legislative Assembly of U. C. in 1839, a judgment having first been obtained against the adulterer for £671-14-3. Two more applications made in 1840 to the Legislature of the new United Canada were abandoned. From 1840 to Confederation, Ontario was joined to Quebec; and, as their object was to live and develop peaceably together rather than to quarrel over a semi-religious question, it is little wonder that a divorce court was not established. In 1845 the *Harris* case was heard; by the time the bill had passed, both parties had left the country, so the bill was disallowed by Her Majesty. Between 1845 and 1867, only three divorce bills were passed. In 1845 a motion to appoint a committee to draft a bill providing for a Divorce Court was defeated, as was a similar motion the next year. In 1859 a communication was received from the Imperial Parliament recommending the establishment of a Divorce Court, but no action was taken on it. The result of a petition from the City of Quebec in 1860 was the same. Numerous times—1870, 1875, 1888, and 1919, at least—the question of establishing a Divorce Court has come up in Parliament, but never with the result of having a bill passed.

In Canada, as in Great Britain, the procedure has always been for private bills to originate in the Upper House. Before 1847, no standing orders on the question of divorce bills appear to have been in existence; the practice was merely to follow British procedure. In 1847 standing orders were adopted; in all unprovided cases reference was to be had to the procedure

ANNOTATION

of the House of Lords; however, the latter was not followed absolutely, the outstanding example being that in this country a wife could get a divorce from her husband on the sole ground of adultery. These Senate rules were amended in 1876, 1888, and again in 1906, and the subject of divorce is now dealt with by rules 133 to 152. These twenty rules are published under separate cover and are available upon application. The only amendment affecting jurisdiction was in 1888. Under the former practice, the Senator in charge of the bill moved immediately after the second reading the appointment of a Select Committee of nine, and also named its members. At the instance of Senator Gowan, who had been a Judge of the district of Simcoe from 1843 to 1883, rules were adopted in 1888 providing for the formation at the beginning of each session of a committee of nine to whom all questions of divorce are referred with a view to relieving the Senate itself of some of the duties which under the old rules had devolved upon it. At first, an attempt was made to select the committee on the basis of provincial representation, but on account of the objection to divorce of Roman Catholic Senators, it has not always been possible to adhere to this plan.

Applications for divorce come under the head of private bill legislation. The practice is now governed by the set of rules adopted in 1906; apart from these rules the general regulations regarding private bills apply if not in conflict with the rules. A committee of selection of nine is appointed at the first of each session to nominate the Senators to serve on the several standing committees—among others, the one on divorce, which consists of nine. Every standing or special committee meets, if practicable, on the day after its appointment, and chooses a chairman. A majority of the committee constitutes a quorum. Senators who are not members of the committee may attend and may speak, but may not vote; in practice members of the House of Commons may also attend. Although R. 152 provides that in cases not covered by the rules the general principles upon which the Imperial Parliament proceeds in dissolving marriages shall be followed, the rule has in practice been regarded as permissive only and not imperative, and the Senate has never felt itself bound by the decisions of the House of Lords. Another similar defect is the fact that the Senate observes precedents only when it chooses to do so; unlike a court of law, it is not bound by them; and the result is that solicitors are left in the embarrassing position in advising clients, that what the Senate has done before is an indication merely and not a guarantee as to what it will do again. Although it probably is impracticable

ANNOTATION

for Parliament to limit its almost omnipotant powers by adopting a rule that precedents are to be followed in the manner in which they are followed in courts of law, yet the practice of the latter in the matter might well be more closely adhered to than it is at present.

The House of Commons, not being particularly concerned with divorce bills, has adopted no special rules relating to them, but has left them to the practice relating to other private bills.

There is of course no appeal from the action of Parliament —except to have the bill introduced again at a subsequent session.

The same principles in regard to proving a legal marriage, the unimportance of the place of commitment of the offence, and domicile as were noticed above in connection with Provincial Divorce Courts apply to Parliamentary divorces.

4. JURISDICTION. DECLARATIONS OF NULLITY.

By those not connected with the legal profession, declarations of nullity are frequently confused with divorce. In their practical effects, they may be somewhat similar, but technically there is a vast difference; and cases do occur where this technical difference impresses itself in a far-reaching manner—e.g., as regards legitimacy of issue, and as regards re-marriage prior to the declaration. Divorce starts with the basis of a legal marriage; a declaration of nullity has as its basis the absence of a legal marriage—the absence of the status of husband and wife. In the Provinces where there are Courts with jurisdiction over divorce, it is not surprising that these Courts have jurisdiction to hear applications for declarations of nullity; in Ontario and Quebec, the exact legal situation is not very clear; and in so far as it is settled, it is probably not just what might reasonably be expected—the decisions of lower Courts are conflicting; of Appeal Courts are lacking in detail.

The theory of annulment is that marriage although accompanied by religious observances is for judicial purposes a contract, and can like other contracts be questioned as to its validity. Anson gives as the elements of a valid contract: 1. Offer and acceptance. 2. Form and consideration; 3. Capacity. 4. Genuine consent. 5. Legality of object.

In connection with the contract of marriage these may be regrouped and enlarged as follows:

1. Genuine consent—error—as to person, as to ceremony; duress; undue influence.

2. Form—as laid down by provincial legislation in regard to solemnisation.

ANNOTATION

3. Capacity—infants; lunatics; intoxicated persons; impotent persons.

4. Legality of object—consanguinity; bigamy.

A sub-division into void and voidable has been attempted by some writers, but such a classification would, besides being confusing on account of different legislation in the various Provinces, appear to be unnecessary, since in practice whether void or voidable, the effect never comes into operation until the validity has been attacked and settled.

1. Consent. Error in regard to the person must be as to identity and not as to condition, either social or physical. Misrepresentation, even though fraudulent, unless it results in such an error is not a ground for a declaration of nullity. The Quebec Civil Code differs from the English Common Law on this subject in that the former provides that after 6 months cohabitation and after having acquired full liberty or become aware of the error, the person coerced or in error cannot have the marriage annulled. (arts. 148-9).

2. Form. Obviously parties are not married unless they comply with the provincial law in regard to solemnisation. This phase of the question has been of much more importance in Quebec than in the other Provinces. A Papal decree, known as the Ne Temere, in 1908, tried to make marriages of two Roman Catholics or of one Protestant and one Roman Catholic except by a priest invalid. It was held by a majority of the Judges of the Supreme Court of Canada to be a question of conscience only and not binding on Quebec Courts. However, in *Re Marriage Law of Canada*, 7 D.L.R. 629, [1912] A.C. 880, the Privy Council held that the power of the Provinces to legislate in regard to solemnisation covered the right to say certain ministers only should be competent to perform the ceremony of marriage for certain persons, and that non-compliance would render the marriage null and void. The matter has recently been before the Privy Council again, (*Tremblay Marriage* case, 58 D.L.R. 29, [1921] 1 A.C. 702, 27 Rev. Leg. 209), and it has been held that the marriage of two Roman Catholics or of a Roman Catholic and a Protestant by a properly authorised person other than a Roman Catholic priest is not a ground for a declaration of nullity.

3. Capacity. The English Common Law which says that a man under 14 and a woman under 12 cannot marry except to prevent illegitimacy is in force in Canada, except in Ontario, where the age limit is 14 for both. (R.S.O., 1914, ch. 148, sec. 16), and in Manitoba, where the age limit is 16 for both, (1906, (Man.) ch. 41, sec. 16). All Provinces have passed legislation

ANNOTATION

to discourage marriage by very young people, but in most cases this legislation does not go so far as to affect legality once the contract has been entered into. In Quebec and Ontario the statutes go further. In the former, a marriage where the parties are under 21 years of age contracted without the consent of the parents can be attacked only by those whose consent was required, and then only within 6 months of the ceremony. In Ontario, by R.S.O., 1914, ch. 148, sec. 36, when a form of marriage has been gone through between persons either of whom is under 18 without the consent of the father if living or of the mother or other guardian if he is dead, the Supreme Court has jurisdiction in an action brought by either party who at the time of the marriage was under the age of 18 years to annul the marriage, provided that such persons have not after the ceremony cohabited together as man and wife and that the action is brought before the applicant is 19. These provisions came before the Courts in 1916 in *Peppiatt* v. *Peppiatt* (1916), 30 D.L.R. 1, 36 O.L.R. 427. It was the case of a marriage without consent on the part of her parents of a girl under 18, and came on for trial before Meredith C.J., C.P., 34 D.L.R. 121, who held that the section of the Ontario Marriage Act R.S.O. 1914, ch. 148, requiring consent was *ultra vires*, and who sent the case on to the Appellate Division, it being the first of such cases to go there. The trial judge said at p. 123: "This is another of those cases which, though of infrequent occurrence in this Province, invariably, indeed necessarily, direct attention to the uncertain and unsatisfactory state of the marriage and divorce laws of Canada whenever they do occur; uncertain and unsatisfactory not only in the conflicting and indecisive character of the case-law upon the subjects, but equally so of the statute-law; and so it has been for many years, notwithstanding the fact that it is a thing regarding which it is of the utmost importance, not only to the persons directly concerned, but to the public as well, that there should be certainty and certainty of a satisfactory character . . How can it be but unsatisfactory for man and woman to be uncertain whether they are really husband and wife; whether they are lawfully married to one another; as well as whether any of the ordinary Courts of law have any power to settle the question? . . . The cases are very much opposed to one another; or rather, the expressions of judicial opinion in them are; and they are less helpful as none of them was ever carried to a court of appeal."

With the desirability of a clear decision so definitely set out by the trial Judge, it is to be regretted that the reasons for the decision of the Appellate Division are not more clearly set out

ANNOTATION

than they are. The Appellate Division felt themselves bound by the decision of the Privy Council in *Re Marriage Law of Canada*, 7 D.L.R. 629, [1912] A. C. 880, which held that everything which is included in the solemnisation of marriage is excepted from the exclusive jurisdiction vested in the Parliament of Canada by sec. 91 (26) of the B.N.A. Act, and that this enables the Provincial Legislature to enact conditions as to solemnisation which may affect the validity of the contract. They then considered the question of whether the Marriage Act makes the consent required by its 15th section a condition precedent to a valid marriage. The action was dismissed, it being held that the consent required by the Marriage Act was not a condition precedent to the formation of a valid marriage but merely a direction to the issuer of marriage licenses. The question of the validity of sec. 36 was not decided. Jurisdiction was held to be conferred by sec. 16 (B) of the Judicature Act. This decision appears to have found jurisdiction elsewhere than was found in *Lawless* v. *Chamberlain* (1889), 18 O.R. 296, and to have overruled *Reid* v. *Ault* (1914), 19 D.L.R. 309, 32 O.L.R. 68, where Middleton J. said, at p. 78: " . . The power to make declaratory decrees conferred by the Legislature is not to be exercised in respect of matters over which the Court has no general jurisdiction."

Where there is insanity—not merely mental deficiency—or drunkenness, there can obviously be no consent to the contract —*A.* v. *B.* (1911), 23 O.L.R. 261, and *Roblin* v. *Roblin* (1881), 28 Gr. 439.

Another capacity essential to the marriage contract is the capacity for the consummation of the marriage, the lack of which is known as impotency and is ground for a declaration of the nullity. It must exist unknown at the time of the marriage; physical incapacity arising subsequently is no ground, as the parties have taken each other subject to all the vicissitudes of life which may arise, but on the belief that all is correct at the start. Moreover, in cases of subsequent impotency, the marriage would already have been consummated. The impotency must be incurable—i.e., the contract must be incapable of completion. Usually it will be apparent to medical authorities; but in some cases, it cannot be detected by them; the practice in such cases is to recognise the claim after the lapse of 3 years. In England the practice has been that the fit party must be the petitioner; but in some cases this rule has not been followed, as where the unfitness was not known to the deficient party. In Quebec, the marriage can be annulled for impotency, natural or accidental, existing at the time of the marriage, but

only if it be apparent and manifest; the jurisdiction can be invoked only by the party who has contracted the marriage with the impotent person, and only before 3 years have elapsed. According to Bishop, there were in England between 1858 and 1872, 15 reported cases.

4. Legality. In England since Lord Lyndhurst's Act in 1835, (Imp.) ch. 54, marriages within the degrees prohibited by 1537 (Imp.) ch. 7, sec. 7, are void *ab initio* and not merely voidable. The Acts of 1835 however do not apply to many of the Provinces of Canada, and therefore in these Provinces such marriages are merely voidable. In *Cox* v. *Cox* (1918), 40 D.L.R. 195, 13 Alta. L.R. 285, to take only one case, the Court of Alberta made a declaration of nullity in connection with a bigamous marriage.

Very similar to a nullity suit is a jactitation suit. It is available to the man or to the woman. The former may complain that the latter has improperly boasted of being his wife and may ask the Court to silence her. She may answer the charge by denying the boasting, by setting up a marriage, or by pleading his permission to assume the character of wife. It has rarely been resorted to in England in modern times, and never in Canada or the U.S.A.

So much for the grounds for declarations of nullity as they are generally recognised at present. Are these grounds too broad or too limited, and are they the only grounds which should be recognised? Should legislation be passed abolishing some of the existing grounds? At the basis of these questions there lies —and always in the past has lain—the desirability of releasing the person from an unhappy contract which was never contemplated or understood, of limiting the number of children of an undesirable physical type which are brought into the world, of limiting the number of children declared to be illegitimate, and of limiting the type of immorality which enters into marriage, thinking that when tired of it, it can easily be annulled. Cases discussed above under the heading of consent would appear to be ones which should be annulled only if action is brought before the marriage has been confirmed by the acts of the injured party which would be within a reasonable time after the error, or duress, etc., has ceased; but if brought within such time, then even though the marriage has been consummated before the error, duress, etc., ceased. The action should lie only at the instance of the injured party; the marriage should be voidable not void. Since ignorance of the law can never be a defence, since the question is also one of crime, and since the State is presumed to punish all crimes of which it has knowl-

ANNOTATION edge, the non-observance of the formalities provided by law for marriage should be ground for annullment only at the instance of the Crown, except when the ignorance is one of fact only and not law, in which case the party acting in such ignorance should be able to bring an action. It would appear to be advisable in most cases in the interests of legitimacy for the Crown to compel the parties to go through a properly binding marriage ceremony, and in fact it would be wise if as well either party could take action to compel the other to complete the contract in regard to form. The classes under the heading of capacity are slightly more complex as regards estimation, and can probably best be considered under headings.

1. Neither party an infant, insane, intoxicated, or impotent —obviously no question arises.

2. One party only an infant, insane, intoxicated, or impotent. If the other party has knowledge of the incapacity, then it would appear that no action should lie at the instance of that party. In the case of insanity an action should lie at the instance of the Crown, and the Criminal Code should provide punishment for the guilty party. If the party with full capacity marries in ignorance but later learns of the incapacity of the other, then in cases of insanity and impotency actions should lie at the instance of the former, provided the necessary action is taken within a reasonable time of the receipt of the knowledge. Actions by the incapacitated person are the same as in the next class, except that a person knowing of his or her impotency should not be allowed to plead it as a ground of nullity, but should if he or she married in ignorance of it.

3. Both parties infants, insane, intoxicated, or impotent.

(a) Infants—action tenable by guardian while infancy exists or by either party acting within a reasonable time of coming of age.

(b) Insane persons—action tenable by Crown, by committee, or by either party acting within a reasonable time of ceasing to be under the incapacity.

(c) Intoxicated persons—action tenable by either party acting within a reasonable time of ceasing to be intoxicated.

(d) Impotent persons—a person who marries knowing him or herself to be impotent should of course not be permitted to plead the other party's impotency as a ground for nullity.

The remarks above in regard to form apply to cases of consanguinity and bigamy.

The grounds additional to the above recommended by both

majority and minority report of the British Commission on Divorce in 1912 were: ANNOTATION

1. Unsoundness of mind less than insanity not apparent at the time of the ceremony, and provided intercourse has ceased after the situation became apparent, and action is started within a reasonable time.

2. Epilepsy and recurrent insanity—as in 1.

3. Venereal disease in a communicable form, and the fact not disclosed at the time of marriage—as in 1.

4. Woman pregnant at the time of her marriage, her condition being due to intercourse with a person other than her husband, and such condition being undisclosed by her to her husband who is ignorant of the fact.

5. Refusal without reasonable cause to permit of intercourse where there has been no intercourse at all.

In passing, it might be noted that adultery, etc., on the part of the plaintiff is no defence in actions of declarations of nullity.

Residence less than domicile is sufficient to give jurisdiction for declaration of nullity—as noticed as the end of the chapter on Provinces with Divorce Courts.

The question of jurisdiction in suits for declarations of nullity is of sufficient importance, and so far as Ontario and Quebec are concerned is still in a sufficiently unsatisfactory state, to warrant a more complete investigation than that made above when considering the question of infancy. Where Provincial Courts have jurisdiction over divorce, they have also jurisdiction over annulment, the one having in all cases been established with the other.

The first case in Ontario in which the question of jurisdiction appears to have been discussed was *Lawless* v. *Chamberlain* (1889), 18 O.R. 296. This was an action for annulment on grounds of duress and infancy. In dismissing the action on the merits, Boyd C. said, at p. 297: " . . . If the alleged marriage has been procured by fraud or duress in such wise that it is *void ab initio*, judgment of nullity may be given by the Court." Mr. Holmested, in his book Matrimonial Jurisdiction in Ontario and Quebec questions at some length the soundness of the reasons given for the judgment. The next case of importance was *T.* v. *B.*, (1907), 15 O.L.R. 224, where the same Judge decided that the Court had not jurisdiction, drawing a fine and rather doubtful distinction between the two cases. In *May* v. *May*, (1900), 22 O.L.R. 559, an attempt was made to obtain a declartion of nullity on grounds of consanguinity; the trial Judge held himself bound by *Lawless* v. *Chamberlain* in regard to jurisdiction, but on appeal this was overruled. In *A.*

ANNOTATION

v. *B.*, 23 O.L.R. 261, it was also held that the Courts did not have jurisdiction. Clute J., here pointed out that the power to make a declaratory judgment did not enable the Court to do so in cases in which it had no jurisdiction over the subject matter in controversy. There is certainly no inherent jurisdiction over the question of annulment; when Upper Canada was given self government it was given power to establish Courts and confer on them jurisdiction; this jurisdiction it proceeded to define by reference to the Common Law and Chancery Courts in England, none of which at the dates referred to had jurisdiction over the subject in question, this then being in the hands of the Ecclesiastical Courts. Middleton J., took the same view in the *Reid* v. *Aull*, 19 D.L.R. 309, 32 O.L.R. 68; but in *Peppiatt* v. *Peppiatt*, 30 D.L.R. 1, 36 O.L.R. 427, the Appellate Division overruled all these cases, and decided that under the power to make declaratory judgments, R.S.O., ch. 56, sec. 16 (b), the Court had jurisdiction. This last decision will hold until it is overruled by a higher Court, but that it is sound law appears to be most doubtful, as if the theory were pressed to its logical conclusions there would be few if any parts of the field of purely Dominion matters which the Provinces could not invade. It would appear that the Court in a recognition of what was desirable as distinct from what existed had pushed a technicality to its limit, if not beyond.

In Quebec, under the French regime, marriage was under the jurisdiction of the French Ecclesiastical Courts; but with the conquest, these Courts, as did all other Church Courts, ceased to have any official status; and such jurisdiction was not conferred on any new Court. True, the Code Civil (ch. 4) enacted before Confederation gives grounds for annulment, but it does not confer jurisdiction on any Court—admitted an anomalous state of affairs, and a rather doubtful one in view of the opinion of the Judges in *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, as to the impossibility of a statute existing without a Court to enforce it; when this particular part of the Code was adopted, the Ecclesiatsical Courts could enforce its provisions; their jurisdiction was abolished—*ipso facto* the Civil Court, one would think, obtained jurisdiction. Without, as it would appear, any legal sanction whatever, the Judges of Quebec have chosen to give a legal sanction to the decrees of Roman Catholic Bishops, the latter making declarations of nullity which are enforced by the Civil Court. True, such a practice would be perfectly correct in regard to purely spiritual affairs distinctly within the realm of the church, as it would for example in regard to the rules of a trade union *qua* union, but is

distinctly incorrect in matters where civil rights are in question. The attempts of the Roman Catholic Church to have annulled marriages between Catholics celebrated by a Protestant minister are clearly beyond their authority until such an enactment is put on the Provincial Statute Book. This was recognised in the *Hebert* case in so far as lack of jurisdiction on the part of the R. C. Bishop was concerned, but it was apparently not even questioned as to the jurisdiction of the Civil Court itself. The matter appears to have been cleared up at last by the *Tremblay Marriage* case, decided by the Privy Council in 1921, 58 D.L.R. 29, [1921] 1 A.C. 702, 27 Rev. Leg. 209. ANNOTATION

5. GROUNDS FOR DIVORCE.

In considering the grounds on which, in Canada, an application may be made for a divorce, it should be kept in mind that the Roman Catholic Church holds strictly to the theory of the indissolubility of a properly celebrated and consummated marriage, and does not recognise divorce on any ground.

Divorce, as pointed out by Senator Gowan in 1888 during the discussion which arose on the proposal to establish a Divorce Court, is not only a question of the effect on the parties themselves, but of the effect in relation to morals and good order—in short upon the well-being of the community. "Divorce has been substantially recognised as a matter involving the happiness and morality of society, and consequently to be treated in the spirit of the moralist as well as of the jurist." (Bourinot's Parliamentary Procedure, 4th ed., p. 627.) The position of the State in regard to the grounds for divorce is summed up in the Minority Report of the British Royal Commission of 1912 as follows: ". . . It (the State) has a concern of its own in the peace of the community, the welfare of the family, the rearing of healthy children, and the training of good citizens, which renders it imperative that the making and breaking of marriage contracts should be treated as matters of public importance touching the commonwealth itself, and not as merely private transactions only affecting the parties." Dicey in Conflict of Laws points out that the doctrine maintained by the Courts of a country in regard to divorce depends on the view entertained in regard to the nature of divorce, and summarises these views under the heading of contractual, penal, and status theories. That the right to rescind the marriage contract much as one rescinds any other contract has not been recognised is apparent to any thinking person; divorce is but rarely looked upon as punishment for a crime—in fact in cases of lunacy, such a view

ANNOTATION

is out of the question; rather divorce is the extinction by the State of a status—the status of husband and wife—the discontinuance of which is expedient for the purpose of giving relief to the person injured.

The grounds for divorce recognised before the Reformation by the Ecclesiastical Courts were very numerous, but the decree, it should be remembered, was one of annulment rather than of divorce as understood to-day. The grounds were: error as to person, error as to condition, vow of chastity on entering religious order before marriage, consanguinity, crime, disparity of worship, duress, preceding marriage, public decorum in being solemnly betrothed to another, madness, affinity, clandestinity, impotency, and rape. After the Reformation the grounds for divorce were limited to consanguinity, previous marriage, corporeal imbecility, and mental incapacity. In England during the period of divorce by Private Acts of Parliament, of the two hundred and forty-nine Acts passed only four were in favor of wives, the first being that of a Mrs. Addison in 1801; all of the remainder were granted to the husband on account of the wife's adultery; in two of the four cases, the adultery was incestuous; in the third there was profligacy, deceit, abandonment, and gross injury; in the fourth, there was bigamy. The Act of 1857 (Imp.), ch. 85, practically adopted the former parliamentary practice in regard to grounds for divorce. Under this Act a man may obtain a divorce on the ground of his wife's adultery; but a woman to get a divorce must prove (sec. 27):

1. Incestuous adultery, *i.e.*, within the degrees prohibited for marriage on account of consanguinity or affinity, or 2. Bigamy and adultery, or 3. Rape, or 4. Sodomy or bestiality, or 5. Adultery coupled with (a) such cruelty as without adultery would entitle her to a divorce *a mensa et thoro*, which has been defined as such conduct as makes it unsafe, having regard to risk of life, limb, or health, bodily or mental, for one married person to continue to live with another; or (b) desertion without reasonable excuse for two years or upwards, which in practice has included wilful refusal to permit of marital intercourse without reasonable excuse.

In Canada the British law is in force in British Columbia, Alberta, Saskatchewan, and Manitoba; it being necessary in these Provinces for a wife to prove as above, it might be expected that in cases of mere adultery women would resort to parliamentary divorce which does not recognise any disparity between the sexes, but in practice this has not occurred. The grounds provided by the New Brunswick and Prince Edward Island

statutes are: 1. Frigidity or impotence, 2. Adultery, 3. Consanguinity. In Nova Scotia, the Act provides that marriages may be declared null and void for: 1. Impoteney, 2. Adultery, 3. Cruelty, 4. Consanguinity.

The Parliament of Canada of course can grant divorces on any grounds it sees fit, but as a matter of policy and good morals it is universally recognised that the power should not be exercised arbitrarily and without cause but only for

". . . . Such a deed
As from the body of contraction plucks
The very soul. . . ." (Hamlet, act 3, scene 4.)

The practice has been for Parliament to place both sexes on an equality in regard to divorce; this means that a wife can obtain a divorce on the ground of a simple act of adultery on the part of her husband without having to prove any of the additional grounds required to be proved in England and in Provinces following English law. The grounds now recognised by Parliament are: 1. Adultery—alone, or accompanied with desertion, cruelty, desertion and cruelty, or bigamy; 2, bigamy; 3, incestuous adultery; 4, rape; 5, sodomy and unnatural offences; 6, bestiality; 7, malformation at time of marriage; 8, impotency; 9, nullity of marriage owing to fraud when there has been no consummation by cohabitation; 10, refusal of sexual intercourse.

In regard to adultery, it is not necessary in order to succeed to prove the actual fact of adultery; in nearly every case the fact is inferred from the proof of circumstances which shew the opportunity for the act, and which lead to the conclusion that it occurred, *e.g.*, travel together and registration as man and wife and occupation of the same room, or the visiting of a brothel, unless very clear evidence is given that adultery did not in fact occur. The evidence of a woman of loose character with whom the act is said to have occurred will be very closely scrutinised; and the evidence of the husband or wife alone is not sufficient unless corroborated by another witness or by strong circumstantial evidence, and particularly so where the fact is sought to be proved by admission. Proof that the respondent has contracted venereal disease not from the applicant is sufficient evidence of adultery; and in the *Browning* case, [1911] P. 161, 80 L.J. (P.) 74, it was held that it is sufficient for a wife to prove that she was infected by the husband, it being then for him to prove that he acquired the disease otherwise than by adultery. Proof of venereal disease must be by medical testimony.

The cases where bigamy is pleaded usually arise in connection with so-called American divorces. This subject necessitates a

ANNOTATION return to the question of jurisdiction. It has already been observed that domicile is an essential according to English law to establish jurisdiction; and that with the exception of desertion by the husband, a wife can not acquire a domicile separate from that of her husband. The American State laws do not recognise this principle to the same extent; in many of them, a wife can acquire a domicile separate from that of her husband, and that by a very short residence. Moreover, most of the States grant divorces for causes not recognised in Canada. As a result, cases are constantly occurring of wives deserting their husbands, taking up for the necessary time what in reality is only a temporary residence in one of the States, frequently Nevada, and then getting there a divorce on grounds which are not recognised in Canada as sufficient; with the result that in one State even of the American union she may be regarded as divorced, while in another and in Canada she is not so regarded. This result of different laws in the United States is often held up to ridicule, and quite properly so, as the situation is as absurd as it is unjust; but, at the same time, it should be remembered that a similar situation has existed for years in regard to divorces granted by Scottish Courts to English wives, and by the Courts of New South Wales to wives from other parts of Australia. A remarriage after such an American divorce is bigamous, and affords in Canada a ground for divorce. The recognised English law on the matter is stated by Dicey as follows, at pp. 381, *et seq.*: "The Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings, even though the ground for divorce is not recognised in the country of domicile at the time of the marriage or in the country of which the parties are subjects. The leading case on the point is *Bater* v. *Bater*, [1906] P. 209, 75 L.J. (P.) 60: "The husband and wife were British subjects domiciled in England; after their marriage the husband acquired a domicile in New York; the wife obtained in New York a divorce on grounds recognised there, but not so recognised in England; the divorce was held to be valid." Dicey goes on to explain that the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings, with the exception that the Courts of a foreign country where the parties are not domiciled have jurisdiction for English purposes to dissolve a marriage, if the divorce granted by such Courts would be held valid by the Courts of the country where at the time of the proceedings the parties

ANNOTATION

were domiciled. The leading case here is *Armytage* v. *The Att'y-Gen'l*, [1906] P. 135, 75 L.J. (P.) 42: The husband was domiciled in New York; his wife obtained a divorce in South Dakota; the New York Courts treat this as a valid divorce; it is therefore treated as valid by the English Court. As already explained in the chapter on jurisdiction in Provinces with Divorce Courts, a party can not for purposes of divorce give a Court otherwise without jurisdiction the right to try the action. At one time it would appear that this was not so—see *Stevens* v. *Fisk* (1885), Cam. Cas. 392, but the principle is certainly followed at Ottawa in regard to applications by men who have previously ill-advisedly consented to the jurisdiction of the American Courts — see the *Campbell* case of 1914 and the *Gordon* case of 1921. It might be pointed out before leaving the question of foreign divorces that in *C.* v. *C.* (1917), 33 D.L.R. 151, 38 O.L.R. 481, affirmed 39 O.L.R. 571, it was held that a divorce granted by a foreign Court being a judgment affecting the status of the parties, stands upon the same footing as a judgment *in rem*, and can therefore not be set aside in this country even on the grounds of fraud by a person not a party to the proceedings in which the judgment was pronounced. One logical and beneficial result of this decision is that men marrying Canadian women who have obtained invalid divorces in the U.S.A. must either support them or bring an action for annulment on the ground of a previous marriage; they can not in an action for non-support or alimony set up as a defence the divorce. Canadian Courts, once jurisdiction has been shewn, will not open a foreign divorce unless it is shewn that there has been fraud, *e.g.*, no notice to the respondent. Also, it has been held that a foreign divorce to be good must be absolute, *e.g.*, no restriction imposed on the guilty party in regard to not marrying again; but the foreign Court can say that neither party can re-marry for a certain time, this being regarded not as the imposition of a disability, but as the fixing of a time from and after which the dissolution shall be regarded as complete. Lastly, it has been held in Ontario that even if the foreign divorce is one not recognised in Canada, yet the party invoking the jurisdiction is bound by it. *Swaizie* v. *Swaizie* (1899), 31 O.R. 81; 31 O.R. 324: American divorce with alimony given payable out of husband's Ontario lands; this action was one for the alimony; defence was invalidity of the American divorce; held that he had invoked the American jurisdiction and was bound by it. In *Re Banks* (1918), 42 O.L.R. 64, a wife set up the invalidity of a divorce she had

ANNOTATION

obtained in Chicago in claiming her husband's insurance; held she had invoked the jurisdiction and was bound by it. The test has never been made as to whether these last two decisions would hold in the case of a party realising that they had secured a divorce which was not recognised in Canada suing for a divorce in Canada, on say the ground of adultery which the other party had committed subsequently to the invalid American divorce; the natural defence would seem to be to plead the latter divorce; yet it hardly would seem reasonable or just that the plaintiff should be debarred from pleading its invalidity and therefore the adultery.

The subjects of impotency, fraud, and refusal from the first to have sexual intercourse have been dealt with in the chapter on annulment of marriage. The first cases granted on the latter ground were in 1919, and its adoption indicates the tendency of Parliament to grant relief on grounds generally recognised in England as sufficient to warrant a declaration of nullity. In England, if the refusal results from incompetence, a decree of nullity may be had. If it is simply wilful and without reasonable cause and there has been no intercourse, the Court has regarded the refusal as rebuttable evidence of incompetence, and if there has been intercourse as evidence of desertion. In the cases which have come before Parliament, the refusal had existed from the first, and had been wilful. The English Divorce Court has held that mere wilful refusal to have intercourse is not in itself sufficient ground for divorce—*Napier* v. *Napier*, [1915] P. 184, 84 L.J. (P.) 177, overruling *Dickinson* v. *Dickinson*, [1913] P. 198, 82 L.J. (P.) 121. The Court merely draws the inference of incapacity from the persistent refusal to consummate—*M.* v. *M.* (1906), 22 Times L.R. 719—and of course the inference may be rebutted, and mere refusal of itself is not a ground for divorce.

An investigation of the grounds for divorce throughout the British Empire shews the following as existing in addition to those already recognised by the Parliament of Canada:

(Report of the Royal Commission on Divorce and Matrimonial Causes—1912—England.)

1. Desertion, wilful—Scotland, 4 years; South African Provinces, as low as 18 months—Natal; Australia, 3 to 5 years; New Zealand, 5 years.

2. Imprisonment, either frequently or for long period—South Africa, Australia.

ANNOTATION

3. Habitual drunkenness, usually coupled with neglect of duty or cruelty—Australia, New Zealand.

4. Cruelty—Australia.

5. Insanity, confinement—New Zealand, 10 years; West Australia, 5 years.

6. Long absence—Cape Colony.

The following summary of grounds for divorce in the United States is taken from the Report on Marriage and Divorce of the Bureau of the Census 1867-1916 (South Carolina does not permit of divorce on any ground; leaving 49 States for which to be accounted, including the Indian Territory):

	No. of States where divorce allowed.	Annulment.
Desertion—Abandonment or desertion	46	
Refusal by wife to move to State with husband—Tennessee	1	
Cruelty—Extreme cruelty	36	
Attempt to take life of other party to divorce	3	
Violence endangering life	7	
Indignities and defamation	9	
Sexual immorality—Adultery	49	
Crime against nature whether with man or beast—Alabama	1	
Lewd conduct indicating unchasteness without actual proof of adultery—Kentucky	1	
Loathsome disease, contracted before or after marriage—Kentucky	1	
Intemperance—Habitual drunkenness	39	
Habitual use of drugs	4	
Neglect of responsibilities—Neglect to provide	17	
Neglect of duty	8	
Defects of disposition—Violent temper	2	
Intolerant religious belief	2	
Crime—Conviction or imprisonment	41	
Fugitive from justice	2	
Previous divorce in another States	3	
Misconduct	2	

ANNOTATION

Vagrancy	2	
Voluntary separation	3	
Civil death, treated as so for crime—Rhode Island	1	
Presumption of death	2	
Causes deemed sufficient by the Court—Washington	1	
Lack of real consent to marriage—Duress or force	4	19
Fraud	8	19
Incapacity to contract marriage—Mental	8	26
Want of age..	1	27
Personal unfitness to contract marriage—Impotency	37	18
Pregnancy	15	
Illicit carnal intercourse by wife before marriage	3	
Illegality of marriage—Bigamy	12	25
Consanguinity	4	22
Miscegenation — marriage with a Negro....		7
Void and voidable marriages not otherwise specified	2	6

(Several States do not recognise annulment on any of the above grounds, while several recognise it on as many as eight. In New York and the District of Columbia, the only recognised ground for divorce is adultery, although both allow annulment of marriages on several other grounds. On the basis of number of grounds for divorce, Kentucky leads with 15; Tennessee, Rhode Island and Washington are next with 12, and Pennsylvania, Georgia and Mississippi next with 11; several States have 10.)

A few people are opposed, so far as their own use is concerned, to the principle of divorce on any grounds. The unreasonableness of their opposition to the availability of divorce to those sharing other views was well pointed out before the British Commission in 1912, by Rev. W. P. Paterson, Professor of Divinity at Edinburgh University, who said that while the ideal of divorce only for adultery, which Christ set up is binding upon members of His Kingdom, it ought not to be imposed by force upon a mixed society, including many who are non-Christian, or only nominally Christians, and that the duty of the State in relation to dissolution of marriage is not to make the Christian ideal compulsory, but to make provision for the relief

ANNOTATION

of those who suffer injustice in marriage, and so far as this shall be compatible with the general interests of society. Others in Canada are willing to recognise divorce on the grounds already adopted; but, whenever new grounds are advocated, a storm of protest is raised, generally on the theory that to admit other grounds is going to make divorce too easy to obtain, and thereby ruin the morality of the country. The utter absurdity of such a doctrine should be apparent to any one who will but reflect that there are several grounds in addition to those already adopted which in fact put an end to married life—not merely to happy married life, but to any married life at all—while in law as distinct from fact, the married life is regarded as continuing. There are cases in which the state, having regard to the requirements and practical circumstances of life and the nature of marriage as a contractual relationship, is obliged to grant the severance of a bond the moral foundations of which have been destroyed. Complex and changing conditions make recognition of new grounds imperative.

This was brought to the attention of the British public by the press in the summer of 1919. A well-known member of the British House of Commons and his wife found that for them to live together was impossible; the wife had committed no act of adultery, nor did either party wish their good name to be dragged through the mud; the husband registered at a well-known hotel with a woman of low character, and occupied the same room with her; this was used as evidence of adultery, and the desired divorce obtained. After the decree had been granted, the husband informed the public through the newspapers that as a matter of fact, although he had spent the night in the same room as the co-respondent, no adultery had been committed. In order that a highly desirable divorce might be obtained, it had been necessary for the man to appear in the roll of a moral delinquent.

The first reform throughout Canada should be to place women on the same footing as men; to make adultery alone on the part of the husband sufficient ground for a divorce by the wife. The inequality which at present exists in Provinces following the English Divorce Act has its origin in a past age when immorality on the part of men was looked upon as less serious than on the part of woman, this theory in turn being based on the belief that the man committing adultery would likely do so with a woman of loose character and under conditions which would be unlikely to produce children and thereby affect inheritance, etc., while in the case of the few wives who might err, the circumstances would in very many cases be just the oppo-

ANNOTATION

site. As a matter of fact, there is in all probability in the vast majority of cases of adultery by either party leading to a divorce little likelihood of the production of children; while in very many cases of the offence by the husband, the possibilities of him contracting and communicating to his wife venereal disease are great. The reason more true to fact for admitting adultery as a ground for divorce to either party is that it strikes at the inmost privacy of married life, at the stability of the home, and at the happiness of the parties concerned—and to woman with her more sensitive nature and finer feelings, the idea would in most cases be far more loathsome than to man, and her future happiness far more prejudiced. Before the Ecclesiastical Courts the sexes had been on an equality; the inequality had its origin in divorce by Private Acts—passed by a Parliament of men. The equality of the sexes on this question is recognised throughout the United States, and was strongly recommended by both the majority and the minority reports of the British Commission of 1912.

Wilful desertion without the consent or against the will of the other party and without reasonable cause for two years and upwards is a ground for a sentence of judicial separation. Clearly such an offence in many cases breaks up a home more than, for example, a single act of adultery; and, in fact, if the subject could be investigated, it is only reasonable to suppose that adultery generally will be committed by the deserting party. In the case of the poorer classes, the circumstances following desertion are often particularly pitiful—a woman may be left with no means of support for herself and family, or a man may be left with no one to look after his home and his children. If divorce were allowed as suggested, re-marriage and possibly happiness would be a possibility. It was recommended by the British Commission that the period should be 3 years; but 2 years has been found to be a just period in cases of separation, and in view of modern means of rapid travel and communication, and of the possibility of distress already referred to, there would appear to be no satisfactory reason for not adopting the 2 year period. This is the period recommended by the American Report.

Cruelty is another of those grounds which in fact put an end to the married life, and should be recognised by law as doing so. "Cruelty is such conduct by one married person to the other party to the marriage as makes it unsafe having regard to risk of life and limb or health, bodily or mental, for the latter to continue to live with the former." (British Commission of 1912.) It should include the communication of venereal disease

knowingly or negligently, and also cases where husbands compel their wives to become prostitutes for their husband's maintenance. This course in regard to venereal disease practically has been adopted by the Senate of Canada, as already noted in connection with proof of adultery.

Insanity pronounced as incurable by competent medical authority, should also be recognised as a ground for divorce. This disease differs from most others in that the person suffering from it has to be put under confinement and is rendered unable to perform all duties connected with married life and domesticity. That a person should be kept linked for years to one who has the dreadful misfortune to be afflicted with this malady, and thereby never know or cease to know the happiness connected with a home and a family is unjust and unreasonable. When the insanity can be shown to have been brought about by the sexual perversions of the petitioner, the relief should not be granted. The theory of eugenics has not as yet behind it a sufficient volume of public opinion, nor is it sufficiently connected with the subject of this article to warrant examination here.

It might at first appear that the development of incurable impotency after the consummation of the marriage should be recognised as a ground for divorce. But it is apparent that there is a vast difference between a properly consummated and a non-consummated marriage, and between the situation in a home where impotency develops and one where desertion, cruelty, or insanity takes place. This question is one which would appear to require further investigation by medical authorities before it can be discussed fully from its legal side. The wilful development of impotency can easily be regarded as refusal to have sexual intercourse.

Habitual drunkenness was said by the British Commission of 1912 to produce as much if not more misery for the sober partner and the children than any other cause in the list of grave offences. The report goes on to say: "Such inebriety carries with it loss of interest in surroundings, loss of self respect, neglect of duty and personal cleanliness, neglect of children, violence, delusions of suspicion, a tendency to indecent behavior, and a general state which makes companionship impossible. This applies to both sexes; but in the case of a drunken husband, the physical pain of brute force is often added to the mental and moral injury he inflicts upon his wife; moreover by neglect of business and wanton expenditure, he has power to reduce himself and those dependent on him to penury. In the case of a drunken wife, neglect of home duties and of the care

ANNOTATION

of the children, waste of means, pawning and selling possessions, and many attendant evils produce a most deplorable state of things. Should anything further be necessary to convince all that under such circumstances married life cannot exist, and that to continue it in law is an injustice. With habitual drunkenness should be classed habitual use of drugs. Divorce in all such cases should be granted only on the proof of failure of all reasonable attempts at cure—for a period recommended in England as 3 years, in the U.S.A. as two years.

The remarks made above in regard to insanity apply almost wholly to imprisonment; with the difference that where the imprisonment is not for life, there is a possibility of the resumption of married life. A life sentence should be made a ground for divorce. This is as far as the British Commission were prepared to go; the U.S.A. report recommends the same in regard to a sentence of 2 years or more; other countries, as noted above, adopt various periods. Cases of poverty urge the adoption of a short period; but when it is remembered that the state has various provisions for assisting the poor, and that the imprisonment is not "incurable," the adoption of a longer period than 2 years would seem desirable—probably 10 years and over. Recurrent imprisonment amounting to this period also should be a ground.

Refusal without reasonable ground to permit of sexual intercourse where there has been no intercourse as already recommended should be made a ground for annulment; if there has been no sexual intercourse, the refusal should after the lapse of 2 years be treated as wilful desertion.

Although not strictly a question of divorce, the question of presumption of death is so closely akin that the matter may be noticed in passing. The law on the subject is found in R.S. C., ch. 146, sec. 307, sub-sec. 3 (b); if his wife or her husband has been continually absent for 7 years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those 7 years—under such circumstances going through a form of marriage does not amount to bigamy. Instead of leaving the law in the very unsatisfactory condition indicated by this section, it would seem much more reasonable—and particularly in view of modern means of communication—that after the lapse of the 7 year period, the other party was entitled to apply for an order of presumption of death and on obtaining such an order to re-marry. Such an order should also be obtainable within the 7 years on proof of definite circumstances leading to a reasonable presumption of death.

ANNOTATION

All the above reforms in regard to the grounds for divorce were recommended in England as long ago as 1912; they are all either recognised or recommended in the United States. Lord Gorell, the chairman of the Commission of 1912, introduced a bill in the House of Lords in 1914 embodying many of the recommendations of the report, but the bill was not adopted. The argument that by increasing the grounds, the number of divorces will be automatically increased, and that knowledge of the possibility of divorce will cause an increase in the offences thereby completing a vicious circle, will not stand examination for one moment. In the United States in States with numerous grounds for divorce, the increase in proportion to the population has been slight or there has been even a decrease (Connecticut); while in other States, having few causes, there has been a considerable proportional increase. (British Report, p. 26). In no case has the granting of a divorce to the guilty party been suggested, and to say that there will be collusion to the extent of a man rendering himself a permanently incurable lunatic, drunkard, or convict is absurd. In cases of desertion and cruelty the absence of collusion in most cases far outweigh the possibility of collusion in a very few; as in cases of adultery, the inability of a Court to get to the bottom of the situation and discover the real facts should not be presumed. The grounds advocated put an end to married life in fact, and in every case are recognised as grounds for a judicial separation, that form of existence which as a permanent remedy for such evils is outrageous, being as it is an existence where one is neither married nor single, where one is married in law and not in fact, where in many cases adultery and illegitimacy are almost natural consequences; an existence of which the Honorable Henry B. Brown, a former Justice of the United States Supreme Court, said in an address before the Maryland State Bar Ass'n.: "A situation more provocative of temptation and scandal cannot be imagined. For the former relation is substituted a marriage which is not a marriage—a celibacy, an amphibious existence which places the strongest instincts of our nature under a ban and deprives both parties not only of the companionship of the other sex, but of the comforts of a home life. A legal separation is, in fact, a punishment rather than a remedy." (British Report, p. 92). In 1917 an effort was made in England to have a separation of 3 years convertible in to a divorce; the effort had the support of the Law Quarterly Review edited by Sir Frederick Pollock. After years and years of effort, such a provision has been adopted in France. Divorce in the cases recommended would not be a degradation of the sanctity of the

ANNOTATION

marriage tie—that in each case has already occurred. The commission of a wrong cannot be prevented by denying redress to the injured party—divorce is not a disease, but a remedy for a disease.

6. DEFENCES IN DIVORCE CASES.

The defences to an application for divorce or the grounds for its rejection are practically the same throughout the British Empire and the United States. Those recognised at Ottawa are: 1. Denial of facts alleged. 2. Connivance. 3. Condonation. 4. Collusion. 5. Recrimination. 6. No or void marriage. 7. *Non compos mentis* at the time of commission of the act of adultery. 8. Delay. 9. Cruelty, desertion, or wilful separation without excuse before the alleged adultery, or wilful neglect or misconduct which has conduced to the adultery complained of.

Connivance is the consent or indifference of the applicant to the commission of the acts constituting the cause of divorce. It occurs before the misconduct.

Condonation is forgiveness, either express or implied, of a matrimonial offence constituting the cause of divorce. It occurs after the misconduct. The mere resumption of sexual intercourse is not absolutely conclusive as implied condonation by a wife. If the condonation is on the condition that no further offence occurs, and there is a repetition such repetition nullifies the condonation.

Collusion is an agreement between the parties that one of them shall commit or appear to have committed acts constituting a cause of divorce, or that facts shall be suppressed, or that no defence shall be entered, for the purpose of enabling the other to obtain a divorce. The practice in regard to this subject appears to be a little too strict. There would appear to be no injustice in the parties agreeing as to the conduct of the application if such an agreement is honestly and properly made, in a suit in which there is previously an adequate and good ground for divorce. The Senate has adopted the practice of admitting in evidence affidavits of the guilty party admitting the facts complained of provided the absence of collusion is amply proved by other evidence.

Recrimination is a showing by the defendant that the plaintiff has committed an act which is a cause of divorce. Adultery is the most frequent example at present. The practice is to reject evidence of adultery by the petitioner if it occurred after the adultery complained of in the application. Generally the adultery of the petitioner although long passed and condoned is a bar to divorce. In Scotland, the petitioner's guilt was no

bar, and it is doubtful if the guilt of both is not a greater reason for sundering the tie than the guilt of one. Lord Daysart in his evidence before the British Royal Commission stated that he often felt that in intervening as King's Proctor to have the applications refused on the ground of the petitioner's adultery, he was doing more harm than good. On the other side, that the applicant must come with clean hands is an old principal of British justice, and one which acts as a check on immorality. The only reform which suggests itself is to leave the check, but to give the Court discretion as to its use according to the circumstances of the case and the petitioner's conduct. The respondents' counterclaim of adultery on the part of the petitioner is useless:

(a) Where the adultery is committed in ignorance of the fact—as where the respondent is believed to be dead;

(b) Or in ignorance of law—as where a party bona-fide believed that a decree nisi dissolved the marriage. (Query this.)

(c) Where the adultery is committed in consequence of the violence and threats of the husband.

Delay pleaded on the part of the respondent may be answered by want of means on the part of the petitioner.

In addition to the above defences, in Provinces where the English Act is followed, under sec. 32, the Court has power to suspend a decree until some provision is made for a wife divorced.

7. PROCEDURE.

As the purpose of this article is to discuss rather the general principles of divorce in Canada than the minute details in regard to practice before the various Provincial Courts, many of which details are those common to all litigation rather than peculiarly the divorce proceedings, only a few points in regard to such practice will be noted in passing.

In the East, the proceedings are commenced by a petition which corresponds to the Writ of Summons in other actions. In Saskatchewan some of the earlier proceedings were commenced by petition and others by writ, but now they are all commenced by writ in the ordinary way. Other pleadings in the form of defence and reply follow this, and have to be served and filed in the usual way. In all litigation it is very desirable to keep the pleadings as simple as possible as regards form, and there would appear to be no reason why a petition should be substituted for the ordinary writ of sum-

ANNOTATION

mons endorsed with a statement of the facts. A practice complained of in England before the Royal Commission of 1912 was that of making in the petition some specific charge of adultery, and then concluding with a general charge of adultery between the parties. The result was a continuous application for particulars which when given amounted to fresh charges of adultery. The Commission recommended (p. 134) that every charge should be specific with sufficient detail to give adequate notice to the other party. This recommendation seems most reasonable and one which might well be adopted in Canada. In the Provinces where English procedure is followed, an adulterer or adulteress must be made a co-respondent. In order that a person may have the chance to deny accusations on his or her good name —accusations which may be false—it would appear to be reasonable that where such co-respondents are known—as distinct, for example, from cases where the evidence is merely that the respondent visited a brothel—service on them should be effected, personal where possible, and in other cases substitutional, barring only substitutional service by advertisement.

As already noted, in most of the Provinces either party may apply for a jury to decide a question of facts. By some it has been suggested that trial of divorce cases by jury should be abolished; the right does not exist in Scotland, and exists in but very few of the United States of America; juries know little of any class of life except their own, and are apt to take an extravagant view of such things as cruelty. However unsavoury may be the nature of the evidence, it remains a fundamental principal of British justice that a man should have the right to be tried by his peers, especially so in divorce cases where the great mass of the work is the settlement of pure issues of fact—e.g., whether there has been adultery, desertion, etc.—and where difficult questions of law, as for instance those which depend on some branch of International Law or the extent of the Court's jurisdiction come up for decision very rarely; and it would seem but just that this right in regard to divorce cases should exist. That it would be infrequently used is suggested by the figures of the British Divorce Court of 1910 which one would presume may be taken as fairly representative:—Total number of cases heard 627, undefended 500, defended 127, tried by Judge alone 567, tried by Judge and jury 60.

The fact that the petitioner is not bound in most cases to answer questions which would admit adultery has been criticised. If the suggestions made in the last two chapters in

regard to offences by the applicant are sound, this point ceases to be of importance.

The usual regulations in regard to the form of evidence and the compelling attendance of witnesses apply.

In regard to collusion and connivance, the practice appears to be for the applicant to satisfy the Court that these have not occurred by a mere declaration to that effect. It is most desirable that every possible check should be put on this phase of the matter, as otherwise the result would amount to divorces almost at will. The Courts should be given the very freest possible hand to adjourn the hearing until any suspicious circumstances can be fully investigated by the Crown authorities. One of the fundamental ideas in connection with divorce is that if one of the parties to a marriage commits any of the offences already referred to in the face of the opposition and dislike of the other party, a divorce should be the relief of the latter if so desired. Unless this happens the parties must make the best they can of life, so that the homes broken up may be kept to a minimum—so that divorce may not become a cause of separation and infidelity, but may continue to be a relief therefrom. If the offence is committed with the sanction of the other party merely for the purpose that a union regarded as undesirable for reasons less fundamental than those suggested as grounds for divorce, such for example as incompatibility of temper, not amounting to absolute cruelty, the parties should not be freed from such a union. Although it is a question not capable of positive proof, it would appear that where the offences are committed with collusion or connivance, in most cases, which are as a matter of fact those of adultery, the guilty party will be prepared to go to the same lengths (i.e., to commit adultery) without such collusion or connivance. In England the annual average of decrees nisi for the period 1906 to 1910, was 639; The King's Proctor interfered in 26 cases, and 23 decrees were reversed.

In Provinces following English procedure, the practice is to grant a decree nisi, not to be made absolute until after the expiration of 6 months, during which time the Crown may intervene to shew collusion, etc.

In the case of the 3 Maritime Provinces and British Columbia, there appears to be no right to appeal beyond the Supreme Court of the Province. In the Prairie Provinces appeals may be carried to the Privy Council. The latter arrangement—so long as the Privy Council continues to be the Court of last resort for Canada—would appear to be desirable, on the basis that questions of divorce are surely of as great an

ANNOTATION

importance as questions involving merely comparatively large sums of money. As a matter of practice, the very nature of the cases will in almost every instance of a decree granted check the parties from going on with an appeal; as by the time their private affairs have been given the publicity of one Court, the parties will have become so estranged as to make them not desirous of continuing the marriage union.

Poor applicants and respondents may proceed in *forma pauperis*, the conditions for which should be twofold: 1st, a *prima facie* case; and secondly insufficiency of means. As the wife is very often dependent on her husband for means, and as he is bound to supply her with necessaries of life—of which divorce, as distinct from an action say for damages or on a contract, may be one—the rules in regard to him providing her with the necessary funds to prosecute or defend her case have been made similar to the rules in alimony actions. Whether innocent or guilty, she is nearly always allowed a certain amounts of costs, for which the husband is primarily liable, unless she is shewn to have separate estate. Where the wife succeeds, she gets her costs as a matter of course; where she fails, she gets such amount as the Court allows.

In view of the criticism which follows it is proposed to examine in some detail the procedure to secure a parliamentary divorce. This is governed by Senate Rules 133 to 152.

The first thing to do is to be sure that the grounds exist, that there is no sustainable defence, and that the case comes within the now usually recognised jurisdiction of Parliament, that there has been no connivance, condonation, or collusion, and that there is sufficient time as detailed hereafter. As already noticed, Parliament has jurisdiction to grant a divorce to a party domiciled in any part of Canada; but, with the exception of a single case from each Province of B.C., and P.E.I., the practice has been to apply to Parliament only in cases where the domicile is in a Province not having a Court of recognised jurisdiction.

Having established these matters, the next step is to start the necessary advertisement. A notice of application must be published once a week for 14 weeks in the Canada Gazette and in two newspapers published in the district (Quebec) or in the County (Ontario) wherein the applicant usually resided at the time of the separation of the parties. The flaw in this regulation is that parties residing in large cities can publish their notice in any paper in the county instead of being required to publish it in a city paper. As a result, in the case, e.g., of Toronto, divorce applications instead of being pub-

ANNOTATION

lished in the city papers at about 6 dollars an insertion, are published in country journals at about 10 dollars for the whole fourteen insertions, and the parties to whom the notice is intended to be given never know of its existence. Notices in the Province of Quebec must be published in one English and in one French paper; if two such papers are not published in the district, they have to be published in one newspaper in both languages. A copy of each issue of the newspaper is required before the committee at Ottawa, and should therefore be obtained while the advertising is in progress. The publication must be between the close of a session and the consideration of the petition; if it is not completed in time to allow the petition to be considered during the session for which notice is given, the Senate does not require any fresh publication; to comply with the regulations of the House of Commons governing private bills, the notice in such a case would have to be republished for two months. As it usually requires about 6 weeks to get a bill through both Houses, it is advisable to have the advertisement completed before the session commences. The form of notice is given in the pamphlet issued by the Senate, containing the rules on divorce.

After advertising has been commenced, the applicant should proceed to effect service on the respondent of: 1. A copy of the notice. 2. A copy of the petition to the Senate. 3. A statement of particulars.

The service must be made not less than 2 months before the consideration of the petition by the committee, and where possible, must be personal service. If all reasonable attempts at personal service fail, and the applicant makes all reasonable attempts to bring such notice, petition, and particulars to the knowledge of the respondent, the committee will regard the service as sufficient. Copies should be mailed or delivered to the respondent's last known address, and to anyone likely to be in communication with the respondent, such as a relative, agent, or solicitor. The form is given in the above mentioned pamphlet.

Service, when made in Canada, is verified by a declaration of service as set out in the pamphlet.

When the service has been effected in a foreign country, the proof must be by affidavit instead of by declaration, the form complying with the law of the country where made. If made before a notary public and certified by his seal, it is generally sufficient. The committee before proceeding with a petition may order substitutional service in some manner different to what has been carried out.

ANNOTATION

After service has been effected, the following documents should be forwarded to the agents in Ottawa of the applicant's solicitor:

1. Declaration of service with exhibits.
2. Petition to House of Commons—"To the Honourable the House of Commons of Canada in Parliament assembled"—and then follows form of petition to the Senate.
3. Petition to the Governor General . . . "To . . . (put in full name and titles) . . ." . . and then follows form of petition to the Senate.
4. Copy of 1 for agent's file.

The Ottawa agent, when the session opens, will give the documents to a Senator and Member of the House of Commons for presentation.

The rules provide that petitions must be presented to the Senate during the first 60 days of the session, but the time for receiving them is often extended. They must be presented to the House of Commons within the first six weeks of the session. No notice of the sitting of the committee is given except by posting in the lobby, but this is done in ample time to enable the parties concerned to be present.

When the petition is presented, it should be accompanied by proof of the following: 1. Publication in the newspapers and the Gazette for 14 consecutive weeks—by declaration. 2. Service—as above.

Duplicates of the following documents should be given to the Clerk of the Senate Committee: 1. Duplicate petition to the Senate. 2. Declaration of service. 3. Declaration of publication. 4. Copies of the newspapers containing the advertisements. 5. Every document to be used as evidence before the Committee—such as marriage certificates, etc. 6. Fees—$210. If the petitioner is too poor to pay this, a petition should be presented asking for leave to proceed in *forma pauperis*.

The applicant, the respondent, and any other person affected may be heard by counsel; the latter wear their gowns. Besides counsel, the services of a parliamentary solicitor are most essential to see the bill safely through the Committee and through each of its three readings before each House, and that it receives the Royal assent. Evidence is upon oath, and witnesses may if necessary be summoned under the hand and seal of the Speaker of the Senate—and on payment of proper expenses. Proof is required before the Committee of the following:—

ANNOTATION

1. A valid marriage including identity of the parties—usually by marriage register, copy of entry in register, certificate of Registrar-General in Ontario and of custodian of register of marriages, etc., in Quebec, or by personal proof of cohabitation.
2. Domicile.
3. Adultery, etc.—It is not necessary to prove the direct fact of adultery; in nearly every case the fact is inferred from the proof of circumstances which shew the opportunity for the act, and which led to the conclusion that it occurred—e.g., registering as man and wife and spending the night in the same room at a hotel, cohabitation, venereal disease, visit to a brothel, birth of an obviously illegitimate child. The evidence of a woman of loose character with whom the adulterer is said to have been committed will be very closely scrutinized, also the evidence of a husband or wife alone, unless corroborated by another witness or by strong circumstantial evidence.
4. Lack of condonation, collusion, and connivance—this in most cases is done by the applicant simply making the statement that there has been none, a system obviously open to all the defects already referred to in connection with applications before Courts of law.

Copies of the evidence are distributed to the Senators, Members of the House of Commons, the parties, and their counsel.

The Committee may drop the application, recommend against it, or recommend in favour of it, or adjourn for further evidence to be produced. If recommended favourably, the report of the Committee to the Senate is accompanied by a draft bill.

The cost of a parliamentary divorce may be summarised as follows: 1. Advertising in two papers—$16 to $175. 2. Advertising in Gazette—$20 to $40. 3. Senate fees—$210. 4. Solicitor's fees and disbursements. 5. Agent's fees and disbursements. 6. Witnesses' fees and disbursements. 7. Counsel's fees and disbursements.

8. PARLIAMENTARY OR JUDICIAL DIVORCE? . .

Now that both jurisdiction and procedure have been examined, it seems meet to consider the advisability of abolishing parliamentary divorce, and of substituting therefor throughout the Dominion, a uniform system of divorce jurisdiction.

Attempts have been made in 1858, 1859, 1860, 1870, 1875, 1888, 1919 and 1920, at least, to abolish parliamentary divorce; but in each case the effort has met with failure, due largely to

ANNOTATION

the opposition of Roman Catholics, partly to the opposition of many non-Catholics, and partly to the general bad luck which may attach itself to any bill in its varied course, through a Parliament run on strictly party lines and where time is limited.

The advantages of divorce by the judgment of a Court of law over divorce by an Act of Parliament are numerous. Although not a positive proof of advantage, it may be noted in passing that in every country in the world where divorce is recognised except Ontario, Quebec and Ireland, the jurisdiction lies in the Courts of the land. The prevalence of Roman Catholics in Quebec and Ireland accounts for the situation there, as it does also in Italy and Spain where no divorce is recognized, separation only being allowed; these are granted by Courts of law and not by a Parliament.

Expense to the public in regard to justice should never be a fundamental consideration; but where other things are equal, it may well be considered. Under the Parliamentary system divorces are tried by nine Senators each drawing $4000 a session, and practically all of whose time is taken up with the work of the Committee. Divorces could be tried by a single Judge, assisted in some cases by a jury. In Ontario a Supreme Court Judge receives $9000 a year. Moreover, these Senators are sent to Ottawa presumably to deal with matters affecting the country as a whole—not the troubles of individuals. Their business should be affairs of state. The above figures do not take into account the cost of having the bill before each House 3 times, with the Members of Parliament each drawing $4000 a session and always pressed for time.

In the next place there is from the decision of Parliament no appeal. True another petition supported by fresh evidence may be presented at a subsequent session; but on a finding on a question of law or fact, there is no appeal. The advantages of a system of appeal in judicial matters is too widely recognised in practice to warrant further discussion here.

The chairman of the Senate Committee on Divorce is always a lawyer; usually 3 or 4 of the other members are lawyers; another 3 or 4 are doctors; and the remainder are anything. Could a body less suited for the trial of such actions be imagined, especially as the capability and certainly the training of the chairman to act in the advisory capacity of a Judge may often be questioned? The body can not be likened to a jury, nor will it be so regarded by many applicants or respondents; the Senators are not the peers of many of the parties who come before them. The poor man who goes before a Court and asks for a jury feels that he will have the opinion of men much in his own station

in life; if he does not ask for a jury, he relies on the legal training of the Judge. On the occasion of the second reading of the bill introduced by Mr. Nickle (Kingston) in 1920, providing for the establishment of Divorce Courts, Mr. Steel, the Chairman of the Private Bills Committee said: ".....The greatest evil is that under the present system divorces can be obtained and are being obtained on evidence which....would not be accepted by the Judge of any Court in the land. I have seen several divorces granted during the present year which no Judge or lawyer entrusted with the examination of witnesses would have been disposed to grant for one moment." The Divorce Committee apparently recognises the necessity of making their proceedings resemble those before a Court of law—e.g., their examination of witnesses and insistence on proof of points of law—then surely the matters should be disposed of by a competent Court of law, instead of by a mere make-believe Court.

A great disadvantage of parliamentary divorce is the length of time it takes, due to the infrequency of the sittings and the necessity of advertising for 14 weeks. Some try to argue that this will prevent rash action; that it will provide time to repent and to reconsider. To this, the answer is that the possibility of reconciliation in divorce cases must from their very nature and from the publicity afforded to them by the necessary advertising be almost negligible. There is also the further and even more practical answer that in many cases this delay is an absolute hardship —the temperamental hardship of being tied to an undesirable union, and in the case of the poor of being unable to marry a desirable helpmate as soon as might otherwise be possible .

Probably the greatest disadvantage of the parliamentary system is the absolute disadvantage, amounting in many cases to prohibition, at which the poor are placed. It means the taking of counsel and witnesses long distances, their maintenance while attending in Ottawa, and the expenditure of $210 alone on parliamentary, and practically useless, printing. As stated by the British Commission in another connection, it is obviously unsatisfactory that, while Courts have been established in which the poor can sue and be sued in respect of small debts and torts and compensation for injuries, they should have no means of redress in these graver matters. The matters which are recognised as grounds for divorce are recognised as intolerable, and yet the remedy is placed beyond the reach of those who need to use it. The latter if too poor to invoke the assistance of Parliament must either take the law into their own hands and live immoral lives, or submit to hardships which the same Parliament has itself recognised as intolerable. It is argued that the poor

ANNOTATION

can never be placed before the law in the same position as the rich! true poor people have to be content with less expensive litigation, generally in the way of counsel; but none the less the State should provide tribunals suitable to their means. This is done in respect of all litigation except divorce. Also the need of the poor for divorce is greater even than the rich. The latter have far more power than the former of mitigating the hardships and miseries consequent on the destruction of the home. The Registrar of the Supreme Court at Victoria gives as his estimate of the total costs in an undefended action before that Court $240; for Nova Scotia a similar estimate is made at $150; for New Brunswick, the estimate covers only Court costs, and is $30.

The criticisms offered of Divorce Courts are neither numerous nor sound. Senator Gowan in 1888 argued that Courts were bound strictly by precedent while Parliament was not. Parliament as a matter of fact recognises in a general way precedent, but the very fact that it is not bound to do so strictly is not an advantage but an absolute disadvantage—what the Committee has done one session is no positive assurance that if your case conforms it will be treated the same way the next session. Surely divorce is of equal importance with other matters of litigation. Or do the opponents of Divorce Courts wish to abolish from all Courts the recognition of the binding effect of precedents, and leave us to the whim of individuals?

The chief criticism of Courts has always lain hidden in the quite general feeling that divorce should be made or kept as difficult as possible—or since the question now under discussion does not involve the grounds for divorce but rather the accessibility of the jurisdiction once the grounds exist, it might be more accurate to say instead of as difficult as possible, accessible to as few as possible. It is said that it would militate against morality if the facilities for trying divorces were extended—that an increase in the number of divorces, even though the grounds are recognized as existing, would mean an increase in immorality. The findings after very careful consideration of the British Commission in 1912 (pp. 38 & 42) were quite to the contrary. Mr. Bishop in his authoritative work, Marriage, Divorce and Separation, says at pp. 21, 22, with reference to the period before 1857 in England: "....Indeed it is well known that in England, where divorces — — — have until lately been obtainable only on applicaton to Parliament, in rare instances and at an enormous expense, rendering them a luxury quite beyond the reach of the mass of the people, second marriages without divorce, and adulteries, and the birth of illegitimate children,

are of every-day occurrence; while polygamy is in these circumstances winked at, though a felony on the statute book..... That wrongs whence come divorces are evils no one denies. If the refusal of divorce would prevent them all would pray for it. But the experience of every state and country withholding this redress is practically, however man may theorize, that no form of matrimonial delinquency is less prevalent there than elsewhere. And to the extent to which separations actually occur, the community is remitted back to the condition it would be in if marriage itself was abolished.....'' The example of the United States is always pointed to in this connection as a dreadful warning as to the certain increase of immorality if facilities for the trial of divorces are adopted. The British Commission investigated this phase of the question most thoroughly, and had the great advantage of accessibility to evidence not available to the individual; and they found that in the case of the United States the high percentage of immorality of a type which is a ground for divorce was not due to the facilities for the latter, but to such things as the ease with which marriage can be entered into, immigration of people with different moral standards, facilities for travel, increase of luxury, a growing spirit of independence, and a resentment of restraint. To these the late E. F. B. Johnston, K.C., added the development of dense commercial centres, a restless and changing spirit, the substitution of business rush for home ideals, the desire to make money quickly, and the mode of living in hotels and rooms. It is even suggested that the increase is attributable in many cases to an appreciation of a higher moral standard. The opponents of Divorce Courts also appear to overlook the fact that right here in Canada there is the wonderful example of a Province (P.E.I.) with a Divorce Court, which owing to the high moral standard of the community has been in disuse for over 50 years. The existence of this Court has certainly not produced immorality. In Australia, New Zealand, and South Africa, Divorce Courts exist, and yet the people of these countries are not regarded generally as moral delinquents.

In a recent personal letter, a Regina barrister says: ''We are somewhat deluged with divorce cases now, but I think that in very few of them the cause of action has arisen since the jurisdiction was established. In other words, all the old grievances are being dug up, and people who years ago would have obtained a Senatorial divorce but for the expense are now taking advantage of procedure in the Courts. When the arrears of divorce work are caught up, I do not think the number of divorce cases here will be startling at all. This is chiefly due to the attitude

ANNOTATION

of our Judges, who are determined Saskatchewan will not be as notorious as Reno. Divorces here have by most of our Judges been granted with great care and only on grounds being most clearly established. Unless the Courts become more lax in granting divorces, I do not think it is going to be detrimental to social conditions here." If divorce is denied, the chances are all in favour of immorality increasing, of, for example, an unfaithful wife living in adultery and bearing illegitimate children, and the husband living with another woman of his choice; reconciliation is generally out of the question. In fact the argument that if Divorce Courts were created the number of divorces would increase is really one of the strongest arguments for these Courts. As the Hon. W. S. Fielding said in the House of Commons: "If thousands of honest men and women in this country are entitled to divorce, not on new grounds but on the well-established grounds recognised by the Courts and by this Parliament, the fact that these men and women are entitled to divorce and are unable to get it because of the present machinery is the strongest argument why that machinery should be discarded . . . ." When the Roman Catholics oppose the extension of grounds for divorce or even the recognition of any grounds, they are, if mistaken in their judgment and in their appreciation of an actual situation as distinct from an antiquated religious teaching, at least sincere to their faith. When their wishes are over-ridden by a majority and divorce on certain grounds is actually recognised and they exert themselves to make application of the adopted principles as difficult as possible, they are playing the part of an undignified and unjust opposition. If they would confine their activities to endeavors to convince Canada that grounds for divorce should be abolished and to teach adherents of their own church that no matter what the facilities for divorce may be they should not take advantage of them, they would more nearly be conforming to the principles for which they profess to stand and would probably sooner see the error of their views and amend the same to meet current conditions. To argue that because in any country there are few divorces the morality of that country is high is a fallacy. Let it be shown that in spite of ample facilities for divorce there are few, and then it may be argued that high morals exist.

At this point the question naturally arises of where the authority lies to make the necessary change in jurisdiction. Sub-section 26 of sec. 91 of the B.N.A. Act gives the Dominion authority to legislate on matters of "Marriage and Divorce", while sub-sec. 14 of sec. 92 gives to the Provinces "The administration of justice in the Province, including the constitution,

maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including the procedure in civil matters in these Courts". From the above, it is obvious that it is within the powers of the Dominion Government to enact that all jurisdiction as at present exercised over the question of divorce shall cease, that in the future such jurisdiction shall be exercised by such authority as the Dominion sees fit to enact, and that the grounds for divorce and annulment and the consequences of a decree shall be as enacted by the Dominion. Questions of procedure must be left to the Provincial Governments or to the rules made by the Judges under the authority of Provincial Acts.

What Courts should exercise this jurisdiction? Mr. Holmested, in Marriage Laws of Canada (1912), recommends a Dominion Court which would sit once a year in each Province, with an appeal to the Supreme Court of Canada. The objections to this are the delay, the probability that it would sit at but one place in the Province, the necessity of filing papers at the Court's headquarters in Ottawa, and the great variation from the present situation in Province with Courts with jurisdiction. The principle advantage would be the continuity in the interpretation of the law, an advantage which rather reflects on the ability of the Judges in the Provinces to give a just and correct interpretation of the law. Mr. Nickle's recent bill proposed to give jurisdiction to the existing and special Provincial Courts and to the Exchequer Court of Canada, the latter provision being suggested because many of the Judges in Quebec are Roman Catholics and are therefore supposed to object to divorce on any grounds, a suggestion which points to one of the obvious weaknesses in the position taken by the Roman Catholic Church—namely that its teachings on the subject are not observed by many of its own adherents. It would seem to be a matter which might easily be left to arrangements on the part of the Judges themselves—i.e., that only Protestants should try divorce cases. Also, it might be observed that Judges are on the bench not to administer such law as meets with their personal approval, but all law. In the United States, the divorce jurisdiction in some States is exercised by the Supreme Court of the State and in others by the District Courts. In England all cases have to be tried before the Divorce Court sitting at London; but the Commission of 1912 recommended that the jurisdiction be transferred to County Courts. The question of divorce is one which goes right to the root of society and one which therefore warrants the attention of the best Judges in each Province. It is also desirable to introduce as little complication as possible into all legal matters and to vary from that to which the people have

ANNOTATION

been accustomed as little as possible, provided justice and efficiency is guaranteed. With the system of the Supreme Court of each Province holding frequent sittings at various points throughout the Province, all these fundamentals would most certainly appear to be adequately secured by giving jurisdiction in matters of nullity and divorce to the existing Supreme Court of each Province, with the right of appeal in the usual way to either the Supreme Court of Canada or the Privy Council.

9. THE DECREE.

By Parliament, the actual divorce is granted by an Act, passed by both Houses and assented to by the Governor General. If the Committee report in favor of granting the relief, the law clerk prepares the necessary bill, which takes about one page in the ordinary statute volume and is composed of the preamble, which recited the facts, and two enacting clauses, one declaring that the marriage in question is dissolved, the effect of which is to restore the parties to the status which they held before the solemnisation of the marriage, and the second declaring that the petitioner may re-marry. Parliament has never definitely stated that the respondent is free to re-marry, but this seems to be covered by the first of the enacting clauses. After the bill has been passed by the Senate, it is "railroaded" through the House of Commons. It finally becomes an Act by receiving the Royal assent.

In the Provinces where the English procedure is followed, the practice is to grant a *decree nisi* which may become a positive decree on motion after 6 months. This procedure seems to be very apt as the question may be appealed, and if so to have the parties living in the meantime under a decree positive seems to be most undesirable. Also, until after the hearing, it may be very difficult if not impossible for the Crown authorities (known in England as the King's Proctor), to prove collusion. The practice of a *decree nisi* to be later confirmed has been adopted in many, but not all, of the States of America.

As one of the very fundamental matters in the arguments both of these in favor and those opposed to divorce is the question of the children and their home life, the effect of the decree on them should be considered. Parliament has occasionally granted the petitioner the custody of the children.....e.g., the *Pitblade* case of 1905——, but the general view is that the custody of the children is one of civil rights, and therefore properly within the jurisdiction of Provincial Legislatures and Provincial Courts. However, cases where there are special circumstances may receive special relief. The English Act

s. 28) definitely provides that the Court shall have power to dispose of the custody of the children as it shall think fit. The practice is practically the same in both England and the U. S.A. The primary question is the interest of the child, and this is followed by the interest of the innocent party; if the child is very young it may be left temporarily in the custody of the mother, even though she is an adulteress; if neither party is fit, the custody of the children will usually be given to any proper person intervening, or the children will be placed in a suitable institution, with the right of access given to both parents; if nothing to the contrary is said in the decree, the father will be liable financially for the children; if application for divorce is dismissed, it is not the practice to make any order in regard to the custody of the children; in annulment cases, the decree may be withheld until provision is made for the children. ANNOTATION

Parliament's attitude to re-marriage has been noted above. In Nova Scotia either party may re-marry after the expiration of the period limited for appealing or after the decision in appeal, but no minister shall be liable to any penalty for refusing to marry any person who has been divorced. A similar section is in the British Act. The question was gone into most thoroughly by the British Commission of 1912, who say: (Par. 42): "The prohibition would probably be a strong deterrent to yielding to temptation placed before women of any social position . .., but it seems doubtful whether it would have any real effect as a deterrent on those of poorer degree; but it might thus result in the end, in the large majority of cases, in continued immorality, which could not be cured by re-marriage." It was also pointed out that in the present state of foreign laws, where such a re-marriage is not prohibited, it would give rise to all sorts of trouble, and finally the Commission reported against any restriction of the right to re-marry. As regards the United States, re-marriage is permissible unless expressly forbidden by the statute, as it is in some of the States. Where there is a prohibition against re-marriage, it has been held that it cannot be enforced, except in the State where it exists, nor can that State enforce it in connection with parties divorced in another State—*Houston* v *Moore*, (1820) 5 Wh. 1 at p 69, Marriage, Divorce and Separation, vol. 2, sec. 1619, p. 616.

The next important question in connection with the decree is that of alimony. The following figures for the United States for the year 1916 are of interest: (U.S. Report, p. 22).

ANNOTATION

Per cent. of divorces granted in 1916.

To Husband		To Wife	
Alimony Asked	Granted	Asked	Granted
6	5	27	20

In the United States, England and Canada, the law is almost the same, and may be stated quite briefly. The final decree may be withheld pending the settlement of alimony and arrangements therefor.

Two types of alimony are known to the law:

1. Alimony *pendente lite*—based on the right of a wife to support; during the proceedings from their very nature she can not co-habit with her husband; therefore he must support her elsewhere. It is usually calculated by adding the wife's income to that of her husband, taking one-fifth of the total, and deducting from that the wife's income, the result being the alimony if any which is to be paid. If this sum is unreasonably large it may be reduced.

2. Permanent alimony—usually calculated on the basis of dower of one-third of the husband's income, but the wife's need and the husband's faculties are considered.

The wife being by common law under no circumstances to be required to maintain her husband nor contribute to his support can never be compelled to pay alimony; some of the States have provided statutory exceptions to this rule. Alimony, unlike the general subject of divorce, is a matter in which the public can have little or no special interest, and therefore any just bargainings of the parties concerning it will not be regarded as collusion, but will be upheld. Besides alimony, the wife may be allowed a sum for costs in bringing or defending an action. Alimony in amount is subject to variations from time to time as circumstances, needs, and pecuniary conditions of the parties change. In some instances alimony has even been allowed to a guilty wife. Parliament's attitude to alimony is similar to its view of the custody of children.

In regard to property generally, the parties to a divorce after a decree has been granted can convey free from dower and curtesy. In some exceptional cases, even Parliament has gone so far as to debar the husband from any interest in the wife's estate (*Holliwell* case 1878,) but usually this is not done as the effect of the divorce unless the bill provides otherwise is to restore the parties with respect to their property to the position which they would have occupied had the marriage never been solemnised. In England probably more than in the U.S.A., there is a tendency to alter marriage settle-

ments. Unless this is definitely done by the Court, the settlements remain unchanged, and even the guilty party forfeits no rights accruing under such settlements; the Court may, however, retransfer all property brought into settlement, the principle being to leave the children and the innocent party in as good a position as before the home was broken up, even though it means giving them income from property brought into the marriage settlement by the guilty party. ANNOTATION

When a marriage has been annulled, the former wife resumes her maiden name. If the marriage has been dissolved by way of divorce, the wife retains her husband's name, although in some of the States, statutes give her the right to revert to her maiden name. The more reasonable course would appear to be that the parties having been put in all other respects in the position as though the marriage had never occurred should be so treated in regard to their names, and this especially so in view of the confusion which might occur where a divorced husband re-marries, and there are then two women using the same name. On the other hand, an objection arises where there are children, as their unfortunate position would probably be unduly borne in on them if their mother was to revert to the prefix Miss.

The English practice which is followed in Canada, provides that the husband may in a suit for divorce on the ground of adultery, sue for damages from the co-respondent, which may be granted even in certain cases when the divorce itself is refused, as where the offence has been condoned or the respondent has yielded under the influence of force. The amount of damages is assessed by a jury, and must represent only simple damages; punitive or exemplary damages are not allowable. Among grounds for reduction of damages may be urged the fact that husband and wife were not living together; the fact that the co-respondent did not know that the respondent was a married woman; or the fact that the woman was openly living in prostitution. The damages awarded do not *ipso facto* go to the husband, but the Court determines their application, usually giving part to the husband, to the children, and even in some cases to the guilty wife as a measure of prevention to her prostitution.

Can.
Ex. C.

THE KING v. THE GLOBE INDEMNITY Co. and HINCHLIFFE, and BARBER, et al, THIRD PARTIES.
(Annotated)

Exchequer Court of Canada, Audette, J. December 3, 1921.

JUDGMENT (§ IG—55)—MOTION TO VARY—JURISDICTION OF TRIAL JUDGE—PRACTICE.

Where the Court in pronouncing judgment has dealt with all the questions of law and fact in issue between the parties, including the right of a defendant to bring in third parties to respond any judgment which might be entered against such defendant, the Court will refuse a motion to vary the judgment by finding, contrary to the actual finding of the trial Judge, that the Court had jurisdiction in the third party proceedings; or, in the alternative (thereby raising a new point of law after judgment) that the judgment be varied by finding that the Court or such trial Judge had no jurisdiction under the Canada Grain Act, 1912 (Can.), ch. 27, and amendments, to grant the relief sought by the Crown in the information. In refusing the motion the Court held that in so far as the motion savoured of an appeal it was irregular; and, on the other hand, that if it were to be treated as a new proceeding between the parties, the subject-matter of the motion was *res judicata*.

MOTION on behalf of defendant The Globe Indemnity Com-Company of Canada to settle the jurisdiction of the Court to decide the issue between the plaintiff and defendants as well as between defendants and third parties, and to vary the judgment previously rendered in this case (1921), 60 D.L.R. 142, 21 Can. Ex. 34.

E. L. Taylor, K.C., for plaintiff.

Coyne, for defendant, The Globe Indemnity Company of Canada.

J. C. Lamont, for third parties.

AUDETTE, J.:—This is a motion made on behalf of the defendant, The Globe Indemnity Co. of Canada "to settle the jurisdiction of this Honourable Court or of Audette, J., to decide the third party proceedings herein and to give the relief asked for in the Information herein; and to vary the judgment of Audette, J., pronounced in this cause on May 12, 1921, on the grounds: (a) that this Court has jurisdiction in the third party proceedings. (b) that by reason of the order permitting the issue of the third party notice served upon the third parties and not moved against and the subsequent conduct of the third parties, they are precluded from setting up want of jurisdiction, (c) that in the alternative, by the conduct of the third parties and this defendant and the hearing of the merits of the issues raised in the third party proceedings, jurisdiction was conferred on Audette, J., to decide the issues raised in said third party

proceedings. (d) that in the further alternative, if the Court or Audette, J., has no jurisdiction in the third party proceedings, neither have they jurisdiction to grant relief to the Crown on the information. (e) and on other grounds appearing in the proceedings and as counsel may advise; and for a judgment against the third parties as claimed in the third party notice, or a judgment dismissing the information with costs, and in the alternative for a variation of the order for costs against this defendant in respect of the third party proceedings."

After hearing counsel for all parties, suffice it to say that by and under my judgment of May 12, 1921, 60 D.L.R. 142, 21 Can. Ex. 34, all the issues and questions raised by the written pleadings, by the evidence and by the argument of counsel for all parties, inclusive of the contract resulting from the bond given by The Globe Indemnity Company of Canada, have been duly considered and passed upon, and such issues or questions have now become *res judicata*. It is axiomatic that there must be finality in litigation before the Courts; and that a trial Judge ought not to sit on an appeal from his own judgment. In *Charles Bright & Co.* v. *Sellar*, [1904] 1 K.B. 6 at p. 11, Cozens-Hardy, L.J., said:—"Since the Judicature Act no Judge of the High Court has jurisdiction to re-hear, such jurisdiction being essentially appellate." If the motion here is to be treated as tantamount to a substantive and new proceeding then clearly I cannot in such proceeding vary or add to a judgment already given in another case. See case cited *supra* at p. 12.

The motion is dismissed with costs.

ANNOTATION.

RIGHT TO CORRECT OR VARY JUDGMENT AFTER SAME PRONOUNCED —PRACTICE IN EXCHEQUER COURT OF CANADA.

BY

Charles Morse, K.C.,D.C.L.

The practice in such matters in the Exchequer Court of Canada is not especially provided for in the General Rules and Orders, and, therefore, under Rule 1 the practice in cases arising outside the Province of Quebec must conform to that prevailing at the time in similar matters in the High Court of Justice in England; if the case arises in the Province of Quebec and if there is a suitable practice in such matters in the Superior Court of that Province then it will be applied, but if not then the English practice will be invoked as above.

ANNOTATION

The English law in such matters may be shortly stated as follows:—

As a general rule no Court or Judge has power to vary or amend any judgment or order after it has been entered or drawn up, upon an application made in the original action. *Flower* v. *Lloyd* (1877), 6 Ch.D. 297, 46 L.J. (Ch.) 838, 25 W.R. 793; *In re St. Nazaire Co.* (1879), 12 Ch.D. 88, 27 W.R. 854; *Preston Banking Co.* v. *Allsup & Sons*, [1895], 1 Ch. 141, 64 L.J. (Ch.) 196, 43 W.R. 231. In the case last cited Lindley, L.J. (at pp. 143, 144,) said: "This is not an application to alter an order on the ground of some slip or oversight. Nor is it a case in which the order has not been drawn up. Here the order has been drawn up and it expresses the real decision of the Court; and that being so, the Court has no jurisdiction to alter it."

Nor can the Court review its own order by means of an independent action brought for the purpose on the ground of error in law apparent on the face of it. *Charles Bright & Sons, Ltd.* v. *Sellar*, [1904] 1 K.B. 6.

But until a judgment or order has been entered or drawn up the Court or a Judge has inherent power to vary or alter the same so as to carry out the real decision with exactitude. *Lawrie* v. *Lees* (1881), 7 App. Cas. 19, per Lord Penzance at p. 35, 51 L.J. (Ch.) 209, 30 W.R. 185. Indeed it seems that until entered or drawn up the order may be withdrawn and reconsidered. *In re St. Nazaire Co.* (1879), 12 Ch.D. 88, per Jessel, M.R. at p. 91.

And even after drawing up or entering, if the order or judgment contains a clerical mistake or error arising from any accidental slip or omission, the Judge who gave or made the order or judgment may correct it so as to do justice and give effect to his meaning and intention. This power of correcting the order or judgment applies to the case of mistakes and omissions or slips made either by the officers of the Court in entering (*Re Gist*, [1904] 1 Ch. 398, 73 L.J. (Ch.) 251, 52 W.R. 422) or by the parties in preparing the order or judgment. *Armitage* v. *Parsons*, [1908] 2 K.B. 410, 77 L.J. (K.B.) 850, interpreting O. XXVIII, r. 11).

This power, however, does not extend to cases where the judgment or order correctly represents what the Court intended to decide, for if it were otherwise the Judge would have the right to review his own decision. *In re Gist*, [1904] 1 Ch. 398; *Charles Bright & Co.* v. *Sellar*, [1904] 1 K.B. 6 at p. 11.

Alterations or additions to the judgment or order based upon

materials which were not before the Court or Judge at the trial or hearing will not be allowed. But in a proper case a supplemental order may be made. *In re Scowby*, [1897] 1 Ch. 741, 66 L.J. (Ch.) 327. ANNOTATION

By the English practice the application to alter or correct should be made to the Court or Judge granting the judgment or order. *Tucker* v. *New Brunswick Trading Co. of London* (1890), 44 Ch.D. 249, 59 L.J. (Ch.) 551, 38 W.R. 741. The application may be made either by summons or notice of motion. O. XXVIII, r. 11; *Websdell* v. *Jenkins* (1902), 46 Sol. Jo. 484; *Fritz* v. *Hobson* (1880), 14 Ch.D. 542, 49 L.J. (Ch.) 735, 28 W.R. 722. Applications for this purpose should be made as soon as the mistake is discovered; but in *Hatton* v. *Harris*, [1892] A.C. 547, 62 L.J. (P.C.) 24, the application to correct a decree was allowed after a period of more than 30 years had elapsed from the date of discovery. The judgment or order itself may be corrected or a supplemental order for the purpose may be made. *Eckersley* v. *Eckersley* (1884), W.N. 133; *Re Scowby*, [1897] 1 Ch. 741.

In so far as Chambers orders are concerned the practice in the Exchequer Court is that even after the order is drawn up and entered it may be corrected by the Judge who made it. Rule 288 of the General Rules and Orders regulating the practice in the Court provides that a Judge may rescind his own order made in Chambers.

In respect of correcting judgments of the Court, it was held in the unreported case of *The Queen* v. *St. Louis* (1897), (noted in Audette's Practice, Ed. 2 p. 482) that where the judgment as settled and entered did not give the defendant the full benefit of a right which the trial Judge intended he should have, the minutes of the final judgment should be corrected in that behalf.

This is in conformity with the English practice; and in many other unreported cases the Court has adopted that practice and applied and followed the English decisions. It should be noted, however, that with reference to the method of applying to correct judgments or orders the Exchequer Court rules especially provide that in the case of applications to the Court they should be made by notice of motion (R. 278); and in the case of applications in Chambers by summons or by petition (R. 287).

Can.

S.C.

GOLD SEAL Ltd. v. DOMINION EXPRESS Co. and ATTORNEY-GENERAL FOR ALBERTA.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, and Mignault, JJ. October 18, 1921.

CONSTITUTIONAL LAW (§ IIA—233)—INTOXICATING LIQUORS—PROVINCIAL REFERENDUM—PROHIBITION—CANADA TEMPERANCE ACT (1919), 2ND SESS., CH. 8—IRREGULARITIES—CURATIVE ACT, 1921 (CAN.), CH. 20—OPERATION—VALIDITY.

Part IV. of the Canada Temperance Act as enacted by 1919, 2nd Sess., ch. 8, forbidding importation of intoxicating liquor into a Province is intra vires the Dominion Parliament, because of its general powers to make laws for the peace, order and good government of Canada.

Section 1 of the Curative Act of 1921, Dom. Stats. ch. 20, which enacts inter alia that the proclamation issued under part IV. of the Canada Temperance Act 1919, 10 Geo. V., ch. 8 shall not be irregular or void because such proclamation states that it shall go into force on such day and date as shall by Order in Council be declared instead of setting out the days on which it shall go into force, as required by sec. 152 of the Act; and sec. 2, which validates any irregularities in the proceedings for taking the votes of the electors are also intra vires the Dominion Parliament. These sections act retrospectively to take away the civil rights of litigants, in actions based on the invalidity of the proceedings taken under sec. 152 of Part IV. of the Act of 1919, and pending at the time of the passing of the Curative Act of 1921.

APPEAL by plaintiff from the judgment of the Supreme Court of Alberta, Appellate Division (1921), 58 D.L.R. 51, 16 Alta. L.R. 113, upon a special case referred to that division by Hyndman, J. Affirmed.

A. A. McGillivray, K.C., for appellant.

H. H. Parlee, K.C., for respondent.

DAVIES, C.J.:—After the argument in this appeal, and after giving much consideration to the several points raised by the counsel for the appellant, I reached the conclusion that his contention must prevail, viz., that the requirement of sub-sec. (g) of sec. 152 of the Canada Temperance Amending Act, 1919 (Can.) 2nd. Sess., ch. 8, was imperative and that non-compliance with it rendered all subsequent proceedings invalid. That section provided that "in any proclamation to be issued by the Governor in Council for taking the votes of all the electors in all the electoral districts of the province for or against the prohibition of the importation or the bringing of intoxicating liquors into the province, such proclamation shall set forth . . . (g) the day on which, in the event of the vote being in favour of the prohibition, such prohibition will go into force." No such day was stated in the proclamation in question in this case and, in my opinion its absence was fatal to the validity

of all subsequent proceedings.

This conclusion of mine was concurred in by the majority of the Court, but, before judgment was delivered Parliament intervened and passed the Act of 1921 (Can.), ch. 20, which declared:—

"1. No proclamation heretofore or hereafter issued under Part IV. of the Canada Temperance Act, as enacted by chapter eight of the statutes of 1919, second session, shall be deemed to be void, irregular, defective or insufficient for the purposes intended merely because it does not set forth the day on which, in the event of the vote being in favour of the prohibition, such prohibition will go into force, provided it does state that such prohibition shall go into force on such day and date as shall by Order in Council under section one hundred and nine of the Canada Temperance Act be declared.

2. No Order of the Governor in Council declaring prohibitions in force in any province, whether heretofore passed or hereafter to be passed, shall be or shall be deemed to have been ineffective, inoperative, or insufficient to bring prohibition into force at the time thereby declared by reason of any error, defect, or omission in the proclamation or other proceedings preliminary to the vote of the electors, or in the taking, polling, counting or in the return of the vote, or in any step or proceeding precedent to the said Order, unless it appear to the Court or Judge before whom the prohibition is in question that the result of the vote was thereby materially affected."

This statute made no exception from its application of proceedings in any suit pending at the time of its passage and however unjust this may seem to be, it cannot affect the validity of the Act itself. This Act, in my opinion, is perfectly constitutional, and being so cannot be called into question by us. It cured what I held to be the fatal defect in the proclamation. That being cured, I feel bound to uphold the validity of the proceedings bringing into operation the provisions of the Act of 1919 (Can.), 2nd Sess., ch. 8, prohibiting the importation into the Province of Alberta of intoxicating liquors. It was admittedly not competent for the Local Legislature to pass such an Act and, in my judgment, the Parliament of Canada, under its general power "to make laws for the peace, order and good government of Canada," and under its enumerated powers in sec. 91 (2) (B.N.A. Act) "for the regulation of trade and commerce" had such power.

On all the other points raised by the appellant in the argu-

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

Idington, J.

ment of this case, I have reached the conclusion that the appeal fails and must be dismissed. Under all the circumstances of this case, however, I think that the appellant company is entitled to be paid its costs throughout.

IDINGTON, J. (dissenting):—The appellant is a company incorporated under the Companies' Act, ch. 79, R.S.C. 1906, for the following purposes amongst others:—

(a) To engage in and carry on in Canada or elsewhere the business of wholesale and retail grocers, wholesale and retail druggists, bonded or other warehousemen, general traders, wholesale and retail merchants, brewers, maltsters, distillers, manufacturers, importers, exporters, packagers or bottlers, distributors of all kinds of wines, spirits, malt liquors and of aerated, mineral and artificial waters and other drinks, of teas, coffees, baking powders, fruits, spices, drugs, all kinds of tobaccos and accessories of the tobacco business and any and all other articles and things which may be conveniently dealt in by the company in connection with above businesses.

(b) To do all such other things as are incidental or conducive to the attainment of the above objects. The operation of the company to be carried on throughout the Dominion of Canada and elsewhere.

The respondent is a common carrier for hire also incorporated, for the purpose of so carrying from and to all points in Canada through which the C.P.R. runs.

Each of the said parties hereto had been carrying on its said respective business when the Alberta Liquor Act, 1916 (Alta.), ch. 4, was passed and the amendments thereto were also passed and also when the Liquor Export Act 1918 (Alta.), ch. 8, as amended 1920, (Alta.) ch. 7, of said Province and amendments in question herein were passed.

The appellant's head office is in the city of Vancouver in British Columbia and there it has a private warehouse and it also, at the time in question herein, had a branch office and private warehouse in the city of Calgary in the Province of Alberta.

The admitted facts of the stated case so far as necessary to present what has to be acted upon in deciding this appeal, are stated therein as follows:—

5. The plaintiff has at all times since its incorporation carried on an interprovincial business throughout Canada as importer and exporter and distributor of all kinds of wines, spirits

and malt liquors and has carried on the business of warehousemen in connection with its said goods.

8. On February 1, 1921, the plaintiff in the ordinary course of its business pursuant to bona fide transactions in liquor with persons in the Province of Alberta, Saskatchewan and Manitoba, respectively, duly tendered to the defendant as such common carrier the following goods:

10. Each of the said packages was plainly labelled so as to show the actual contents thereof and the name and address of the plaintiff, the consignor thereof, and each of the said packages was addressed to a bona fide person, the actual consignee thereof, at his private dwelling house, to be dealt with in a lawful manner, viz.: as a beverage, all of which was within the knowledge of the defendant at the time of the tender to it of the said package.

12. Each of the packages mentioned in paragraph 8 hereof contained intoxicating liquor as defined by the Canada Temperance Act.

13. The defendant has not only refused to carry the goods of the plaintiff as aforementioned but has notified the plaintiff that hereafter it will not carry any such wines, spirits, malt liquors or other intoxicating liquors from the plaintiff at Vancouver in the Province of British Columbia to any person or persons or corporation in the Provinces of Alberta or Saskatchewan or Manitoba and that it will not carry any such wines spirits, malt liquors or other intoxicating liquors from the plaintiff at Calgary in the Province of Alberta to any person or persons or corporation in the Province of Saskatchewan or Manitoba.

14. In addition to the tenders for carriage of the goods before mentioned on February 1, 1921, the plaintiff in the ordinary course of its business tendered to the defendant at Vancouver in the Province of British Columbia for delivery to the plaintiff's warehouse at Calgary, Alberta, the following goods:

16. Each of the packages mentioned in para. 14 hereof contained intoxicating liquors as defined by the Canada Temperance Act.

The trouble between these parties arises solely out of the question of the validity of certain enactments by the respective Legislatures of Alberta and Saskatchewan and Manitoba and supplementing same the observance or rather non-observance of the provisions of the Canada Temperance Act, ch. 152 of the R.S.C. 1906, as amended, and the failure to observe same in

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

Idington, J.

the Orders in Council, proclamations and proceedings to carry same out; and possibly also the Dominion Election Act, 1920 (Can.) ch. 46.

Shortly and in plain English, if the carrying of said liquor in question so tendered for carriage would have been against the law as claimed by the Government of Alberta, it would have been, the respondent must be excused for its refusal, but if the legislative provisions in question, or any of them, were so *ultra vires* the Legislatures of Alberta, Saskatchewan or Manitoba as to be ineffective as excuses, then in whole or in part as the case may turn out the respondent is not excused.

The questions raised are somewhat involved and may be made very confusing. It will be observed that the appellant, desirous of testing the various questions of right it sets up, made a series of tenders of shipment of liquor to the respondent and thus got a series of refusals.

The parties agree to submit their disputes to the Alberta Court in the shape of a stated case, from which I have adopted above several paragraphs as setting forth essentially what is in dispute; to be illuminated so far as I can see by supplementing thereto the story of relevant law as I understand the decisions of the Court above bearing thereon.

Beginning with the latest decision of said Court directly bearing upon a very important part of the questions involved, we find that the Province of Manitoba passed in the year 1900 ((Man.) ch. 22,) an Act for the suppression of the liquor traffic in that Province.

In due course a test case was submitted to the Court of King's Bench for Manitoba by the Attorney General of that Province, and the Manitoba License Holders Ass'n in which the question of its constitutional validity was threshed out. That Court held that the Legislature had exceeded its powers in enacting the Liquor Act as a whole.

On appeal to the Judicial Committee of the Privy Council that Court reversed said decision and held that the Legislature had jurisdiction to enact said Liquor Act. It is reported in *Attorney General of Manitoba* v. *Manitoba License Holders' Ass'n*, [1902] A.C. 73.

In that Act there was the following clause:—

"119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Manitoba, except under a license or as otherwise specially provided by this Act, and restrict the consumption

of liquor within the limits of the Province of Manitoba, it shall not affect and is not intended to affect bona fide transactions in liquor between a person in the Province of Manitoba and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly."

This was probably the result of the judgment of the Judicial Committee of the Privy Council in the case of *Att'y Gen'l for Ontario* v. *Att'y Gen'l for the Dominion et al*, [1896] A.C. 348, where in answer to the following question at p. 349: "Has a Provincial Legislature jurisdiction to prohibit the importation of such liquors into the Province?" that Court answered as follows at p. 371:—

"Their Lordships answer this question in the negative. It appears to them that the exercise by the Provincial Legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament."

These judgments seem to settle much if duly observed in prohibition legislation.

But unfortunately the Legislature of Alberta after passing in 1916 (Alta.), ch. 4, an Act taken evidently from said Manitoba Act containing same clauses as above quoted relative to importation, saw fit in 1918 (Alta.) ch. 4, to pass another Act in substitution of the former and not only omitted said section but attempted thereby and by numerous amendments to render importation impossible despite the above cited judgment of the Court above. At the same session the Legislature enacted by ch. 8 an Act called the Liquor Export Act, attempting thereby to prohibit the export thereof.

I cannot refrain from suggesting that the exportation of all the liquor in or coming into Alberta from that Province ought to be held as an aid in promoting the prohibition of the use of said liquor in Alberta which is all that the Legislature of that Province can be legitimately concerned about.

Passing that practical view of the matter I submit that the constitutional aspect of the subject matter thus brought forward seems but the counterpart of the importation question expressly passed upon by the judgment above quoted from the Ontario case, [1896] A.C. 348.

In short I agree with the result reached by the Alberta Court in the case of *Gold Seal Ltd.* v. *The Dominion Express Co.* (1920), 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377, holding that Act *ultra vires*.

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

Idington, J.

That brings me to the consideration of the possible bearing of what is involved herein of sec. 121 of the B.N.A. Act, which reads as follows:—

"121. All articles of the growth, produce, or manufacture of any of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

This section has not, so far as I know, received anything but a casual consideration by any of the Courts having to deal with such questions as are involved herein.

Indeed until the Alberta Acts, to which I have above referred, there was no legislation in which the rights established by said section would seem to have been plainly disregarded.

In the argument before us herein a reference to said section caused the inquiry to be made as to the facts of whether or not any of the said goods tendered for carriage had been of the "growth, produce, or manufacture of any one of the Provinces."

That fact was admitted and subsequently made to appear in a consent filed by leave of this Court so far as appears therein.

Hence the question arises whether or not this section does not render *ultra vires* any effort by either Local Legislatures or Parliament to override the said provision.

I incline to hold that it does unless in the possible case of an enactment by Parliament in the exercise of its exclusive jurisdiction over criminal law.

Certainly no single Province, nor all combined, can override the plain meaning of the language used.

And when we turn to the "Regulation of Trade and Commerce," I think there are many decisions shewing that the powers to be exercised thereby are not applicable to anything that is likely to be involved in the meddling with this provision.

There may be, however, times when the products of a Province may be infected with, for example, some contagious disease rendering it absolutely necessary as matter of public safety, to forbid transportation across the lines bounding a Province or a district therein.

It seems to me that the true and only remedy for such a condition of things would be the exercise by Parliament of its powers resting in its jurisdiction over criminal law and procedure in criminal matters.

The section, in my opinion, adds to the difficulties in the way of any Provincial Legislature seeking to bar the importation

of liquor not alone from another country, which the Court above expressly decided in the *Att'y Gen'l for Ontario* v. *The Att'y Gen'l for the Dominion, supra,* such legislation could not do, but also from one Province where manufactured into another.

Again there is, by virtue of the recent decisions of the Judicial Committee of the Privy Council in the *Great West Saddlery Company* v. *The King,* 58 D.L.R. 1, [1921] 2 A.C. 91, 90 L.J. (P.C.) 102, and other cases heard together therewith, established doctrine that a legal entity created by virtue of the provisions in the Dominion Companies Act R.S.C. 1906, ch. 79, above cited, has rights, despite local legislation, such as no individual citizen would think of asserting.

It adds to the strength of appellant's case so far as Alberta and much of Saskatchewan legislation is concerned.

Until recently it had been generally supposed to be quite clear that corporations created by Parliament in virtue of its exclusive jurisdiction, for the due execution of any of the specific purposes, falling within the enumerated classes of subjects defined in sec. 91, of the B.N.A. Act; as, for example, banks and others, could be assigned such rights over property and civil rights as Parliament chose to confer.

On the other hand it had been generally assumed that other corporate creations of Parliament rested upon its residuary powers alone and could not, as regards property and civil rights, exceed in capacity the powers of the private citizen when operating in any Province; unless so far as the Legislature of the Province so concerned, in virtue of its exclusive authority over property and civil rights, had otherwise enacted.

Hence at a very early date the decision in the *Citizens Insurance Co. etc.* v. *Parsons* (1881), 7 App. Cas. 96, maintained the right of a Provincial Legislature to declare, by virtue of its said exclusive power over property and civil rights, the contractual capacity of any insurance company operating in the Province and the effective limitations of its contract and conditions therein, whether the company had been incorporated by the Dominion Parliament or elsewhere.

That I respectfully submit was an exercise by a Provincial Legislature of a power as great or greater than to refuse a company, unless licensed, the right to assert its pretensions in the Courts of its Province.

The item of "Regulation of Trade and Commerce" in the enumeration of the class of exclusive powers assigned Parliament was pressed then and therein as it has been in numerous cases since, without availing the companies anything.

Can.
S.C.
GOLD SEAL LTD. v. DOMINION EXPRESS CO.
Idington, J.

It was again brought forward in the *John Deere Plow* case (annotated), 18 D.L.R. 353, [1915] A.C. 330.

The reasoning upon which the Court proceeded is now declared, in the recent judgment above referred to, to have rested upon said item No. 2 of the B.N.A. Act, though upon considering it in some cases when before us I doubted that intention, for reasons I set forth in that case (1919), 48 D.L.R. 386, at pp. 393, 394, 59 Can. S.C.R. 19.

The pith of all that was necessarily involved in the *John Deere Plow* case, 18 D.L.R. 353, was the refusal of the authorities in British Columbia to register the company unless and until it changed its name. I humbly conceived that it was not necessary in order to rectify such a wrong to hold that the item 2 of sec. 91 was the basis of the existence of all Dominion corporations save in specified cases otherwise covered by the enumeration of classes in said section.

Unfortunately the judgment of the Court above in said *Great West Saddlery* case, 58 D.L.R. 1, and other cases makes it clear that there can no longer be any hope of resting the creation of such corporations upon anything save in said item No. 2, relative to "trade and commerce," and that we cannot properly shrink from the very grave consequences of such a departure from the old view that the basis of such incorporation as there in question was the residual power of Parliament and not the item No. 2 relative to the regulation of trade and commerce as now asserted.

It is not our province to reconcile the view taken in the *Parsons'* case, 7 App. Cas. 96, and other cases with the latest exposition and decision pursuant thereto, but to apply the latest decision when no way of escape therefrom seems possible as bearing upon the issues raised herein.

It would therefore seem clear that a Dominion incorporation such as appellant, engaged merely in the import and export business, cannot by virtue of local legislation be debarred from carrying on its business.

Honestly doing such as it professes to have been doing could not necessarily infringe upon the prohibition of the local law against the consumption or selling of intoxicating beverages in the Province of Alberta.

Neither would the carrying by respondent for appellant to another Province be necessarily against, or a violation of, the prohibitory legislation thereof, so long or so far as such legislation could be held *intra vires*.

For the several foregoing reasons I am of the opinion that the

refusal of the respondent to carry appellant's goods in question cannot be upheld unless by virtue of some enactment of Parliament.

It is contended by respondent that such legislation had been effectively enacted at the time in question.

Have each and all of the foregoing difficulties in the way of a Provincial Legislature, rendering illegal such service as the respondent herein was asked by appellant to perform, been so overcome by Dominion legislation which has become effective and is not *ultra vires?*

That seems to me the crucial question herein.

1919 (Can.) 2nd. Sess. ch. 8 amending the Canada Temperance Act, if its several provisions for bringing it into force had been duly observed, in my opinion would have had such effect so far as Alberta was concerned.

The tender made for carriage of such goods from British Columbia into any of the other Provinces in question herein, wherein said amendment has not been made effective, or elsewhere permitting of lawful carriage there of course stands good.

The appellant raises many objections to the validity of the proceedings to bring the amendment into effect.

In the first place its counsel points out the same is only applicable to a "province in which there is at the time in force a law prohibiting the sale of intoxicating liquors for beverage purposes."

Although, for the reasons I have pointed out, the legislation in Alberta on the subject has exceeded I had almost said, all bounds, by enacting provisions that seemed in conflict with the law so declared by the Court above in the *Ontario* case, [1896] A.C. 348, and in other respects which I need not repeat, yet when all these unwarranted attempts are blotted out there still remains a substantial enactment of what was taken from the Manitoba Act held valid, to constitute what might answer to the descriptive terms I have quoted as the basis for a further Dominion Act such as 1919, (Can.) 2nd. Sess. ch. 8.

Another objection taken is that Parliament cannot supplement and aid provincial legislation. I am of the opinion that it can and in doubtful cases of the respective jurisdiction of the Provincial Legislature and Dominion Parliament it is often advisable that there should be concurrent legislation to overcome such doubt or difficulty.

Again it is contended that Parliament cannot enact a law which may only become operative in a part of Canada.

I am quite unable to understand such a contention in face

CAN.
S.C.
GOLD SEAL LTD. v. DOMINION EXPRESS CO.
Idington, J.

of the fact that the Canada Temperance Act, which distinctly provided for counties and other municipalities by the votes of the electors, bringing same into force it should then and there become effective, and such conditional legislation was upheld in the *Russell* case (1882), 7 App. Cas. 829.

The condition of its becoming operative is by this amendment made dependent upon the vote of the electorate of the Province to be affected, instead of being confined to that of the county or other municipality in question, rendering it so.

The conditional character of the legislation is in principle the same. And there is a very good reason for Parliament providing such a course. It requires the support of public opinion in any district affected by such legislation in order to render its enforcement effective, instead of becoming a mockery leading to evil results of a most undesirable kind.

Indeed it may be doubted whether or not the support of a bare majority of those voting can be relied upon as a safe guide in that respect. That, however, is a question with which we are not concerned. All we have to deal with is the existence of the power to enact such a conditional form of legislation.

A number of other objections of less import made by counsel for appellant seem to me answered by the same mode of reasoning I have adopted as to one or more of the foregoing objections which I have specifically dealt with; out of respect to the arguments presented.

Assuming for argument's sake, as has been suggested, that parts of the Alberta Acts trespass on the field of criminal law, when the Dominion Parliament which is possessed of absolute power over "criminal law and procedure in criminal matters," sees fit to pass an enactment which, with the rest of the Canada Temperance Act, may well fall within and be attributed to an exercise of that source of its jurisdiction for so enacting though their Lordships in the Court above in the *Russell* case, *supra*, assigned another as preferable, the room for dispute seems to me ended.

Even if to enforce that enacted within the reserved power of "peace, order and good government" I submit the powers given relative to "criminal law and procedure in criminal matters" may be relied upon as well as the other, if inherently applicable.

There remains a further ground of objection taken by the appellant that the right of export is not touched by the amendment in question and hence the importation for the mere purpose of export is for a commercial purpose within the meaning of the amendment, sec. 154, sub-sec. 3.

This certainly is a fairly arguable point but I incline to think, having regard to what sub-sec. (c) of sec. 154 regarding the transportation of liquor through the Province and a doubtful import of the word "commercial" when read in connection with the rest of the proviso in which it appears, it was the evident purpose of the amendment, read as a whole, to exclude any other form of export but that provided by through transportation.

The final point made that the statutory provisions made for the amendment coming into force have not been duly followed seems to me fatal to the said proceedings.

The amended Act in question 1919, (Can.) 2nd. Sess. ch. 8, sec. 1, expressly provides that the Governor in Council "may issue a proclamation in which shall be set forth (a)The day on which the poll for taking the votes of the electors for and against the prohibition will be held; (b) that such votes will be taken by ballot between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of that day * * * * (g) the day on which, in the event of the vote being in favour of the prohibition, such prohibition will go into force."

It seems to me idle to try to minimise the effect of these provisions and to try to justify such plain departures therefrom as were taken by extending, in the case of Manitoba and part of Alberta, the hours for taking the poll and also failing in each of the three Provinces to declare when the Act was to come into force.

In the case of Manitoba the extension of the hours for taking the poll was directed by the proclamation in absolute disregard of the express provisions in sub-sec. (b) above quoted.

In the case of Alberta the disregard thereof was the work of a returning officer who presumed to assert, contrary to the fact, in his notice to the electors, that the extended hours had been named by the proclamation.

Can such elections be held to be in due conformity with the imperative basic conditions precedent, laid down in the statute as the only method of procedure which should be taken to enable the constituted authorities to take steps for bringing that statute into force and rendering it effective?

The word "shall" used in declaring what such a proclamation should, if ventured on, contain, shews, the peremptory nature of the enactment.

That governed items therein from (a) to (g) and the only permissive thing, in way of adding thereto, was as follows:—

"(h) any further particulars with respect to the taking and summing up of the votes of the electors as to the Governor in Council sees fit to insert therein."

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

Idington, J.

I cannot find existent in the legislation providing for this peculiar election, or elsewhere, any curative or validating enactment anticipating and providing for such gross or any departures from the express provisions of Parliament requiring the hours stated of voting (9 to 5) to be observed and the date of the coming into force to be named.

The only such enactment cited and relied upon is sec. 101 of the Dominion Elections Act 1920, (Can.) ch. 46, assented to July 1, 1920, which by its first sub-section enacted as follows:—

"101. (1). Whenever under the Canada Temperance Act a vote is to be taken, the procedure to be followed shall, in lieu of the procedure therein directed, be the procedure laid down in this Act with such modifications as the Chief Electoral Officer may direct as being necessary by reason of the difference in the nature of the question to be submitted, and with such omissions as he may specify on the ground that compliance with the procedure laid down is not required."

This was enacted two months after the respective proclamations for Alberta and Saskatchewan calling the election for taking the required poll, to bring into force the amendment in question to the Canada Temperance Act, had been issued.

In each of these proclamations the hours named within which the votes were to be taken were 9 o'clock in the forenoon and 5 o'clock in the afternoon. In the case of Manitoba the proclamation was issued on August 14, 1920, and the hours named within which the votes were to be taken were as to urban polling subdivisions, between 6 o'clock in the forenoon and 6 o'clock in the afternoon, and as to rural polling sub-divisions 8 o'clock in the forenoon and 6 o'clock in the afternoon. The said sec. 101 could not by its terms be made applicable to such a change of the said imperative conditions I quote, and the Chief Electoral Officer never attempted to so apply it—though acting thereon in other regards not in question.

It is to be observed that the hours within which voting must take place had been peremptorily fixed by the enactment; and that no one can now tell what the exact result would have been had that been adhered to; and also that the delegated duty of fixing the time when its result was, if favourable, to become law was imperatively required to be declared by Order-in Council previous to such voting and stated in the proclamation calling the election.

These departures from the express conditions of bringing the statutes into effect were, to my mind, fatal errors and rendered ineffective the attempt to bring the Act into force in said

three provinces, and thus left the appellant's tenders of goods, for carriage by respondent so effective, at the time when made, as to entitle the appellant to succeed therein.

It is true that Parliament has, after the argument herein and pending the delivery of judgment thereon, enacted a statute for the purpose of curing the effect of such errors.

Clearly that statute cannot retrospectively affect the civil rights of appellant; though Parliament proceeds in a general way therein to deal with pending cases as if possessed with plenary powers over property and civil rights. With great respect I cannot so hold or maintain the attempt to take away the rights of a litigant which must be determined by the relevant law of the Province bearing thereon where its cause of action arose, and, I submit, cannot be properly affected by any enactment of Parliament.

There might arise cases of corporate bodies created within and by virtue of the powers assigned specifically by the enumerated items of sec. 91 of the B.N.A. Act to the Dominion alone, and solely dependent for their civil rights thereon, when a judgment founded thereon might be affected by retrospective legislation, but this is not such a case. The appellant's rights herein rested entirely, save as to the important fact of its incorporation, on provincial law, as to property and civil rights which were, save as to its incorporation, not conferred by Parliament and over which it is powerless either to impair or take away. I do not think the destruction or limitation of any of the powers of the legal entity of appellant can be held as within the purview of said Act. I cannot conceive that Parliament intended to discriminate against a creation of its own when clearly it intended all to be treated alike. Private citizens and provincial or other than Parliament's non-corporate creations, clearly could not be affected by such legislation.

It would, in my view, be improper to express any opinion as to the effect of this curative legislation beyond dealing with the civil rights of the parties hereto.

In my opinion the appellant is entitled to have the judgment from us which the Court below should have pronounced or, in other words, determine the civil rights of the parties by the law applicable to the Province as it stood before this enactment.

We have no jurisdiction to determine otherwise.

It is suggested by the intervenant's counsel in a supplementary factum, that though we have by the Supreme Court Act, R.S.C. 1906, ch. 139, to declare the law as the Court below should have done yet this amendment by Parliament which

Can.
S.C.
COLD SEAL LTD. v. DOMINION EXPRESS CO.
DUFF, J.

created the Court and so defined its limitations of jurisdiction, must have intended by this enactment to have changed, for the purposes of this case, that limitation.

I do not find in the Act in question any such intention either express or implied.

The Act, so far as I can understand it, was to my mind so framed in this regard by reason of haste and accidental oversight of the limited powers of Parliament over property and civil rights.

Let us assume for a moment that Parliament had at any time enacted, quite independently of this conditional form of legislation, by way of referendum, as I conceive would be quite competent for it, if rested on its exclusive jurisdiction over criminal law, a statute prohibiting the import or export of liquor, and pretended therein to deal with the rights theretofore acquired by any one over property or civil rights resting solely upon the provincial legislation in virtue of the exclusive jurisdiction of the Provincial Legislatures over property and civil rights; and to take such rights away by merely making such enactment retrospective, as is attempted by the Act in question herein, how long would argument in support of such legislation be listened to by any Court acquainted with the B.N.A. Act,

Of course if Parliament acting upon item No. 2 and asserting an obvious intention to destroy or limit the powers of its creature resting thereon, I conceive it might do so even if retroactive legislation of another character than presented for consideration herein.

Or suppose the appellant had chosen to pass this Court and go to the Court above, is it conceivable that it would, if taking the view I do as to the effect of non-observance of the conditions of bringing into operation this referendum style of legislation, feel bound to hold such an infringement upon property and civil rights as they existed before the enactment of such an Act as binding it?

I am of the opinion that on the stated case the appellant is entitled to succeed and that the appeal should be allowed with costs.

DUFF, J:—I concur in the view of the majority of the Appellate Division (1921), 58 D.L.R. 51, 34 Can. Cr. Cas. 259, 16 Alta. L.R. 113, that the proclamation was not invalid. The evidence furnished by the parent enactment (the Canada Temperance Act) as well as by the amending statute of 1919 appears to point rather definitely to the conclusion that the Order in

Council to be passed after the vote has been taken is intended to be the operative instrument by which the prohibitions are to be brought into force and the instrument governing the date upon which they are to become law.

Consider first the provisions of the parent Act, R.S.C. 1906, ch. 152, the relevant section being sec. 109. The language is unqualified. Where a petition has been adopted, the section provides "The Governor in Council may at any time after the expiration of sixty days from the day on which the same was adopted, declare that Part II. of this Act shall be in force and take effect" on the day on which the licenses then in force shall expire if such day be not less than 90 days from the "date of such order in council" and if less "then on the like day in the following year," and "upon, from and after that day" Part II. of the Act shall become and be in force. It is to be observed that the section commits it to the uncontrolled discretion of the Governor in Council to determine the time when the Order in Council shall pass and it is by reference to this date that the time is fixed when the prohibitions are to come into force.

The second sub-section (which applies where there are no unexpired licenses) in terms entrusts the Governor in Council with absolute authority to decide when Part II. shall come into operation.

This authority of the Governor in Council which arises only after the vote has been taken seems to extend to all cases; and it would extend, I think, to any case in which by the proclamation a specified day has been named.

The fact, no doubt, that by sec. 2, the Governor in Council is authorised to state in the proclamation the date upon which, in the case of a favourable vote, Part II. is to come into operation gives colour to the suggestion that it is intended to authorise the Governor in Council to decide upon that date in advance. But the tenor of sec. 109 seems opposed to such an inference. It is the Order in Council in every case which brings the prohibitions into force and it is the date of the Order in Council which in every case automatically determines the time when they are to take effect. The section in pointed terms authorises the Governor in Council to act "at any time" after the expiration of 60 days from the adoption of the petition and it would seem singular indeed, if his discretion was to be controlled by the naming of a date in the proclamation, that some reference to that contingency does not appear in sec. 109. It may be suggested, of course, that votes might conceivably be influenced by the circumstances that the prohibitions are to

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

DUFF, J.

come into force upon this or that date and that to change the date would involve something like a breach of faith. But giving the fullest weight to that suggestion it seems to be quite overborne by the obvious inconveniences entailed by adopting the alternative construction; under which all the labour and expense of taking the vote might be wasted by the accident of the proceedings being prolonged (in consequence, for example, of legal controversies) beyond the date named in the proclamation. It is difficult to suppose such a result to have been contemplated.

The language of sec. 153 of the Canada Temperance Amending Act is just as pointed and imposes an imperative duty upon the Governor in Council to "declare the prohibition in force" if the vote proves to be favourable to the petition.

The inconvenience, indeed, of the alternative construction is perhaps even more obvious in the case of proceedings under the Amending Act. Harvey, C.J., 58 D.L.R. at pp. 57-59, has alluded to circumstances indicating the impracticability of fixing in advance the day upon which the Governor in Council is to act after the result of the poll is finally known. Needless to say, there is nothing fanciful in these suggestions; and where the area (as under the Amending Act) in which the vote is to be taken is a whole province they are of the gravest practical importance.

For these reasons I think the weight of argument favours the conclusion that the discretion of the Governor in Council under sec. 109 and under sec. 153 is not fettered by anything stated in the proclamation as to the date when the prohibitions are to come into force, in other words, that he was not authorised under the original Act or under the Amending Act to limit the exercise of that discretion by an irrevocable decision at the time of the issue of the proclamation.

It seems accordingly that if a date be named it must be as a provisional date subject to the possibility, at all events, of any change which the Governor in Council may consider necessary in the exercise of his judgment after the result of the vote has been ascertained; and if that be the manner in which this machinery was intended to operate it would seem to be in furtherance of the intention of Parliament to say simply, as does the proclamation in question, that the prohibitions shall come into force in accordance with the order of the Governor in Council under sec. 109 of the Act.

The fact that a direction is mandatory in form is not conclusive, of course, as to the result of non-compliance; and the

statute in this case does not assist us by any express provision. The duty of the Court therefore is to collect the intention of Parliament by considering the whole scope of the enactment. *Liverpool Borough Bank* v. *Turner* (1860), 2 DeG. H. & J. 502, 45 E.R. 715. As Lord Penzance said in *Howard* v. *Bodington* (1877), 2 P.D. 203 at p. 211: "You must look to the subject matter; consider the importance of the provision [in question] and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

Considering the matter in this aspect and guided by the considerations indicated above, my conclusion must be that even if the appellants are right in their view that sec. 152 directs the insertion in the proclamation of the date of coming into force of the prohibitions (specified by the day of the month), then the direction is what is called "directory" only, that is to say, there is no solid ground for implying that nullity shall be the consequences of disobedience.

The prohibitions of the Amending Act of 1919 were therefore duly brought into force if the Parliament of Canada had authority to enact them and if the other conditions mentioned in the Act have been fulfilled, namely, that there shall be a "law prohibiting" the sale of intoxicating liquor "in force" in the Province of Alberta and that the result of the vote shall be favourable.

I agree with the reasons given by Harvey, C.J., in the Court below, 58 D.L.R. 51, that both these conditions were satisfied.

The capacity of the Parliament of Canada to enact the amendment of 1919 is denied. With this I do not agree. And, first, I am unable to accept the contention founded upon sec. 121 of the B.N.A. Act; the phraseology adopted, when the context is considered in which this section is found, shews, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting inter-provincial trade in the products of any Province of the Union.

It is not strictly necessary to express any opinion upon the point whether this statute can be supported as passed in exercise of the power given by the second enumerated head of sec. 91. It has been held that the literal meaning of the words "trade and commerce" must be restricted in order to give scope for the exercise of the powers committed to the Provinces by sec. 92. The legislation of 1919, however, deals only with imports into the Provinces to which it applies and it is

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

DUFF, J.

legislation, clearly, I think, beyond the authority of a Province to enact. The reason mentioned therefore seems to fail of application. It has been held also that the regulation of a particular business in each of the Provinces throughout the Dominion by a general system of Dominion licensing is not a "regulation of trade and commerce" within the meaning of the phrase as here employed. That rests in part at least upon the ground that such a construction would give to No. 2 a scope including subjects specially dealt with by other heads of sec. 91, banking and shipping. This is an objection which would appear to have little force as applied to legislation dealing only with a foreign or inter-provincial trade and it seems at least much open to question whether the general elucidation of the language of No. 2 in *Parsons'* case, 7 App. Cas. 96, when properly construed, contemplates the exclusion of legislation dealing with exports or imports even of a specified commodity from the ambit of the authority arising under that head; and in the *Insurance Act Reference*, 26 D.L.R. 288, [1916] 1 A.C. 588, 25 Que. K.B. 187, it was expressly held that an enactment requiring a foreign company to take out a license before carrying on the business of insurance in Canada was an enactment within the category of "regulation of trade and commerce." A much more serious objection, however, arises from the decision of the Lords of the Judicial Committee in *Att'y Gen'l for Ontario* v. *Att'y Gen'l for Dominion*, [1896] A.C. 348 at p. 363. It was there held that the authority touching the regulation of "trade and commerce" given by sec. 91 contemplates the passing of laws with the view to the preservation of the thing to be regulated and not with a view to its destruction and consequently that a law abolishing all retail transactions in liquor within a specified area could not be supported as a law passed in the exercise of this power.

It is undoubted that the Act of 1919 was passed in aid of provincial liquor enactments and in substance aims at the abolition in transactions in liquor within the Provinces to which it applies, and that being the case there is of course much force in the suggestion that the Act of 1919 could not be sustained as a valid enactment in "regulation of trade and commerce" consistently with their Lordships' decision.

On the other hand in a wider view it might be well suggested that a law prohibiting the export or importation of a specified commodity or class of commodities from or into a particular Province is, when considered in its bearing upon the trade and commerce of the Dominion as a whole, a law passed "in regula-

tion of trade and commerce''; and it may be open to doubt whether their Lordships' decision on the reference of 1896 ought to be regarded as applying to an enactment solely directed to the prohibition of such exports or imports.

On the other hand the enactments of the amending Act are not enactments dealing with a matter falling within any of the classes of matters exclusively assigned to the Provinces by sec. 92 and they are within Dominion competence if they are enactments touching ''the peace, order and good government of Canada''; . . . which seems too clear for argument. It is argued that such an enactment must be one whose operation extends to the whole of Canada—which this enactment does, conditionally, at all events. But I am not prepared without further examination of the point to agree that an enactment in the terms of the Act of 1909 confined in its operation to one Province could not be sustained as relating to ''the peace, order and good government of Canada.'' I pass no opinion upon that point.

In this view it is not necessary to pass upon the question of the validity of the statute of 1921 but as it has been the subject of discussion by other members of the Court I will give my opinion upon it.

Clearly, I think, if the Dominion had power to pass the Act of 1919 it had power by a subsequent enactment to construe it with the consequence that all Courts would be bound to observe the construction so placed upon it. That is so because the power of legislation is plenary and it could not be seriously disputed that given legislation being valid as dealing with a subject within the jurisdiction of the Dominion Parliament a subsequent interpreting statute would equally be valid provided of course that the interpreting statute did not so entirely change the character of the legislation as to cause it to operate within a field withdrawn from Dominion authority. If the enactment as constructed could validly have been passed then the construing statute is *intra vires*. Could the provisions of 1921 have been enacted as part of the statute of 1919 without impairing the validity of the last mentioned statute? The answer to this question must be in the affirmative except at all events as to the third section. And it is no objection that pending litigation is affected; since that is only one of the consequences necessarily involved in the full exercise of the authority to pass legislation of the type in question.

The fallacy lies in failing to distinguish between legislation affecting civil rights and legislation ''in relation to'' civil

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

DUFF, J.

rights. Most legislation of a restrictive character does incidentally or consequentially affect civil rights. But if in its true character it is not legislation "in relation to" the subject matter of 'property and civil rights" within the provinces, within the meaning of sec. 92 of the B.N.A. Act, then that is no objection; although it be passed in exercise of the residuary authority conferred by the introductory clause. Ancillary legislation permissible as in exercise of the powers given by the enumerated heads of 91 may be legislation of a different order, that is to say it may be legislation which, if enacted by a Province, would be legislation "in relation to" some matter (civil rights, for example), falling within the classes of matters specified in sec. 92. *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31. The Parent Act as well as the Amending Act affect property and civil rights although they are not enactments in relation to that subject matter. The Amending Act makes the importation of liquors into Alberta unlawful and accordingly a common carrier could not either under the provisions of the Dominion Railway Act or by the common law be required to accept liquor for shipment into Alberta. The right which otherwise the owner of the liquor would have possessed has therefore ceased to exist because the Dominion Parliament has validly declared the act he could before have required to be done an unlawful act. The legislation does not deal with the duties of common carriers as such but the law as declared by it necessarily has a very important effect upon the duties of common carriers.

So the Act of 1921 declares that certain acts shall be deemed to have been unlawful and it follows that a Court holding that the importation would have been unlawful must, as a consequence, hold that the right set up by the shipper did not exist.

It is not quite clear indeed whether or not the right set up in this case is not really a right derived from Dominion legislation, but that is of little importance. Neither by the law of British Columbia nor by that of Alberta could a common carrier be required to do an act which by competent legislative authority had been declared to be illegal.

Section 3 presents a different question. It may well be argued that it is legislation relating to civil rights or to the administration of justice; and not within the competence of Parliament to enact in exercise of the residuary power. I express no opinion upon this as there has been no argument upon it.

For these reasons the appeal should, in my opinion, be dismissed with costs.

ANGLIN, J:—The plaintiff company is incorporated under the Dominion Companies' Act and empowered to engage throughout Canada, in buying, selling, importing and exporting intoxicating liquors. The defendant company is a common carrier and operates between the points to and from which the liquors, of which the carriage is in question in this action, were consigned. The plaintiff sues to recover damages for alleged wrongful refusal by the defendant to accept for transport 4 consignments of intoxicating liquors, within the meaning of that term in the Canada Temperance Act, which were duly tendered to it. One of these shipments, tendered at Vancouver, B. C., was, to the knowledge of the defendant, intended for export by the plaintiff from its warehouse at the city of Calgary in the Province of Alberta to which it was consigned. Each of the other three shipments was, to the defendant's knowledge, *bona fide* consigned to an individual at his private dwelling house where the provincial law in each instance permitted such liquors to be received and used.

The material facts are stated in a special case submitted, pursuant to an order of a Judge of the Supreme Court of Alberta, for the opinion of the Appellate Division as to the legality of the defendant's refusal to carry. If the plaintiff should be entitled to recover in respect of the rejection of the 4 shipments the parties have agreed that the damages sustained by it amounted to $7,260 and that judgment should be entered for that sum.

It is stated in the special case that the defendant justified its refusal to accept the tendered shipments solely on the ground that, having regard to the Canada Temperance Act, R.S.C. 1906, ch. 152, as amended in 1919, and the Dominion Elections Act, 1920, (Can.) ch. 46, and certain Orders in Council, proclamations and proceedings purporting to have been made, issued and taken by virtue of those statutes, it could not lawfully carry intoxicating liquors into the several Provinces for which the shipments were respectively destined, viz., Alberta, Saskatchewan and Manitoba.

The Appellate Division of the Supreme Court of Alberta by a majority judgment determined the issue so presented in favour of the defendant and dismissed the action, 58 D.L.R. 51. From that judgment the present appeal is brought.

In the Provincial Court counsel were heard representing the parties to the litigation and the Attorney-General of Alberta, who, upon being notified of the hearing by direction of the Court, intervened to oppose the plaintiff's contention. The

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

Anglin, J.

Minister of Justice, although likewise notified, was not represented. In this Court counsel appeared for the plaintiff as appellant and the Attorney-General of Alberta as intervenant, Neither the defendant nor the Minister of Justice was represented.

The appellant urged the following grounds of appeal;

(I.) That secs. 152 *et seq.*, added to the Canada Temperance Act in 1919 by 10 Geo. V., ch. 8, are *ultra vires* of the Dominion Parliament, because, (a) they are designed to aid provincial prohibition legislation; (b) the initial step for bringing the prohibitive section (No. 154) into force is a resolution of the Provincial Legislature; (c) such a resolution is *ultra vires* of a Provincial Legislature; (d) the amendments apply only to certain Provinces—those in which a local prohibition law is in force. As legislation dependent upon the "Peace, order and good government" provision of sec. 91 of the B.N.A. Act (*Russell* v. *The Queen, supra*), Dominion prohibition legislation to be valid must extend to the whole of Canada; (e) the "liquor evil" is dealt with, not as a matter of Dominion wide importance, but as a matter of local importance in each Province affected. *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for Canada;* (f) the amendments interfere with free export and import as between Provinces of articles which are the produce or manufacture of one of them, contrary to sec. 121 of the B.N.A. Act; (g) the amendments interfere with the civil rights of the individual citizen safeguarded by the provincial law to have intoxicating liquor in his private dwelling-house.

(II.) That, if valid, upon a proper construction the prohibitive section, No. 154—one of the added sections—does not forbid the importation of intoxicating liquor intended for export.

(III.) That sec. 154 has not been brought into force in Alberta, Saskatchewan or Manitoba, (a) because there was not in force in such Province a valid law prohibiting the sale of intoxicating liquors for use as a beverage; or, (b) because the requisite majority for prohibition has not been obtained; or, (c) because essential steps prescribed for bringing sec. 154 into force were not taken.

But for legislation (1921 (Can.), ch. 20), passed since the argument I should have been prepared to give effect to the appellants' contention last stated, that non-compliance with the imperative requirement of clause (g) of sec. 152 of the Canada Temperance Act—that the proclamation of the Governor in Council for taking the poll should state "the day on which, in the event of the vote being in favour of the prohibition such

prohibition will go into force''— was fatal to the validity of all the subsequent proceedings, including the Orders in Council bringing prohibition into force. This would have meant that they would recover judgment for $7,260 and costs. Parliament has, however, by an Act so framed as to admit no doubt as to its construction in this particular ordained (sec. 2) that, notwithstanding any such defects, those Orders in Council shall be and shall be deemed to have been valid, effective and sufficient from their respective dates.

Although at first disposed to doubt the power of Parliament thus to take away the civil rights of litigants, further consideration has satisfied me that since such interference with civil rights, though no doubt intended (vide sec. 3) is merely an incidental consequence of the legislation, its validity cannot be successfully impugned on that ground. The legislative jurisdiction which authorised the Act of 1919 will likewise support the auxiliary statute of 1921—at all events, secs. 1 and 2 thereof.

This recent Act also overcomes any objection to the Orders in Council bringing prohibition into force based on prolongation of the hours of polling beyond those prescribed by clause (b) of sec. 152. There is nothing in the record to shew that the result of the vote was materially affected either by that irregularity or by the omission from the proclamation of the date on which prohibition should go into force.

Interference by *ex post facto* legislation with rights involved in pending legislation, even when deemed necessary in the public interest is to be deprecated. Where such interference is not necessary to the attainment of the object of the legislation it is difficult to conceive of any defence for it. Here if my view of the fatal effect of the omission from the proclamation of the Governor in Council of the date on which prohibition should come into force be correct, the plaintiffs' right to recover $7,260 has been taken away. The purpose of the act of June last—to prevent the loss of the thousands of dollars expended in taking polls in several Provinces—would have been fully attained had a proviso saving the rights of the plaintiffs and others in like plight been inserted in it.

The legislation of 1919 when brought into force prohibits the importation of intoxicating liquor into those Provinces where its sale for beverage purposes is forbidden by provincial law. It was enacted as Part IV. (secs. 152 to 156) of the Canada Temperance Act, R.S.C. 1906, ch. 152, and was passed in order to supplement and make more effective such provincial

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

Anglin, J.

prohibitory laws. Its true character therefore is temperance legislation rather than legislation regulating the importation of liquor as a matter of trade and commerce. It prohibits; it does not regulate. Moreover, it deals with trade in only one class of commodities. In view of these facts Part IV. itself should be regarded, as the Canada Temperance Act has been (*Att'y Gen'l for Ontario* v. *Att'y Gen'l for Dominion*, [1896] A.C. 348, at pp. 362, 363; *Att'y Gen'l for Canada* v. *Att'y Gen'l for Alberta*, 26 D.L.R. 288, at p. 290, [1916] 1 A.C. 588, 25 Que. K.B. 187), rather as an exercise of the general power of Parliament to pass laws for the "peace, order and good government of Canada," than ascribable to its powers to legislate for "the regulation of trade and commerce" (the only enumerative head invoked to support it) or authorised by any other of the enumerated powers conferred by sec. 91 of the B.N.A. Act.

It is common ground that the prohibition of importation is beyond the legislative jurisdiction of the Province. It is not covered by any of the enumerated heads of sec. 92. It lies outside of the subject matters enumeratively entrusted to the Provinces under that section and upon it, therefore the Dominion Parliament can legislate effectively as regards a Province under its general power "to make laws for the peace, order and good government" of Canada. *Att'y Gen'l for Canada* v. *Att'y Gen'l for Alberta*, 26 D.L.R. 288 at p. 289, [1916] 1 A.C. 588. The Canada Temperance Act itself, the validity of which was upheld in *Russell* v. *The Queen*, 7 App. Cas. 829, Lord Haldane assures us is an instance of such a case.

The facts that the legislation of 1919 was designed to aid provincial prohibition legislation, that it applies only to certain Provinces—those in which a local prohibition law is from time to time in force—that it deals with the liquor evil as a matter of local importance in each Province affected, and that it interferes with civil rights of the individual citizen safeguarded by the provincial law therefore do not afford arguments against its validity. The propriety of concurrent or supplementary legislation to cover a field which lies partly within the jurisdiction of the Provincial Legislatures and partly within that of the Dominion Parliament was indicated by Lord Atkinson in delivering the judgment of the Judicial Committee in *City of Montreal* v. *Montreal Street Railway*, 1 D.L.R. 681 at pp. 688, 689, 13 C.R.C. 541, [1912] A. C. 333.

Nor do I see any force in the objection that the initial step towards bringing the prohibitive sec. 154 into force is a resolu-

tion of the Provincial Legislature. I see no reason why a Provincial Legislature may not thus intimate its opinion that concurrent action by the Dominion authorities is desirable. Under the Canada Temperance Act the initial step is a petition of one-fourth of the electors of the county or city in which it is sought to bring that Act into force.

Neither is the legislation under consideration in my opinion obnoxious to sec. 121 of the B.N.A. Act. The purpose of that section is to ensure that articles of the growth, produce or manufacture of any Province shall not be subjected to any customs duty when carried into any other Province. Prohibition of import in aid of temperance legislation is not within the purview of the section.

The prohibition of import and of inward transportation by sec. 154 is absolute. No exception is made in favour of liquor intended for export from the Province into which it is sought to take it. I find nothing to justify the reading of such an exception into the statute.

The two remaining grounds taken by the appellants were that sec. 154 was not in force in the Province of Alberta (a) because the law of that Province prohibiting the sale of intoxicating liquor as a beverage is *ultra vires* in that it prohibits the holding within the Province of liquor except for export therefrom, and (b) because a majority in favour of prohibition was not obtained in each of the electoral districts of the Province.

(a) The stated case submits no question as to the Alberta Liquor Act. That statute is not set up as a justification of the defendants' refusal to accept the tendered shipments. In fact it is not mentioned in the stated case at all. Its invalidity was raised in argument by counsel for the plaintiff solely to support his contention that because there was not a valid prohibition law in force in Alberta a condition precedent to the Dominion prohibition of import being brought into effect in the Province did not exist. If the Alberta Liquor Act should be construed as prohibiting the holding within that Province of intoxicating liquor for export (having regard to the provisions of the Liquor Export Act I do not think that is its effect) it might be *pro tanto* but *pro tanto* only, *ultra vires*. The question is discussed at length in the judgments rendered by the Supreme Court of Alberta in *Gold Seal Ltd.* v. *Dominion Express Co.*, 53 D.L.R. 547, 33 Can. Cr. Cas. 234, 15 Alta. L.R. 377. Speaking generally, I am disposed to accept the dissenting opinions of Harvey, C.J. and Stuart, J., in that case.

Can.

S.C.

GOLD SEAL LTD. v. DOMINION EXPRESS CO.

Mignault, J.

(b) Section 153 of the amended Canada Temperance Act provides that "the Governor in Council shall by Order in Council declare, the prohibition in force [in the province] if more than one-half of the total number of votes cast in all the electoral districts are in favour of such prohibition."

Counsel for the appellant contends that the word "all" is here used in the sense of "each and every of." No doubt "all" is often susceptible of that meaning. But the context, particularly the words immediately preceding, viz., "one-half of the total number of votes cast"—and the general tenor of the statute makes it plain that the phrase "in all the electoral districts" is here used as the equivalent of "in the whole province." Any other interpretation of it would shock common sense. Although the majority in some of the electoral districts in each of the three Provinces was against prohibition, a majority of the total number of votes cast in each Province, taken as a whole, was distinctly in favour of it. This contention of the appellant fails.

On the whole case, therefore, although with some reluctance because I think the plaintiffs were quite unnecessarily and, if I may say so with respect, arbitrarily deprived of what I regard as a good cause of action by the *ex post facto* legislation of last June, I concur in the dismissal of this appeal.

With some hesitation, because of the presence in sec. 3 in the recent Act of the concluding words "having regard to the provisions of this Act," I concur in the exercise of discretion by this Court in awarding to the plaintiffs their costs of this litigation throughout.

MIGNAULT, J.—As this case stood after the argument, and before Parliament enacted the recent statute, 1921 (Can.), ch. 20, which received Royal sanction on June 4, 1921, my opinion was that the proclamation ordering the vote should have mentioned the day on which prohibition would go into force in the event of the vote being in its favour, (sec. 152 Canada Temperance Act) and that the omission of this statement rendered the subsequent proceedings void. This would have entitled the appellant to judgment for $7,260, the agreed amount of its damages by reason of the respondent's refusal to carry its goods.

The new statute materially modified this situation, and notwithstanding Mr. McGillivray's ingenious argument I must hold that it is clearly retrospective. The omission made in the proclamation therefore can no longer justify a judgment in favour of the appellant.

On all other features of the case my opinion was against the

contentions of Mr. McGillivray. I take it that the validity of the Canada Temperance Act having been affirmed by the Judicial Committee in *Russell* v. *The Queen*, 7 App. Cas. 829, the amendment of 1919 (Can.) 2nd Sess., ch. 8, being legislation of the same character, cannot be assailed as transcending the powers of Parliament.

Nor do I think that any argument can be based on sec. 121 of the B.N.A. Act which states that "All articles of the growth, produce or manufacture of any of the Provinces shall, from and after the Union, be admitted free in each of the other Provinces."

This section, which so far as I know has never been judicially construed, is in Part VIII. of the Act, bearing the heading "Revenues, Debts, Assets, Taxation," and is followed by two sections which deal with customs and excise laws and custom duties.

In the United States constitution, to which reference may be made for purposes of comparison there a somewhat similar provision (art. 1, sec. 9, paras. 5 and 6) the language of which, however, is much clearer than that of sec. 121. It says: "No tax or duty shall be laid on articles exported from any state.

No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties to another."

I think that, like the enactment I have just quoted the object of sec. 121 was not to decree that all articles of the growth, produce or manufacture of any of the Provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say without any tax or duty imposed as a condition of their admission. The essential word here is "free" and what is prohibited is the levying of custom duties or other charges of a like nature in matters of interprovincial trade.

My conclusion therefore is that in view of the provisions of the statute of 1921 judgment can no longer be rendered in favour of the appellant on the only point where, in my opinion, under the then state of the law, it was justified in attacking the proclamation and the Order in Council. The appeal must consequently be dismissed.

On the question of costs, however, other considerations arise. Here the statute of 1921 gives the Court full discretion to make such order as it may see fit, and it is natural that it should have done so. Retrospective legislation of this nature, affecting

Sask.

C.A.

THE KING v. HAYFORD.

Lamont, J.A.

pending litigation, can only be justified under very extraordinary circumstances. It takes away from the appellant its right to obtain damages for the refusal of the respondent to carry its goods, refusal which was not, when made, justified by the proceedings had under the Canada Temperance Act. But as it leaves to the Court full discretion to adjudicate upon the costs, I think that the appellant should have its costs throughout. As I have said, before the statute of 1921, the appellant was right in attacking the proclamation as being insufficient in an essential particular, and I would not further penalise it by making it bear the costs it has incurred. And although, as a rule, costs should follow the event, here, carrying out what I take to be the intention of sec. 3 of the new statute, I would grant them to the appellant.

My opinion is to dismiss the appeal but to give to the appellant its costs here and below.

Appeal dismissed, costs against respondent.

THE KING v. HAYFORD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Brown, C.J.K.B. August 5, 1921.

Perjury (§III—30)—Assertion True in One Sense and False in Another—Necessary Evidence to Convict.

Where an assertion made is true in one sense and false in another, the Crown before it is entitled to a conviction for perjury, must prove that it was false in the sense in which the accused used it. [Low v. Bouverie, [1891] 3 Ch. 82, followed.]

APPEAL by way of stated case from a conviction for perjury. Conviction quashed.

H. E. Sampson, K.C., for the Crown.

P. H. Gordon, for the accused.

The judgment of the Court was delivered by

Lamont, J.A.:—The accused was charged with having committed perjury on October 26, 1920, by swearing in the preliminary examination of Henry Nealand et al., for the offence of aggravated assault, that he (the accused) had not agreed to sell to one Renard certain furniture specifically mentioned.

There was evidence that, some time prior to the preliminary examination, negotiations had taken place between the accused and Renard for a sale to Renard of the accused's crop, stock and furniture for $3,600, but no concluded agreement was arrived at; that on the Sunday following they did arrive at an agreement, and the accused received a cheque

for $500, in part payment of said goods and chattels. The trial Judge found the accused guilty. In the stated case he says:—

"I hold (1) That the agreement entered into on Sunday was an unlawful agreement under the R.S.C. Cap. 153 and void unless ratified, and there was no evidence of ratification. (2) That the prisoner had made an assertion of fact which at the time he made it he believed to be false and which was intended by him to mislead the Court. (3) That the prisoner having made an assertion of fact which he did not know to be true, the fact that it was subsequently disclosed that the agreement was void by operation of the law did not affect the question of guilt under Section 170 of the Criminal Code. There is authority for so holding in Russell on Crimes, 7 Canadian Edn. 476, where it is stated: 'It does not matter whether the fact deposed to is in itself true or false, even if the thing sworn may happen to be true, yet if it were not known to be so by him who swears to it, his offence is as great as if it had been false.' The decision in Byrnes v. Byrnes, 102 N.Y. 49, an American case, is to the same effect. I find no decision upon the question in Canadian Courts. As the question is one of construction of the Canadian Criminal Code, I reserved on my own initiative at the trial the question: Am I right in holding as above stated?"

The only evidence given at the trial, so far as the material shews, is that of Renard, who testified that he and the accused concluded an agreement on Sunday, and that of the police corporal, who testified as follows:—"On Monday, 20th September, 1920, I went to Hayford's in response to a telephone message. He said parties had come and taken his furniture. On questioning by me he admitted he had sold the furniture two days before and received a cheque for $500."

Perjury is defined in the Criminal Code, R.S.C. 1906, ch. 146, as follows:—

170. Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding.

Sask.

C.A.

THE KING v. HAYFORD.

Lamont, J.A.

From the definition it is clear that to constitute perjury there must be an assertion by the witness, and that assertion must have been known by him to be false at the time he made it.

The trial Judge found that the agreement entered into between the accused and Renard was void. A void agreement is, in one sense, no agreement at all. It is void of legal effect. Whether, therefore, the accused was guilty of perjury depends upon whether in his denial he meant that he had made no legal or valid agreement, or whether he meant that he had not gone through the form of making an agreement, irrespective of its legal effect. If he meant the former, his statement was true; if the latter, his statement was false.

On September 20, according to the evidence of the corporal, he admitted making an agreement. On October 26 he swore he did not. If between these two dates he had taken legal advice and had been informed that the agreement which he agreed to make was no agreement at all in law, he might, it seems to me, with perfect honesty testify that he had not made any valid agreement.

In Low v. Bouverie, [1891] 3 Ch. 82, at p. 106, Bowen, L.J., said:—"It seems to me that a person who alleges that he has undertaken to grant a lease really alleges that he has undertaken to grant a valid lease."

Conversely, why should he who alleges that he has not entered into an agreement for the sale of certain articles, not be held to have alleged that he had not entered into a valid agreement when nothing appears to indicate in what sense he is using the words? The onus was on the Crown to establish not only that the assertion was false, but that the accused knew it was false. Where the assertion made is true in one sense and false in another, the Crown, in my opinion, before it is entitled to a conviction, must prove that it was false in the sense in which the accused used it. This, in my opinion, has not been done. I would therefore quash the conviction.

Conviction quashed.

DOMINION LUMBER Co. v. ALBERTA FISH Co.

Alta.

S.C.

Alberta Supreme Court, Walsh, J. November 19, 1921.

SALE (§ IB—9)—BILLS OF SALE ORDINANCE (ALBERTA)—SUFFICIENCY OF DELIVERY WHEN AGREEMENT NOT IN WRITING.

The immediate delivery and actual change of possession required by the Bills of Sale Ordinance C.O. 1911 (Alberta), ch. 43, sec. 9, is an open delivery reasonably sufficient to afford public notice thereof. The provisions of the section are not complied with by removing the goods a short distance from a lumber yard to a railway right of way, there being nothing to indicate to the public that the goods are not still in the possession of the lumber company.

[*Kinloch* v. *Scribner* (1886), 14 Can. S.C.R. 77; *McLeod* v. *Hamilton* (1857), 15 U.C.Q.B. 111; *Doyle* v. *Lasher* (1866), 16 U.C.C.P. 263; *Snarr* v. *Smith* (1880), 45 U.C.Q.B. 156; *Conn* v. *Hawes* (1912), 4 D.L.R. 4, 22 Man. L.R. 464, followed.]

ACTION by execution creditors to recover a quantity of lath which the defendant claimed to have bought from the debtor company.

H. H. Parlee, K.C., and *D. W. McKay*, for plaintiffs.

R. E. McLaughlin, for defendant.

WALSH, J.:—The plaintiffs as execution creditors of McKenna Lath & Lumber Co. Ltd. claim to be entitled as against the defendant to a quantity of lath which the defendant claims to have bought from the McKenna company.

This sale is not evidenced by a bill of sale, and the plaintiff claims that it was neither accompanied by an immediate delivery of the lath to the defendant nor followed by an actual and continued change of its possession and so it is void as against them.

The examination for discovery of the defendant's president, which was put in by the plaintiffs at the trial, disclosed that though the agreement for this sale was made on May 13 no delivery of it was made until June 10 or 13 following. On the trial, however, the evidence was that a man was sent out to pile it on May 22 and that the man who went out on June 10 or 13 was sent to count the lath of which delivery had thus been made. It seems to me unnecessary to decide which of these is the correct version of the facts. The sale was of lath to an agreed value of about $6,500 to be measured out from the lath on the mill property of the McKenna company. It was therefore not a sale of specific goods the property in which passed to the purchaser upon the making of the contract, but rather a sale of unascertained goods to be selected from a larger quantity. Until that selection was made the sale was not concluded and no property in any of the lath passed to the defendant. Upon lath to the

Alta.

S.C.

DOMINION LUMBER CO. v. ALBERTA FISH CO.

Walsh, J.

specified value being appropriated to the contract and accepted by the defendant the sale was complete, and it is as of that date that the immediate delivery called for by the Bills of Sales Ordinance, C.O. 1911 (Alta.), ch. 43, is required. The delivery made was contemporaneous with the selection and acceptance of the lath appropriated to this contract, and so in my opinion this requirement of the law was lived up to except with respect to two car-loads.

Seven car-loads of the selected lath were shipped in to Edmonton on the defendant's instructions. The president, some time after its arrival in Edmonton, decided that there was not enough lath in these shipments to realise the agreed value to which his company was entitled, and so he sent his man out to ship in enough more to cover the anticipated deficiency, and two additional cars came in. On his discovery examination the president swore that this man reported to him that these two car-loads did not form a part of the lath selected and piled for the defendant in May or June, but were taken from the McKenna company's yards. At the trial, however, the man who was sent out for this further quantity swore that these two car-loads constituted a part of the lath originally delivered to and accepted by the defendant and represented what was left of the entire quantity appropriated to the contract after the first seven car-loads were shipped in.

It is, of course, difficult for me to decide whether this man correctly reported the facts to the president and he gave the right version of them on his examination or whether the witness before me stated the truth. The probabilities are entirely in favour of the former view. The scheme of the arrangement as contended for was that lath to the agreed value should be sold to the defendant, and the men who went to the mill for the defendant were sent to accomplish that result. The lath delivered and accepted became the property of the defendant in satisfaction of the purchase money regardless of whether or not in the light of subsequent events that quantity should prove too small or too big. I am quite unable to understand why the defendant should stop shipping when seven car-loads had been sent forward if there still remained two car-loads which were its property. It surely would have sent down all of its lath while it was about it. I think that all of the lath delivered to the defendant in May or June came down in September, and that when, perhaps owing to a falling market, it was seen there was likely to be a shortage, a man was sent up to have the supply supplemented from the McKenna company's own stock. There

is so much that is unsatisfactory, not to say suspicious, on the defendant's part in connection with the whole affair that I am not disposed to accept unreservedly what its officers and employees have to say about it.

I am of the opinion that as to these two car-loads there was no immediate delivery. I doubt very much if the defendant had even as against the McKenna company the right to appropriate this lath to itself as it did. The plaintiffs are entitled to succeed, therefore, to this extent at least.

The next question is whether or not there was as to the rest of the lath the actual and continued change of possession which is required by the Ordinance.

When the contract of sale was entered into all of the lath which the McKenna Co. had on hand was in its mill-yard. This yard adjoined the right-of-way of what is now known as the Canadian National Railway. The lath selected for the defendant by its representative was by him removed to and piled by itself upon this right-of-way immediately in front of and adjoining the mill site, and close to the railway siding used for the loading and shipment of the McKenna Co.'s products. It remained there from May or June until it was shipped to Edmonton in September, there being no other lath during this interval on the right-of-way. When it was piled there was no fence or other visible thing to shew where the mill-yard ended and the right-of-way began, but shortly after the lath was measured in June a wire fence was put up along a part of the boundary some distance to the east of the place where it was piled. This fence of course did not separate the right-of-way from the mill-yard at the point where the lath was piled. For the purpose of this case the only end that it served was to clearly mark that part of the boundary line where it was erected so that anyone who knew that it was a line fence could see that a continuation of it westwardly on the same line would run between the spot where the lath was piled and the mill-yard. The actual change of possession relied upon by the defendant lies simply in the removal of this lath to and the piling of it upon the right-of-way, a distance of about 100 feet.

Upon the evidence before me I hold that the delivery of the lath was not accompanied by an actual change of its possession. There was nothing in the physical situation of the lath and its surroundings after it was piled on the right-of-way to convey to anyone ignorant of the facts any knowledge of any change in its ownership. I have been trying to visualise what one of these creditors would have seen if he had gone to the mill before the

Alta.

S.C.

DOMINION LUMBER CO. v. ALBERTA FISH CO.

Walsh, J.

middle of June when it was still running for the purpose of taking stock of conditions there as they presented themselves to him without asking any questions or being told anything by anybody. He would have found a mill in operation with a mill-yard extending apparently to the railway siding and lath scattered through it and one pile of it alongside the railway siding apparently for shipment with nothing on it or near it or anywhere on the premises to indicate the slightest difference in ownership between it and the rest of the lath in the yard. The inference which I think he would naturally have drawn would be that all of the lath there was the property of the McKenna company, the mere piling of a part of it upon ground which to the eye at least was a part of the yard being quite insufficient in itself to be even suggestive of any sale of it by the company. Stress was laid in argument upon the fact that this lath was piled on railway land. If there had been any visible boundary line between the mill property and the right-of-way there would be more force in this contention, but I am unable to agree that the mere placing of the lath on land which, though in fact the property of someone other than the vendor, was to all appearances part and parcel of the vendor's own premises, constitutes in itself such a change of possession as the law requires, particularly when other goods of a like character and admittedly its own were on other parts of what appeared to be the same premises. The obvious purpose of the Ordinance is through the publicity given to such a transaction either by the filing of a bill of sale or the actual taking and keeping possession of the vended goods to protect creditors and others from the prejudice resulting from a secret sale.

Strong, J., in *Kinloch* v. *Scribner* (1886), 14 Can. S.C.R. 77, at p. 82, said that "The evil which the statute of Ontario was intended to remedy was that which arose in the case of a transfer of property of goods in which a mere formal possession was delivered but which were allowed to remain in the house or building or upon the premises in the occupation of the assignor and so in his apparent possession." The change of possession here relied upon afforded absolutely no protection to anyone for whose protection the Ordinance was designed. On the contrary it allowed the McKenna company to represent to its creditors, as it did in the following August, that it still owned this lath.

Our Ordinance was copied from the Ontario statute, R.S.O. 1887, ch. 125. In 1892 (Ont.), ch. 26, sec. 3, that statute was amended by providing that the actual and continued change of possession called for by it should be "such change of possession

as is open and reasonably sufficient to afford public notice thereof," and this amendment has not been carried into our Ordinance. The decisions of the Ontario Courts upon the original wording of the statute were, however, uniformly to the effect that the change of possession must be open. In *McLeod* v. *Hamilton* (1857), 15 U.C.Q.B. 111, at p. 113, Robinson, C.J., said: "I take the statute to mean such a change of possession as shall be visible to others and shall shew that the parties have acted openly and above board." In *Doyle* v. *Lasher* (1866), 16 U.C.C.P. 263, at p. 270, Wilson, J., said: "No one could have told in his dealings with the debtor that he was not just as much the owner after the sale as he was before it. .. .. .. The very mischiefs intended to have been removed and provided against by the statute have all been permitted to continue here." This was followed in *Snarr* v. *Smith* (1880), 45 U.C.Q.B. 156. See also *Danford* v. *Danford* (1883), 8 A.R. (Ont.) 518. In accordance with our now well-settled rule we should adopt these Ontario cases as decisive authorities upon our own Ordinance which is in this respect copied literally from the Ontario Act. The Manitoba case, *Bernhart* v. *McCutcheon* (1899), 12 Man. L.R. 394, decided under a corresponding provision of the Manitoba statute upon facts very like those with which I am dealing is a strong authority against the defendant. See also *Conn* v. *Hawes* (1912), 4 D.L.R. 4, 22 Man. L.R. 464.

It is obvious that this finding will apply to all of the lath piled on the right-of-way, including not only the seven car-loads of which I have been speaking but also the other two car-loads if it should be held that I was wrong in concluding that they were not in this pile.

It is unnecessary for me to dispose of the many other grounds of attack made upon this transaction, such as that there never was any sale of these goods made by the McKenna company to the defendant either in fact or in law, and that if there was it was either of a fraudulent character or subject to impeachment on the ground of preference. For the purpose of the foregoing findings I have treated the case as though a sale was in fact made. I must say, however, that while there seems no room to doubt the making of the advances by the defendant to the McKenna company which constituted the consideration for this transaction and while I do not in the slightest discredit the evidence of Mr. McMillan as to his understanding of it, I find it quite impossible to reconcile the letters written either by or for Campbell as the president and manager of the McKenna company to some of that company's creditors months after this

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

sale is said to have taken place, but whilst the lath was still at the mill with the evidence of the same Campbell as the president and manager of the defendant company given in this action. These letters indicate quite clearly that this lath was at their respective dates still the property of Campbell's McKenna company, while his evidence is that it was then the property of his other company, the defendant in this action. These letters make me doubt very seriously, to put it mildly, his evidence in this case and lead me to gravely question his present contention that when they were written the lath was really the property of the defendant as the result of a concluded agreement of sale, largely negotiated by himself with himself in the dual capacity of president and manager of both companies.

There will be judgment declaring that the goods in question are not the property of the defendant as against the plaintiffs and ordering the defendant to pay to the plaintiffs their costs of this issue and the plaintiffs' and the sheriff's costs of the interpleader order.

Judgment for plaintiff.

ANDERSON v. STEWART AND DIOTTE.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. June 9, 1921.

ELECTIONS (§III—80)—NEW BRUNSWICK ELECTION ACT, 1916 STATS., CH. 15, SEC. 69—DIRECTORY ONLY—NON-OBSERVANCE OF SECTION BY SHERIFF—INJUSTICE TO ELECTORS IN SETTING ELECTION ASIDE.

The provisions of the New Brunswick Elections Act, 1916 Stats., ch. 15, are directory only and the non-observance of the section by the sheriff in not requiring an oath as to the signatures on the nomination papers of candidates for election, is not sufficient ground on which to set the election aside, such non-observance not being of a character contrary to the principles of the Act, and an absolute injustice to the electors being the result of setting aside the election after the nomination papers had been received by the sheriff and pronounced by him to be in order.

ELECTIONS (§ IIA—22)—IRREGULARITIES—NATURE AND CHARACTER OF IN ORDER TO AVOID ELECTION.

Before an election can be set aside for irregularities and a new election ordered, it must be shewn that the irregularities are substantial and not merely formalities and must be of such a nature as that they may reasonably be said to have a tendency to produce a substantial effect upon the election, and also must be of such a nature as to satisfy the Court that there either was no real electing or that the election was not conducted under the subsisting election laws. Irregularities are not cumulative in their effect and each irregularity must be dealt with by itself.

APPEAL under the Controverted Elections Act, C.S.N.B. 1903,

ch. 4, from a decision of BARRY, J., on a petition under the said Act. Reversed.

J. B. M. Baxter, K.C., for appellants.

P. J. Hughes, for respondent.

The judgment of the Court was delivered by

HAZEN, C.J.:—This is an appeal from the judgment of Barry, J., who was the Judge assigned to the trial of election petitions under the New Brunswick Controverted Elections Act, C.S.N.B. 1903, ch. 4, for the county of Restigouche in the present year. The petition was filed against the return of Stewart and Diotte, who were the candidates who received the largest number of votes at the general election that was held on October 9 last, and a curious fact in connection with the matter is that no wrongdoing is alleged against them or either of them. They are not charged with having committed bribery or impersonation or any corrupt act, or any offence against the provisions of the election law, but the petitioner relies entirely on irregularities committed by the sheriff of the county, who was the returning officer, and his deputies, and on the insufficiency of the nomination paper of Labillois and Duncan, and alleges that these were of such a character that these candidates were not legally or properly nominated, and that the irregularities in connection with the election were so many and so extensive in their character that the election cannot be said to have been conducted under the principles and according to the provisions of the New Brunswick Election Act, 1916, ch. 15. It was not alleged or contended by either party that the returning officer was actuated by any corrupt motive.

The writ for the election which had been issued to the sheriff was returned by him to the provincial secretary-treasurer on November 6, 1920, and in such return he stated that the nomination papers of A. T. LeBlanc, S. S. Harrison, D. A. Stewart, H. Diotte, W. Duncan and C. H. Labillois were filed with him at the Court fixed for the nomination of candidates on October 2, 1920, which Court was held as appointed in the writ, and that at the close of the Court at 12 o'clock noon he declared the above named 6 candidates as being duly nominated. The election was held on October 9, following, and attached to his return and marked "A" is the result of the election, as follows:—Stewart, 2,109 votes; Diotte, 1,763; Harrison, 1,646; LeBlanc, 1,645; Labillois, 1,590; Duncan, 1,063; and upon this result he states that he did on October 22, 1920, to which date declaration proceedings were adjourned from October 16, as one of the ballot boxes containing the returns from one of the polling subdivi-

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

sions had not then been returned, declare Stewart and Diotte as having the highest number of votes, to be elected. He further states that between October 22 and October 26 he received notice that the Judge of the Restigouche County Court would at the Court House in the town of Dalhousie on October 26, proceed to count the votes which were cast at the election of 2 members for the Legislature Assembly in the said county. In obedience to the summons he says he attended then and there with his election clerk and the parcels containing the ballot papers, and the Judge of the County Court started recount proceedings and did recount the ballots taken from the ballot boxes from 7 polling stations, but refused to recount the votes cast in the remaining 21 polling stations in the district. He states the reasons given by the Judge for his refusal to recount were that the deputy returning officers in the three respective polls in the town of Dalhousie had returned the ballots loose in the ballot boxes and not in the envelopes. Of the 8 polling stations in the town of Campbellton the Judge recounted the ballots of one known as No. 8. The others of the 21 polling sub-districts mentioned returned their ballots loose in the boxes or in separate envelopes and not contained in the packages. On November 4 he says the said Judge of the Restigouche County Court in a statement gave his reasons for not continuing the recount and concluded the same with the following:—

"The Act directs me to recount the votes cast at the election complained of, and on the completion of the recount to certify the results of the recount to the returning officer. I have been unable to complete the recount. If I correctly interpret the Act it cannot be done. As I have been unable to comply with the requirements of the Act in recounting ballots, I am therefore unable to certify the result of the recount to the returning officer. I am also enclosing the result of the polls counted—hereto annexed marked B."

This return was signed by Thomas Craig, returning officer, and the statement of polls so far as the same were recounted by McLatchy, J., shews the following result:—Stewart, 779; Diotte, 735; Harrison, 569; LeBlanc, 525; Labillois, 441; Duncan, 240.

Having received the statement from the Judge of the Restigouche County Court as set out in his return, the returning officer concluded that as the Judge was unable to certify the result of the recount to him, his duty was to make his return to the provincial secretary, which he accordingly did on November 6, as previously mentioned. The application for the

recount which it was sought to have before the sheriff was made under the provisions of secs. 135 *et seq.* of the New Brunswick Election Act, 1916, ch. 15. The application was made within the time provided by the statute, being within 4 days after the returning officer had made an addition of the votes for the purpose of declaring a candidate or candidates elected. The Judge decided that he could not proceed with the recount and consequently could not give the certificate that is required by the statute, sec. 144 (1) which provides that the Judge shall forthwith certify the result of the recount or final addition to the returning officer, who shall then declare to be elected the candidate or candidates having the highest number of votes. The return so made on November 6 by the returning officer was returned to him by the deputy provincial secretary by instructions of the provincial secretary on December 2, calling his attention to sec. 154 of the New Brunswick Election Act, which provides that the returning officer shall after receipt of notice from the Judge that a recount or final addition shall be had, delay his return to the provincial secretary until he receives a certificate from the Judge of the result of such recount or final addition, and upon receipt of such certificate he shall proceed to make his return, instructing him to enclose a certificate to him (the provincial secretary) or a certified copy of the same when completing his return. To this letter the sheriff replied on December 8 stating that on receipt of the letter from the deputy provincial secretary he saw McLatchy, J., the Judge of the County Court, and shewed it to him, and the Judge informed him that he could not give him any certificate. The sheriff then proceeded to inquire from the deputy provincial secretary if being unable to obtain a certificate from the Judge it was necessary for him to change the return he had made on October 22, according to sec. 127 of the New Brunswick Election Act, that section being the one which says that the returning officer at the time and place appointed by his proclamation having opened the ballot boxes and adding together the number of votes shall declare elected the candidates or candidate who on the addition of the votes is found to have the greatest number. To this letter a reply was received by the sheriff from the deputy provincial secretary that he was not permitted or required to interpret the meaning of any section of the New Brunswick Election Act, but that he could see no reason why sub-sec. 1 of sec. 144 and sec. 154 should not be read together as defining how far it is possible for a returning officer to go in a declaration of election, and in transmitting

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

his returns to the provincial secretary-treasurer. In consequence of this, on December 13, 1920, the sheriff made another return or communication to the provincial secretary which after reciting the facts in connection with the election, the dates, time, etc., the names of the persons who were nominated, the fact that he made a declaration of the votes received by all the candidates on November 22, that he had received from McLatchy, J., a notice stating that he would recount the votes, that the Judge stated "I have been unable to complete the recount. If I correctly interpret the Act it cannot be done. As I have been unable to comply with the requirements of the Act in recounting the ballots I am therefore unable to certify the result of the recount to the returning officer." The Sheriff then concludes his letter with this statement:—"As the said Judge of the Restigouche County Court has been unable to give me a certificate certifying the result of his recount or final addition, and as I have received no such certificate from the said Judge making such recount or final addition, I am therefore unable by virtue of the provisions of sec. 154 of the New Brunswick Election Act to make a return to the provincial secretary-treasurer of the Province of the result of the election held in the county of Restigouche on the 9th day of October, 1920, and am unable to make a return of any member or members elected to represent the said county in the Legislative Assembly of the said Province of New Brunswick."

That is to say the sheriff in the first place when he received word from the Judge of the County Court to the effect that he could not give a certificate made his return to the provincial secretary declaring Stewart and Diotte elected. This return having been made on November 6, 1920, he in consequence of the letter received from the provincial secretary and other advice which he subsequently obtained made another return which was practically to the effect that he was unable to make a return, or, the effect of which would be that if a Judge of the County Court saw fit to declare that he could not recount the ballots and refused to give the certificate required by the Act, no return could be made, and unless special legislation was enacted the county would be left without representation until the time of the next general election, and in fact the county was left without representation at the recent session of the Legislature. This would be the practical effect of such action, and a little later on in my judgment I will discuss the question as to whether the first return was not a perfectly proper return, the proceedings for a recount having proved

abortive, and if having made his return the sheriff had not fulfilled the duty cast upon him and if there was any authority vested in the provincial secretary to send back to him the return he had so made and ask that the same should be corrected.

The petition was filed and the trial took place before Barry, J., under the provisions of the Controverted Elections Act, ch. 4, C.S.N.B. 1903, and it is from his decision, the effect of which was to unseat Stewart and Diotte and order a new election, that this appeal has been taken under the provisions of sec. 75 of the same Act.

The first point to which it seems to me the consideration of the Court must be directed is to the contention that Labillois and Duncan were not properly nominated, it being objected (a) That their nomination papers were not signed by 20 electors, (b) the names of the nominors were not proved to be the names of electors, (c) the consent of the nominees to the nomination was not properly authenticated, (d) the persons purporting to be nominated were not absent from the Province at the time of their alleged nomination, and that although their names were posted as candidates at the several polling booths in the county on October 9 and kept posted during the election as stated in para. 7 of the election petition as candidates, they having been declared such by the sheriff on nomination day, a large number of electors were misled and deceived into voting for them, in consequence of which their votes were wholly lost, and it is alleged and claimed by the petitioner that a large number of the votes given for Labillois and Duncan would have been given for Harrison and LeBlanc had not the electors been misled and deceived into voting for the two improperly nominated candidates by the acceptance by the returning officer of their nomination papers and his treating them as properly nominated candidates.

Section 69 of the Election Act, 6 Geo. V., 1916, ch. 15, relating to the filing of nomination papers is as follows:—

"The Sheriff shall require the person, or one or more of the persons producing or filing as aforesaid any such nomination paper, to make oath that he or they know that the several persons who have signed such nomination paper are electors duly registered on the voters' list in the electoral district, and that they have signed the same in his or their presence; and he shall also require the person, or one or more persons witnessing the consent of the candidate, to make oath that the consent of the candidate has been signed in his or their pres-

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

ence; on in case the person named as candidate is absent from the Province, that such person, according to his best information, knowledge and belief, is absent from the Province."

It is provided that such oath may be in a form (P) that is given in the Act, and that the fact of its having been taken shall be stated on the back of the nomination paper.

Mr. Labillois' nomination paper was signed by 23 persons who describe themselves as electors of the electoral district of the county of Restigouche, and gave their addresses in said county, and 22 of them gave their addition or occupation. The paper containing their signatures, additions and addresses stated that the signatures by the said electors were made in the presence of Arsene Allain, of Dalhousie, N.B., who signed his name as witness thereto. This paper contained Labillois' consent in writing to such nomination signed by him in the presence of the said Allain. Duncan's paper was signed similarly by 23 persons who described themselves as electors of the electoral district of the county of Restigouche, who signed in the presence of the said Allain who also witnessed the consent in writing of said Duncan thereto. Of the 23 who signed Duncan's nomination, all gave their addresses in the county of Restigouche, and 18 gave their addition or occupations. This becomes of importance under the provisions of sec. 65, sub-sec. 1, which provides that any 20 electors may nominate a candidate, or as many candidates as are required to be elected for the electoral district for which the election is held, by signing a nomination paper in the form (O) stating therein the names, residences and addition or description of each person proposed in such manner as sufficiently to identify such candidate, and by causing such nomination paper to be produced to the sheriff at the time and place indicated in his proclamation or to be filed with the sheriff. It further provides that the residence and addition of the electors may be written by any person. The form of the nomination paper is as follows:—

We, the undersigned electors of the Electoral District of .....hereby nominate (name, residence and addition or description of person nominated) as candidate at the election now about to be held to represent the said Electoral District in the Legislative Assembly.

Witness our hands at ..... in the Electoral District, this ..... day of ..... 19 .

(Signature with residence and additions).

Signed by the said electors in the presence of.....

The nomination papers in both cases were duly signed by

the requisite number of electors, and in both cases the residences of the necessary number were given. In the case of Duncan's nomination paper, however, the additions were only given in the case of 18 of the number, and on this ground it is contended that his nomination at least was illegal. While I do not believe that it can be so held in this case, it is clearly not within the right of the petitioner to urge any such ground now as no such ground was taken in the petition. Paragraph 5 of the petition, which is the one which relates to Duncan, says that he was not nominated as candidate for the reason that the paper which was alleged to be the nomination paper was not signed by 20 electors of the county, and that none of the persons producing or filing with the said returning officer the said paper made oath that they knew the said persons who had signed such paper were then electors duly registered on the voters' list in the electoral district of the said county, or that these persons signed the same in his or their presence, and that no person witnessing the consent of the said Duncan to the said nomination made oath that he had signed the consent as such candidate in his presence. Neither in the petition nor anywhere else so far as I can ascertain was the claim made that the nomination papers of Labillois and Duncan or either of them were void because 20 of the parties signing the same did not give their additions and descriptions thereto, and I am therefore of opinion that that ground cannot now prevail.

On nomination day the papers purporting to be the nomination papers of Labillois and Duncan, signed as I have described, were presented to the sheriff at the proper time and place. On the trial of the election petition, Allain, whose name was signed as a witness to the signatures of the nominors and to the consent to the nomination by Labillois and Duncan was called as a witness. His evidence is short and I think it desirable to give it here in full:—

"Arsene Allain, called as a witness on behalf of the respondents, being duly sworn, testified as follows:—Direct examination by Mr. Baxter. Q. Where do you live? A. Dalhousie. Q. Were you on the voters' list for 1920? A. Yes. Q. And voted at the election? A. Yes. Q. You know Mr. Charles H. Labillois and Mr. Duncan who has been on the stand? A. Yes. Q. There is Mr. Labillois' nomination paper. Which of the names on that paper did you see signed by the people who are known by these names? A. I was there when every one of them were signed. Q. Signed in your presence? A. Yes. Q. Did you see Mr. Labillois sign this consent in your presence? A. Yes.

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

Q. And this is your signature? A. Yes. Q. As witness to that consent? A. Yes. Q. Look at Mr. Duncan's paper. Did you see all the people who bear those names sign that paper? A. Yes, sir. Q. Did you see Mr. Duncan sign that consent? A. Yes. Q. That is your signature witnessing it? A. Yes. Q. That was all done with both papers before they were brought up to nomination in the Court House? A. Yes. Q. Did you come with Mr. Duncan and Mr. Labillois to the Court House? A. Yes. Q. Did you stand outside of this desk? A. No, I was standing right in the corner of this railing. Q. Did the sheriff require you to make oath to anything? A. No. Q. But you were present and ready to do so if required? A. Yes. Q. Did you hear any conversation between Mr. Labillois and the sheriff or between Mr. Duncan and the sheriff? A. The only thing I heard, the sheriff said 'the paper was all right.' I asked Mr. Labillois if he was done with me and he said 'Yes.'

By Mr. Hughes:—Q. Did you sign that (indicating) yourself? A. Yes. Q. That is your signature? A. Yes. Q. When did you put it there? A. Nomination day. Q. What time? A. About twenty-five minutes or half past eleven or twenty-five minutes to twelve. Q. Any of the persons who signed this sign after you had signed it? A. No, I was the last one to sign."

It appears from this that Allain filed the nomination papers with the consent of Labillois and Duncan with the sheriff at the proper time; that he was prepared to make affidavit to the signatures of the nominors and to the consent of the candidates. He was not required by the sheriff to do so, and the sheriff at that time stated that the papers were all right and at the close of the time for nominating the candidates delivered duly certified lists of names of the several candidates who had been nominated. Labillois in his evidence also stated that he had signed his nomination paper and that the same was subscribed by 23 persons, each of whom he knew personally and each of whom was a qualified elector for the county of Restigouche. He stated that the same thing was true of Duncan's nomination paper, and that the electors were all qualified. Further than that he said he saw them all sign and he saw their names were on the election list because he had the list with him, meaning thereby I presume that before they signed he saw that their names were on the list. He further said that he took his nomination paper to the Court House to the sheriff on election day and that Duncan's paper was there at the same time. They both went together, and Allain, who was the witness to the signatures and a man whom he (Labillois) secured to get the

names on both papers also accompanied them. He swears that he signed his consent to be a candidate in the presence of Allain, who was a voter on the town of Dalhousie. He gives similar evidence with regard to Duncan's nomination paper, and states that the names that were on them, his own and Duncan's, were signed before they were presented to the sheriff. He is then asked this question: "Q. When you went to the sheriff to present the papers what did you do? A. I handed him the papers with the $100 deposit and he asked me if I found those names were all on the list, and I said yes, and I said we had our witness there to prove it. Q. What did the sheriff say? A. Something to the effect that he was satisfied when I told him the names were on, and then he folded up the papers." He further swears that the sheriff did not offer to swear his witness Allain or require anyone to make oath to the signatures or the consent.

Duncan, who was called as a witness, swore that he signed his consent to be a candidate in the presence of Allain. Asked as to what took place on nomination day, he says "We" referring to Labillois and himself, "stood in front there and both handed in our nomination papers to the sheriff. He turned the papers over in a moment and said to me (the sheriff was right in the witness box) he said, the oath is not on it. I said no, I didn't have time to write the oath, but the witness is right here, Mr. Allain. The sheriff didn't say anything further only he said there was no time now to write oaths."

Duncan said 'Is it not necessary to endorse it on the back of the paper?' To that the sheriff made no reply and did not do anything, and after the time was up to declare the Court closed Mr. Labillois rose and said to the sheriff, will you give us the names of the candidates. The sheriff did not reply for a moment. He wrote 6 names on a piece of paper and then stood up, turned the paper towards us. Those are the candidates in this election, he said. "Q. Who did he mean by that? A. Those names on the paper. Mr. Montgomery, I knew him by his voice but didn't see him, called out 'Name them.' The sheriff then read the names of all six. Q. LeBlanc, Harrison, Stewart, Diotte, Labillois and Duncan? A. Yes."

The question then arises—should the election of Stewart and Diotte, who received a substantial majority of the votes cast, be set aside on the ground that Labillois and Duncan were not properly nominated. It would have been within the right of the sheriff when these papers were presented to him to have refused to accept them until the persons producing or filing them

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

made oath that the several persons who had signed them were electors and that the persons nominated consented to be candidates as provided by sec. 69. He did not do this, however, and I think the matter is open to the belief that the sheriff being familiar with the residents of the county and knowing Labillois and Duncan, who were present at the time the papers were offered was quite satisfied as to the bona fides of their nomination papers and that the people who signed them were electors of the county, and that they consented, because their consents were given in writing as required by law to their nomination. It seems to me under the language of the Act that having produced the person who was willing and ready to swear to the signatures as required, that Labillois and Duncan fully discharged the duties required of them, and that then it was for the sheriff to require the oath to be taken. The language of sec. 69 is plain and explicit. It does not say the person producing or filing a nomination paper shall make the oath or shall offer to make the oath, but that the sheriff shall require such person to do so. In my opinion the fact that he did not do so would not justify the setting aside of the election, and the fact that Stewart and Diotte received a substantial majority of the votes that were cast and no allegation of wrongdoing is laid against either of them, should not make the Court astute to find reasons for setting aside the will of the electors. It seems to me the language of sec. 69 should be regarded as directory and not obligatory. Section 66 names the cases in which a nomination paper shall be invalid and shall not be acted upon by the returning officer. That section is as follows:

"66. No nomination paper shall be valid or acted upon by the returning officer unless it is accompanied by: (a) The consent in writing of the person therein nominated, except where such person is absent from the Province, when such absence shall be stated in the nomination paper; and (b) A deposit of one hundred dollars in legal tender or in the bills of any chartered bank doing business in Canada, or a cheque for that amount drawn upon and accepted by such bank."

These are the only cases that I can find in which it is stated the nomination paper should not be acted upon by the returning officer. The provisions of sec. 66 are certainly obligatory as are also the provisions of secs. 99 and 100 of the Controverted Elections Act, which have reference to voting by ballot, and of which it is said that they shall not be construed as directory only.

In discussing these sections, Barry, J., in his judgment says:

"Sections 99 and 100, containing directions as to ballot papers and how they are to be marked, are by the express provisions of the Act declared to be mandatory and obligatory and are not to be construed as directory only. Nothing is said as to the construction to be placed upon the other provisions of the Act. It does seem to me that the Legislature in selecting two sections of the Act and declaring these and these only to be mandatory or obligatory and not directory, has indicated in an unmistakable way that the intention of the law makers was that the rest of the Act should be construed as directory only. If the Legislature had intended that the whole Act was to be construed as imperative and therefore, strictly, then there would seem to be no necessity of singling out two sections, and in express terms, stipulating that those two sections should have that construction."

I entirely concur in this deduction of the trial Judge, but it also seems to me that the provisions of sec. 66 are as obligatory and directory as if at the foot of them were placed the words which we find in sec. 100, to the effect that the provisions of it and sec. 99 are mandatory and obligatory, and shall not be construed as directory only.

Applying Barry, J.'s, own language, it seems to me that the provisions of sec. 69 must be regarded as directory and that it was not mandatory upon the sheriff to require oath to be made in the sense that the failure to do so would render the nomination of Labillois and Diotte illegal and set aside the election of the candidates who received the majority of the votes. If the provisions of sec. 69 were to be regarded as mandatory the provisions of sec. 67 would have to be regarded in the same way. This section provides that the returning officer shall give to the candidate or his agent a receipt for his deposit which shall in every case be sufficient evidence of the production of the nomination paper, of the consent of the candidate, and of the payment therein mentioned. Could it for one moment be contended that the failure of the returning officer to give such receipt would invalidate the election? It seems to me that such a contention would verge upon absurdity, and yet, as I said before I think it can be as well contended that the provisions of that section are mandatory as that the provisions of sec. 69 are.

Barry, J., in the course of his judgment considers very fully the question of construction, with respect to whether or not a statute should be regarded as mandatory or directory, and citing the judgment of Lord Campbell in *Liverpool Borough Bank* v. *Turner* (1860), 2 De G.F. & J. 502, 45 E.R. 715, 30 L.J. (Ch.)

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

379, he says, quoting from Maxwell on Statutes, ed. 3, p. 521:—

"A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty, and where they relate to a privilege or power. Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred; and it is therefore probable that such was the intention of the Legislature. But when a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, or under any other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative. . . . When a statute confers a right, privilege, or immunity, the regulations, forms, or conditions which it prescribes for its acquisition are imperative, in the sense that non-observance of any of them is fatal."

And at pp. 528, 529:—

"On the other hand, where the prescriptions of a statute relate to the performance of a public duty; and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, without promoting the essential aims of the Legislature; they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal indeed, but it does not affect the validity of the act done in disregard of them. It has often been held, for instance, when an Act ordered a thing to be done by a public body or public officers, and pointed out the specific time when it was to be done, that the Act was directory only, and might be complied with after the prescribed time. . . . To hold that an Act which required an officer to prepare and deliver to another officer a list of voters, on or before a certain day, under a penalty, made a list not delivered till a later day invalid, would, in effect, put it in the power of the person charged with the duty of preparing it, to disfranchise the electors; a conclusion too unreasonable for acceptance."

Barry, J., is thus using the summing up of the law as found in Maxwell on Statutes, ed. 3, pp. 528, 529, with which I fully

agree, and it seems to me in the present case to affect with invalidity the nomination of Stewart and Diotte because the sheriff did not require the oath mentioned in sec. 69 of the Act to be administered, would work serious injustice not only to the candidates but to the electors of the county as well, and that sec. 69 and many other sections in the Act, apart from those which are clearly obligatory or declaratory, must be regarded as mere instructions for the guidance and government of the sheriff or of those on whom duties are imposed, or in other words, as directory only. As a matter of fact the regulations for the conduct of elections under the Imperial Ballot Act, 1872, ch. 33, have been held to be so far directory only that an election is not invalidated by the non-observance of them, unless the non-observance was of a character contrary to the principle of the Act, or might have affected the result of the election. This was decided in the case of *Woodward* v. *Sarsons et al* (1875), L.R. 10 C.P. 733, and I entirely fail to see how the non-observance by the sheriff of the provisions of sec. 69 can in any possible way be said to be of a character contrary to the principles of the Act. To my mind the section, under every proper canon of construction is purely directory and an absolute injustice will be done to the electors after the nomination papers had been received by the sheriff and pronounced by him to be in order, if because of his action in not requiring an oath as to the signatures to be taken, the election should be set aside.

With all possible respect, I am of opinion that so far as this ground is concerned the Judge was in error.

Having come to this conclusion I will now deal with the question of the irregularities that occurred after nomination proceedings took place, and the effect which the same have upon the election. In the first place I will refer to some cases which have a bearing upon the present application, and which lay down certain principles that should be followed.

In the case of *Jenkins* v. *Brecken* (1883), 7 Can. S.C.R. 247, it was proved that the deputy returning officer had placed his initials on a counterfoil before giving the ballot paper to the voter, and afterwards previous to his putting the ballot in the ballot box had detached and destroyed the counterfoil, and that the ballots used were the same he had supplied to the voters. It was held that the deputy returning officer having had the means of identifying the ballot papers as being supplied by him to the voters, and the neglect of the deputy returning officers to put their initials on the back of these ballot papers not having affected the result of the election or caused substantial in-

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

justice did not invalidate the election. At p. 262 Ritchie, C.J., said:—

"No doubt it is the duty of all officers engaged in the holding of an election to inform themselves fully of the provisions of the statute under which they are acting, and to be most careful to comply strictly with all requirements of the law, but though they did not do so it by no means follows all and every error they may commit or mistakes they may make necessarily invalidate the election and disfranchise the electors."

In giving judgment in the same case Strong, J., referred to the *Monck Election* case (1876), H.E.C. 725, in which it was held that the neglect or irregularities of the deputy returning officers will not invalidate an election unless they have affected the result of the election or caused some substantial injustice. Blake, V.-C., in the course of his judgment said at pp. 727, 728:—

"I do not think I should lightly disfranchise so large a body of the electors, nor should I lightly say the irregularity is of such a nature as to disfranchise and this disfranchisement being so general, the whole matter must be set at large and a new election ordered. I am of opinion that, under this clause, irregularities of the nature here relied upon, in order to invalidate the election must be substantial and not mere informalities. That the informality must be of such a nature as that it may reasonably be said to have a tendency to produce a substantial effect upon the election."

Blake, V.-C., also referred to the *Hackney* case (1874), 31 L.T. (N.S.) 69 at p. 72, quoting Grove, J., to the following effect:—

"An election is not to be upset . . . it is not to be upset because the clock at one of the polling booths was five minutes too late, or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated to affect the result of the election."

And the Vice-Chancellor adds:—

"It must also be borne in mind that if the Court lightly interferes with elections on account of errors of the officers employed in their conduct, a very large power may thus be placed in the hands of these men. That which arises from carelessness to-day may be from a corrupt motive to-morrow, and thus the officer is enabled, by some trivial act or omission, to serve some sinister purpose, and have an election avoided, and at the same time to run but little chance of the fraudulent intent being proved against him."

In the case of *Ackers* v. *Howard* (1886), 16 Q.B.D. 739,

Hawkins, J., in delivering the judgment of the Court, which was to the effect that a ballot paper which conformed in every respect to the requirements of the Act was not void because it had not on the face of it the official mark directed by that Act to be marked on both sides of the ballot paper, said at p. 746:—

"In considering the construction to be put upon the various provisions of the Ballot Act, it should be borne in mind that no enactment contained in it affects the franchise; the Act relates to procedure alone. The right to vote exists exactly as it did before the Act was passed; that Act merely directs the mode in which the vote shall be given, the main object of it being to ensure, as far as possible, secrecy."

A leading case on this subject is that of *Woodward* v. *Sarsons et al* (1875), L.R. 10 C.P. 733, 44 L.J. (C.P.) 293. It was held in that case that although a parliamentary or municipal election will be void by the common law of Parliament if it be so conducted that either there be no real electing by the constituency at all or it be not really conducted under the subsisting election law, which is now an election by ballot, yet if there be no reasonable ground to believe that a majority of electors may be prevented from voting in favour of the candidate they prefer, and if the election be substantially an election by ballot, the election will not be void by the common law of Parliament, notwithstanding there may have been mistake or misconduct in the use of the machinery of the Ballot Act. In the course of his judgment, Coleridge, C.J., said at pp. 743, 744, 745 (L.R. 10 C.P.):—

"We are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections if it was so conducted that the tribunal which is asked to avoid it is satisfied as a matter of fact either that there was no real electing at all or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., *that there was no real electing by the constituency at all*, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished or not open, or by other of the means of voting according to law not being supplied or supplied with such errors as to render the voting

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think that the same result should follow if by reason of any such or similar mishaps the tribunal without being able to say that a majority had been prevented should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But if the tribunal should only be satisfied that certain of such mishaps had occurred but should not be satisfied either that a majority had been or that there was reasonable ground to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament. This, we think, is the result of comparing the judgments of Grove, J., at *Hackney*, 2 O'M. & H. 77, 81, and *Dudley*, 2 O'M. & H. 115, 121, with the judgment of Martin, B., at *Salford*, 1 O'M. & H. 133, 140, and of Mellor, J., at *Bolton*, 2 O'M. & H. 138, 142, all of which judgments are in accordance with, but express more accurately, the grounds of the decisions in Parliament, in the older cases of *Norfolk*, 9 Journ. 631; *Heyw. Co.* 555 (n), *Morpeth*, 1 Doug. El. C. 147, *Pontefract*, 1 Doug. El. C. 377, *Coventry*, P. & Kn. at p. 338; C. & R. at p. 276, *New Ross*, 2 P.R. & D. 188, and *Drogheda*, W. & D. 206; and the *Drogheda* case, 1 O'M. & H. 252, 257,—all of which are mentioned in Rogers on Elections, 10 ed. 365 et seq.

As to the second, i.e., that the election was not really conducted under the subsisting election laws at all, we think though there was an election in the sense of their having been a selection by the will of the constituency, that the question must in like manner be whether the departure from the prescribed method of election is so great that the tribunal is satisfied as matter of fact that the election was not an election under the existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws; it is necessary to be able to say that either wilfully or erroneously the election was not carried out under those laws but under some other method. For instance, if, during the time of the old laws, with the consent of a whole constituency, a candidate had been selected by tossing up a coin or by the result of a horse race, it might well have been said that the electors had exercised their free will, but it should have been held that they had exercised it under a law of their own invention, and not under the existing election laws which prescribed an election by voting. So now, when the

election is to be an election by ballot, if either wilfully or erroneously a whole consistuency were to vote, but not by ballot at all, the election would be a free exercise of their will, but it would not be an election by ballot and therefore not an election under the existing election law. But if, in the opinion of the tribunal, the election was substantially an election by ballot, then no mistakes or misconduct, however great, in the use of the machinery of the Ballot Act, could justify the tribunal in declaring the election void by the common law of Parliament."

Having regard to these authorities and many others which I have consulted, including *Wilson* v. *Ingraham* (1895), 64 L.J. (Q.B.) 775, 72 L.T. 796; *the Islington* case (1901), 5 O'M. & H. 120; *the Pembroke* case, [1908] 2 Ir. 433; and *the Drogheda* case (1874), 2 O'M. & H. 201 at p. 210, I have come to the conclusion that before the election can be set aside and a new election ordered it must be shewn that the irregularities are substantial and not merely informalities, and must be of such a nature as that they may reasonably be said to have a tendency to produce a substantial effect upon the election. And in this connection I may say that I am very much impressed with the language of Blake, V.-C., in *the Monck* case where he points out that that which arises from carelessness to-day may be from a corrupt motive to-morrow, and an officer enabled by some trivial act or omission may serve some sinister purpose and have an election avoided.

I am further of opinion that the irregularities complained of must be of such a character as to satisfy the Court that either there was no real electing at all or that the election was not conducted under the subsisting election laws, and I believe that that is the conclusion that was come to by Barry, J. In other words it must be proved that the constituency had not in fact a fair and free opportunity of electing a candidate whom the majority might prefer, and that the non-observance of the rules or forms must be so great as to satisfy the Court that it affect or might have affected the majority of the votes, or in other words the result of the election. I might add that in this case there is no dispute as to the fact that the election was held by ballot, and there is no contention that the secrecy of the ballot was violated in any way.

Now what are the irregularities complained of in the present case, and do they bring it within the principles which have been laid down in the cases which I have cited. Before, however, giving a list of those irregularities that have been complained of, I may say that in my opinion irregularities are not cumula-

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

HAZEN, C.J.

tive in their effect and that it cannot be said that one irregularity that is not fatal becomes fatal when it is accompanied by other irregularities which taken alone would be equally harmless. The irregularities as stated by Barry, J., at p. 23 of his judgment, I find to be as follows:—

1. The returning officer did not before entering upon his duties take the oath of office as prescribed by the New Brunswick Election Act, sec. 60. 2. No election clerk was appointed and sworn under sec. 61. 3. In 18 cases out of the 28 the precepts of appointment of the deputy returning officers (Form Q) do not state the polling sub-districts for which the deputy returning officer is appointed. In two cases he did not appoint the deputy returning officers but deputed another to do so. 4. Although the returning officer in his evidence swears that he swore all the returning officers whom he appointed, and the form of oaths signed but not sworn to put in evidence would seem to verify this—he made no written record of his having done so. 5. In 19 cases there was no oath in Form R. nor the certificate in Form S. of such oath having been taken, returned with the poll books and the voters' list and other documents used in the election, as required by the Election Act. 6. In 23 cases the returning officer did not make the entry of the number of voters whose names appear on the poll book as having voted, as required by sec. 116 of the Elections Act. 7. In 7 cases the oath of the deputy returning officer after the close of the poll (Form FF) was not subscribed by the deputy returning officer or was in other respects incomplete. 8. In one case the jurat to the deputy returning officer's oath was signed by the poll clerk. 9. In 8 cases there were no voters' lists returned with the ballot box. 10. In 16 cases the returned ballots were not separated, but all loose in large containers. 11. In 19 cases the voters' lists returned with the poll book were not certified as official by the sheriff. The returning officer has indeed sworn that in no case did he furnish the sheriff's official lists to the deputy returning officer. In most cases the lists furnished were simply certified by the secretary-treasurer of the county. In one case the list was furnished by the deputy returning officer who happened to be the revisor; in another the list was obtained from the candidates' election committee room and in the case of the eight Campbellton polls the lists were furnished by M. A. Kelly, and were divided among the 8 returning officers alphabetically without reference to the returning officer at all. 12. In 8 cases the oath of the deputy returning officer (Form FF) and the

oath of the poll clerk (Form GG) were signed by the deputy returning officer and poll clerk, but no name was signed in the jurat. 13. In 3 cases the appointment of the poll clerk does not specify the polling sub-district for which he was appointed. 14. In 11 cases the appointment and oath of poll clerk are incomplete or irregular. 15. In 2 cases the forms FF and GG are not filled in. 16. In 5 cases there is no appointment of a poll clerk. 17. In 7 cases there is no warrant of appointment of deputy returning officer. 18. In one case the ballots returned were tied in one bag, but not in any container. 19. In one case ballots tied in one packet and enclosed in one container. 20. In one case the ballots were in one container but not enclosed in small envelopes. 21. In one case an uncertified voters' list not belonging to the poll was found in the ballot box. 22. In the election proclamation which the deputy returning officer issued on September 20, he gave notice that polls would be opened on election day at the polling subdivisions which he mentioned in the proclamation. These were numbered from one to thirteen inclusive and were and are the polling subdivisions for the electoral district of Restigouche established by law. On election day, without any authority whatever or warrant of law that I can see, he opened and established or authorised and deputed others to establish and open 6 other polling subdivisions. These he numbered 4½, 5½, 6½, 12½, 13½ and 14, and either himself appointed or had others appoint deputy returning officers and poll clerk for them. These are not cases where the voters at a polling subdivision exceeding 300, the returning officer is authorised by the 81 sections of the Act to provide two or more polling stations for such subdivision, nor are they cases where new subdivisions having been established by Act of Assembly, or polling places not having been provided for, the sheriff is authorised under sec. 82 to provide lists and appoint polling places. In these 6 cases the subdivisions were already established and polling places provided. The returning officer simply of his own volition, carved out of the existing established subdivisions, new ones, animated by the best of motives I have no doubt, that is, the convenience of the electors, but at the same time without any warrant or authority whatever; and if my conception of the Election Act be a correct one, in my opinion not a ballot deposited at either of those unauthorised subdivisions was a legal vote and one that should have been counted.

This is Barry, J.'s summing up of the irregularities in consequence of which he has decided that no election was held in

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

conformity with the existing election laws. I have referred to the fact already that in the course of his judgment the Judge expressed the opinion that secs. 99 and 100 of the Election Act having been declared to be obligatory the intention of the law makers were that the rest of the Act should be construed as directory only, and therefore in his opinion it is clear that these irregularities in so far as they were violations of the Election Act were violations of provisions of the law that were not intended to be mandatory or obligatory, and therefore unless they have affected the result of the election or caused some substantial injustice to be done would not have the effect of voiding it and disfranchising the electors. Irregularities there were no doubt, but as is stated in *Woodward* v. *Sarsons* (1875), L.R. 10 C.P. 733, it is not enough to say that great mistakes were made in carrying out the election. It is necessary to be able to say that either wilfully or erroneously the election was not carried out under existing laws, but under some other method. One of the irregularities to which Barry, J., refers is the fact that the returning officer did not before entering upon his duties take the oath of office as prescribed by the New Brunswick Election Act, sec. 60. This section requires the returning officer to take the oath of office and provides that the person administering such oath shall make a certificate thereof. The only person who knows whether this oath is taken is the sheriff himself. If he fails to do so and proceeds *de facto* to hold the election, how could it possibly be held that that being merely a direction for the guidance of the returning officer, was sufficient to avoid the election and practically disfranchise the electors, there being no fault on the part of the candidates or of the electors themselves.

So, too, with regard to the second irregularity, that no clerk was appointed and sworn under sec. 61, the same reasoning would apply, although in this case the sheriff swore that his son was appointed and acted as election clerk, but there is no written evidence of his having taken an oath. In the case of *Deane* v. *Magistrates of Haddington* (1882), 9 Ct. of Sess. 4 Series, 1077, it was held that the returning officer committed serious irregularities in violation of the rules of the Ballot Act 1872 (Imp.), ch. 33, during the counting of the votes and in dealing with the voting papers afterwards, in consequence of which the votes of electors might have been disclosed. The Court, being of opinion that the election had been, notwithstanding the irregularities, conducted in accordance with the

principles of the Act, held that there was no ground for voiding the election.

As I have already stated, in my opinion irregularities are not cumulative in their effect and each irregularity must be dealt with by itself, and unless it can be shewn that some of the irregularities referred to by Barry, J., affected the result or caused some substantial injustice, I am of opinion that the petition must fail. It was claimed, however, by the able counsel for the petitioner, as follows:—"For instance, the respondent Diotte had a majority of 117 over Harrison and 118 over Labillois on the sheriff's count, but when the voters' list used in 13½ was compared with the official list it was found to be 168 names short. It was further found that excluding soldiers the names of 50 persons were found on the list used which were not on the official list, a difference of 218, much more than enough to over-balance Mr. Diotte's majority. If the sheriff had certified the lists this could not have happened. There were 299 votes rejected by the deputy returning officer in counting. These should be open to examination on recount. By the irregularities in the conduct of the election that could not be done. The number affected by the illegal lists and the number of rejected votes together amount to 517. Stewart's majority over Harrison was only 463. It is impossible therefore to say what the result would have been if the vote had been recounted. Then there were about 1,500 votes wasted in being cast for Labillois and Duncan, who were not candidates. If these votes had not been lost they would have entirely changed the result."

I have already held that Labillois and Duncan were properly nominated. Therefore the argument about the 1,500 votes polled by them cannot prevail. So far as the statement that the votes rejected by the deputy returning officer should be open to examination and recount, it should be borne in mind that a recount was applied for and proved abortive, and that when the Judge of the County Court declined to proceed further with such recount, it was within that applicant's right to have applied under the provisions of sec. 148 of the New Brunswick Elections Act to a Judge of the Supreme Court to command the Judge of the County Court to proceed with and complete such recount or final addition. This he did not do, and the present petitioner Anderson might have applied for a scrutiny under this petition but did not do so and in the absence of such a scrutiny it must be presumed that the ballots were properly counted.

N.B.
App. Div.
ANDERSON
v.
STEWART
AND DIOTTE.
Hazen, C.J.

In view, however, of the contention raised by the counsel for the petitioner, I have considered it necessary to make a careful, and as far as I was able to do so thorough examination of the exhibits relating to poll 13½ in the parish of Grimmer and other polls. I will deal first with the voters' list. This was a list returned in the ballot box, and no evidence was given with reference to it. Counsel for all parties by agreement made a summary of the contents of all the ballot boxes which summary is set out at pp. 116 to 152 of the record. The fact that this list was returned in the ballot box raises the presumption that it was the list used, as it was the duty of the deputy returning officer to return all documents used by him at the election. On comparing this with the official list it is evident that a page was missing from this copy, and that this page should have contained 53 names, beginning with the letter "L," and 97 beginning with the letter "M." It should also have contained names under the letters "N" and "O," 18 in all, but on inspecting the documents from No. 14 Grimmer I find that these letters were voted on at that poll, so there is in question, it seems to me, only the names beginning with the letters "L" and "M." I have compared the entries in the poll book for No. 13½ containing the names of those who actually voted, with the official list, and I find that 30 persons whose names commence with "L" and were omitted from the copy returned, and which were in the official list actually voted there, and that 54 persons whose names commence with the letter "M" and were on the official list also voted there. It would appear, therefore, that out of the 150 names which appear on the official list but not on the list returned with the box, that 84 voted. In the three districts in the parish of Grimmer there were over 1,170 names on the total list, out of which number some 652 appear by the returns to have deposited their votes and from this it appears that the proportion of the 150 names voting was even greater than the average for the parish. Under these circumstances it is evident to me that some document other than the insufficient list must have been used by the deputy returning officer, and the result does not convince me that the imperfect list in any way affected the result of the election. In the *Bothwell* case (1884), 8 Can. S.C.R. 676, Ritchie, C.J., looked at a ballot and referred to the entries in the poll book, from which he drew the inference that a ballot might have been wrongly marked by the voter and returned to the deputy returning officer as spoiled. Acting on similar lines I am forced to conclude that the deputy returning officer at this

poll must have had before him a list which was a correct copy of the official list, even though it is not certified by the sheriff as it appears from the evidence that none of the lists were so certified. Even if I am in error in this conclusion, the alternative would be that the whole poll would have to be struck out. This would deduct 73 votes from Stewart, 71 from Diotte, 95 from LeBlanc, 73 from Harrison, 51 from Labillois and 45 from Duncan, and would alter the general result so as to give Stewart and Diotte a larger majority than appears from the sheriff's return.

Mr. Hughes contended that if the sheriff had certified the lists this error could not have happened, but this is by no means clear, as it is quite possible that by inadvertence and without any improper intention a sheet might have been omitted from the list, even though certified. He further contends that 299 votes rejected by the deputy returning officers in counting should be deducted from the vote cast for the successful candidates on the ground that these should be open to examination and recount, and that by the irregularities in the conduct of the election that could not be done. I can see no reason why McLatchy, J., could not have effectively counted the votes cast, and counted them in accordance with the statute but whether he did so or not would not in any way affect the right of the election Court to do so upon petition. All the ballots cast were available and are in evidence and could have been recounted by the Court if any application had been made to do so. In *Jenkins* v. *Brecken*, 7 Can. S.C.R. 247, the petition was brought to have the ballots scrutinised. I can see no reason, therefore, why the rejected ballots should in the absence of any evidence or investigation whatever, be presumed to have been improperly rejected, and it seems to me it is entirely impossible to accede to the contention that they should be deducted from the votes that were counted for the respondents.

Counsel in the case agreed to a statement to the effect that there were 50 ballots cast by persons not entitled to vote. In some cases, as in that of Annie M. Lynch, who was entered on the poll book, 13½ Grimmer, while the name on the official list is Marie M. Lynch, it is very likely that there has been an error in making the entry, and there are other similar cases, but even if the total of 50 votes be deducted from the respondent it will not alter the general result—they will still have a majority.

Another objection is that Nos. 4½ Balmoral and 5½ Colborne were improperly constituted, these parishes being divided

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

territorially and not alphabetically. In *the Greenock* case (1869), 1 O'M. & H. 246 at pp. 250, 251, Lord Barcaple says, as to whether if there had been to any extent a contravention of the statutory conventions that contravention should invalidate the election: "I think that these statutory provisions are of such a kind that it would require that something more should be made out than merely that they were transgressed in good faith and without any serious consequence, to invalidate the election."

It seems to me that the sheriff in the case under consideration was endeavouring to provide facilities for the convenience of the voters in the different parishes. As far as I can see from the evidence his error in dividing the polls territorially instead of alphabetically is not shewn to have caused a single voter to be misled, and it seems to me too much, in such a case to call upon the respondents to prove a negative by establishing the fact by evidence that no one was misled, and I do not think the cases cited can be authority for such a proposition. If it were necessary in cases such as the present, the respondent would have to call every voter on the list who had not voted, for the purpose of shewing that his failure to vote was not in consequence of the irregularity. In *the Greenock* case no such burden was sought to be established, nor was it contended in the *East Clare* case (1892), 4 O'M. & H. 162, where too short a time elapsed between nomination and polling. I think the rule to be deduced from *Gribbin* v. *Kirker* (1873), I.R. 7 C.L. 30, and cases of that class is that where an irregularity is shewn by the petitioner to have affected some votes, the burden then rests upon the respondent to prove that the general result of the polling could not have been changed thereby.

No. 4 Balmoral and No. 5 Colborne were regular. They had the complete list of voters for their respective parishes. Assuredly any voter in each of such parishes could have voted at such poll. The additions of 4½ in Balmoral and 5½ in Colborne did not take away that right, and there is no evidence that anyone was disfranchised thereby. If, however, I am wrong in this conclusion, and the votes in 4½ Balmoral and 5½ Colborne should be rejected the poll would stand thus:

	Stewart	Diotte	LeBlanc	Harrison	Labillois	Duncan
4½ Balmoral	36	51	27	43	42	4
5½ Colborne	42	14	85	73	113	36
	78	65	112	116	155	40

taking these from the sheriff's returns of

	2109	1763	1645	1646	1590	1063
leaves	2031	1698	1533	1530	1435	1023

It will be seen, therefore, that the 50 votes improperly voted in the 8 polls, as agreed to by counsel, would not affect the general result if deducted from Stewart and Diotte. There is absolutely no process of computation except that suggested by Mr. Hughes of subtracting 168 names not on the paper found in the ballot box of 13½ Grimmer or the 299 rejected ballots, by which LeBlanc and Harrison can be said to have had a majority of votes. Of the 168 missing names it is clear, as I have pointed out, that 18 were not missing from the poll but were included in the list voted on in another poll. Of the 150 which remained, 84 voted and were entitled to do so. It is therefore not clear to me why a number of persons who did not vote and who have not been shewn to have been prevented from voting by any irregularity, should be deducted, nor am I able to see any possible reason for deducting the rejected ballots.

This case, after all, is not one of majorities. If the petitioner succeeds, the seats will be declared vacant. It is therefore important to consider the possible effect of the alleged irregularities upon the expression of the vote of the electors, and so far as I am able to see after having given the matter the most careful study and investigation that I can, they have no effect at all beyond the 50 votes polled by persons whose names were not on any list and whose votes when deducted from the whole do not appreciably affect the result.

I have dealt with the principal irregularities, and I do not think it necessary to take up the others in detail, for I have come to the conclusion that none of these irregularities substantially affect the result of the election, and under the authorities which I have cited, and which I will not again refer to, as no substantial injustice was done I am of opinion that the appeal must succeed also on this ground.

I have referred in a previous part of this judgment to the effort that was made by an applicant to obtain a recount of the votes and of his failure to do so, as the Judge of the County Court was of opinion that he could not proceed with the recount, and so stated, and further stated that he would not give a certificate to the sheriff as required by the Act. It seems to me that this was an abortive proceeding, and that when the sheriff was informed that the County Court Judge would not proceed with the recount or grant a certificate it was his duty

N.B.

App. Div.

ANDERSON v. STEWART AND DIOTTE.

Hazen, C.J.

to make a return to the provincial secretary, which he did. That return, made on November 6, as I before pointed out, declared that Stewart and Diotte were elected by a majority of votes. Barry, J., says that in his opinion that return was illegal and void by reason of its having been made before the returning officer had received from the County Court Judge the result of the return and final addition of the votes, and declared that it was void, and ordered that it be set aside and avoided. I say with all possible respect that I cannot agree with this conclusion. It was the duty of the returning officer to make a return and if he had waited until he obtained a certificate from the Judge of the County Court, which certificate he (the Judge) stated he would not give, no return would have ever been made to the writ and the county would have been without representation during the term of the present House. It was open to the applicant for the recount, had he seen fit to do so, to make an application to a Judge of the Supreme Court to order the County Court Judge to proceed. This he did not do, and I cannot see why any duty of doing so was cast upon Stewart and Diotte, who had been declared elected by the sheriff and who were not interested in having the votes recounted. I can not find any power whatever vested in the provincial secretary to send back the return after it had been once deposited with him, and the fact that a second return was made practically by direction of that official does not to my mind alter the case at all. A second return to the same writ seems a most extraordinary and unheard of proceeding. A return had been made and that having been made it seems to me that in so doing the sheriff had discharged his duty. He was *functus officio* so far as the matter was concerned, and could not be called upon to make a corrected or a second return. If the return was incorrect then it could be corrected, but only on application to the Courts, and if the sheriff returned, as he did return, Stewart and Diotte as the elected members for the county, it seems clear to me that if any of the electors or the candidates felt that an error had been made in so doing, or an injustice had been done them, it was open to them to take proceedings in the Court by the way of election petition or otherwise to have the matter corrected, and the return of Stewart and Diotte set aside. *The Poole election* case (1874), L.R. 9 C.P. 435, 43 L.J. (C.P.) 209, has some application to the matter. In it at pp. 212, 213, Lord Coleridge says:—

"The words are 'return has been made,' and we are to determine what is their reasonable construction, and it seems to

me that in doing so a consideration as to the consequence may fairly be taken into account, and that therefore we may sensibly put this construction, that the return is not made until it has been so made that the clerk of the Crown has had an opportunity of acting upon it. If we say that the return is complete the moment the clerk of the Crown has had such opportunity, we fix a point both for the member and those who may be interested in questioning the return."

In this case the return was made and it was in the hands of the clerk of the Crown or the provincial secretary, and he had an opportunity of acting upon it, and the case I have cited lays down the principle that the return is complete when that event occurs. The result of not accepting the first return has been that Messrs. Stewart and Diotte were unable to be sworn in as members of the House of Assembly, and the county was without representation at the last session. I have said before that I think the Judge of the County Court should have proceeded with the recount. In my opinion it was possible for him to do so, and even though there were difficulties in the way and irregularities in some of the polls he should have made such a recount as could have been made under the circumstances using his best judgment in regard to the different matters that might come before him and the sufficiency and legality of the ballots that he was asked to count, and then given a certificate to the sheriff who would have made a return accordingly, and the matter could then have been taken to the Courts of the country by any candidate or elector who felt aggrieved.

In my opinion, having regard to all the circumstances of the case, for although there were many irregularities, there was nothing that substantially affected the result of the election, and the election was held, in my opinion, in conformity with the principles of the Elections Act of this Province. The appeal should be allowed with costs and the election of Stewart and Diotte be confirmed.

Appeal allowed.

LOVETT v. COMMINS.

Quebec Superior Court, Bruneau, J. September 3, 1920.

WILLS (§ IE—40)—TWO WILLS OF SAME PERSON—ADMISSION TO PROBATE —QUEBEC LAW.

There is nothing in the law of Quebec which prevents two wills of the same person from being admitted to probate provided they are not inconsistent with each other.

N.B.

S.C.

THE KING v. LIMERICK; EX PARTE WOODS.

Hazen, C.J.

PETITION for probate of a will, a former will of testator having been already probated. Petition granted.

Markey, Skinner and Hyde, for plaintiff.

Beulac and Mailhiot, for respondent.

BRUNEAU, J.:—Considering that there is nothing in our law which prevents two wills of the same person to be probated, specially if they are not inconsistent with each other; Howell's Probate Practice (ed. 2) p. 42; *Cutta* v. *Gilbert,* Beauchamp, Jurisprudence of the Privy Council, vol. 1, p. 357; that the object of the probate is to give authenticity to the copies of the will after summary proof is adduced that the formalities required by law for the making of a will have been fulfilled, without however pronouncing upon the validity of the document: Mignault vol. 4, p. 36; Doth grant probate of the said last will of the said late Thomas Lovett, senior, marked A and dated January 2, 1917, and doth hereby order that the said will be deposited in the archives of the said Superior Court, at Montreal, and be registered in the register of probates of the said Court, and that authentic copies of the said will be given, and according to law, with costs.

Petition granted.

REX v. LIMERICK; EX PARTE WOODS.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. June 9, 1921.

Intoxicating Liquors (§IIIA—55) — New Brunswick Intoxicating Liquor Act—Prosecution of Holder of Beer License for Keeping Liquor for Sale—First Offence—Proper Penalty.

A person holding a beer license in New Brunswick is entitled to be proceeded against for having liquor for sale contrary to the provisions of the Intoxicating Liquor Act 1916 (N.B.), ch. 20, under the provisions of sec. 181 of the Act, and when and if found guilty is liable to a penalty for a first offence of not more than $80 as provided by sec. 96, and in addition, under the provisions of sec. 182, to have the beer license taken away. A fine for $200 imposed by a Magistrate under the provisions of sec. 92 is clearly in excess of the amount which should be imposed upon one holding a beer license and who is convicted of a first offence under sec. 181, and such conviction will be quashed.

APPLICATION by way of certiorari to quash a conviction under the New Brunswick Intoxicating Liquor Act. Conviction quashed.

P. J. Hughes shews cause against a rule nisi.

J. J. F. Winslow in support of rule.

The judgment of the Court was delivered by

Hazen, C.J.:—Clara A. Woods, the holder of a beer license issued to her under the name of the Enterprise Bottling Co. by the chief inspector under the Intoxicating Liquor Act, 1916, (N.B.) ch. 20, was on December 8, 1920, convicted before Walter Limerick, Esq., Police Magistrate of the City of Fredericton, of a first offence against the Intoxicating Liquor Act, 1916, for keeping liquor for sale in the city of Fredericton on October 29, 1920, and it was adjudged that she pay a penalty of $200 and costs or be imprisoned for a period of 6 months. Section 181 of the Intoxicating Liquor Act, 1916, ch. 20, as amended by ch. 22, sec. 10, of the Acts of 1917, provides that "a 'beer license' shall be construed to mean a license for selling, bartering or trafficking by retail in such drinkable liquids as are classed by this Act as non-intoxicating, but no such license shall authorize the sale or keeping for sale of any beverages which are in fact intoxicating, malt or spirituous."

Section 96 provides that everyone who offends against sec. 181 shall on summary conviction be liable to a penalty of not less than $20, nor more than $80, and in default of immediate payment to imprisonment for a period of not less than 10 days nor more than 2 months, and for a second offence to a penalty of not less than $25, nor more than $100, and in default to imprisonment for a term not less than 2 months nor more than 4 months. It is contended that the penalty imposed by the Magistrate was in excess of that provided by this section, and that therefore the Magistrate acted wholly without jurisdiction.

The counsel who shewed cause claimed that the proceedings against Mrs. Woods were not necessarily under sec. 181 of the Act, but might have been taken under sec. 5, which provides that no person shall within the Province keep for sale any liquor without having first obtained a wholesale license or a retail license authorising him so to do, and that the appropriate penalty for a violation of the provision contained in sec. 5 was to be found under sec. 92, which provides a penalty for an offence against the provisions of sec. 5 for a first offence of not less than $50, nor more than $200, which is the penalty imposed by the Police Magistrate in the present case, and he further claimed that in any event, if there was any question about the matter it was remedied by sec. 182 of the Act, which provides that "Any holder of a beer license . . . shall be

N.B.

S.C.

THE KING v. LIMERICK; EX PARTE WOODS.

Hazen, C.J.

subject to the penalties provided by this Act for selling or keeping liquors for sale, and in addition thereto upon a conviction for such an offence the chief inspector shall cancel his beer license."

The question is one that is not free from difficulty, but in my opinion the provisions of sec. 182 providing as aforesaid should be construed in the case of a beer licensee as having reference to the penalty provided in sec. 96, with the additional penalty of the cancellation of the beer license being provided for. The words "penalties provided by this Act for selling or keeping liquors for sale" it seems to me to have as much reference to an offence under sec. 181 as they have to an offence under sec. 5, and Mrs. Woods being the holder of a beer license, in my opinion, should be proceeded against if she is charged with having liquor for sale, under the provisions of the first named section. I do not think that the difficulty which is involved in the present case is cured by the provisions of sec. 182, and having regard to the rights of the subject I am of opinion that a person holding a beer license should be proceeded against under the provisions of sec. 181 and when and if under sec. 5, where the penalty is greater, and it seems to me that there has been an attempt on the part of the draughtsman of the Act, though he has not made his meaning very clear, to distinguish between the case of violation in the case of the holder of a beer license, and of another who is not in that position, and that if Mrs. Woods, being the holder of such a license is proceeded against for keeping liquor for sale she has a right to be so proceeded against under the provisions of sec. 181 and when and if found guilty is liable to a penalty for a first offence of not more than $80, as provided by sec. 96, and in addition, under the provisions of sec. 182, to have her beer license cancelled. As the fine of $200 imposed by the Magistrate was under the provisions of sec. 92, and is clearly in excess of the amount which, if I am right, should be imposed upon one holding a beer license and who is convicted for a first offence under the provisions of sec. 181, I am of opinion that having regard to the judgments of this Court in the Broderick case, (1920), 52 D.L.R. 397, 33 Can. Cr. Cas. 88, 47 N.B.R. 344, there should be a rule absolute for certiorari and a rule absolute to quash the conviction.

Conviction quashed.

BARBOUR v. MOORE.

Sask.

C.A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 14, 1921.

SALE (§ IIID—75)—OF ANIMALS SUBJECT TO LIEN—REGISTRATION OF NOTE IN DISTRICT IN WHICH ANIMAL IS KEPT—REMOVAL OF ANIMAL TO ANOTHER DISTRICT FOR PURPOSES OF PASTURAGE — FAILURE OF OWNER TO COMPLY WITH SEC. 3 (2) OF CONDITIONAL SALES ACT — FAILURE OF PERSON REMOVING TO NOTIFY—SUBSEQUENT PURCHASE BY PERSON HAVING NOTICE OF LIEN—RIGHTS OF PURCHASER.

The duty under the Conditional Sales Act, R.S.S. 1920, sec. 3 (5), ch. 201, of notifying the owner of the removal of an animal which is subject to a lien of its removal out of the district in which the lien note is registered is upon the purchaser and not on the person who actually removes the animal under such purchaser's instructions for the purpose of pasturing it for such purchaser and although the person pasturing the animal had notice of the lien, he acquires title to the animal free from the lien if he purchases it in good faith and for valuable consideration after its removal and when it is in a district where the lien note has not been registered in compliance with sec. 3 (2) of the Act.

[*Ferrie* v. *Meikle* (1915), 23 D.L.R. 269, followed.]

APPEAL by plaintiff from the judgment at the trial of an action on a lien note. Affirmed.

D. Buckles, K.C., for appellant; *F. L. Bastedo*, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—In October, 1917, the appellant sold the horse in question to one Draper, taking from Draper a lien note which was duly registered in the Swift Current Registration district, where the parties resided and the horse was kept. In the spring of 1918 Draper gave the horse to the respondent to pasture, and it remained in the respondent's custody until it was finally disposed of by him as will be noted later. About June, 1919, the appellant informed the respondent that he held a lien note on this horse of Draper's. In July, 1919, the respondent removed the horse, with some other horses he was pasturing, to grazing land which he had near Montmartre in the registration district of Regina, where it remained until March, 1920. In this latter month, the respondent, having an account against Draper of $48 for pasturing the horse and $5 for the amount of a veterinary surgeon's bill paid by him, agreed to buy the horse from Draper for $95, paying him the balance of the purchase price in oats; and the sale was made on these terms. Subsequently the respondent sold the horse to one Floss.

The appellant did not comply with sub-sec. 2 of sec. 3 of ch. 201, R.S.S. 1920, The Conditional Sales Act, by registering the lien note in the office of the Regina registration district within 60 days after its removal to that district, as required by that

Ont.

S.C.

RE MOTHERWELL LTD.; EX PARTE MORRISON.

section. When the respondent purchased the horse from Draper in March, 1920, this lien note was registered in the Swift Current district only.

Upon these facts I think I am bound to hold, upon the authority of *Ferrie* v. *Meikle* (1915), 23 D.L.R. 269, 8 S.L.R. 161, and *Lanston Monotype Machine Co.* v. *Northern Publishing Co.* (1921), 61 D.L.R. 16, 14 S.L.R. 371, that the respondent purchased the horse from Draper "in good faith and for valuable consideration" and that the property in it passed to him free from the appellant's claim under his lien note.

Sub-section 5 of sec. 3 of ch. 201 aforesaid provides that a person removing a chattel which is subject to a lien note out of the district in which the note is registered shall give the owner notice of such removal. It is contended in this case that the respondent, before removing the horse to Montmartre, should have notified the appellant, and that, not having done so, he cannot, as a purchaser, derive any protection from the fact that the note was not registered in the Regina district. I do not agree with this contention. At the time of the removal the defendant was pasturing this animal for Draper. He took it to Montmartre apparently with Draper's knowledge and upon, at least, his implied instructions, and the duty of notifying the plaintiff was Draper's and not the defendant's.

The appeal should, I think, be dismissed with costs.

Appeal dismissed.

Re MOTHERWELL Ltd.; Ex parte MORRISON.

Ontario Supreme Court in Bankruptcy, Orde, J. June 9, 1921.

SOLICITORS (§ IIC—30)—RIGHT OF AUTHORISED TRUSTEE TO PRODUCTION OF DOCUMENTS WHICH ARE SUBJECT TO A LIEN OF THE DEBTOR'S SOLICITOR.

The solicitor has a right to a lien on the documents of his client, but if third persons have a right to call on the client to produce them, the lien of the solicitor cannot debar them that right. An authorised trustee has, in respect to documents in the hands of the debtor's solicitor the same rights as a creditor of the debtor would have. The order to produce may be "subject to the solicitor's lien," and in that case the documents at the close of the administration of the estate should be returned to the solicitor and not retained by the trustee under R. 110.

[See Annotations of Bankruptcy Act of Canada, 53 D.L.R. 135, Rules 40, 43, 110, 145; Bankruptcy Act Amendment Act, 59 D.L.R. 1.]

APPEAL by the solicitor from the judgment of Holmested, Registrar in Bankruptcy, which is as follows:—

"The authorised trustee (Osler Wade) applies for the de-

livery to him of the charter, minute book, and the share certificate book, of the debtor company and the atlas of the peat bogs owned by the company, and such other books as the trustee may be held entitled to. The documents in question came into the possession of Mr. Frank Morrison, the former solicitor of the company, prior to the assignment, and he claims a lien thereon for costs due to him by the company, and incurred prior to the assignment, and objects to produce them.

By R. 145 (53 D.L.R. 226), "No person shall, as against the trustee, be entitled to withhold possession of the books of account belonging to the debtor or set up any lien thereon."

By R. 40 (53 D.L.R. 210), "The Court may * * * order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the Court may think fit to be produced."

By R. 43 (53 D.L.R. 211), it may by an ex parte order direct the examination or cross-examination of persons for the purpose of discovery of documents.

These rules appear to be made for the purpose of carrying out the provisions of sec. 56, sub-secs. (4) and (5) of the Act, 1919 (Can.), ch. 36.

With regard to books of account, if any, in Morrison's possession belonging to the company, R. 145 expressly excludes any right to a lien on them. But it is claimed that books and documents which do not come within that category are subject to the solicitor's lien and cannot properly be ordered to be produced or delivered to the trustee except upon the terms of payment of the solicitor's bill of costs.

The right of a solicitor to a lien on the documents of his client which come to his hands in the course of his employment is a well recognised right, and one which, as Lord Romilly, M.R., remarked in *In re Moss* (1866), L.R. 2 Eq. 345, 35 L.J. (Ch.) 554, is for the benefit of clients as it often enables or induces solicitors to carry on proceedings for the client which they might otherwise be unwilling to do; but it is a right which is subject to certain qualifications.

The right of a solicitor in documents in his possession cannot exceed that of his client, and if third persons have a joint interest in them, or for any other cause have a right to call on the client to produce them, the lien of the solicitor cannot debar them of that right: *Furlong* v. *Howard* (1804), 2 Sch. & Lef. 115.

The solicitor's lien creates no charge upon the property, if any, to which the documents relate, it is not like an equitable

Ont.

S.C.

RE MOTHERWELL LTD.; EX PARTE MORRISON.

mortgage by deposit; the lien is merely a passive right of retainer, and cannot be actively enforced as in the case of other liens. So long as it exists it has been held that the solicitor can withhold the documents from inspection by his client, or anyone claiming under him: *In re Biggs and Roche* (1897), 102 L.T. Jo. 364; although it has been held that the client can by *subpoena duces tecum* served on the solicitor compel him as a witness to produce them in evidence in support of the client's case: see *Hunter* v. *Leathley* (1830), 10 B. & C. 858, 109 E.R. 667, 8 L.J. (K.B.) 274.

Where the client is adjudged bankrupt, or makes an authorised assignment, the trustee is representative not only of the client but also of his creditors; he is therefore not claiming only through the client but also as representative of his creditors.

Speaking of the winding-up provisions of the Companies Act, 1862, Lord Hatherley, L.C., in *In re South Essex, etc., Co.; Ex parte Paine* (1869), L.R. 4 Ch. 215, at p. 216, said:—

"The former Acts did not interfere directly with the rights of creditors, who were allowed to go on with their actions until they were stayed by the Court, but by the last Act the rights of creditors were largely interfered with, they were prevented from suing, and were compelled to come in under the winding-up. The official liquidator had therefore now to act for the benefit of creditors as well as of the shareholders."

And Rigby, L.J., in *In re Hawks; Ackerman* v. *Lockhart*, [1898] 2 Ch. 1 at p. 14, 67 L.J. (Ch.) 284, said:—

"This is an express decision of the Lord Chancellor that a creditor is not a person who claims through or under the client so as to be in the same position with him, but is a person claiming hostilely to him so as to be entitled to the full benefit of Lord Redesdale's statement of the law in *Furlong* v. *Howard*, 2 Sch. & Lef. 115."

And the judgment in *Furlong* v. *Howard*, *supra*, to which he refers, was to the effect that though a solicitor may have a lien on a deed for his costs yet if his client is bound to produce it for the benefit or at the instance of a third person so also is the solicitor.

The observations of Lord Hatherley to which I have referred, though directed to the effect of the English Companies Act, 1862 (Imp.), ch. 89, appear to me to apply with equal force to the position of a trustee under a receiving order: see the Bankruptcy Act, sec. 7; but whether they are equally applicable to a trustee under an authorised assignment may perhaps be open to question, inasmuch as sec. 7 appears to be limited to the

case of a receiving order and does not in terms extend to the case of an authorised assignment; and it is possible that there is no power to stay actions by creditors where merely an assignment is made. But, notwithstanding this fact, it appears to me that under an authorised assignment the trustee is for the purpose of the realisation and administration of the estate the representative not only of the assignor but also of the creditors. It is true that in the case of a receiving order the trustee is the nominee of the Court and the administration of the estate in that case may be said to be carried on practically in Court by the trustee in the same way as an administration of an estate under ordinary civil jurisdiction of the Court, whereas under an assignment authorised by the Act the administration of the estate is being carried on as it were out of Court. At the same time, although that may be true, the administration is more or less under the supervision of the Court; appeals to the Court from the trustee's decisions acting under an assignment are authorised, he must come to the Court if he wishes to be discharged from his trust, and when doing so must give an account of his administration.

Although therefore the trustee under an authorised assignment is not appointed in the first instance by the Court, he is nevertheless just as amenable to the jurisdiction and control of the Court as if he were. Even a trustee appointed by a receiving order, may be subsequently changed and a substitute appointed by the creditors if they see fit. In which case the substituted trustee is no more the nominee of the Court than a trustee under an authorised assignment, though equally subject to the control and supervision of the Court; and by sec. 17 (2) it is expressly provided that a trustee (and that word includes I think not only a trustee under a receiving order but also a trustee under an authorised assignment) shall in relation to and for the purpose of acquiring or retaining possession of the property of the debtor be in the same position as if he were a receiver of the property appointed by the Court and the Court may on his application enforce such acquisition or retention accordingly.

If, as I assume, a trustee under an authorised assignment does represent the creditors his rights in regard to documents in respect of which a lien is claimed by the debtor's solicitor must be determined having regard to that fact. If a creditor for the purpose of establishing his claim against the debtor would be entitled to call for the production of the company's

Ont.

S.C.

RE MOTHERWELL LTD.; EX PARTE MORRISON.

charter notwithstanding the lien, then the trustee may require its production notwithstanding the lien.

If for enforcing his claim the creditors could examine the debtor and inquire into the property he owns and the means he has of satisfying his claim and for that purpose may call for the production of the debtor's title deeds and other documents relating to his property notwithstanding the solicitor's lien, so may the trustee.

If in the case of a company he could call for the production of the minute book or the share register for the purpose of ascertaining the shareholders and what if anything is owing from them to the debtor company notwithstanding the solicitor's lien, so may the trustee.

It therefore becomes necessary to inquire what are the rights of creditors in reference to documents of the debtor which are subject to a lien of the debtor's solicitor.

In the first place I may refer to the judgment of Lord Redesdale, L.C., in *Furlong* v. *Howard*, already mentioned. Though a solicitor may have a lien on a deed for his costs yet if his client is bound to produce it for the benefit of a third party so is also the solicitor. I know this is not so understood in general but the common opinion that the solicitor may withhold it from all parties, in such a case, is erroneous. The right is only between him and his client. In that case the deed in question on the application of the plaintiff was ordered to be lodged with an officer of the Court, the deed being one which the defendant was bound to produce and on which his solicitor claimed a lien. In *Belaney* v. *Ffrench* (1873), L.R. 8 Ch. 918, 43 L.J. (Ch.) 312, a settled estate was being administered by the Court and a receiver was appointed; one of the parties interested in the estate had before suit placed plans and other documents relating to the estate in the hands of his solicitor and the solicitor claimed a lien thereon; but the Court ordered them to be delivered up to the receiver notwithstanding the lien on the ground that the other parties were interested in the documents and entitled to production thereof by the client of the solicitor.

In *In re Toleman and England; Ex parte Bramble* (1880), 13 Ch. D. 885, 42 L.T. 413, a partnership deed of a firm which had become bankrupt was ordered to be produced to the trustee for inspection notwithstanding the lien of the solicitor; but according to the decision in the *South Essex* case, *supra*, he would appear to have been also entitled to the delivery up of the document. The case, however, at any rate is authority for ordering in the present case the production of the charter.

Hunter v. *Leathley, supra,* was an action at law on a policy of insurance, and a broker, served with a *subpoena duces tecum,* was called as a witness by the plaintiff at the trial to produce the policy, which he refused to do, until paid premiums advanced by him and for which he claimed to have a lien on the policy. Lord Tenterden, C.J., who presided at the trial ordered him to produce it "inasmuch as he would not thereby be deprived of his lien," and the full Court subsequently refused to grant a rule against his decision on that point. This was a strong case because it was the person who was liable for the amount of the costs in respect of which the lien was claimed who was calling for the production of the policy.

In *Hope* v. *Liddell* (1855), 7 De G. M. & G. 331, 44 E.R. 129, 3 Eq. R. 790, a solicitor was subpoenaed as a witness in a suit in equity and called on to produce a deed on which he claimed to have a lien for the costs of preparing it; the clients for whom he acted were dead, and he objected to produce it except on payment of his costs; but on the application of the defendants in the action the Court ordered the solicitor to produce the deed. From this order the solicitor appealed, and in the course of the argument Knight-Bruce, L.J., asked the counsel for the appellant:—"Can a lien on a document give a witness greater privileges as to withholding it than the absolute property in it would? If it were the witness's property, and contained material evidence, could he refuse to produce it?"

Counsel for the appellant did not venture to say that he could.

The appeal was dismissed by Knight-Bruce and Turner, L.JJ.

In *In re Hawkes, Ackerman* v. *Lockhart, supra,* the foregoing cases are referred to with approval and Lindley, M.R., said at pp. 6, 7:—

"A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the solicitor and third parties, the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if he had the documents in his own possession. The principle is as applicable at law as it is in equity. Accordingly, it has been long settled that if a solicitor is required by his client to produce documents under a *subpoena duces tecum* the solicitor can refuse to do so if he has a lien on them [but see *contra Hunter* v. *Leathley, supra*] but that the lien is no answer to a demand for their production by a third party."

In that case, which was for the administration of the estate

Ont.

S.C.

RE MOTHERWELL LTD.; EX PARTE MORRISON.

of a deceased person, the conduct of which had been given to a creditor, a question arose whether steps should be taken to get in a debt due to the estate, and to determine that question it was necessary to see some of the documents in the hands of a solicitor, who had been the solicitor for the deceased and who claimed a lien for costs; but Kekewich, J., ordered the solicitor to produce the documents for perusal by the creditor having the conduct of the cause and his order was affirmed by the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.)

In *Re Capital Fire Ins. Ass'n.* (1883), 24 Ch.D. 408, 53 L.J. (Ch.) 71, which was a winding-up proceeding, a solicitor, who had acted for the company prior to the winding-up, claimed a lien for costs on the share register and minute book; but it was held that the directors had no power to place these books in the hands of any one so as to prevent them from being in the place and open to inspection as required by the Companies Act or so to interfere with their being used for the purposes of the company, and the lien claimed as to them was disallowed; but in respect to documents relating to the allotment of shares which had come to the solicitor's hands before the winding-up proceedings had begun, Chitty, J., ordered them to be delivered up to the liquidator, but the Court of Appeal held that the winding-up order could not defeat any valid lien existing when the winding-up petition was presented; and the documents relating to the allotment of shares which had come to the solicitor's hands before the presentation of the petition, were held to be protected, and the order for their delivery to the liquidator was rescinded. The conclusion as to the latter documents however seems difficult to reconcile with the later decision of the Court of Appeal, *In re Hawkes, Ackerman* v. *Lockhart, supra*, if in the case of a winding-up, or bankruptcy, or authorised assignment, the trustee represents not only the client but also the creditors of the debtor, as I think he does. Because in that case it seems immaterial when the lien arose, whether before, or after the receiving order or assignment, and it seems equally immaterial from this point whether there is or is not any statutory direction as to the place of keeping any of the books of the company.

In *In re Rapid Road Transit Co.*, [1909] 1 Ch. 96, 78 L.J. (Ch.) 132, Neville, J., refused to order the delivery up of documents to a liquidator, on which a lien was claimed by a solicitor; but the Judge in that case assumed that the liquidator had no greater right than the client, which appears to me to be opposed

to the decision of Lord Hatherley in *In re South Essex Estuary and Reclamation Co., supra.*

Where a client of a solicitor is a party to a litigation he may be called on to produce documents, and it is no answer to such an application for him to say that the documents are in the hands of his solicitor, who claims a lien thereon for costs which he is unable or unwilling to pay. He must nevertheless make a bona fide effort to get them from his solicitor: *Lewis* v. *Powell*, [1897] 1 Ch. 678, 66 L.J. (Ch.) 463; *Vale* v. *Oppert* (1875), L.R. 10 Ch. 340, 44 L.J. (Ch.) 579, though the Court might hesitate to commit him for contempt if he satisfied it of his inability to procure the documents. But the case of *Hope* v. *Liddell* already referred to, seems to establish that a successful application might in such a case be made against a solicitor himself to produce the documents in question notwithstanding his lien.

The principle applicable to cases of this kind it appears to me is simply this, that the authorised trustee has in respect to documents in the hands of the debtor's solicitor not only the right of the debtor, but also all such rights as the creditors of the debtor would have, and that the solicitor of the debtor cannot withhold on the ground of lien any documents of the debtor which are necessary for the realisation and administration of the debtor's estate.

Where a creditor would be entitled to call for the production of a document notwithstanding a claim of lien by a solicitor, so may a trustee.

But it was pointed out by Chitty, J., that to require the trustee to go to the solicitor's office to inspect the documents would be a needlessly expensive proceeding, and the same remark would apply if the documents in question were required to be deposited in Court, and it would be obviously a more convenient place to direct the documents of which the trustee is entitled to the production for the purpose of discovery to be delivered to him subject to the solicitor's lien as has been done in some of the cases above referred to.

Under the rules, I am authorised to make an order for the discovery of documents, and to save a further application it appears to me the solicitor had better now make an affidavit of documents, and on the same being filed I could , before the order issues, determine whether all of the documents, or some only, should be delivered to the trustee, otherwise an order for production would have to issue and the question of delivery would have to be

Ont.

S.C.

RE MOTHERWELL LTD.; EX PARTE MORRISON.

Orde, J.

adjourned until the affidavit had been filed. The costs of the trustee should be paid out of the estate—but otherwise I make no order as to costs, but this of course is not to interfere with the agreement of the trustee's solicitor to pay Mr. Morrison's proper witness fees for his attendance for examination before me.

I may add that the order I propose to make for delivery would be "subject to the solicitor's lien," and that the documents when delivered to the trustee ought on the conclusion of the administration of the estate to be returned to Mr. Morrison and not retained by the trustee under Rule 110, unless the Court shall see fit at any future time to make other order concerning the documents or any of them. It may be that on the sale of the debtor's property the purchaser might call for the delivery of the title deeds, and whether he would be entitled to them as against the solicitor I do not now determine.

Frank Morrison in person.

G. M. Willoughby for the trustee.

ORDE, J.—I have carefully considered the judgment of the Registrar and see no reason for departing from the general principles, upon which his order is based. It was suggested, however, that as to certain of the documents in question the Registrar's decision was not applicable, the order covering some things as to which the trustee was really indifferent. As to those my order ought to provide that the Registrar's order be varied by excluding from its operation those documents which the trustee does not require.

The trustee is chiefly concerned with the company's charter and minute-book, and with a "Peat Atlas," and counsel for the trustee contended that the company's solicitor could claim no lien upon them, because they were in no sense the product of his work, but had come to his hands otherwise than in his capacity as solicitor for the company. But a solicitor's lien is not limited to those documents which he has produced, but is a general lien over all papers, even though handed to him for a particular purpose, which entitles him to "decline to hand them over unless paid any balance of costs that may be due to him in respect of all matters in which he has acted as solicitor for the client." 26 Hals. p. 816. The general lien may be taken away in effect by statute in certain cases, as in England in the case of those books of a joint stock company which the law directs shall be kept at the head office. Bankruptcy Rule 145 (53 D.L.R. 226), also makes it impossible to assert a lien upon a debtor's books of account. A solicitor's lien, being merely a passive one, ought

not to be permitted to hamper the trustee in dealing with the insolvent estate. For this reason I approve of the order made by the Registrar that such books and documents as are in Mr. Morrison's possession and as the trustee may require, be delivered up to the trustee in bankruptcy for the purpose of winding-up of the insolvent estate, but subject to Mr. Morrison's lien, and that upon the conclusion of the winding-up they may, subject to any further order, be returned to him. The Registrar's order will therefore be affirmed, with the slight variation already suggested as to those documents which the trustee does not require for the purposes of the winding-up.

There will be no costs of this application. The trustee's costs will be payable out of the estate.

Judgment accordingly.

KEATLEY v. CHURCHMAN.

Alberta Supreme Court, Walsh, J. November 11, 1921.

VENDOR AND PURCHASER (§ IE—27) — CONTRACT TO PURCHASE LAND—VENDOR INDUCED TO ACCEPT WORTHLESS SECURITIES AND GIVE TRANSFER—CONFIDENCE OF VENDOR IN THIRD PARTY ON WHOSE JUDGMENT HE RELIES—THIRD PARTY BRIBED BY PURCHASER—FRAUD —RESCISSION.

In an agreement for the sale and purchase of property the vendor relied on the judgment and business acumen of a third party in whom he had implicit confidence, such third party as a result of bribery on the part of the purchaser induced the vendor to accept as security for the land sold a number of notes and other securities which were absolutely worthless and in return for which he was induced to give a transfer of the land. The Court ordered rescission of the contracts on the ground of fraud.

ACTION for specific performance of two agreements for the sale and purchase of land.

H. H. Parlee, and *J. A. Mackenzie*, for plaintiff.

H. C Macdonald, K.C., for defendant.

WALSH, J.:—The defendant Churchman agreed to sell his farm to the plaintiff for $16,200 payable $250 in cash, $3,750 in 2 months and the balance in yearly instalments spread over a term of 5 years. Churchman shortly after assigned this agreement to the defendant Rea in payment or part payment for a farm purchased by him from Rea. The first of the deferred instalments of the purchase money, $2,500 and interest fell due on December 1, 1918. In November the plaintiff saw Rea and told him that he could not meet that payment even to the extent of the interest, but offered to transfer to him his choice of certain

Alta.

S.C.

KEATLEY v. CHURCHMAN.

Walsh, J.

securities which he held if he would accept the same in full satisfaction of the balance of the purchase money and give him a transfer of the land. Nothing resulted from that conversation then but later Rea went to see the plaintiff taking with him one Taylor to look after him in his negotiations. The plaintiff produced to these men a lot of documents which he euphemistically described as securities and offered them their choice of them to an amount equalling all but $2,500 of the unpaid purchase money and said that upon their acceptance of them he would be able to borrow from or through his wife $2,500 which he would pay and thus satisfy Rea's claim in full upon the agreement that he should then get a transfer of the land. Rea and Taylor consulted over the matter and finally agreed to accept the proposition. They culled from the securities offered them the following as coming more nearly than any of the others within the definition of "gilt-edged," namely four promissory notes aggregating $1,700 all of which were then overdue, an agreement of sale made by the plaintiff's wife as vendor with one Jackson as purchaser covering a quarter section on which $1,680 was unpaid, a chattel mortgage for $1,700, ten unimproved lots in the Bronx subdivision in Edmonton and 15 unimproved lots in the Stanley Park subdivision of Edmonton at an agreed value of $4,800. A writing evidencing this agreement dated November 15, 1918, was drawn up by Taylor and signed by the parties. Two weeks later and before this arrangement had been carried out the plaintiff went to Taylor and said that he would like to substitute for the Jackson agreement of sale certain shares held by his wife in the capital stock of a company known as Interior Securities Ltd. His excuse for wanting to make this substitution was that he wanted to borrow some money which he could manage with the help of the Jackson agreement as collateral. Taylor saw Rea about it with the result that an agreement was reached and reduced to writing under date of November 28, and signed by both parties that the plaintiff would deliver to Rea $5,000 worth of these shares in place of the Jackson agreement which shares the plaintiff might redeem within 2 years by the payment of $2,000 with interest at 8%. On the same day the plaintiff made his cash payment of $2,500 and handed over the securities covered by the two agreements with Rea except the title to the Edmonton lots. A transfer of these lots with the duplicate certificates of title is I understand now in Court, and the plaintiff brings this action for specific performance of his original agreement with Churchman as varied

by the two subsequent agreements with Rea. The title to the land covered by this agreement is still in Churchman who is ready and willing to transfer to such of the parties as the Court may direct. Rea resists the claim for specific performance of his two agreements with the plaintiff and asks rescission of them on the ground of fraud and misrepresentation and bribery by the plaintiff of his agent Taylor.

I find that Rea's consent to the agreement of November 15, was procured by the plaintiff's fraudulent misrepresentation. I accept the evidence of Rea as against that of plaintiff and Taylor that the chattel mortgage security was represented to be a first encumbrance on the mortgaged chattels whereas it is admittedly and to the plaintiff's knowledge a second charge on part of them. The representations made by the plaintiff as to the promissory notes though specious, and intended to lead Rea into the belief that they were absolutely good have not been proved to be untrue, although the fact that these notes still remain almost wholly unpaid 3 years after the making of this agreement justifies a suspicion at least that they are not what the plaintiff represented them to be. I do not think that the representations as to the Edmonton lots were actionable. They were more a matter of opinion though not honestly held and dishonestly expressed than a representation of an existing fact.

My finding as to the chattel mortgage would of course be quite sufficient to vitiate the entire transaction evidenced by the agreement of November 15, but unfortunately for himself Rea after learning of this fraud affirmed that agreement by accepting some small payments on a couple of the notes covered by it and taking renewals of two of them. Mr. Parlee admits that the second agreement, that of November 28, cannot stand, and expresses the plaintiff's willingness to take back the share certificate delivered to Rea under it and pay $2,000 in cash in its stead.

If I was disposing of this case on the question of misrepresentation I would give Rea a judgment for $1,700 with interest at 8% from July 17, 1918, compounded as provided for by the Dabels' chattel mortgage being his damages by reason of the plaintiff's false and fraudulent representation with respect to that mortgage and for $1,680 with interest thereon at 8% from November 28, 1918, being his damages by reason of the plaintiff's false and fraudulent representation with respect to the shares of Interior Securities Ltd., and I would decree that upon the payment of these sums and both defendants' costs of the action

Alta.

S.C.

KEATLEY v. CHURCHMAN.

Walsh, J.

and Rea's costs of the counterclaim the land should be transferred by Churchman to the plaintiff.

It is now however admitted by both the plaintiff and Taylor that the former paid to the latter $200 for securing Rea's consent to the new agreement of November 28, under which the worthless shares of Interior Securities were substituted for the perfectly good Jackson agreement. That payment was undoubtedly in the nature of a bribe to induce Taylor to betray his principal Rea and it succeeded, and I understand that it is because of this that Mr. Parlee admits that this agreement cannot stand. In addition to that the statements made by the plaintiff with respect to these shares were in my opinion so fraudulently untrue as to make it impossible for him to sustain that agreement.

There is however no direct evidence that the plaintiff bribed Taylor to procure Rea's consent to the agreement of November 15. They both swear that there was no bribery with respect to it and no understanding or suggestion that he should be paid or rewarded in any manner for the service he undoubtedly performed for the plaintiff when he procured Rea's acceptance of this offer. The defendant Churchman swears that Taylor told him that he was being paid a commission of 5% by the plaintiff on the whole deal of which he had received $400 in cash and a note for $200. Taylor denies all of this except the statement as to the $200 note which he admits and which was his bribe for his services in bringing about the second agreement. I unhesitatingly accept Churchman's word as against Taylor's. Churchman is a clean-cut, honest appearing fellow of whose truthfulness I have no doubt. I do not think that I can accept this as evidence against the plaintiff however although I might perhaps be justified in doing so on the ground that he and Taylor were in conspiracy to defraud Rea. It certainly however is admissible in contradiction of Taylor's solemn assertion that he was not bribed. I think though that I am quite justified in drawing the inference from all the facts in evidence that Taylor was bribed to secure Rea's assent to the agreement of November 18 and I so find.

That agreement was so far as Rea is concerned utterly improvident. He had in security for the $12,200 of unpaid purchase money and interest due to him the title to the land on which the substantial payment of $4,000 had been made a few months before and the personal covenant of the plaintiff whose oath is that he was worth considerable money. There is no suggestion

in the evidence that Rea would not have been able to realise the full amount owing him if he had retained his original security. Yet he was induced to substitute for it a lot of worthless junk which with the exception of the Jackson agreement out of which these worthies afterwards defrauded him, possessed practically no intrinsic value. Past due promissory notes for $1,700 of parties unknown to either Rea or Taylor were palmed off on Rea. Chattel mortgages covering second hand machinery and a mill building and machinery and other buildings which neither Rea nor Taylor ever saw and which they had no opportunity to inspect or enquire about except from the plaintiff were taken in satisfaction of another $1,700 of the plaintiff's well-secured liability. A value of $480 a lot was attributed to each of the ten lots in the Bronx subdivision and $4,800 more of this well-secured liability was thereby cancelled. These lots then had no actual value. There was no sale for them at all. If one could have been made I doubt very much on the evidence if $50 a lot could have been secured for them The opinion was expressed by the plaintiff during the negotiations that they would be worth $480 in 2 or 3 years time and so on this insincere opinion a present value of $480 was attributed to each of these then absolutely valueless parcels. The Stanley Park lots were admittedly worth nothing and so they were thrown in without any value being given to them doubtless either to impress this simple man Rea with a good opinion of the plaintiff's fairness or as a deodoriser to take away some of the smell from this rotten transaction. Now Taylor was the man upon whom Rea relied for protection in the making of this agreement. He had acted as his agent in putting through the deal with Churchman under which Rea had become the assignee of the agreement of sale between Churchman and Keatley. He had implicit confidence in him. Rea is a simple-minded man, who is quite without business experience and absolutely lacking in business acumen. The plaintiff is a keen-witted, unscrupulous man with an extensive business experience. In about 5 years he cleaned up in Edmonton out of a pool room and a rooming house and a restaurant between $30,000 and $40,000. Rea would be simply a child in his hands if left to himself and I think he realized that and so he took with him to protect him Taylor his trusted agent. Taylor says that for this first agreement Rea alone is responsible, that he (Taylor) tried to keep him out of it, that he pointed out the folly of giving up the unquestionable security that he held for such worthless stuff as he was taking over but that Rea was so anxious to get the

Alta.

S.C.

KEATLEY v. CHURCHMAN.

Walsh, J.

$2,500 in cash to meet his pressing needs and that he insisted upon going through with it. I don't believe a word of this. I am satisfied that Taylor could have kept him out of it if he had wanted to and that he only went into it because Taylor approved of it. It must have been either lack of intelligence or absolute dishonesty that impelled Taylor to this course. He is no fool. On the contrary he is a bright, intelligent man of fair education, who was then practising as a druggist and chemist carrying on the business of notary public, conveyancer, real estate, loan and insurance agent. The two agreements in question were drawn by him and give some line upon his qualifications in that kind of work. For a layman they are exceedingly well-drawn. I must absolutely acquit him of stupidity and so the only reason I can find for his conduct is that he betrayed his trust and that he was paid for his treachery. He admits that he knew that the Bronx lots were then unsaleable and yet he permitted his principal, who was relying upon him, to throw away $4,800 of a perfectly good security for them. No man as intelligent as he is could have done that honestly. The confession now made by each of the two conspirators of the bribery in connection with the second agreement (though neither of them admits that the money was paid as a bribe) justifies a suspicion of their honesty in the earlier transaction. The shares which Taylor induced Rea to accept under the second agreement were not worth the paper on which the imposing share certificate with its impressive gold seal was engraved, and I think Taylor knew it. And yet for $200 of the plaintiff's money he induced Rea to accept this truck and part with a security worth $1,700. Surely I am justified in thinking as I most certainly do that when this man was so dishonest in this transaction he was equally so in the first one, especially when he encouraged his principal into a contract so absolutely improvident as it was. It may be said that their admission of the subsequent bribery entitles them to have their word of denial as to corruption in the first agreement accepted. I am sure that this admission was only made because its fact was so easily capable of proof. The payment was made by note which I understood Churchman to say that he saw and which afterwards went into the bank. Taylor when first charged by Rea with having taken this money denied it and became very indignant over the charge. I am satisfied that he only told the truth about it when he knew that the charge could be proved. I accept Rea's word as against that of the plaintiff or of Taylor or both of them combined wherever they clash. I think Rea

is an honest man and I am satisfied that the plaintiff and Taylor are unscrupulous.

I find therefore that both of the agreements between the plaintiff and Rea were induced by the plaintiff's bribery of Taylor, of which Rea did not become aware until after this action was brought. I dismiss the action with costs to both defendants and grant the defendant rescission of these contracts with costs.

The sum of $2,500 in cash paid by the plaintiff was the instalment due at that date on the original agreement and Rea is not bound to make restitution of that but is entitled to retain it and apply it in payment of that instalment. The small amounts received by Rea on the notes he must return to the plaintiff or apply them upon the purchase money as of the dates of their receipt as the plaintiff may elect. Churchman will transfer the land to Rea subject to the plaintiff's agreement of sale.

Judgment accordingly.

ROBILLARD v. THE "ST. ROCH" AND CHARLAND.

Exchequer Court of Canada, Maclennan, D.L.J. in Adm. June 13, 1921.

COURTS (§ IVD—274)—JURISDICTION OF EXCHEQUER COURT OF CANADA SITTING AS AN ADMIRALTY COURT—MARITIME LAW OF ENGLAND—BILL OF SALE OF SHIP—BAD FAITH—SETTING ASIDE—CONCLUSIVENESS OF ENTRY IN REGISTER OF SHIPPING AS TO SALE.

The Exchequer Court of Canada as a Court of Admiralty is a Court having and exercising all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890 (Imp.), ch. 27, over the like places, persons, matters and things as are within the jurisdiction of the Admiralty Division of the High Court of England, whether by virtue of a statute or otherwise, and as a Colonial Court of Admiralty it may exercise such jurisdiction in like manner and to as full an extent as the High Court of England.

Where the question of ownership is raised the Court will inquire into the circumstances of the sale, the entry in the register of shipping not being conclusive evidence of such sale, and where the purchaser has bought in bad faith and knowing that the vendor was committing a fraud the sale will be set aside.

A bill of sale of a ship which does not comply with the provisions of sec. 24 of the Merchant Shipping Act, 1894 (Imp.), ch. 60, does not transfer the ownership therein.

ACTION *in rem* by which plaintiff claims the ownership and possession of defendant ship, and prays that the sale and transfer thereof be set aside on the ground of bad faith. Sale set aside.

Conrad Pelletier, K.C., for plaintiff.

F. J. Bisaillon, K.C., for defendant and intervenant.

MACLENNAN, D.L.J.A.:—This is an action *in rem* by which plaintiff claims the ownership and possession of the sailing sloop

Can.

EX. C.

ROBILLARD v. THE "ST. ROCH" AND CHARLAND.

Maclennan, D.L.J.A.

St. Roch.....The action is contested by the intervenant, Alcide Charland.

Plaintiff's case is that, on June 17, 1897, he bought the *St. Roch* through Calixte Deneau from Adolphe Laperriere, Jr., with his own money, and, as he was then involved in some litigation with his wife, took a bill of sale from Laperriere in the name of his uncle, Joseph Robillard, as purchaser, which bill of sale was registered at the Custom House, Montreal, on June 29, 1897; that he took possession of and operated the sloop from that date for his own profit and benefit, and kept the sloop in repair until the close of the navigation season of 1918; that his uncle Joseph Robillard, died on October 17, 1905, leaving a will under which his wife, Annie de Lorimier, was the universal legatee and sole executrix and that she, at plaintiff's request, on March 3, 1908, executed a bill of sale of the *St. Roch* to Melina Robillard, a sister of plaintiff, which bill of sale was duly registered on June 22, 1908; that Melina Robillard allowed her name to be used in said bill of sale for the purpose of holding the *St. Roch* for and on behalf of plaintiff; that she had no real interest in the sloop; that she died on February 11, 1919, leaving a will in which she appointed her nephew, Nathaniel Rondeau, executor and trustee and that the latter, during plaintiff's illness and without his knowledge or consent, knowing that Melina Robillard had no interest in the *St. Roch*, and that she was only holding the sloop in her name for the plaintiff, illegally and in bad faith, by an irregular bill of sale dated May 12, 1919, and registered August 15, 1919, purported to sell the sloop for an insignificant price to the intervenant, Alcide Charland, and by his action the plaintiff claims to be declared the sole and real owner of the sloop and its equipment, and to be put in possession thereof.

The intervenant's case is that he is the sole and actual owner of the *St. Roch* in virtue of the will of Melina Robillard and the bill of sale of May 12, 1919, in which intervened Anthime Robillard and Maria Anne Robillard, wife of Louis Rondeau, in their quality of sole legatees of Melina Robillard. The intervenant admits the bills of sale from Laperriere to Joseph Robillard and from Annie de Lorimier to Melina Robillard and the death of the latter, and all other allegations of the plaintiff's claim are denied, and the intervenant concludes for the quashing of the arrest of the *St. Roch* and the dismissal of plaintiff's action with costs.

The first important question to be decided is:—Is it the Maritime Law of England or the Canadian Law which governs the

rights of the parties in respect to plaintiff's claim for title and possession of the sailing sloop *St. Roch*? The Exchequer Court of Canada as a Court of Admiralty is a Court having and exercising all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890 (Imp.) ch. 27, over the like places, persons, matters and things as are within the jurisdiction of the Admiralty Division of the High Court in England, whether exercised by virtue of a statute or otherwise, and as a Colonial Court of Admiralty it may exercise such jurisdiction in like manner and to as full an extent as the High Court of England.

In *The Gaetano and Maria* (1882), 7 P.D. 137, Brett, L.J., at p. 143, said:—

"The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English maritime law."

Although the Exchequer Court in Admiralty sits in Canada it administers the Maritime Law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty.

The plaintiff's action is based upon sec. 4 of the Admiralty Court Act, 1840 (Imp.), ch. 65, which provides that the Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel arising in any cause of possession which shall be instituted in the said Court after the passing of that Act. This is a cause of possession.

26 Hals. p. 15, says:—

"Ownership in a British ship or share therein may be acquired in any of three ways—by transfer from a person entitled to transfer, by transmission or by building. Acquisition by transfer and transmission have been the subject of statutory enactment. Acquisition by building is governed by the common law. Ownership in a British ship or share therein is a question of fact and does not depend upon registration of title. Whether registered or unregistered, the person in whom ownership in fact vests is regarded in law as the owner—if registered, as the legal owner; if unregistered, as the beneficial owner."

The statutory provisions applicable to the transfer of a registered ship are to be found in the Merchant Shipping Act 1894 (Imp.) ch. 60, sec. 24, and beneficial or equitable ownership is

Can.

Ex. C.

ROBILLARD v. THE "ST. ROCH" AND CHARLAND.

Maclennan, D.L.J.A.

recognised in sec. 57, and sec. 91 make these provisions applicable to Canada.

The register of the *St. Roch* shews that she was built in 1894 and registered on July 27, 1896, in the name of Adolphe Laperriere, Jr., as owner; that he executed the bill of sale in favour of Joseph Robillard, whose executrix executed a bill of sale in favour of Melina Robillard, and whose executor in turn executed a bill of sale to Charland, the intervenant. If these several bills of sale and their registration are conclusive evidence of ownership, the plaintiff has no case. He, however, claims a right to look behind the bills of sale and investigate all the surrounding circumstances in order to determine the real character of the bills of sale and to establish that he was at all times since the registration of the bill of sale in favour of Joseph Robillard, the real beneficial and equitable owner of the sloop and that, although Joseph Robillard and Melina Robillard appeared on the register as the registered owner, each of them was in fact only his nominee or trustee holding the apparent and registered title for his benefit and on his behalf, or under the title, as it is known in the Province of Quebec in civil matters, of a *prete-nom* for him. The right of the Court in a case like this to inquire into the validity of the bills of sale and into all other circumstances affecting the right of property in the sloop is clearly recognised in the Maritime Law of England, as will appear from a reference to the following cases:—*The Victor* (1865), 13 L.J. 21; *The Empress* (1856), Swabey 160, 3 Jur. (N.S.) 119, 5 W.R. 165; The *Margaret Mitchell* (1858), Swabey 382, 4 Jur. (N.S.) 1193; *Gardner v. Cazenove* (1856), 1 H. & N. 423 at pp. 435, 436, 156 E.R. 1267, 26 L.J. (Ex.) 17, 5 W.R. 195; *Orr* v. *Dickinson* (1859), 28 L.J. (Ch.) 516 at p. 520, 5 Jur. (N.S.) 672; *Holderness* v. *Lamport* (1861), 30 L.J. (Ch.) 489 at p. 490, 29 Beav. 129, 54 E.R. 576, 7 Jur. (N.S.) 564, 9 W.R. 327; *Ward* v. *Beck* (1863), 32 L.J. (C.P.) 113 at p. 116, 13 C.B. (N.S.) 668, 143 E.R. 265, 9 Jur. (N.S.) 912; *The Innisfallen* (1866), L.R. 1 A. & E. 72 at p. 76; *The Jane* (1870), 23 L.J. 791; *The Rose* (1873), L.R. 4 A. & E. 6.

The same principles were adopted and applied by the Local Judge of this Court in British Columbia recently in the case of *Haley* v. *S.S. "Comox"* (1920), 56 D.L.R. 662, 20 Can. Ex. 86.

Applying the principles laid down in these cases, it is clearly established that the plaintiff became the purchased and real owner of the sloop in 1897; that he paid the price with his own money and remained in possession until the end of 1918; that

during all these years he kept the sloop in good order and repair at his own expense and that he never rendered any account of his operations to his uncle, Joseph Robillard, nor to his sister, Melina Robillard, nor to any one else. He was in fact openly and publicly in possession and operating the sloop for his own benefit and advantage and no one else ever claimed to be the real owner of the *St. Roch*. On the death of Joseph Robillard, his widow, knowing the sloop really belonged to plaintiff, executed at his request the bill of sale in favour of plaintiff's sister, Melina Robillard, who was unmarried, living in plaintiff's house as a member of his family and never exercised or claimed any right of ownership in the sloop. There is evidence that during her lifetime she admitted that the *St. Roch* belonged to plaintiff. At the close of the navigation season of 1918, plaintiff laid up the sloop at Berthier for the winter. In January, 1919, he became ill and came to Montreal for an operation in an hospital and was ill and unable to attend to business matters during practically the whole of that year. During his illness his sister died and the sloop passed into the possession of Charland in May, 1919. The evidence clearly establishes that although the sloop was registered, first, in the name of Joseph Robillard, afterwards, in the name of Melina Robillard, the plaintiff was during all these years the real owner.

The intervenant Charland claims title under the bill of sale dated May 12, 1919, and registered August 15, 1919, in connection with which two important questions have to be considered. First, was the transfer of the *St. Roch* to Charland made in accordance with the provisions of the Merchant Shipping Act? And second, did Charland buy the sloop in good faith and without knowledge of fraud on the part of Nathaniel Rondeau? Unless both these questions can be answered in the affirmative, Charland's title is defective.

Under sec. 24 of the Merchant Shipping Act a registered ship shall be transferred by bill of sale which shall be executed by the transferor in the presence of and be attested by a witness or witnesses. The bill of sale upon which Charland relies describes the transferors as being Nathaniel Rondeau, executor under the will of Melina Robillard, and Anthime Robillard and Marie Anne Robillard, wife of Jean Louis Rondeau, sole legatees of Melina Robillard, who, "In consideration of the sum of $850.00 paid to us by Alcide Charland, of 263 Moreau Street, in the said City of Montreal, Province of Quebec, Canada, Sailor, the receipt whereof is hereby acknowledged, transfer 64 shares

Can.

Ex. C.

ROBILLARD v. THE "ST. ROCH" AND CHARLAND.

Maclennan, D.L.J.A.

in the ship above particularly described, and in her boats, guns, ammunition, small arms and appurtenances to the said Alcide Charland. Further, we, the said Anthime Robillard and Marie Anne Robillard, for ourselves and our heirs covenant with the said Alcide Charland and his assigns, that we have power to transfer in manner aforesaid the premises hereinbefore expressed to be transferred and that the same are free from incumbrances. In witness whereof we have hereunto subscribed our name and affixed our seal this twelfth day of May, one thousand nine hundred and nineteen.

Executed by the above named Anthime Robillard and Marie Anne Robillard, in the presence of:—Donat Martel, Notaire, Notary Public, 92 Notre-Dame East, Montreal.

Anthime Robillard, Marie Anne Robillard, Jean Louis (his X mark) Robillard.

Witness: Rene Coutu, Nathaniel Rondeau."

This bill of sale purports to shew that Anthime Robillard and Marie Anne Robillard executed it, that they signed it in the presence of Donat Martel. No witness was examined to prove the execution of the bill of sale, but Alcide Charland swore that it was signed by Nathaniel Rondeau; he does not say that Rondeau signed in his presence. According to Charland's evidence, he bought from Rondeau as executor. Under the will of Melina Robillard the two legatees, Anthime Robillard and Marie Anne Robillard certainly had no power to sell the sloop. By sec. 24 of the Merchant Shipping Act, the bill of sale must be in the form given in the first schedule of the Act and must be executed by the transferor in presence of and be attested by witness or witnesses. There is no witness or attestation of the signature of Nathaniel Rondeau in the bill of sale. The notary Donat Martel, witnessed and attested the signatures of Anthime Robillard and Marie Anne Robillard. The Privy Council, in 1912, in the case of *Shamu Patter* v. *Abdul Kadir Ravuthan* (1912), 28 Times L.R. 583, L.R. 3 Ind. App. 218, laid down the principle that the word "attesting" in a statutory provision similar to sec. 24 of the Merchant Shipping Act meant the witnessing of the actual execution of the document by the person purporting to execute it. Rondeau does not covenant that he had power to make the transfer. This is another defect in the bill of sale.

In *Burgis* v. *Constantine*, [1908] 2 K.B. 484, 77 L.J., (K.B.) 1045, 99 L.J. 490, 13 Com. Cas. 299, 11 Asp. M.C. 130, 24 Times L.R. 682, Sir Gorell Barnes, at page 1052 (L.J.K.B.), said:—

"Beneficial owners who leave their shares on the register in

the name of another person are to be bound by anything he does in the manner provided by the Act, but not otherwise." See also observations of Fletcher Moulton, L.J., p. 1053, and Farwell, L.J., p. 1055.

Assuming that Nathaniel Rondeau, as executor, had the right to transfer the sloop by bill of sale, it is settled law that he could only do so in the manner provided by the Act and not otherwise. The bill of sale in this case has not been executed in the manner provided by the Act, and I come to the conclusion that it did not transfer the *St. Roch*.

There remains the question whether Charland bought in good faith and without knowledge of fraud on the part of Rondeau. Charland admits that he has been a navigator for 15 years, with the exception of a period of 4 years immediately preceding his purchasing of the *St. Roch*, and that while he was navigating he knew the *St. Roch* and had always seen plaintiff in charge of her. The price of $850 which he paid was not a reasonable price. The *St. Roch* was worth fully twice that sum. At the trial, plaintiff swore that he met Charland in Montreal, about March 21, 1921, and had some conversation with him concerning Charland's purchase, and plaintiff swore in examination in chief and also in cross-examination, that one of Charland's statements to him was: "Il m'a dit qu'il n'avait pas droit de le vendre, mais qu'il le vendait quand meme." [translated, "He told me he had not the right to sell it but he would nevertheless."] It is rather significant that Charland subsequently called as a witness on his own behalf, did not deny this statement. The circumstances surrounding the transaction were sufficient to put Charland on inquiry and it is reasonable to infer that he entered into the transaction knowing that Rondeau was committing a fraud on plaintiff. Rondeau was not examined as a witness, but the evidence shews he knew plaintiff was the beneficial owner of the sloop. All the circumstances of the alleged purchase go to indicate that Charland was not acting in good faith.

The evidence in this case and the principles of law applicable lead me to the conclusion that the plaintiff has established his claim as the real owner of the *St. Roch;* that the bill of sale relied upon by Charland was not executed in accordance with the provisions of the Merchant Shipping Act and is therefore invalid and void as a transfer and that the intervenant, Charland, did not acquire the sloop in good faith, and there will therefore be judgment pronouncing Jean Baptiste Robillard, the plaintiff, to be lawful owner of the sloop *St. Roch*, and that

B.C.

C.A.

LOEWEN v. DUNCAN.

Macdonald, C.J.A.

he is entitled to be registered as the sole owner thereof, declaring null and void the bill of sale to Charland, dated May 12, 1919, and registered August 15, 1919, and its registration, and that possession of the said sloop be delivered to him by Charland, with costs against the latter.

Judgment accordingly.

LOEWEN v. DUNCAN.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. October 14, 1921.

VENDOR AND PURCHASER (§ IE—26)—ACCEPTANCE OF TITLE—POSSESSION FOR NUMBER OF YEARS—PERMANENT IMPROVEMENTS BY PURCHASER—DEATH OF VENDOR—RESCISSION ON THE GROUND OF MUTUAL MISTAKE.

A purchaser who accepts the title takes the conveyance and pays the purchase money and is put into possession of the property cannot afterwards rescind the contract on the ground of mutual mistake merely because of a difference in value or quantum or area between what was supposed to be and what was taken, unless it is such as to render the property valueless for the purpose for which it was to be used. In any case where the purchaser has been in possession for a number of years and has made permanent changes and improvements to the property, so the parties cannot be restored to their original positions and after the death of the vendor, rescission will not be granted.

[*Allen* v. *Richardson* (1879), 13 Ch. D. 524; *Thomas* v. *Powell* (1794), 2 Cox 394, 30 E.R. 182; *Penrose* v. *Knight* (1879), Cassels' Digest 1875-1893, 776; applied.]

APPEAL from the judgment of Gregory, J., refusing to grant rescission of a contract for the sale and purchase of land on the ground of mutual mistake. Affirmed.

J. A. Aikman, for appellant, *C. J. Prior*, for respondent.

MACDONALD, C.J.A.:—The land in question was purchased by the late Mrs. Loewen by description according to registered plan. She subsequently sold and conveyed the lots to the appellant by the same description and without knowledge of error, if any, in the plan. The appellant gave a mortgage to secure the balance of the purchase money and that mortgage being in arrears, the present action was brought by the executors of the late Mrs. Loewen for foreclosure.

The defence set up to the action is that the plan does not conform to a true survey of the land in question, which abuts on the shore of Shawnigan Lake. The alleged mistake was in the shore lines, and which if corrected, would, she alleges, deprive her of part of the land apparently embraced by the lots as shown on the plan. The result of this alleged error she al-

leges is to deprive her of one half of a rocky point projecting into the water with a convenient bay for landing, and to cut down the acreage of her land by rather more than one half. A re-survey would affect adjoining lot-owners, but no adverse claim has been made against the appellant by such, who have not disturbed or threatened to disturb her in the possession and enjoyment of the premises.

The appellant purchased the lots and entered into possession thereof in 1913, and shortly thereafter had notice of the alleged error through Harris while he was surveying an adjoining lot. Appellant's husband communicated this information to Jones, who had been Mrs. Loewen's agent. They consulted a solicitor who advised that the plan governed, and from that time to the issue of the writ, appellant took no action in respect of the alleged error. The evidence does not disclose whether or not the solicitor consulted was the solicitor of the respondent, nor does it shew that Jones had any authority to represent Mrs. Loewen in such consultation or to receive and transmit to her the complaint made by appellant.

While fraud is pleaded, there is not a tittle of evidence to support it, and the Judge below has so held. That issue was abandoned before this Court and appellant's case was founded upon mutual mistake, upon which she asks for rescission.

After careful review of the authorities, Malins, V.C. in *Allen* v. *Richardson* (1879), 13 Ch. D. 524 at p. 541, said:—"I do not think there is a more important principle than that a purchaser investigating a title must know that when he accepts the title, takes the conveyance and pays his purchase-money and is put into possession, there is an end to all as between him and the vendor on that purchase."

And he points out the consequences which would, in his opinion, follow if this were not so.

As early as 1794, in *Thomas* v. *Powell* (1794), 2 Cox 394, 30 E.R. 182, the Court refused to stop the payment out of Court of purchase money to the vendor after conveyance, notwithstanding that the purchaser was threatened with eviction by a person claiming a superior title. In *Penrose* v. *Knight* (1879), reported so far as I am aware, only in Cassels' Digest, 1875-1893, pp. 776, 777, it was sought to rescind a contract perfected by conveyance, on the ground of fraud. The Court of Appeal for Ontario agreed with the trial Judge that there was no fraud, but differed from him by holding that after conveyance the purchaser was confined to his remedy on the covenants. This was affirmed by the Supreme Court of Canada.

B.C.

C.A.

LOEWEN v. DUNCAN.

Macdonald, C.J.A.

We were referred to a decision of the Supreme Court of the United States which is of interest. The Court was dealing with a principle of the common law, namely, as to whether after completion there could be relief except upon the covenants. The Court said that it was the settled law of that Court that in the absence of fraud or actual eviction, the vendee in possession cannot controvert his vendor's title; that the rule was founded on reason and justice; that in such cases the vendor by his covenants, if there were such, agrees upon them and not otherwise to be responsible for defects of title, and if there are no covenants, he assumes no responsibility but the purchaser takes the risk.

That a contract induced by fraud may be rescinded after conveyance is not open to controversy, and it is equally well settled that innocent misrepresentation or mistake is ground for relief before conveyance, but there is to be found in several cases, language to the effect that the contract may be rescinded even after completion upon the ground of mutual mistake. For example in *Jones* v. *Clifford* (1876), 3 Ch. D. 779 at p. 793, which by the way was an action for specific performance, it was said that *Scott* v. *Coulson*, [1903] 2 Ch. 249, was a case where relief was granted after completion on the ground of mistake, but I think, with respect, that the Court of Appeal decided the case on the ground of mistake followed by fraud before completion, and moreover, in that case the life insured had ceased to exist before the date of the contract, there being therefore a total failure of consideration. In *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98, freehold stabling, with dwelling rooms above were sold and conveyed, and a year later the purchaser discovered that the vendor was not the owner of some of the rooms nor of part of the cellar, yet, rescission was refused. I think it will be found that dicta to the effect that rescission may be decreed for common mistake after completion were spoken in reference to cases where money was paid or obligations assumed for which there was a total failure of consideration. *Cole* v. *Pope* (1898), 29 Can. S.C.R. 291, or misapprehension as to the continued existence of the subject matter or as to the ownership, such as occurred in *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126, 27 E.R. 934, and *Cooper* v. *Phipps* (1867), L.R. 2 H.L. 149.

In *Kennedy* v. *Panama etc. Mail Co.* (1867), L.R. 2 Q.B. 580 at p. 587, Lord Blackburn said:—"But where there has been innocent misrepresentation or *misapprehension*, it does not authorize a rescission unless it be such as to shew that there is a complete difference in substance between what was supposed to

be and what was taken so as to constitute a failure of consideration."

The difference in substance there referred to, cannot, I think, be a difference merely in value or quantum or area. It may no doubt be proper to say that if the difference between what was contracted for and what was taken were such as to render the balance valueless for the purpose for which it was used, that would be a difference in substance. In *Tyrell* v. *Woodhouse* (1900), 82 L.T. 675, Cozens-Hardy, J., said:— "Counsel have not been able to discover a single instance of setting aside a purchase after conveyance except because of fraud or total failure of consideration."

And *Johnson* v. *Johnson* (1802), 3 Bos. & P. 162, 127 E.R. 89, distinctly affirms the applicability of the maxim *caveat emptor* to purchasers of land and the general rule that the purchaser must look to his covenants except where there has been fraud or total failure of consideration i.e., when an action will lie for money had and received.

It cannot, I think, be said in this case, that there was such a difference in substance as Lord Blackburn had in mind or that there was more than a partial failure of consideration. In her counterclaim the appellant makes an alternative claim for damages for the deficiency which she places at $1,600, the whole contract price being $3,500.

The appellant has been in possession of the property since the year 1913; has made permanent improvements she claims in the erection of buildings and fences. Putting aside for the moment the question as to whether she was guilty of laches or not, it appears to me that the parties cannot be restored to their original respective positions. After 8 years of possession and after extensive changes in the corpus, and when the market for such property may have materially fallen and the vendor is dead, there ought to be no rescission, even apart from what I have said above.

By anything I have said above, I do not wish to intimate that the appellant is, in my opinion, not entitled to the land as depicted on the registered plan. That is a question which may possibly arise in the future should appellant's title to the land she occupies be challenged by an adverse claimant.

The appeal should be dismissed.

MARTIN, J.A., (dissenting), would allow the appeal.

MCPHILLIPS, J.A., agrees with Macdonald, C.J.A.

Appeal dismissed.

Sask.

K.B.

REX v. DONOVAN.

(Annotated)

REX v. DONOVAN.

MacDonald, J.

Saskatchewan King's Bench, MacDonald, J. November 15, 1921.

GAMING (§ I—6)—KEEPING COMMON GAMING HOUSE—SETTING ASIDE PART OF STAKES IN POKER GAMES TO COMPENSATE PROPRIETOR FOR REFRESHMENTS SUPPLIED—PURPOSE OF "BANKER" IN GAME TO AID IN MAINTAINING GAMING HOUSE — LIABILITY AS AN AIDER AND ABETTOR—CRIM. CODE SECS. 69, 226, 228.

A person who aids and abets in the keeping of a common gaming house may be convicted of the keeping under Cr. Code secs. 69, 226, and 228; and where an incorporated club permitted the playing of stud poker on its premises and received as compensation for refreshments consumed by the players the value of white chips each representing 25 cents one of which was set aside out of every "large pot" at the discretion of the "banker" selected by the players themselves, and the "banker" is found to have acted as the agent of the club and to have received a portion of the stakes on its behalf, he is an aider and abettor and as such is liable to conviction for the principal offence of keeping.

[See Annotation on "Aiding and Abetting Club in Keeping Common Gaming House," at end of this case.]

MOTION for a writ of certiorari to quash a conviction for unlawfully keeping and maintaining a common gaming house contrary to sec. 226 (b) and sec. 228 of the Criminal Code. Motion dismissed.

T. A. Lynd, for applicant.

F. A. Sheppard, for informant.

MACDONALD, J.:—This is an application to quash a conviction made by Fred M. Brown, Justice of the Peace, of William Donovan on an information that he, on April 14, 1921, at the city of Saskatoon, did unlawfully keep and maintain a disorderly house, that is to say a common gaming house, being a room in the Annex Block, No. 214, 21st St. East in the city of Saskatoon, used for playing therein a game of chance, to wit stud poker, contrary to sub-section (b) of sec. 226 and to sec. 228 of the Criminal Code.

The facts are that the Cosmopolitan Club is an incorporated club having its rooms in said annex. On the evening in question the police of the city of Saskatoon raided the premises and found therein 9 persons, of whom the accused was one, playing stud poker, which is admittedly a game of chance or of mixed chance and skill. In the game in progress that evening the accused was the banker, that is to say he sold chips to the players and bought or redeemed the same at the conclusion of the game. The practice at these games was as follows: The Cosmopolitan Club kept on hand soft drinks, cigars, cigarettes and chewing gum. The players were privileged to help themselves to these

refreshments, and sometimes during the progress of the game the players would send out to a restaurant and order a lunch to be sent up. At the commencement of the evening's "session" the players would select from among themselves the particular player who would act as banker for the evening; and from "pots" which are referred to as "large pots," that is pots usually averaging over $20, but all in the judgment of the banker, a white chip representing 25c. would be taken out and set aside to pay for the refreshments, cigars, cigarettes or gum, consumed during the evening. The supplies kept on hand by the club were in the first place paid for out of club funds, but the club was reimbursed by being handed over the amount represented by the white chips so set aside as aforesaid. The banker himself did not personally retain any rake-off. Under these facts it is argued that the accused was not a "keeper" within the meaning of the Code.

A "common gaming-house" is defined as follows [See Can. Stat. 1918, ch. 16, sec. 2, amending Code sec. 226]

"226. A common gaming-house is,— (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 (ia) The whole or any portion of the stakes or bets or other proceeds at or from such games is either directly or indirectly paid to the person keeping such house, room or place; 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.

"(2) Any such house, room or place shall be a common gaming-house, although part only of such game is played there and any other part thereof is played at some other place, either in Canada or elsewhere, and although the stake played for, or any money, valuables, or property depending on such game, is in some other place, either in Canada or elsewhere."

The rooms in question were admittedly used for playing therein at a game of chance or a mixed game of chance and skill. It is clear from the evidence that a portion of the proceeds of the game was paid to the Cosmopolitan Club to reimburse the club for the drinks, etc., consumed by the players. The Cos-

ANNOTATION

mopolitan Club was, therefore, the keeper of a common gaming-house. On the night in question the accused was acting as the representative or agent of the club and received on behalf of the club some proceeds of the game. Section 69 of the Code provides that "Every one is a party to, and guilty of an offence, who ..... (b) does or omits an act for the purpose of aiding any person to commit the offence." The accused did an act for the purpose of aiding the Cosmopolitan Club to commit the offence of keeping a common gaming-house contrary to sec. 226 of the Code, and is therefore a party to and guilty of the offence himself.

The application for certiorari and to quash the conviction is dismissed with costs.

Certiorari motion dismissed.

ANNOTATION

OFFENCE OF AIDING AND ABETTING CLUB IN KEEPING COMMON GAMING HOUSE—CR. CODE, SECS. 69, 226, 228.

The importance of the cases dealing with the question of 'gain' under Cr. Code sec. 226 has been minimised by the amendment of 1918, adding para. (1a) to sub-sec. (b). No matter how small the share of the stakes or other proceeds which the keeper receives either directly or indirectly, such receiving brings the place within the definition of sec. 226, and the keeper within the penalties of sec. 228. *R.* v. *Johnson* (1919), 32 Can. Cr. Cas. 7 (Alta.)

A place is a common gaming house because of the fact alone that the proprietor sold cards for which he was paid out of the games which means, if not direct, certainly an indirect, payment to the person keeping such place. *R.* v. *Johnson, supra.*

As regards the offence of aiding and abetting in the keeping of a common gaming house, the decision in *R.* v. *Donovan*, above reported, appears to rest largely, if not entirely, upon the finding that the purpose of defendant's act was to aid the club in keeping a common gaming house and that defendant was acting as the representative or agent of the club and received on behalf of the club some proceeds of the game of "stud poker," such being a game of chance or of mixed chance and skill within the terms of Cr. Code sec. 226. Different considerations would arise in a case in which no such agency for the club was made out. Whether or not the banker received the rake-off for refreshments for and on behalf of the club is a question of fact in each particular case. In the *Donovan* case, mention is made of the custom which prevailed at the club,

and it probably is to be inferred that the evidence shewed a knowledge of this custom on the part of the accused although it is not stated that he was a member. The gist of the offence by an alleged aider and abettor is that he did some act for the *purpose of aiding* another to commit the offence or abetted such person in the commission of the offence. Cr. Code sec. 69.

If such purpose did not appear, the mere fact of a banker in a poker game at a club setting aside chips at the request of his fellow players to pay for refreshments would not make him criminally responsible for the act of the club in keeping a common gaming house. It may happen that the banker on a particular occasion is not a member of the club and is not aware of, nor concerned with, the destination of the rake-off set aside for refreshments. These might have been supplied by a caterer other than the club itself while the club retained the control and management of the premises.

SHEEHAN v. BANK OF OTTAWA.

Quebec Superior Court, Maclennan, J. January 28, 1921.

MASTER AND SERVANT (§ IIIA—293)—JUNIOR CLERK IN BANK—INSTRUCTIONS TO CARRY LOADED REVOLVER — INSTRUCTIONS TO RETURN REVOLVER TO VAULT WHEN NOT USING AS INSTRUCTED—REVOLVER TAKEN HOME AT NIGHT BY CLERK—PLAYMATE SHOT AND KILLED WHILE PLAYING IN EVENING—LIABILITY OF BANK.

A bank cannot be held liable in damages for the action of its junior clerk who, engaged by it to attend the bank messenger with a loaded revolver which he is to hand to the messenger if necessary to be used by him for his protection, and having instructions to return the revolver to the bank vault when not carrying it as instructed, takes the revolver home with him without the permission or knowledge of the bank, and shoots and kills a companion while playing with him on the street in the evening.

APPEAL by defendant from the verdict of a jury for $1,500 for damages for the death of plaintiff's son who was shot by an employee of the defendant, while playing on the street in the evening, with a revolver belonging to the defendant and which had been taken from the bank without the knowledge of the bank and against its express instructions. Reversed.

Laflamme, Mitchell & Callaghan, for plaintiff.
Lafleur, MacDougall & Co., for defendant.

MACLENNAN, J.:—This is an action in damages by the father of a young boy who was shot on McGill College Ave., in the City of Montreal, on the evening of January 17, 1921, by one Douglas E. Stott with a revolver belonging to the defendant which Stott

Que.

S.C.

SHEEHAN v. BANK OF OTTAWA.

Macdonnan, J.

had surreptitiously taken home with him when his day's work was over at the bank defendant where he was employed as a junior clerk. It is alleged in the declaration that Stott had been instructed by the defendant to accompany the latter's messenger on errands on bank matters to other banks and to the clearing house and, that for protection of the messenger while on such duty, Stott had been given a loaded revolver to be used, if necessary, while accompanying the messenger and to be returned and deposited in one of the vaults of the defendant when his duties for the day were over. The messenger had a license to carry a revolver; Stott had not. In the afternoon of January 17, 1919, Stott, in violation of his instructions and without the knowlege of the messenger or any one connected with the bank, took the revolver out of the bank, and about eight o'clock that evening met plaintiff's young son and some other boys on McGill College Ave. and shot young Sheehan who died as the result of the shooting. The case was tried before a jury and the jury found that plaintiff's son was killed on January 17, 1919, by being shot with a revolver, the property of defendant, discharged by Stott, an employee of the bank, and in answer to question 5 reading as follows:—"Was the said accident due to the fault and negligence of defendant, its servants or employees? If so, in what did the said fault and negligence consist"? Nine of the jury answered: "Yes, in not taking sufficient precaution to investigate the said Stott's character and previous record, also in placing in the hands of Stott a revolver when he had no license to carry same, and also in not ascertaining whether the revolver had been put back in its proper place." The jury also found that plaintiff suffered damages as the result of the death of his son in the sum of $1,500.

The plaintiff has moved that judgment be rendered in his favour for the amount awarded by the jury, namely $1,500, with interest and costs, and the defendant has also moved that whereas the verdict in this case is contrary to the evidence and against the weight of evidence and is contrary to law, that notwithstanding the said verdict judgment be rendered in this case in favour of the defendant dismissing the plaintiff's action with costs.

Two questions arise on defendant's motion for the dismissal of the action notwithstanding the verdict:—1. Is it absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the defendant?

2. Was the determining cause of the damage claimed by

plaintiff due to the criminal act of Stott or to the fault and negligence of the defendant as found by the jury in answer to question No. 5?

"A verdict is not considered against the weight of evidence unless it is one which the jury, viewing the whole of the evidence, could not reasonably find": (C.C.P. art. 501). The jury find fault and negligence against defendant in not taking sufficient precautions in investigating Stott's character and previous record. The evidence shews Stott, then a youth 17 years of age, was interviewed two or three times by the accountant whose duty it was to engage the junior clerks, was brought before the manager and the inspector, who interviewed him, and was given the customary bank examination in arithmetic, dictation and writing. He was asked to furnish a reference from his last employer and he brought a letter from the Garth Company stating that he entered its service as an office boy in August, 1918, in which position he remained for about a month, leaving to better his position. The accountant telephoned the Garth Co. and was informed that he was a good boy. The accountant and the manager of one of the city branches of the bank went to the residence of Stott's mother and interviewed her. It turned out at the trial that Stott, when he left the Garth Co., went to an auditing company but was discharged after a month's service for incompetency, and also that before coming to Canada he had been in trouble for stealing and was over 3 years in a school in Dundee, Scotland. These two circumstances were concealed from the defendant. The jury's reference to character and previous record doubtless refer to these two incidents in Stott's life, but as they were not disclosed to the bank by either Stott or his mother, it is difficult to know what further precautions the bank could have taken to ascertain anything about his character and previous record. Everything the bank ascertained was favourable to Stott's character and its three officers who interviewed him were favourably impressed with him.

Stott had no license to carry the revolver and it was in his possession when plaintiff's son was shot, not with the consent or knowledge of defendant, but had been taken from the bank in disobedience to the instructions he had received. Stott practically stole the revolver from the bank when he left the premises at the close of the business day of January 17, 1919. The revolver was not placed in Stott's hands to be taken home by him at night, but to be used for the bank's purposes while Stott was on the bank's business with the messenger. This case is very

Que.

S.C.

SHEEHAN v. BANK OF OTTAWA.

Maclennan, J.

different from what it would have been if Stott had shot a person on the street while in the performance of the work for which he had been employed.

Stott's duties at the bank, so far as they relate to the revolver, were to accompany the messenger who carried and had charge of money and other bank property to and from the clearing house and to carry the revolver in his pocket for the messenger and to be ready to hand it to the messenger for use by the latter in case of necessity and on return to the bank to place the revolver in the vault and to leave it there until it was next required. When he returned to the bank with the messenger from the clearing house, on Friday morning, January 17, 1919, the messenger swore that Stott went into the vault where he had to go to return the revolver. He did not follow Stott into the vault to see him actually place the revolver on the shelf, but he assumed Stott had followed the instructions which he had received. The messenger had no reason to suspect Stott had not put the revolver where he should have placed it.

In my address to the jury in connection with question No. 5, I stated that the word "accident" in that question meant the shooting which caused the death of the young boy Sheehan, and the question therefore to be considered was as if it read: Was the shooting of the boy or his death due to the fault and negligence of the bank? The jury before answering question No. 5 had already found in answer to questions 2, 3 and 4, that the boy was shot by Stott, an employee of the defendant, with a revolver, the property of the defendant.

Having regard to the answers given to the previous questions, to the instructions given to the jury, and to the whole of the evidence, in my opinion, it is absolutely clear the jury was not justified in finding that the death of young Sheehan was due to the fault and negligence of the defendant, as stated in the answer to question No. 5, and that it is equally clear the jury was not justified in finding any verdict other than one in favour of the defendant.

If I had come to the conclusion that the evidence justified the jury's answer to question No. 5, there still remains the question:—What was the determining cause of the damages claimed by the plaintiff? Unless the damages were caused by defendant's fault, the action must be dismissed.

Girouard, J., in rendering the judgment of the Supreme Court in the case of *Geo. Matthews Co.* v. *Bouchard* (1898), 28 Can. S.C.R. 580, at pp. 586, 587, said:—

"The rule of law is therefore well established that no em-

ployer is responsible for his fault towards an employee, unless the latter proves that it is the immediate, necessary and direct cause of the injury he sustains. That rule is embodied in article 1053 of the Civil Code of Quebec; it is one of almost universal law among civilized nations, as well under the civil law as under the common law of England, a proposition which the authorities quoted in *The Montreal Rolling Mills Company* v. *Corcoran*, 26 Can. S.C.R. 595, fully establish."

The plaintiff is in no more favourable position than the employee in the case just referred to. The fact that the revolver was the bank's property is of no importance as it was Stott who had it in his care and put it into action at the fatal moment when he was not in the performance of the work for which he was employed and was using the revolver for his own purposes in violation of instructions. When two or more separate and distinct faults are suggested as the cause of damage, it is for the Court to decide which was the direct, proximate and determining cause. Here the plaintiff's boy was shot by Stott whose criminal act intervened between anything the bank did or failed to do in connection with its employment of Stott as a junior clerk in its banking house. The boy's death naturally and directly followed from the shot he received at the hands of of Stott and not from the causes found by the jury in answer to question No. 5. The defendant incurred no liability from the circumstances that Stott was in its employ. He was not subject to the bank's supervision or doing any work for it while playing with other boys on an uptown street at 8 o'clock in the evening. The principles of law which, in my opinion, govern this phase of the case are to be found in the following authorities:—*Curley* v. *Latreille* (1920), 55 D.L.R. 461, 60 Can. S.C.R. 131, 26 Rev. de Jur. 146; *Tooke* v. *Bergeron* (1897), 27 Can. S.C.R. 567; *Roberts* v. *Hawkins* (1898), 29 Can. S.C.R. 218; *Banque d' Hochelaga v. Canadian Inspection and Testing Laboratories Ltd.* (1919), 56 Que. S.C. 187, 191; 10 Hals. para. 572; 20 Hals. para. 603; D. 1845-2-58; D. 1848-2-146; D. 1885-1-63; 2 Sourdat, No. 919 & 925.

I therefore come to the conclusion that the direct, proximate and determining cause of the damage which plaintiff sustained through the death of his boy was Stott's crime and not anything the bank did or failed to do, and holding this opinion and also that the jury's answer to question No. 5 is not justified, the plaintiff's action is dismissed with costs.

Judgment: The Court, having heard the parties by their respective counsel, and their witnesses, upon the merits of this

Que.

S.C.

SHEEHAN v. BANK OF OTTAWA.

Maclennan, J.

cause; having examined the pleadings and documents of record, and deliberated:—

Whereas plaintiff alleges in his declaration, that he is the father of the late J. M. P. Sheehan, who died on January 17, 1919; that defendant, at the time hereinafter mentioned, was carrying on the business of banker in the city of Montreal and elsewhere in Canada and, a few days prior to January 17, 1919, engaged one D. E. Stott, a boy of about 16 years of age, as a junior clerk on its staff attached to its Montreal office on St. James street, and that said Stott had been instructed to accompany defendant's messenger while on errands on bank matters to other banks and to the clearing house, and, in order that said messenger be protected while on duty, defendant had given the said Stott a loaded revolver to be used by him, if necessary, while accompanying the messenger, and said Stott had been instructed, when his duties for the day were over, to return said firearm to the possession and custody of defendant and to deposit the same in the vaults of said office; that, on January 17, 1919, instead of returning said firearm to defendant, as he had been instructed to do, Stott retained possession thereof and failed and neglected, to defendant's knowledge, to return and deposit it after his daily duty in defendant's vaults, and during the evening of January 17, 1919, on a public street in the City of Montreal, said Stott shot and killed outright the plaintiff's said son; that defendant is responsible to plaintiff for the damage resulting to the latter from the death of his son; that prior to said engagement Stott was absolutely unknown to defendant, having recently arrived in Canada from Europe, and defendant took no steps before engaging Stott to ascertain his capacity, ability and liability in the performance of his duties as a member of defendant's staff, or to be entrusted with a loaded firearm while in defendant's service; that Stott had no experience in the use of firearms and was too young to be entrusted therewith, as defendant well knew; that the defendant did not ask for any recommendation from reliable persons as to Stott's experience and ability to perform his duties; that defendant had instructed Stott, after office hours, to return said firearm to the defendant's possession and custody, but notwithstanding these instructions the defendant, on January 17, 1919, was fully cognisant, or would have known had it taken precautions, that the said instructions had been violated by Stott who failed to return said firearm to defendant's vault and defendant should have ascertained whether the instructions so given were carried out; that

Que.

S.C.

SHEEHAN v. BANK OF OTTAWA.

Maclennan, J.

said Stott to defendant's knowledge had no license to carry a firearm; that defendant was negligent and imprudent not only in selecting Stott as an employee, but in not properly controlling or supervising the performance of his duties and ascertaining that its instructions had been carried out; that said firearm was the property of defendant; that defendant is responsible towards plaintiff for the damage suffered by reason of the death of his son who was a bright boy, of excellent conduct, intelligent and in sound health and had already commenced to contribute to plaintiff's maintenance and support and plaintiff had reason to expect that his son would continue to contribute to his maintenance and support as he advanced in years; that as a result of said accident plaintiff had suffered loss and damage in the sum of $1,500 which defendant has been requested to pay but refuses and neglects so to do, and plaintiff, making option of trial by jury, prays for judgment against defendant in the sum of $1,500, with interest and costs;

Whereas defendant by its defence admits that it was carrying on business as bankers; that in order that its messenger be protected while on duty defendant had given said Stott a loaded revolver to be used if necessary while accompanying said messenger and that Stott had been instructed, when his duties for the day were over, to return said revolver and deposit it in the vaults in the office, and prays act of plaintiff's admissions as to the instructions given to Stott and his failure and neglect to comply therewith, but specifically denies that he so failed and neglected to comply with his duties to defendant's knowledge; all other allegations of the declaration are denied, and defendant alleges that the damages claimed by plaintiff did not directly result from any act of defendant, but on the contrary the same are indirect, remote, unnatural and are entirely due to the independent act of a third person, and defendant prays for the dismissal of plaintiff's action with costs;

Whereas the plaintiff by his answer joins isue with the allegations of said defence and prays for its dismissal with costs;

Considering that this case was tried before a jury who answered the questions submitted to them as follows:—

1. "Q. Is the plaintiff the father of John Milton Patrick Sheehan who departed this life on January 17, 1919? A. Yes (Unanimous). 2. Q. Was the said Sheehan killed on January 17, 1919, by being shot with a revolver? A. Yes. (Unanimous). 3. Q. Was the said revolver the property of the defendant? A. Yes. (Unanimous). 4. Q. Was the said revolver discharged at the said Sheehan by one Stott, an employee of the defendant?

Can.

S.C.

COLLINS v. THE KING.

A. Yes. (Unanimous). 5. Q. Was the said accident due to the fault or negligence of the defendant, its servants or employees? If so, in what did the said fault and negligence consist? A. Yes. In not taking sufficient precaution to investigate the said Stott's character and previous record, also in placing in the hands of Stott a revolver when he had no license to carry same, and also in not ascertaining whether the revolver had been put back in its proper place (9 for, 3 against). 6. Q. Has the plaintiff suffered damages as the result of the death of the said Sheehan? If so, in what amount? A. Yes, $1,500 (9 for, 3 against).

Considering the answers given by the jury to questions 2, 3 and 4, instructions given to the jury and to the whole of the evidence, it is absolutely clear that the jury was not justified in finding that the death of plaintiff's son was caused by the fault and negligence of the defendant, as stated in the jury's answer to question 5, and that it is equally clear the jury was not justified in finding any verdict other than one in favour of the defendant;

Moreover, that the direct, proximate and determining cause of the damages claimed by plaintiff in this case was due to the crime of Stott and not to the negligence or fault imputed by the jury to the defendant in answer to question 5;

The plaintiff has not established any ground upon which defendant has been held responsible for the damages resulting from the death of plaintiff's minor son;

That plaintiff's motion for judgment on the verdict should be as it is hereby dismissed with costs;

That defendant's motion for a judgment in its favour notwithstanding said verdict is well founded;

Doth dismiss plaintiff's action with costs.

Action dismissed.

COLLINS v. THE KING.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 20, 1921.

Criminal Law (§IIB—42)—Charge before Magistrate—Option of Accused to be Tried before Court of King's Bench—Attorney-General Requiring Trial by Jury—Right of Accused on Day of Trial to Ask for Adjournment in Order that he may Change his Election.

An accused having when charged before the Magistrate expressly renounced any desire for speedy trial, and having been committed for trial, and the Attorney-General having required that the case should be tried by a jury under sec. 825 (5) of the Criminal Code, will not on the day of trial be granted an

adjournment of the trial until the next term, so as to allow him to change his election if he so desires, although the application is made before the commencement of proceedings to select the petit jury.

[Giroux v. The King (1917), 39 D.L.R. 190, 29 Can. Cr. Cas. 258, 56 Can. S.C.R. 63; Minguy v. The King (1920), 58 D.L.R. 77, 61 Can. S.C.R. 263, 34 Can. Cr. Cas. 324, distinguished; The King v. Collins, 32 Que. K.B. 76, affirmed.]

APPEAL by way of stated case from the refusal on the day of trial to adjourn the case until the next term so as to allow the accused if he so desired to change his option of trial before the Court of King's Bench. Affirmed.

Alleyn Taschereau, K.C., for appellant.

A. Marchand, K.C. and L. Cannon, K.C. for respondent.

Idington, J.:—The accused having when charged before the Magistrate expressly renounced any desire for speedy trial without jury and later notwithstanding pleaded to the indictment without raising any sort of objection thereto, in my opinion, had waived any legal right he had up to that time to elect for a speedy trial.

Such was the settled state of the law until the decision of this Court in the case of Giroux v. The King (1917), 39 D.L.R. 190, 56 Can. S.C.R. 63, 29 Can. Cr. Cas. 258, affirming 26 Que. K.B. 323.

I am not quite sure in light of that decision, what the law so laid down really is, but when applied to this case which is, as it were, the counterpart of that, I think it has no application.

If that decision should, necessarily, govern in regard to the point I raise, I would bow to it, though I dissented therein, but it does not, I think, and therefore I hold the pleading to the indictment, under the attendant circumstances, fatal to the appellant's contention herein.

There the accused was allowed, even after plea to an indictment, to withdraw his plea and elect to go to trial before a judge without a jury.

I thought then there was no jurisdiction in the Courts to so proceed.

This case is quite distinguishable from the case of Minguy v. The King (1920), 58 D.L.R. 77, 61 Can. S.C.R. 263, 34 Can. Cr. Cas. 324, where the accused had indicated his desire to elect, as he was entitled to have done, for a trial without a jury before he was forced to plead to an indictment and thereby, as I held, improperly deprived of his right to elect.

I am, notwithstanding the doctrine laid down in the case

Can.

S.C.

COLLINS v. THE KING.

Duff, J.

of Giroux v. The King, unable to see that it necessarily governs this case.

I therefore would answer the first question of the stated case in the negative.

And as to the second question I am of the opinion that, under all the attendant circumstances, the error if any, which is disputed, would not necessarily be fatal to the validity of the trial, and therefore answer it also in the negative.

The appeal therefore, in my opinion, should be dismissed.

Duff, J.:—The appeal, in my opinion, should be dismissed.

1st. As to the constitution of the panel. In this respect no substantial prejudice was suffered by the accused. It is unnecessary to repeat the observations contained in the case as stated and signed by the Chief Justice of the Superior Court and in the judgment of Martin, J., with which I concur.

2nd. As to the right of the accused to elect to be tried by a Judge. Admittedly the accused had that right under secs. 826 and 827 of the Crim. Code unless by virtue of a requirement by the Attorney-General under sub-sec. 5 of sec. 825 Can. Cr. Code that right was taken away. In Minguy v. The King I concurred in the opinion of the Chief Justice of this Court that where the Attorney-General prefers a bill of indictment under sec. 873 or where the bill of indictment is, by the special direction of the Attorney-General, so preferred that in itself constitutes a requirement that the case should be tried by a jury within the meaning of sec. 825 sub-sec. 5.

I am not at all impressed by the argument that the power given by sec. 837 is a different power from that given by sub-sec. 5 of sec. 825. They are not the same power, no doubt; but it does not follow that each must be exercised by an independent proceeding. A proceeding under sec. 837 may and prima facie does, import a determination that the accused shall be tried by a jury, a determination negativing his right to be tried without a jury and at all events, in the absence of some qualifying declaration it is an exercise of the authority given by sec. 825 sub-sec. 5. I may add that the decision in Giroux v. The King (a case in which the Judges who took part in it proceeded upon diverse grounds) is not an authority having any relevancy to this question.

I think that in this case there is sufficient evidence and

there was sufficient evidence before the trial Judge that the Attorney-General had required that the case should be tried by a jury within sec. 825, sub-sec. 5.

It is important, I think, to add that had it not been for sub-sec. 5 of sec. 825 of the Crim. Code, I should have been constrained to hold that in the language of sec. 1019 "something not according to law was done at the trial" and consequently that the conviction must be set aside. The accused, as I have already said, was entitled, in the absence of action by the Attorney-General under sec. 825, to have the benefit of the procedure provided by secs. 826 and 827. Through no fault of his own but through the default of the officers of the Crown he was put upon his trial without being given the opportunity to take advantage of those provisions; and had it not been for the intervention of the Attorney-General he could not, I think, have been tried legally in these circumstances.

It is not so much a question of jurisdiction. The Court of King's Bench had jurisdiction to decide whether or not the accused could legally be tried as it had jurisdiction to decide all other questions of procedure and substantive law touching the liability of the accused to be tried and convicted of the offence with which he was charged. The point is that the trial of the prisoner in such circumstances would not have been a trial according to law; an objection which could properly be raised by way of stated case and dealt with on appeal under the provisions of the Code.

For the reasons given I am of opinion, however, that these last mentioned considerations are without application in the present case.

Anglin, J.:—Two questions are submitted by the reserved case granted the appellant: 1. Was there error in refusing to grant acte of the option made by the accused for a speedy trial before a Judge of the Sessions without the intervention of a jury? 2. If it was the fact, that cards to the number of 66, bearing the names, numbers and addresses of 66 petit jurymen were placed in the panel box for the purpose provided, did it constitute an irregularity or illegality sufficient to entitle the accused to the relief sought?

One of the Judges of the Court of Appeal dissented from the majority of the Court on both points.

(1) Although the argument travelled over the whole field of the rights of a person committed for trial to elect

Can.

S.C.

COLLINS v. THE KING.

Anglin, J.

for a speedy trial—the duties of the sheriff and the Judge, under secs. 826-7, to accord him an opportunity to make such an election being specially dwelt upon as imperative and as such affording a basis for the contention that because those sections had not been complied with the Court of King's Bench lacked jurisdiction to try the appellant—the first of the two questions actually presented for decision lies in a very much narrower compass. The only thing approaching an "option made by the accused for a speedy trial" of which the record contains any evidence is to be found in the following extract from the procedure book of the Court of King's Bench, (translated):

"Before proceeding to draw by lot the cards containing the names and numbers of the petit jurors, Mr. Alleyn Taschereau, attorney for the accused, demanded the adjournment of the trial until the next term, so as to allow the accused to change his option, if he so desires, under the Criminal Code and its amendments. Mr. Lucien Cannon objected to this request on behalf of the Crown. The Court decided that the trial must proceed."

The only application made to the Court was for a postponement of the trial to the next Assizes to permit the accused to re-elect, if he should think fit. That motion was simply refused. Apart from the fact that there had been no previous election and the case was therefore not one for re-election, what took place at the Assizes Court certainly did not amount to an election for a speedy trial. There was not even an intimation that such an election would be made if the postponement asked for were granted. There was, therefore, no refusal "to grant acte of an option made by the accused for a speedy trial." He had made no such option and an acte of such an option therefore was not and could not have been sought or refused. The first question must be answered accordingly. It is not within our province, as was held by a majority of this Court in the recent case of Scott v. The King (1921), 58 D.L.R. 242, 34 Can. Cr. Cas. 187, materially to modify, qualify or enlarge the scope of a question in a reserved case merely because it does not cover the ground of appeal which counsel presents to the Court, although that should appear to be what the appellant conceives to be his substantial grievance.

(2) In not discharging the 6 additional jurors over the required panel of 60 (R.S.Q. 1909, arts. 34-38) the Court exercised a discretion conferred on it by R.S.Q. 1909, art.

Can.

S.C.

COLLINS v. THE KING.

Anglin, J.

3459. The 6 additional jurors having been lawfully retained I am not satisfied that their names were not properly placed in the panel box (Crim. Code sec. 927) from which the names of the petit jury were drawn. As is pointed out by Martin, J., only 60 jurors answered the roll call on the day of the trial. Six were absent. No juror called for the trial was in fact challenged by the appellant. The only objection taken on his behalf on this branch of the case which appeared to be of moment, viz., that the proportion of peremptory challenges which he was entitled to exercise was disturbed by the presence of the 6 additional jurors, thus appears to be lacking in substance. His right of challenge was not in fact affected. Even if there was something done at the trial not according to law, the right of challenge not having been interfered with, sec. 1019 of the Crim. Code precludes the granting of a new trial since no substantial wrong or miscarriage was occasioned.

Brodeur, J.:—This is an appeal in a criminal case. Two questions are submitted to us. The first deals with the jurisdiction of the Court which condemned the accused. The second deals with the validity of the selection of the petit jury.

The accused was arrested for robbery while armed, under sec. 446 of the Crim. Code. He was brought before the Judge of the Sessions of the Peace on September 18, 1920, for summary trial, but declared his option for a trial before the Court of King's Bench, as he was entitled to do (secs. 777, 778 Crim. Code), that is to say, he chose a trial by jury.

The Judge of the Sessions of the Peace then proceeded to preliminary enquiry and the accused was on October 12 committed for trial. The record shews that before the Judge's declaration of commitment the accused had escaped from the gaol in which he was imprisoned.

On October 13 the Crown prosecutors preferred before the grand jury an indictment which they had signed as follows:—

L. A. Taschereau, Attorney-General by Aime Marchand, Lucien Cannon, duly authorised.

This indictment was endorsed as follows, the signature being that of the Attorney-General himself:—

Can.

S.C.

COLLINS v. THE KING.

Brodeur, J.

"This indictment is preferred by the undersigned, the Attorney-General for the Province of Quebec. L. A. Taschereau, Attorney-General for the Province of Quebec."

The grand jury on the same day found the indictment and the accused was immediately arraigned and pleaded not guilty.

On October 15, at the moment when his trial was about to commence and before the selection of the petit jury, the accused by his attorney verbally applied to the Court for an adjournment of the case until the next term to allow the accused to change his option if he so desired. The Crown objected, the trial proceeded and the accused was condemned. He now maintains that he was illegally deprived of his right to optate for a speedy trial, and that when lots were drawn to select the petit jurors, there were 66 cards in the box, instead of 60, being 6 more than the number required by law.

This last point does not appear to have been raised in time, and besides there is nothing to show that any text of law has been violated.

Under arts. 3438 and 3455 R.S.Q. (1909), the sheriff is empowered to summon more than 60 jurymen. If after having examined the claims for exemption the Judge finds that there are more than 60 jurymen present, he may dismiss the remainder. He is not bound to do so; on the contrary the law leaves the matter to his discretion. It may indeed happen that, with a heavy term and a large number of cases to be tried, the Judge may at his discretion retain more than 60 jurymen, and this was what happened in the present case. The Judge therefore did not violate any text of law, but simply exercised the discretion allowed him.

The other question before us deals with the jurisdiction of the Court and the right of the accused to optate for a speedy trial.

The Court of King's Bench certainly had jurisdiction to try the accused. The offence with which he was charged designates this Court as having the right to try him.

An indictment had been preferred against the accused and had been found by the grand jury. The endorsement on the indictment bearing the signature of the Attorney-General declared that this indictment had been preferred before the grand jury on his explicit instructions.

Before the amendment of the Criminal Code in 1909, anyone accused of an offence such as that with which Collins was charged had the absolute right of declaring his option in favour of a speedy trial before the Judge of the Sessions of the Peace. By the amendment of 1909 (art. 825, sec. 5), this right is refused when the Attorney-General requires that the trial shall take place before a jury. The law adds that the Attorney-General may make this demand, even though the accused has consented to a speedy trial before the Judge of Sessions.

It seems to me that the signature of the Attorney-General on the indictment constitutes this demand referred to, in art. 825, sec. 5 of the Criminal Code. I would further be inclined to believe that, under art. 873, from the moment when the Attorney-General prefers an indictment before the grand jury, whether or not there has been a preliminary enquiry, the Court of King's Bench is duly seized of the case and may try and dispose of it. We are not called upon to examine the previous proceedings, and if the accused, as in this case, demands a speedy trial, the Court is clearly entitled to refuse him this privilege and to proceed with a trial by jury.

In the present case I consider that the Attorney-General in himself signing the indictment shewed in unmistakable fashion that he required a trial by jury (art. 825, sec. 5, Crim. Code). That was the absolute right of the Attorney-General, and he sufficiently expressed his desire so as to prevent us from considering that the Court was without jurisdiction. It would, however, be better if this request should be inserted in the original record, so as to take away from the Judge of Sessions even the appearance of jurisdiction.

We cannot set aside a conviction, even if something was done not in conformity with the law and if wrong instructions were given, unless a substantial wrong or a miscarriage of justice resulted. I cannot find in this case any illegality of such a nature as to constitute a miscarriage of justice (sec. 1019 Crim. Code).

The Crown was entitled to require the accused to undergo his trial before the Criminal Court. That Court was justified in exercising its discretion to refuse an adjourn-

Can.

S.C.

COLLINS v. THE KING.

Mignault, J.

ment. The petit jurors were not illegally selected. The conviction of the accused must be maintained.

The appeal should be dismissed with costs.

Mignault, J.:—This appeal comes to this Court on two questions, as to both of which Greenshields, J., dissented from the majority judgment of the Court of King's Bench: "1. Was there error in refusing to grant acte of the option made by the accused for a speedy trial before the Judge of the Sessions without the intervention of a jury? 2. If it was the fact that cards to the number of 66 bearing the names, numbers and addresses of 66 petit jurymen were placed in the panel box for the purpose provided, did it constitute an irregularity or illegality sufficient to entitle the accused to the relief sought?"

First question:—The appellant's counsel argued this question as if it were quite a different question, namely whether under sec. 826 et seq., Crim. Code, he should have been brought before a Judge and the statement required by sec. 827 made to him, at which time and on which statement being made to him he would have been afforded the opportunity of exercising, if he saw fit, an option for a speedy trial or to be tried in the ordinary way. I think I sufficiently stated in Minguy v. The King (1920), 58 D.L.R. 77, 61 Can. S.C.R. 263, 34 Can. Cr. Cas. 324, what procedure should be followed in cases like this one.

But this is not the question we have to answer. And I propose to reply to the question submitted in the negative because the appellant never made an option for a speedy trial, and therefore there was no option of which acte (to use the language of the question) should have been granted.

This does not necessarily mean that I disagree with what Greenshields, J., said on this first point, but under the question put to the Court there is no necessity of expressing any opinion on this point.

Second point. I would also answer this question in the negative for the reasons given by Martin, J., in the Court of King's Bench which are entirely satisfactory to me.

The appeal should be dismissed.

Appeal dismissed.

SWIFT CANADIAN v. CITY OF EDMONTON.

Alta.

App. Div.

SWIFT CANADIAN v. CITY OF EDMONTON.

Harvey, C.J.

Alberta Supreme Court, Appellate Division, Harvey C.J., Stuart and Beck, JJ. October 1, 1921.

TAXES (§ VI—220)—HEAD OFFICE OF BUSINESS IN TORONTO, BRANCH OFFICE IN EDMONTON — BRANCH OFFICE SUPPLYING OUTSIDE BRANCHES—NO PROFITS ON TRANSFER—INCOME—ASSESSMENT.

The plaintiffs carry on business in several places in Canada, one branch being situate in Edmonton, and the head office being at Toronto. The Edmonton branch has a variety of operations. There is a packing plant in which live stock is killed and prepared for market and there is a sales and distributing side. The latter has four classes of business comprising (1) sales to Edmonton butchers and dealers, (2) sales outside of Edmonton upon orders of travellers working from the Edmonton branch, (3) distribution of products to other branch businesses in Alberta and British Columbia, (4) distribution of its products to persons outside of Canada. By the provisions of the Edmonton charter as amended in 1918 (Alta.) ch. 52, sec. 44, the city was given power to levy an income tax under sec. 534 "In the case of the income of persons residing or having their head office or principal place of business outside of the city but carrying on business therein or therefrom, either directly or through or in the name of any other person, the income shall be the net profit or gain arising from the business of such person controlled, conducted or carried on, in or from the City of Edmonton; provided however that in the case of any other branch business where no separate profit and loss account is available, five per centum of the gross business of the Edmonton Branch." In 1919 (Alta.), ch. 56, sec. 15, the section was amended to make the proviso read "provided however that in the case of any branch business where no separate profit and loss account is available, the net income shall be deemed to be ten per centum of the gross business of the Edmonton branch; if however the person assessed can shew to the satisfaction of the collector that his or its net profit of the Edmonton branch is less than ten per centum of the gross business thereof, the net income shall be the actual profit shown by such person, but in no case shall it be deemed to be less than five per centum of the gross business."

APPEAL by the plaintiffs from the judgment of Simmons, J. Reversed.

S. B. Woods, K.C., for plaintiff.

J. C. F. Bown, K.C., for respondent.

HARVEY, C.J. (after setting out the facts as stated in the headnote):—In the summer of 1918 the plaintiff's office manager at Edmonton filed a return as required by the Act for the purpose of shewing the taxable income which appeared by the return as $377,533.26, upon which, according to the computation which has not been questioned, the tax payable was $29,637.66.

The correctness of this return apparently was questioned by the head office or elsewhere, it being contended that the true income was much less. In December when the time came for paying the tax, this amount was paid under protest and with the

Alta.

App. Div.

SWIFT CANADIAN v. CITY OF EDMONTON.

Harvey, C.J.

mutual understanding that the proper amount only should be collectable whenever it was determined what that should be.

At some time or times other returns were filed, one for each of the three years in question, which shew a quite different income and tax. It may be noted in passing that the Act requires the return to be in the form prescribed (sec. 539) and that only the first return which the plaintiffs contend is erroneous, furnishes the information called for by the prescribed form of return. By the amended return the plaintiff's taxes for the 3 years are shewn to be $7,171.79, $2,714.11 and $4,815.44, making a total of $14,701.34, and this action is to recover back $14,936.32, the excess of the amount paid over what is claimed to be the amount payable.

It is admitted by the plaintiffs that in respect of the business done under classes (1) and (2) above set out they are liable for income tax and it is admitted by the defendants that in respect to the business under class (4) they are not so liable. They differ as regards class (3). Mr. Woods, for the plaintiffs, contends that the City is inconsistent, that there is no essential difference between classes (3) and (4) in that in neither is the business controlled and carried on in Edmonton.

In the first place the Act does not say, as Mr. Woods so constantly did "controlled *and* carried on," but "controlled *or* carried on" "*in or from*" Edmonton.

The evidence shews that the foreign business (class (4)) is controlled entirely from the head office, the Edmonton branch merely sending goods as directed from head office and apparently never receiving any payment in any form for such goods. On the other hand I gather from the evidence that the distribution under class (3) is on orders from the branches to which goods are sent, much the same as on orders under classes (1) and (2). It is true they were not sales in the ordinary sense since the goods were merely transferred from one place to another, still remaining the property of the same owner, but they were charged at the regular Edmonton market prices and remittances made for them to the Edmonton branch, which accounted for them to head office. This at least was the course pursued until some time during the last 3 years in question. Whether the payment was made to the Edmonton branch before the goods were actually sold by the branch to which they were sent is not very clear but in any event what the Edmonton branch received would appear to be at least *prima facie* payment for the goods sent out by it through its business carried on in Edmonton. If what it received included any profit made by the other branch,

that would not in my opinion be a return from any part of the business carried on in Edmonton and could not, therefore, be considered income under the Act. Its business ends when the goods are shipped out at the regular price. Indeed if it were shewn that the actual sale was at something less than that price I am of opinion it would be perfectly proper to deduct the deficiency from the price charged the other branch, if the latter had been remitted by that branch, since the plaintiffs only ultimately receive the amount paid by the purchasers from them. No doubt under normal conditions instances of such a situation would be negligible.

On this issue therefore I accept in the main the contention of the defendants.

The returns made by the plaintiffs are based on the business under classes (1) and (2), excluding (3). It follows that they are necessarily erroneous in their result. It is necessary, however, to consider the principle upon which they are made up and what is the proper principle upon which to arrive at the correct income. The trial Judge states in his reasons for judgment that "The plaintiffs admit that no separate profit and loss account for the Edmonton business is available." Mr. Woods takes exception to this but it is impossible to read Mr. Woods' examination of the Edmonton office manager, who states that he is an accountant, without coming to the conclusion that his main purpose was to prove that a separate profit and loss account for the Edmonton business was, in his words "an actuarial impossibility."

In answer to Mr. Bown's question, "But you have no profit and loss account which shews—rather you don't keep the books of this plant in such a way that you could shew the profit and loss account of it as if it were a separate entity by itself, is that what I understand?" The witness said, "It is not separate, it is all part of a business; it is not separate in the strict sense of the word." He also said the head office has no such account.

I think, therefore, to say that the plaintiffs admit that there is no separate profit and loss account, is putting it quite mildly. The amended and subsequent returns filed by the plaintiffs attempt to arrive at the income by setting out the total business of the plaintiffs everywhere and the total net income derived therefrom, and then assigning to the Edmonton branch as its share of the total income the same percentage as its total business is of the total business everywhere. This method as already indicated shews the tax for the first year as less than one quarter of the amount shewn by the method adopted by their local

Alta.

App. Div.

SWIFT CANADIAN v. CITY OF EDMONTON.

Harvey, C.J.

manager, and is therefore naturally a much more satisfactory method from the plaintiff's point of view than the other, but I do not think that any intelligent person can seriously contend that it can be depended on to shew the actual profit of the Edmonton separate branch. It can only do so when all the branches are carrying on uniformly as to profit and loss which is practically never.

It is indeed nothing but a substitute in the absence of the actual profit and loss account and might quite reasonably have been adopted by the Legislature but the Legislature provided a different method and it is the substitute authorised by the Legislature rather than the one suggested by the person paying the tax that we must adopt.

The amendment to the proviso of sec. 534 quite definitely provides the method of ascertaining what will be assumed to be the income when the party has not kept his accounts so as to shew the actual profit and loss. Under that, if there is no separate profit and loss account, the party may still shew the amount of the actual profit which will be taken to be the income if it is not less than 5% of the gross business done, but if it is less, then 5% of the gross business, will be treated as the income. If he does not see fit to shew what the actual profit is then 10% of the gross business will be considered to be the income for the purpose of the tax.

This provision applies to the tax for 1919 and 1920. The trial Judge, no doubt inadvertently, treated it as applying only to the 1920 tax, but both parties agree that it applies to the 1919 tax as well. The original proviso of the section which applied to the 1918 tax was treated by the trial Judge as fixing 5% of the gross business as the taxable income in the absence of a separate profit and loss account. I regret to say that I can give no intelligible meaning to the proviso and think it must be disregarded. Mr. Bown states that the section as originally presented to the Legislature contained other instances in the proviso which were struck out, apparently without it being observed that what was left makes only a partial sentence without furnishing any sensible meaning, without some verb to use with the "five per centum of the gross business," no meaning can be attached to it and the verb can be supplied only by guess, which is not a proper way to determine the meaning of a statute.

In the result the main portion of the section must be considered without modification by any proviso and the net profit or gain for the year 1917 must be ascertained to determine the taxable income for the year 1918.

Notwithstanding the evidence of the office manager, I have no doubt this can be ascertained with reasonable accuracy by any competent accountant by an examination of the books of account, and if the parties cannot agree on the amount, which seems improbable, there will have to be a reference to ascertain it.

The plaintiff's office manager considered that the return he made shewed the net profit of the business but he states that he included under the word "operations" the total sales under all four classes, taking all distributions as sales. As already indicated, these under class 4 should be excluded, they constituting no part of the income since there was no income from them received in Edmonton.

The city's right to tax can be no broader than what the Province can give. Under our constitution, the Province can tax only such property as is within the Province. This being a tax on income, the income must be within the Province, or we may say for the present case, within the city. Such being the case, any income which did not come to the Edmonton branch, even in respect of business controlled or carried on in or from Edmonton, could not be taxed. This consideration appears to affect the last year's income in respect to the class (3) distributions, for it is stated that during 1919 the procedure changed and during part of that year Edmonton branch received no payments for shipment to branch houses which were thereafter accounted for direct to head office. If a separate profit and loss account were available there would be no income from this business to be taxed, but there being no such profit and loss account the arbitrary and artificial method of fixing as taxable income an amount which may be quite different from the amount of real income does not necessarily exclude this business from consideration. However, I take the defendant's position to be that it does not claim income in respect of the foreign business even though the actual profit is not shewn and the income must be determined by the substitute of the proviso to the section and the principle of exclusion of this business would also exclude that portion of the business with branch houses not accounted for to the Edmonton branch and, therefore, I do not consider whether the gross business contemplated by the section may not intend to include all business whether it results in an actual income or not.

In this view the gross business to be taken for fixing the taxable income for the years 1919-1920 will in addition to the business under classes (1) and (2) include so much of the busi-

Alta.

App. Div.

SWIFT CANADIAN v. CITY OF EDMONTON.

Harvey, C.J.

ness under class (3) as was accounted for by payment to the Edmonton branch.

The plaintiffs should file proper returns or on failure or in the event of the defendants not finding the returns satisfactory or failing to agree, the reference should include the ascertainment of the taxable income for these years.

It may be observed that the figures of the amended return for 1918 for the business of the Edmonton branch though sworn to be only in respect to classes (1) and (2) are nearly double those of the first return, which is sworn to cover all four classes. There is clearly an inconsisteney here.

Although in the result the judgment as herein directed differs in many respects from the judgment entered below, yet the appellants have failed on practically all substantial points and should pay the costs of this appeal.

There is no need to interfere with the reservation of the costs of the trial as directed by the trial Judge because until either the parties agree on the amount of tax payable or the reference is held, the result is still in doubt, though if the figures of the amended returns are correct there seems no doubt that the plaintiff's action must fail.

STUART, J.:—I was at first inclined to agree with the opinion of Harvey, C.J., that the proviso in the original sec. 534 was not capable of being given an intelligible meaning. But on further consideration, it seems to me that anyone reading the whole section together cannot have any doubt as to what the precise idea was which the Legislature intended to convey. Clearly an accidental mistake in technical grammatical construction was made, but it seems to me to be too clear for any doubt whatever, when one does read the whole clause over, that the words "the income shall be" are to be understood. I think the true rule of construction is to give a meaning to the words of the written instrument including a statute if it is at all possible even by supplying anything *necessarily to be inferred* from the terms used. Beal pp. 148, 70, 324. I think the words "the income shall be" are clearly necessarily to be inferred from the terms used in the whole section.

Then, with regard to the use of the word "other" in the proviso, I am of opinion, as I ventured to suggest upon the argument, that the true meaning is to be found by interpreting that word as being simply explained by the use of the phrase "where no separate profit and loss account is available." The section had already enacted that the income should be "the net profit or gain arising from the business controlled, conducted or

carried on in or from the City of Edmonton." Then the use of the word "other" is simply due, in my judgment, to the consideration that there might be a case where that criterion could not be applied because there might be no profit and loss account available as a basis of calculation. In this view the word "other" and the expression "where no profit and loss account is available" are simply used in an appositive sense. It is, I think, not sound to say that the words "other branch" is used in contradistinction to the Edmonton branch because it is so obvious that no branch but the Edmonton branch is or could be taxable by the city in any case and it is only the profit, or, if no profit account is available, 5% of the gross business, of the Edmonton branch upon which the income tax is imposed.

This, of course, applies only to the profit or gross business for the year 1917 but assessable in 1918. And the phrase "the gross business of the Edmonton branch" with which the proviso ends, must, I think, be read with the body of the section in mind and interpreted as meaning the gross business controlled conducted or carried on in or from the city of Edmonton.

With respect then to the income for 1917 for which the tax is assessable and payable in 1918, the first question to be determined is whether it can be said that there is "no separate profit and loss account available." Here we meet another grave question of interpretation of terms. What is meant by the word "available"? One may ask the question available to whom? Upon the argument, as I remember, the phrase was discussed as if it admittedly meant "where the separate profit of the branch can not be ascertained." But I am not at all sure that that is what is meant. It occurred to me that it might possibly have been intended that if there was not regularly kept upon the books of the person or corporation, available for inspection, an account shewing the profit or loss for the year then that should end the matter and 5% of the gross business should be taken. A wagon or any other article can scarcely be said to be available if in order to get it one has to gather materials together and have one made. So with an *account* of profit and loss, which may, I think, very well be taken to mean a regularly kept account of the company's books and not a statement that may perhaps be made up from a mass of material collected from various sources. If this should be the true meaning then admittedly there was no such account available.

But however this may be, I agree with the opinion of Harvey, C.J., that even in the other sense there was no separate profit and loss account available. The argument of counsel for the

Alta.

App. Div.

SWIFT CANADIAN v. CITY OF EDMONTON.

Stuart, J.

appellant was, that a separate profit and loss account for the Edmonton branch could be arrived at by simply taking the total business of the corporation in Canada, its total profit in Canada and then fixing the profit of the Edmonton branch at that proportion of the total profits that the gross business of the Edmonton branch bore to the entire gross business of the company in Canada. I find myself quite unable to accede to this proposition. One quarter of an apple, no doubt, has the substance of an apple and may come under the category "apple," but I certainly cannot describe it as a "separate" apple. I take the evidence of Spencer as shewing conclusively that it was impossible to ascertain what the separate profits were which the company derived from that portion of its business which was controlled, conducted or carried on in or from Edmonton. And this may very well be the case, notwithstanding that the company would be able in some way or other to make up its mind whether or not it was profitable for it to continue the business and operations of the Edmonton branch. Certainly if the company entered upon that enquiry it would not by any means decide it upon the principle suggested in the argument on its behalf.

We have here to do, moreover, not with an enquiry into customary established methods of taxation or of adjusting the possible results of obscure and disputed wording in taxing statutes, but with the interpretation of the true meaning of the words of a particular statute which is before us though that statute is difficult of construction because of both extreme generality and embarrassing obscurity in the terms used—a condition almost inevitable from the nature of the subject matter of the tax.

For 1918 then, I think, the next enquiry is,—what was the amount of the gross business controlled, conducted or carried on by the company in or from the city of Edmonton? Or upon what principle rather, should that amount be ascertained? The company is not merely a wholesale dealer in certain products. It is engaged at various places in Canada in manufacturing those products. But for a manufacturer his business comprises more than manufacturing. If he stopped at manufacturing he would soon stop altogether. His business is to *manufacture and sell* so as to gain money. Selling is, therefore, essentially a part of the manufacturer's business. It is common ground that the statute does not attempt to take cognisance of the mere amount of goods manufactured. It is not a personal property tax that is im-

posed. That statute takes cognisance only of business done admittedly in the sense of business completed by sales.

I am unable to see why the mere shifting of the physical location of portions of the manufactured products of the company from its manufactory at Edmonton to its warehouses in Calgary, Nelson or Vancouver, can properly be deemed to come within the meaning of the term "business." We ought first, I think, to arrive at a clear conception of what the statute means by that term. It ought, in my opinion, to be understood in the sense in which merchants generally understand the term. When a merchant speaks of the gross business transacted by his firm in a year he certainly means the gross amount of his sales of the goods he deals in. It seems, therefore, to me to be clear that when the statute speaks of the "gross business" or the "business" of a person it is using the term in that sense. It is just the same as if the company had purchased its goods instead of manufacturing them itself. Its gross business means its gross sales of goods.

I think, therefore, we must understand the statute as saying that the income shall be the net profit arising from, or 5% of, the gross business, that is the total sales of the company which are controlled, conducted or carried on in or from the city of Edmonton. What sales are shewn then in this case to have been conducted, controlled or carried on in or from the city of Edmonton, *i.e.* in or from the Edmonton branch? Can it be truthfully said that any portion of the gross sales at Calgary, at Vancouver, or at Nelson were substantially conducted, controlled or carried on in or from Edmonton? In my opinion, upon the evidence, that cannot be said. It is abundantly clear that the Edmonton branch had nothing whatever to do with either conducting or controlling or carrying on any of those sales. The Edmonton branch is not shewn indeed to have had any control even over the mere fixing of the bulk amount of goods that were requisitioned from it either by the outside branch managers or, of course, by the head office. But, even if the manager in Edmonton did have something to say about whether he would fill a particular requisition or not that is very far from saying that he conducted, controlled or carried on the sales that were made by those outside managers. Even if the goods forwarded on requisition were invoiced to the branch at a certain price that would not be enough, in my opinion, to bring the transaction within the category of "business" of the company as I have said that I think that term should be understood. It must not be forgotten that while the statute in dealing with the busi-

Alta.

App. Div.

SWIFT CANADIAN v. CITY OF EDMONTON.

Stuart, J.

ness of the Edmonton branch, is also dealing with that business only in so far as it is properly "business" of the company as a whole. And until sales are made, I do not think the company as such has transacted any business at all within the meaning of the term as used in the statute.

I cannot see what difference either, it can make, haw the price at which sales are made at the branches is fixed. There was evidence, I think, that the current market price at Edmonton was taken as the basis, but I am unable to see how that causes the sales at the outside branches to be conducted, controlled or carried on by the Edmonton manager. Indeed there is no evidence that that individual fixed the price.

Moreover, even if the outside managers, in making their sales, added something to the Edmonton price or even if a practice could be discerned of allowing for a manufacturers' profit, still I am unable to see how either of these things could affect in the slightest degree the fact that the "business" of the company at the branches outside of Edmonton, that is, the company's gross sales at those branches was not in any way shewn to be under the charge of or conducted, controlled or carried on by the Edmonton branch. It seems to me that any contrary argument is based upon an enquiry into what it is just or fair or reasonable that the Edmonton branch should pay taxes upon, that is, into the proper policy of taxation, whereas the true problem is merely how the words of the statute before us ought to be interpreted, that is, what did the Legislature mean by the words it actually used, not what one may think it probably had, or ought in enacting a taxing statute to have justly and fairly had, in mind. It is this latter consideration, erroneous as I think it is, which, in my opinion, gives rise to a discussion of the methods of accounting between the branches and the methods of channels by which the head office at Toronto gathers in its gross returns.

It is for that reason that I think the circumstance that remittances of cash returns from these branches were gathered together at the Edmonton office and therefrom forwarded in bulk to Toronto, has really no relevancy or material bearing upon the case. The tax imposed on a profit from, or on 5% of, the gross business that is, as I have said, the total actual commercial sales, to others than the company, which were conducted, controlled or carried on in or from Edmonton; and for the reasons I have given I do not think any of the "business" (in that sense) of the branches outside of Edmonton were conducted or controlled or carried on either in or from Edmonton, even though the physical

products, the subject matter of that business, were obtained upon mere requisition from the manufactory at Edmonton.

What I have said seems to me to determine everything in dispute before us. The income upon which the tax was payable in 1918 was, in my opinion, 5% of the gross business for the preceding year under items (1) and (2) of para. (7) of the statement of defence. In 1919 and 1920 the income upon which the tax was payable was, at any rate upon the evidence before us, 10% of the gross business for the preceding years under those two items.

I am unable to see how the company can, in view of the evidence presented by it at the trial, ask with any reason for a chance to shew "to the satisfaction of the collector" (which is what the amended section says) that the net profit of the Edmonton branch is less than 10% of the gross business of that branch. At the trial the company, by its official and its counsel, strongly insisted that it was impossible to arrive at any such separate net profit for the Edmonton branch except upon the principle of proportionate profit which for the reasons I have given I think, is quite untenable. In these circumstances I cannot see any other result to be arrived at than that 10% of the gross business for 1918 and 1919 must be taken as the income for those years and as the basis of taxation for the years 1919 and 1920.

I would, therefore, allow the appeal. Paragraph (1) of the formal judgment which contains obviously an accidental error should be amended accordingly. Paragraph (2) of the formal judgment, which in my view, as I have expressed it, is erroneous, should be amended to express the result I have arrived at. And para. (3) can stand as it is. With respect to the costs of the appeal, it is true, of course, that the appellant has in my opinion partially succeeded but it has not succeeded to full extent contended for. The extent of the success is indeed somewhat in doubt until the reference is concluded or the amended return accepted as indicated in para. three of the formal judgment. I would, therefore, let the costs of the appeal be reserved to be decided upon a separate application afterwards, and I would let the trial Judge's disposition of the other costs stand as it is.

BECK, J., concurs with STUART, J.

Appeal allowed.

Can.

S.C.

MONTREAL TRUST CO. v. RICHARDSON.

Supreme Court of Canada, Davies, C.J., and Idington, Duff, Anglin and Mignault, JJ. December 9, 1921.

CONTRACTS (§IID—175)—FOR PURCHASE OF STOCK OF COMPANY—CONSTRUCTION—EVIDENCE.

The promotor of a company, in a letter to the defendant requesting him to take stock in a company which he was promoting, stated that certain financial agents had undertaken to sell $150,000 worth of the stock. The defendant signed the form enclosed agreeing to purchase from the financial agents 100 shares and that "this undertaking may be pledged or hypothecated with any banking institution as security for advances." The defendant never paid for the stock which was afterwards pledged by the financial agents as security for advances. In an action to recover the price of the shares the Court held that the evidence as to the circumstances which led to the agreement to purchase and pay for the shares and the language of the agreement itself shews that it was not an absolute and unconditional agreement to purchase but was an agreement to do so if $150,000 of stock was not taken up by the public, and when this amount of stock was taken up the liability under the agreement was at an end, and a pledge of it passed only the contingent liability that the original maker had undertaken.

[*Montreal Trust Co.* v. *Richardson* (1920), 55 D.L.R. 190, 48 O.L.R. 61, affirmed.]

APPEAL by the plaintiff from the judgment of the Supreme Court of Ontario (1920) 55 D.L.R. 190, 48 O.L.R. 61, reversing the judgment at the trial of an action to recover the purchase-money of 100 preferred shares of a company which it is alleged that G. T. Richardson whose executor the appellant is agreed to purchase. Affirmed.

The facts of the case are fully set out in the judgments following.

Hellmuth, K.C., and *Chipman*, K.C., for appellant.

Cunningham, K.C., for respondent.

DAVIES, C.J.:—I am, after much consideration, of the opinion that the document or agreement on which the action is based was not an absolute and unconditional agreement to purchase and pay for the 100 shares subscribed for by Richardson but was an underwriting or a conditional agreement to do so if the $150,000 worth of the shares of Canadian Jewellers, Limited, which Mackay & Co., Ltd., had subscribed for and were about to put on the market were not taken up by the public, and only to the extent that they were not so taken up.

The contentions of the appellant Trust Company with which the agreement or underwriting was pledged or hypothecated

by Mackay & Co., for advances made, were that it was not limited to the $150,000 worth of the stock of Canadian Jewellers, which Mackay & Co. had subscribed for and were putting on the market, and further that even if defendant respondent's contention as to the limited construction of the agreement was correct, and it was so limited, they as pledgees or hypothecatees nevertheless are entitled to recover because they had no notice or knowledge of the conditional nature of the agreement which contained the express provision that the underwriting may be pledged or hypothecated with any banking institution as security for advances."

I am of the opinion that the Trust Company appellants may fairly be said to come within the phrase "Banking Institution" in the underwriting agreement mentioned.

I am also of the opinion that the document was merely an underwriting. It is on its face expressly called so and the Trust Company must be taken when making advances upon it when it was pledged with them, to have so understood it. The duty of inquiring and finding out what extent and what amount of shares the "underwriting" covered devolved upon them. If they had discharged that duty they must have learned that the underwriting agreement was a conditional one binding upon Richardson only to the extent that Mackay & Co.'s subscription to the shares of Canadian Jewellers, which they were offering to the public for sale, were not taken up by the public.

The letter which Timmis, the co-promoter with Mackay & Co., of the Canadian Jewellers, sent to Richardson, a letter enclosing the "underwriting form" to be signed by him in case he decided to take any shares, expressly stated that $150,000 worth of stock was the amount which Mackay & Co. had "undertaken to sell to their clients." The appellant Trust Company would have learned by further prosecuting their inquiries that the underwriting had reference to and only covered that amount of stock. They would thus have found the limited nature of the underwriting and have only themselves to blame if they, neglecting their duty, failed to make the inquiries which they should have made.

It appears by the evidence that Mackay & Co. had sold to the public the full amount of their undertaking of $150,000 and that Richardson's obligation under his indemnity was at an end.

On the whole I am of the opinion that the appeal should be dismissed with costs.

IDINGTON, J.:—The Canadian Jewellers was incorporated by letters patent dated August 11, 1911, according to a minute of the first meeting of the provisional directors, on 30th of said

Can.

S.C.

MONTREAL TRUST CO. v. RICHARDSON.

Idington, J.

month of August, under and by virtue of the Companies Act, R.S.C. 1906, ch. 79.

There would seem to have been only five subscribers, each subscribing for a single share, and they were declared provisional directors who met as such on said August 30 and elected themselves directors, and passed by-laws of which No. 18 provided as follows:—

"25,000 shares of the unsubscribed and unissued capital stock of the Company, of the par value of $100 each share, are hereby created and shall be issued as preference shares having priority both as to capital and as to dividends over the ordinary shares which dividends shall be at the rate of 7 per cent per annum, and shall be cumulative.

It was moved by Mr. O'Brien, seconded by Mr. Gilmour and resolved: That the Montreal Trust Company be and is hereby appointed transfer agents of the shares of the company for such considerations and upon such terms and conditions as may be arranged by the president of the company; and that the president and secretary of the company be and they are hereby authorized to sign and execute in the name of the company the necessary agreement with the said trust company."

This helps to shew the business relation of the appellant to said company and is suggestive that the appellant probably had a better chance than deceased Richardson of knowing a good deal he should have been told and thus it was put on the inquiry.

One Timmis and the firm of J. A. Mackay & Co. both being brokers in Montreal which was to be the business home of said new company, had an agreement between them whereby they undertook the promotion of the company and sales of its stock and to divide the profits between them on a stated basis. Each took a large part of the stock—Timmis to the amount of $100,000 and J. A. Mackay & Co. to the amount of $150,000 intending, of course, to resell same to the public.

The scheme promoted was the merger of certain named companies engaged in the jewellery business and the business of others likewise so engaged.

Timmis wrote the late George T. Richardson as follows:—

Montreal, 8th Sept., 1911.

"George T. Richardson, Esq.

Messrs. James Richardson & Sons, Ltd., Kingston.

Dear Mr. Richardson:—I enclose herewith an outline of the Canadian Jewellers, Limited, an amalgamation which has been originated by myself, and which is being financed by J. A. Mackay & Co., Ltd., financial agents of this city. I also enclose

an underwriting form. Mr. J. W. McConnell, Mr. R. J. Dale and Mr. James Playfair have taken $15,000 each. The money which we will receive from the sale of surplus merchandise when the different factories have been concentrated, with the $150,000 of stock which Messrs. Mackay & Co. have undertaken to sell to their clients, will give the new concern ample cash capital, so that it is exceedingly improbable that any payment whatever will ever be called on the underwriting. The underwriters will get 50 per cent of common stock as compensation for their underwriting services. It was my intention to have offered this to Mr. H. W. Richardson, but as he is now in the west, I am submitting it to you. We do not desire to have names for less than $10,000 or more than $15,000. I shall be very glad indeed to have you in on it if you care to come, but feel perfectly free to decline if it is not entirely acceptable to you. I only wish to give you the same opportunity as my other "Missisquoi" friends.

With kind regards, yours faithfully.

(Sgd.) Henry Timmis."

The outline enclosed, so referred to, set forth in the first part thereof, as follows:—

Canadian Jewellers, Limited.

"To be incorporated under the Companies Act of the Dominion of Canada.

Capital ..... $5,000,000.

Consisting of: 25,000 shares of seven per cent (7 per cent) Cumulative Stock, and 25,000 shares of Common Stock

The Company is being organized for the purpose of acquiring, coordinating and extending the business at present carried on by a number of the leading and most successful wholesale manufacturing and import jewellery houses of Montreal, Toronto and elsewhere, among others being:

William Bramley,
The Hemming Mfg. Company,
The Hemsley Mfg. Company,
J. E. Brown & Company,
Caron Bros. and others.

These concerns have gross assets approximating one million of dollars, all of which has been practically acquired from the profits of the respective businesses."

It then proceeded to set forth the rosy future to be expected from such an amalgamation.

The late Mr. Richardson replied by letter of Sept. 12, 1911, enclosing the underwriting agreement asked for which is said

Can.

S.C.

MONTREAL TRUST CO. v. RICHARDSON.

Idington, J.

to have been identical in all its terms save the date of payment with the following:—

Subscription for Stock.

Canadian Jewellers, Limited.

Authorized Capital:		To be issued:
Preferred shares	$2,500,000	$600,000
Common shares	$2,500,000	$450,000 Approx.

All shares of the par value of $100 each.

We, the undersigned, severally subscribe for and agree to purchase from J. A. Mackay & Co., Limited, preferred shares of the above company to the number and amounts set opposite our respective names. The price to be paid for said shares is 95 per cent of the par value thereof with 50 per cent of the par value thereof in bonus common stock of the company. The purchase price to be paid on the 15th day of January, 1913.

This underwriting may be pledged or hypothecated with any banking institution as security for advances.

This agreement may be signed in counterpart, and all counterparts taken together shall be deemed to be one original instrument.

Name of subscriber, G. T. Richardson; address, Kingston, Ont. Witness, A. W. Brown.

No. of shares subscribed 100; total amount of subscription $10,000.

This is called a renewal of the original and substitutes January 25, 1913, for the date of payment therein which was September 15, 1912.

On October 30, 1914, by an agreement in writing between the appellant and the said J. A. Mackay & Co., the latter acknowledged an indebtedness to the former of $138,141.15 and interest at 7 % from October 1, 1914, payable monthly and then assigns as follows:—

"2. As collateral security for the payment of the said indebtedness and any interest which may accrue thereon the borrower hereby acknowledges to have assigned, transferred and made over to the lender all its right, title, claim and interest in and to the subscription made by G. Richardson, of Kingston, Ontario, for one hundred (100) shares of the preferred capital stock of Canadian Jewellers, Limited, at a price of ninety-five per cent (95%) of the par value thereof, with fifty per cent (50%) of the par value of such subscription in bonus common stock of the company, the purchase price of which stock was to be paid on the fifteenth day of January, one thousand nine hundred and thirteen (1913), as more fully appears from the

copy of the said subscription hereto annexed to form part of these presents."

Then followed an acknowledgement by appellant of the borrower having theretofore delivered to it stock certificates of the Canadian Jewellers to be delivered to the subscriber at the time of payment of the said subscription.

The appellant never tendered such certificates of stock to said Richardson who had enlisted in one of the first Canadian Expeditionary Forces and gone to Valcartier, and thence overseas to France where he was killed in the late war in 1916.

Indeed any correspondence, on the subject of what is in question herein, had with him before his departure was either with Timmis or Mackay or latter's firm.

The appellant claims to have sent the late Mr. Richardson at Kingston something in the end of December, 1914, but no proof of his having got it or heard of it and the appellant must have known he was not there.

Prior to bringing this action there was a demand made on the executor of deceased's estate in Winnipeg for payment. This action is brought against said executor to recover the sum of $9,500 with interest thereon at 7% and is founded upon the foregoing subscription, not, it is to be observed, to take stock in the company, but to buy from J. A. Mackay & Co. shares thereof held by them.

The Court appealed from held, and I think rightly, having regard to all the surrounding facts and circumstances which must be considered to interpret and construe what is a most ambiguously worded contract, that the condition of his so contracting had been fulfilled by the sale of stock to the public by Mackay.

Indeed, the whole of the contract as finally developed and executed is not before us but only one part, which if justice is to be done, should have been supplemented by whatever is included in the cryptic term at the end thereof, as follows:—

"This agreement may be signed in counterpart and all counterparts taken together shall be deemed to be one original instrument."

What does that mean? Where are these counterparts? How much has been realized from them by J. A. Mackay & Co. or the appellant?

Preceding that we have the following:—

"This underwriting may be pledged or hypothecated with any banking institution as security for advances."

What is meant by "this underwriting?"

Can.

S.C.

MONTREAL TRUST CO. v. RICHARDSON.

Idington, J.

I find assistance in the case of *Re Licensed Victuallers' Mutual Trading Association; Ex parte Audain*, (1889) 42 Ch. D. 1 at p. 7, 58 L.J. (Ch.) 467, 37 W.R. 674. Such an able Court as there seized of that case and such an authoritative expert, if I may be permitted the term, as Lindley, L.J., relative to the branch of the law in question, found it necesary to bring in evidence to help to the meaning of the term "underwriter."

I think that example might well have been followed by those conducting this case instead of leaving us to guess which of the variety of meanings the term may have is to be applied in the peculiar connection in which it was used herein.

Let us never forget this is not the common case of an issue of stock by a company in which men calling themselves for the moment underwriters do in fact undertake the management of the floating on the market a particular issue of stock or debentures by a company desiring their services.

It seems to have been in regard to what is herein in question a device copied therefrom by two men who owned a certain amount of stock in a company. Indeed the term as used herein has given rise to several different interpretations according to the side counsel happened to be on and even these not always consistently adhered to.

I think I have said enough to shew in what sense I think this contract is most ambiguous and why the surrounding facts and circumstances must be looked at. And I repeat that when so looked at and considered it was not a flotation of the entire preferred stock issued and offered by the company, but that held by J. A. Mackay & Co., and so issued and offered.

Clearly they disposed of more than they then had or offered and the obligation arising from signing such a counterpart as this now in question ended.

There is, however, another and graver point raised and that is the charge that the contract was induced by fraud or by unjustifiable misrepresentation of fact. The trial Judge found expressly that there was fraud so inducing the contract and going to the very root of the matter as would have rendered it void in the hands of J. A. Mackay & Co.

He did not give effect thereto for the reasons he gave, resting upon the decision of the case of *Re Agra and Masterman's Bank*, L.R. 2 Ch. 391, 36 L.J. (Ch.) 222, 15 W.R. 414, to which I will presently refer.

The trial Judge's statement of fact upon which he rested his finding is challenged in appellant's factum before us. The statement the trial Judge made is verified by the evidence given in

answer to the questions 75 to 85 referred to by him. The full import thereof did not in his view of the law call for an expanded argument and we are not to take his reference as more than an indication of much else.

The actual facts are that of the five companies set forth in the outline above quoted from, one known as the Caron Company, never had agreed as represented to come into the merger, and of the four others one was in the hands of a receiver.

And the company was induced, by means I need not enlarge upon, to accept the representation of Timmis and, in September, almost concurrently with the signing by the late Mr. Richardson of the first subscription by him now in question, to take over some of these others from Timmis at such a gross overestimate of the value of their assets that later on, under threat of a lawsuit, he was induced to reduce their valuation to an aggregate of less than one-third of that he had induced the company to agree to.

His representations to the late Mr. Richardson were not, however, revised, but, on the contrary, long after he had been so compelled by the company to accept that reduction he continued in his correspondence with him, in answering his inquiries, to maintain the rosy side of things instead of telling him the truth.

Mackay was appealed to and responded in like fashion. If he had told Richardson the actual facts of the disastrous change I venture to think he never would have got the renewal subscription now sued upon.

Either Timmis knew that the representations he was making to Richardson were false, or he made them recklessly not caring whether true or false, and thus the contract was founded on fraud, and null.

Or there may have been in law an alternative view of possibly mere misrepresentation which entitled Richardson, on its coming to his knowledge, to repudiate the contract.

I am of the opinion that in law the appellant has no higher right than J. A. Mackay & Co., with whom the contract was made. And I have no doubt that the trial Judge, while having ample ground in the evidence that was before him in the whole case, and not confined to one or more sentences thereof, to say and hold that the contract had been induced by fraud, erred in holding that the *Agra* case (1 L.R. 2 Ch. 391), above cited, prevented his applying the facts as against appellant. That case seems to me quite distinguishable. It proceeded on a promise, as in principle the Court found, to honour drafts provided for in a letter of credit there in question.

Can.

S.C.

MONTREAL TRUST CO. v. RICHARDSON,

DUFF, J.

Here there is nothing but a contract, non-assignable in law, to buy from J. A. Mackay & Co. a number of shares. And there is added thereto a consent to its being used in a specified manner without any promise express or implied that there was or could not be anything vitiating it.

Moreover there was nothing involved in the *Agra* case, but the liability to answer for a recognized breach of contract to the creditors of the bank in liquidation, no charge of fraud or the like being involved.

I have looked at all the cases cited in appellant's factum and fail to find in any of them anything to support appellant's contention on this point.

Indeed most of them relate to transfers of negotiable bonds or debentures. One other case cited seems to rest upon estoppel which does not help here.

The point taken by the respondent that the appellant is not a banking institution within the meaning of the term as used in this contract is, I think, well founded.

In view of sec. 156 of the Bank Act, R.S.C. 1906, ch. 29, prohibiting appellant from calling itself a banking institution, I prefer that to the Century Dictionary as my guide to the meaning of such a term when used in such a document as in question herein. Indeed the objection seems fatal to the right asserted by appellant that it has any higher title than J. A. Mackay & Co. would have if suing.

And the case of *Crouch* v. *Crédit Foncier of England* (1873) L.R. 8 Q.B. 374, 42 L.J. (Q.B.) 183, 21 W.R. 946, is much more in point than any of the bond and debenture cases cited by the appellant, for it shews how little may take away from these usually negotiable instruments the quality of negotiability.

In quitting this branch of the case I may say I have endeavoured to find something on the curious question of what exact meaning may be attached to the words "this underwriting" but found nothing more instructive than the *Ex parte Audain* case 42 Ch. D. 1, 58 L.J. (Ch.) 467, 37 W.R. 674, cited above. And I presume industrious counsel on either side citing so many decisions have failed also or we should have had some results worth while.

I, for the foregoing reasons, have come to the conclusion that this appeal should be dismissed with costs.

DUFF, J.:—The agreement sued upon is an underwriting agreement. This is sufficiently clear from the form of the document. It is true that there is an undertaking to accept and pay for shares but the undertaking is declared in explicit terms to be

of the nature of an underwriting. In essence therefore the obligation is an obligation to indemnify J. A. Mackay & Co. against failure to dispose of the underwritten shares. In any action to enforce this undertaking the onus is of course on the plaintiff to shew that the circumstances have arisen making absolute the conditional obligation to accept the shares and pay for them and this proof is lacking.

Mr. Hellmuth's principal contention was that the clause "this undertaking may be pledged or hypothecated with any banking institution as security for advances" constituted an authority to the lender to make advances as upon the security of an absolute obligation to pay. I cannot find any evidence of such authority in this document, on the contrary the obligation upon which the lender is invited to advance is described in express words as "this underwriting."

Mr. Hellmuth relies upon the judgment of Lord Cairns in *Re Agra and Masterman's Bank* (L.R. 2 Ch. 391), at pp. 396 and 397. The substance of Lord Cairns' judgment in this case, in so far as now pertinent, is that the letter there in question was an invitation to bankers to advance money upon the faith of a promise contained in that letter to accept bills drawn upon the writers of it and that this virtually constituted an undertaking to pay such bills irrespective of the equities between the writers and the persons to whom the letter was addressed *propriis nominibus*. The letter contained an unqualified promise to honour the drafts of the addressees and was expressed in terms plainly constituting an invitation to third persons to negotiate such drafts in reliance upon that promise. The letter was either a promise to pay such drafts in disregard of equities or it was a mere trap, which of course the writers of it could not be allowed to aver. I find at most only a superficial resemblance between that letter and the document now under consideration. Here there is no unqualified undertaking and indeed no undertaking of any description by the subscribers to repay advances made upon a pledge or hypothecation of the agreement.

The appeal should be dismissed with costs.

ANGLIN, J.:—After giving to all the circumstances of this case most careful consideration I have reached the conclusion that the plaintiff's appeal should not succeed.

I have no doubt that the Trust Company took the obligation of the late G. T. Richardson subject to whatever equities and conditions affected it in the hands of J. A. Mackay & Co., of which its *ex facie* designation as an "underwriting" in my opinion gave them constructive notice. I cannot accept the

Can.

S.C.

MONTREAL TRUST CO. v. RICHARDSON.

Mignault, J.

view that the mere statement that the non-negotiable document signed by Richardson might be pledged or hypothecated as security for advances enables the assignee of it to assert rights higher than those held by its assignor.

I think it is also reasonably clear that the liability assumed by Richardson towards J. A. Mackay & Co. was not absolute but conditional and in the nature of an underwriting. I am not so well satisfied however as to the terms of the condition on the happening of which Richardson's liability on the document sued upon was intended to cease. In view of the facts that this document is an underwriting of J. A. Mackay & Co. and that Mackay himself tells us that "the amount to be underwritten (by his firm) was to be $150,000," I am not convinced that the conclusion of the Chief Justice of Ontario, at p. 193 (55 D.L.R.) that Richardson "was to pay only in the event of the $150,000 [to be underwritten by J. A. Mackay & Co.] not being taken up by the public," is wrong. The evidence taken as a whole leaves little room for doubt that J. A. Mackay & Co. did in fact dispose to the public of more than the original $150,000 worth of preferred stock for which they undertook to obtain purchasers. Therefore, while not entirely satisfied that the condition of the underwriting sued upon was what the Appellate Divisional Court has found it to be, since the evidence, oral and documentary, does not enable me to say that it was something different and was unfulfilled, a reversal of the judgment *a quo* would not, in my opinion, be justified.

MIGNAULT, J.:—The document on which the appellant's action is based is an undertaking signed by the late George T. Richardson, represented by the respondent, his executor, to subscribe for and purchase from J. A. Mackay & Co., 100 preferred shares of Canadian Jewellers, at the price of 95% of the par value thereof, with 50% of the par value thereof in bonus common stock of the company, the purchase price to be paid on January 15, 1913. This undertaking replaced a former one not produced, but said to have been similar in tenor and states:—"This underwriting may be pledged or hypothecated with any banking institution as security for advances."

It is very important to observe that this document is not a negotiable instrument. And I fear that many of the appellant's contentions are based upon a negotiability which it certainly does not possess.

The appellant however relies upon the clause stating that this *underwriting* may be pledged or hypothecated with any banking institution as security for advances, and the trial

Judge, on the authority of the judgment of Lord Cairns (then Sir H. M. Cairns, L.J.), in *Re Agra and Masterman's Bank, ex parte Asiatic Banking Co.*, L.R. 2 Ch. 391, at p. 397, decided that under this clause the appellant took Richardson's undertaking free from any equities it might have in the hands of J. A. Mackay & Co.

In my opinion the case cited does not help the appellant. It was the case of a letter of credit issued by a bank in favour of one of its clients, authorising the client to draw upon the bank to the extent of £15,000, and undertaking to honour on presentation drafts drawn thereunder. Lord Cairns said, at p. 397: "The essence of this letter is, as it seems to me, that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter and to have it in order to obtain the acceptance of the bills which are negotiable instruments payable according to their tenor and without reference to any collateral or cross claims."

There is nothing similar here. The stipulation that the "underwriting" might be pledged or hypothecated did not add anything to it as a contract, nor did it, in my opinion, give the assignee any greater right than is conferred by the assignment of a contract or chose in action, the more so as the very clause permitting its pledge or hypothecation gave notice to the pledgee that it was an "underwriting," that is to say, as I will show, a conditional contract. And surely a conditional contract can only be assigned subject to the condition expressed in it or consequent on its nature.

The other cases referred to by the trial Judge are bond cases to which very different principles apply.

I have said that Richardson's undertaking, being an "underwriting" is a conditional contract.

Bouvier, Law Dictionary, vol. 3, p. 3352, defines "underwriting" and "underwriting contract" as follows:—

"Underwriting. An agreement made in forming a company and offering its stocks or bonds to the public, that if they are not all taken up, the underwriter will take what remains. An underwriter is held liable in England on the stock subscribed by him. See 42 Ch. D. 1.

Underwriting contract. An agreement to take shares in a company forming, so far as the same are not subscribed to by the public."

An underwriting is therefore essentially a conditional contract, and whatever rights J. A. Mackay & Co., or the appellant as its assignee, had, were subject to this condition.

Can.

S.C.

MONTREAL TRUST CO. v. RICHARDSON.

Mignault, J.

It follows that the appellant took this undertaking subject to any equities and conditions which affected it in the hands of J. A. Mackay & Co. In other words it acquired no higher rights than J. A. Mackay & Co. itself had to exact performance of Richardson's undertaking.

There is some difficulty in determining here what was the preferred stock which had to be taken up to free Richardson from liability under his contract.

The heading of the document signed by Richardson represents the preferred shares as being $2,500,000, of which shares to the amount of $600,000 were to be issued. Is the amount of shares underwritten by Richardson the whole $600,000, or, as found by the Appellate Division, only the $150,000 which J. A. Mackay & Co. had undertaken to sell to its clients?

It is to be observed that Richardson's contract to underwrite shares was made with J. A. Mackay & Co. The form signed by Richardson, or a similar form, was enclosed in the letter which one Henry Timmis, promoter of the company, wrote to Richardson on September 8, 1911, whereby he sought to induce Richardson to enter into an underwriting contract with Mackay & Co. This letter represented that Mackay & Co., who were financing the company, had undertaken to sell $150,000 worth of stock to their clients, and the document signed by Richardson being an underwriting contract made with Mackay & Co., this letter would shew that the stock to be underwritten was the $150,000 worth of stock which Mackay & Co. had undertaken to sell to their clients. There is no suggestion in this letter that Mackay & Co. were seeking subscriptions for a greater amount of the preferred stock.

Timmis, in his evidence, stated that Mackay & Co. and he himself had sold to the public 4,760 shares. I do not think therefore that there can be any serious doubt that the whole $150,000 of stock had been sold by Mackay & Co. to the public.

This being the case, Richardson's obligation to subscribe the stock underwritten by him came to an end, and Mackay & Co. would have no action against Richardson to force him to take the stock. The appellant, not being in a better position than Mackay & Co., cannot therefore assert any rights under Richardson's contract.

The appeal should be dismissed with costs.

Appeal dismissed.

HORSNAIL v. SHUTE.

B.C.

C.A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 9, 1921.

COURTS (§ IA—2)—JURISDICTION—HEARING OF APPEAL—REVIEW OF REGISTRAR'S CERTIFICATE.

The Court has inherent jurisdiction to refer the question of damages to its officer.

DAMAGES (§ IIIA—62)—MEASURE OF, BREACH OF CONTRACT.

A party disregarded an agreement of sale of land between himself and the other party, and sold the land to another. This prevented the other party from obtaining the relief of specific performance. The measure of damages will be the difference between the contract price and the value of the land at the date of the plaintiff's abandonment of his claim for specific performance, and in addition a sum equal to plaintiff's loss of profits as a result of being deprived of the land.

[Authorities reviewed: *Hadley* v. *Baxendale* (1854), 9 Ex. 341, followed.]

APPEAL by defendant from a judgment of Macdonald, J., in an action for specific performance of a contract for the sale of a bearing orchard, which was abandoned by the plaintiff on discovery that the orchard had been sold to a third party, the plaintiff then relying on his claim for damages. Affirmed.

Alfred Bull, for appellant.

W. M. Griffin, for respondent.

MACDONALD, C.J.A.:—There are two questions involved in the appeal, one of the jurisdiction to hear it and the other concerning the proper measure of damages for breach by a vendor of his contract for the sale of land.

In *Beatty* v. *Bauer* (1913), 13 D.L.R. 357, 18 B.C.R. 161, Murphy, J., decided that he had jurisdiction to review the Registrar's certificate. When that case came up to this Court on the merits, we did not in the reasons for judgment handed down deal with the question of jurisdiction, but it is manifest that the Court must have thought the order of Murphy, J., was right, otherwise we could not have entertained the appeal. In each case the reference was to the Registrar as an officer of the Court. I think the Court below had inherent jurisdiction to refer the question of damages to its officer and therefore it was unnecessary to resort to the provisions of the Arbitration Act or the statute and rules, to which we were referred, in aid of the order of reference.

The other question depends for its decision upon the following facts: The defendant in June, 1918, agreed to sell a bearing orchard to the plaintiff but thereafter refused to carry out the

B.C.

C.A.

HORSNAIL v. SHUTE.

Macdonald, C.J.A.

agreement, and some weeks later sold the orchard to one Baskin, at an advance of $500. It is conceded that this sum represents the true difference between the contract price and the value of the orchard at the date of the repudiation. The plaintiff did not acquiesce in the repudiation, and without knowledge of the re-sale, sued for specific performance. Later he amended and in the alternative claimed damages for breach of contract, and still later and about a year after the breach, upon discovery of the fact of the re-sale, he abandoned his claim for specific performance and relied solely upon his claim for damages. The parties then agreed upon a stated case as to whether or not there had been a binding contract and to a reference to the Registrar to find the damages in the event of the Court deciding that there had been. Liability was found, the reference was had and on a motion to a Judge to vary the Registrar's certificate being refused, this appeal was taken.

The Registrar found the measure of damages to be the difference between the contract price and the value of the orchard at the date of the plaintiff's abandonment of his claim for specific performance, that is to say, the date of his discovery that specific performance could not be decreed because of the re-sale, and on this basis, for the loss of his bargain, awarded him $1000, being the difference between the contract price and the value of the orchard in July, 1919, and in addition thereto, he awarded a sum for damages equal to the profits which Baskin had made from the fruit crop of 1918, amounting to $1,223.97. The defendant's counsel contended that the sole liability of his client was for the $500 above mentioned, that is to say, that the true measure of damages was the difference between the contract price and the value of the orchard at the date of the repudiation of the contract.

Had the breach been that of the purchaser and not of the vendor, the rule to be applied would be that applicable to breaches of contract for the sale of goods. *Keck* v. *Feber, et al* (1916), 60 Sol. Jo. 253, but where as here the breach was that of the vendor it was argued that that was not the rule to be applied.

Robertson v. *Dumaresq* (1864), 2 Moo & P.C.C. (N.S.) 66, 15 E.R. 827, is the authority upon which the judgment appealed from is founded. The Supreme Court of New South Wales regarded that case as one not governed by the ordinary rules of the common law, but Lord Chelmsford, delivering the judgment of the Judicial Committee of the Privy Council, appears not to have adopted that view, but nevertheless sustained the judgment professedly upon the principle adopted in such cases of *Shep-*

herd v. *Johnson* (1802), 2 East 211, 102 E.R. 349; *Harrison* v. *Harrison* (1824), 1 Car. & P. 412; and *Owen* v. *Routh et al* (1854), 14 C.B. 327, 139 E.R. 134, wherein it was held that the damages to be awarded for failure of the borrower of shares to return them on the agreed day, were to be ascertained as of the date of the trial and not of the breach, because the lender's money had not been available to him to replace the stock. Applying that principle Lord Chelmsford held that since the plaintiff had paid for the land in 1831, when he rendered the agreed consideration, he was entitled in damages to the value of the land at the date of the trial. Had the plaintiff here paid the purchase money, no distinction in principle could be made between the two cases. There was a suggestion of the application of that principle based on the fact that plaintiff had sent $400 to his bank to be paid to the defendant as a deposit and which he did not receive back until several months thereafter, but I do not need to consider that circumstance since the defendant was not responsible for this as the money never came into his possession or under his control. The contract, therefore, was not an executed one, as was that in *Robertson* v. *Dumaresq, supra,* but was an executory one merely. It is therefore not within, what appears to me to have been the *ratio decidendi* of the case in the Privy Council. What then is the rule to be applied in estimating damages when the *vendor* refuses to carry out his part of an executory contract? The submission was that as the breach was not assented to by the plaintiff and as in equity he was entitled to bring suit for specific performance, which suit was defeated ultimately, owing to the defendant having made a re-sale whereby he put it out of his power to convey, the time at which the difference between the selling and the market prices should be ascertained, was the date of plaintiff's discovery of the fact of re-sale, and not the date of the repudiation, nor that of the actual re-sale itself.

The general rule stated in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, and affirmed in the subsequent cases, is, that the party breaking his contract should be made to pay to the other the full loss sustained by him. The difficulty which arises in this and many other cases, is as to how that loss is, without entering into the realms of speculation, to be estimated. A general rule which attains only an approximate result has been adopted in the case of breaches of contract for the sale of goods capable of being replaced. The measure there is the difference between the contract price and the market price at the date of the breach. This rule is, I think, on principle and authority ap-

B.C.

C.A.

HORSNAIL v. SHUTE.

Macdonald, C.J.A.

plicable to breaches of contract for the sale of real property, where in like circumstances it would be applicable to breaches of contract for the sale of goods. When the repudiation of the one party is acquiesced in by the other there will in general be no great difficulty in assessing the damages and when specific performance cannot be sought, the date of the termination of the agreement will govern the application of the rule, but when an action for specific performance will lie and pending the trial, the vendor commits another breach, *i.e.*, defeats the purchaser's rights to specific performance by sale of the property to an innocent third person, that act is the act which determinates the contract, or in other words, renders it impossible of enforcement.

This action was commenced on August 23, 1918, the conveyance to the third person was executed in September and registered in October; the trial Judge has found that the plaintiff cannot be said to have had knowledge of the re-sale until July, 1919, and he therefore held the damages to be the difference between the contract price and the value of the property in July, 1919. These facts raise a point which must here be noticed. The contract was in strictness at an end in October, 1918, and had plaintiff had notice of this, actual or imputed, that date I think would govern. He had no actual notice until July, 1919, and in my opinion, notice cannot be imputed to him by reason of the registration of the deed in October, 1918. If the plaintiff wished to protect himself, as against innocent purchasers, prudence would lead him to file a certificate of *lis pendens*, but as against the defendant, the wrong-doer, he was under no obligation to do this or to keep himself posted from day to day of the state of the defendant's title.

One may therefore ask: Would it be correct to hold that if the re-sale had not actually been made until July, 1919, the measure of damages would be the difference between the contract price and the value of the orchard in July, 1919? I think it would, since the plaintiff would then and not until then, have lost his right to specific performance.

The reasons, particularly those of Sir Francis Jeune in *Day* v. *Singleton*, [1899] 2 Ch. 320, appear to me to lend some support to this conclusion.

Then must the result be different where, as in the present case, the re-sale was at an earlier date but unknown to the plaintiff? I think not. The rule is based upon the doctrine that the plaintiff must mitigate his loss if he can do so. Ordinarily this is done by replacement at once of the thing which was the

subject matter of the contract. But where the plaintiff is pursuing his remedy for enforcement of the contract that doctrine can have no application. The plaintiff was within his rights in persisting in his claim for specific performance until the impossibility of success was disclosed. It was upon discovery of that fact, wrongly concealed from him by defendant, and then only, that he was thrown back upon his claim for damages.

The judgment for the item of $1000 must stand. But in addition to this item, a sum equal to the net profits realised from the fruit crop of 1918 by the person who gathered it, viz., Baskin, was allowed and confirmed in the judgment appealed from. These were damages which at the date of trial were capable of reasonably accurate ascertainment. The appellant attacks the principle of the assessment not the amount assessed; he denies any liability whatever on that score. In cases wherein specific performance has been decreed, damages have been given for delay in carrying out the contract. On the principle of *Hadley* v. *Baxendale*, *supra*, that would appear to be only justice. On the other hand, where the contract is executory, anticipated profits are regarded as too speculative to be enquired into. In such cases the difficulty of arriving at a safe conclusion when so many factors must be uncertain and impossible of satisfactory ascertainment, has, I apprehend, been the obstacle in the way rather than a want of consciousness of the fact of loss sustained. Here there is not uncertainty. The Registrar was in as favourable a position to define with reasonable accuracy the loss suffered by the respondent by the appellant's refusal to put him in possession of the orchard as he would have been had specific performance been decreed in July, 1919. If, therefore, I am not in error in respect of the first branch of the case, it would appear to me to follow that the second item of damages was properly allowed.

I would therefore dismiss the appeal.

MARTIN, J.A., would dismiss the appeal.

GALLIHER, J.A.:—In my opinion the trial Judge came to the right conclusion, both as to jurisdiction and confirmation of the Registrar's award.

I would dismiss the appeal.

McPHILLIPS, J.A.:—This appeal would seem to present some features of difficulty with regard to a review of the damages as assessed by the Referee (Registrar) and Mr. Griffin, the counsel for the respondent, strenuously submitted in his able and careful argument that there was no right of review—as at present

B.C.

C.A.

HORSNAIL v. SHUTE.

McPhillips, J.A.

advised, my opinion is that the right to review does lie—however, I do not wish to be considered to have given any definite or final opinion thereon, and it is unnecessary in the present case to decide the point as I am of the view that the damages as assessed, should not be disturbed.

It is true that a question of some nicety arises as to what the damages should be when there has been a sale to another and it is impossible to decree specific performance; here there was a clear breach of contract as the appellant in disregard of the agreement for sale of the land to the respondent, sold and conveyed away the land. It follows that in a case of this kind damages must be given. At first thought it might be said the damages would be the profit made upon the re-sale—unquestionably in some cases that would be the extent of the damage, but it cannot be said to be the only damages that may be assessed when the authorities are carefully examined. Here the land was orchard land and had the appellant done what he should have done, completed the contract with the respondent and let the respondent into possession, the respondent would have earned profits from the sale of the crop and these profits have been allowed to the respondent by the Referee. The assessment of damages as found by the Referee was appealed against and confirmed upon the appeal by Macdonald, J., and it is from the judgment of Macdonald, J., this appeal is brought.

In *Joyner* v. *Weeks*, [1891] 2 Q.B. 31, 60 L.J. (Q.B.) 510, Fry, L.J., at p. 517, said:—"As a general rule I conceive that where a cause of action vests, the damages are to be ascertained according to the rights of the parties at the time when the cause of action vested."

Unquestionably here the appellant by his conduct prevented the respondent earning profits which had the contract been carried out he would have earned. The rule is not so adamantine in the assessment of damages that the special circumstances of the case cannot be considered, and in this connection I observe that the trial Judge, in arriving at the value of the land, applied, and I think rightly applied, the principles laid down in no uncertain terms by their Lordships of the Privy Council in *Robertson* v. *Dumaresq* (1864), 2 Moore (N.S.) 66, 15 E.R. 827, where in determining the value of the land the judgment of the Supreme Court of New South Wales was upheld, *i.e.*, "The rule for the measure of damages is, the value of the specific land at the time of trial, which the party had not received in performance of the contract made to him." (see head-note at p. 66). And at p. 95, Lord Chelmsford said:—"The allotment of land promised

to the respondent was a thing which he could not obtain except by the performance of the promise. If he had received his allotment as he ought to have done, he would have had it, with the benefit of the increased value which it might have acquired while in his possession. Of this the other party has deprived him by the breach of his promise; and whether he has obtained the benefit himself, or has hindered the respondent from enjoying it, it seems to be equally just and reasonable that he should pay the full value of the property to the person from whom he has wrongfully withheld it."

I had occasion to discuss the rule governing the assessment of damages where there was failure to complete a sale of land consequent upon the act of the vendor in *Bagley* v. *B.C. Southern R. Co.* (1917) 37 D.L.R. 733, at pp. 737, 738, 24 B.C.R. 400. In *Engell* v. *Fitch* (1869), 38 L.J. (Q.B.) 304, 10 B. & S. 738, Kelly C.B., at pp. 305, 306, said:—

"Where the breach arises not from some defect in the title but from the vendor's neglect in delivering possession of the premises, and that the question is, whether the purchaser in the case before us is entitled to recover this difference in the market value? Now, if this be the question which is raised, I will say at once that we are prepared to adopt the rule laid down by Parke, B., in *Robinson* v. *Harman* (1 Exch. Rep. 850, s.c. 18 Law J. Rep. (N.S.) Exch. 202)—'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.'"

I, therefore, for the foregoing reasons, am of the opinion that the judgment of Macdonald, J., which has been appealed against, should be affirmed and the appeal dismissed.

Appeal dismissed.

PALIN v. PALIN.

Saskatchewan King's Bench, MacDonald, J. November 2, 1921.

DIVORCE AND SEPARATION (§ VB—50)—ALIMONY—COSTS—RIGHT OF WIFE TO, WHO BRINGS CASE TO TRIAL WITHOUT APPLYING FOR.

If a wife brings her case for alimony to trial without applying for costs and is unsuccessful she is not entitled to costs.

[*Sewell* v. *Sewell* (1919), 49 D.L.R. 549, 13 S.L.R. 44, referred to. See Annotation, Divorce Law in Canada, 48 D.L.R. 7, 62 D.L.R. 1.]

Sask.

K.B.

PALIN v. PALIN.

MacDonald, J.

ACTION for judicial separation and alimony. At the close of the plaintiff's case the action was dismissed but the question as to costs was reserved.

W. B. Willoughby, K.C., and *P. J. Dixon*, for plaintiff.

J. E. Lussier and *R. W. E. Scott*, for defendant.

MACDONALD, J.:—This is an action for judicial separation and alimony. At the close of the plaintiff's case I dismissed the action, but reserved the question whether the plaintiff should have her costs against the defendant. In this case there was no application for costs beore the trial, and in case this decision should come before a higher Court I may state that I am also of opinion that the solicitor for the plaintiff took up her case *bona fide*. The plaintiff was not shewn to have separate estate. Under this state of facts, is the plaintiff entitled to costs?

In *Sewell* v. *Sewell* (1919), 49 D.L.R. 594, 13 S.L.R. 44, the Court was equally divided, Haultain, C.J.S., and Elwood, J.A., holding that in an action for alimony a wife, unless her solicitor has not taken up her case *bona fide*, whether successful or not, is always allowed a certain amount of costs unless she is shewn to have a separate estate. Newlands and Lamont, JJ.A., held that, if a wife brings a case for alimony to trial without applying for costs, and loses her case, she is not entitled to costs except in the discretion of the trial Judge.

The Court in *Sewell* v. *Sewell* having divided equally, I am of course free to follow my own opinion in the matter, and the best conclusion I can come to is that if a wife brings her case for alimony to trial without applying for costs, and is unsuccessful, she it not entitled to costs. A perusal of the cases cited in the judgment of Newlands, J.A., convinces me that the peculiar rule as to costs in alimony cases is founded on the consideration that a wife might be unable, without assistance from her husband, to bring the case to a hearing, and therefore an interim order as to costs is made; but when a wife brings her case to a hearing without having previously taxed her costs against her husband, and without having obtained security for same, and fails, that is the best evidence that the foundation of the rule does not exist, and therefore she should not have her costs. There will therefore be no costs to either party.

Judgment accordingly.

Re F. E. WEST & Co.

Ont.

S.C.

Ontario Supreme Court in Bankruptcy, Orde, J. July 12, 1921.

BANKRUPTCY (§II—20)—PRIORITIES—RIGHT OF CROWN TO PRIORITY SALES TAX OWING BY INSOLVENT—RIGHT OF CITY CORPORATION TO PRIORITY IN REGARD TO BUSINESS—RIGHTS OF WORKMEN'S COMPENSATION BOARD.

In the winding-up of an insolvent estate under the Bankruptcy Act, 1919 (Can.) ch. 36, whether under a receiving order or by virtue of a voluntary assignment under the Act, His Majesty in the right of the Dominion Government is entitled to priority over all other unsecured creditors (including those having claims for wages) for his claim in respect of sales taxes owing by the insolvent to the Crown. A City Corporation is not entitled to priority for business taxes, nor is the Workmen's Compensation Board of Ontario entitled to priority, such claims being based on priorities given by Provincial Statutes which are not preserved by the Bankruptcy Act.

[See Annotations, Bankruptcy Act, 1920, 53 D.L.R. 135, Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

MOTION by a trustee under the Bankruptcy Act, 1919 (Can.) ch. 36 to determine the respective priorities of His Majesty in right of the Dominion Government for sales taxes; the right of the Corporation of the City of Toronto for business taxes; The Toronto Hydro Electric Commission for electric light and the Workmen's Compensation Board of Ontario.

H. H. Shaver, for the authorized trustee.

W. G. Thurston, K.C., and *F. H. Snyder*, for the Attorney-General of Canada.

J. A. R. Mason, for the City of Toronto.

The Workmen's Compensation Board was not represented.

ORDE, J.:—The trustee of this estate, after paying the expenses of administration and the preferred claims for wages and after making allowance for the trustee's compensation, finds that there is not left sufficient to meet the claims of the following, all of whom claim to rank as preferred creditors:—

His Majesty the King, in the right of the Dominion Government, for Sales Taxes	$853.00
The Corporation of the City of Toronto, for Business Taxes	278.22
The Toronto Hydro Electric Commission, for Electric Light	14.19
The Workmen's Compensation Board of Ontario	48.75

The Trustee now submits for determination the question as to the respective priorities, if any, of these 4 claims. The Workmen's Compensation Board, although served with notice, did not appear.

Ont.

S.C.

RE F. E. WEST & Co.

Orde, J.

In the winding-up of an insolvent estate under the Bankruptcy Act, 1919, (Can.) ch. 36, whether under a receiving order or by virtue of a voluntary assignment made under the Act, the priorities of creditors must depend upon the provisions of the Bankruptcy Act itself. No priority given by any Provincial Act can be of any avail unless that priority is preserved by the Bankruptcy Act. When considering the question of priority it is well to keep in mind that the claims of secured creditors are upon a different footing. The right of a secured creditor to realise upon his security is not affected by the Act, but is expressly preserved by sec. 6, sub-sec. (1) though if he elects to file a claim then his power to deal with his security is to some extent modified by the provisions of sec. 46. And the special security which is given to a landlord by way of distress is protected by sec. 52. See also *Re Auto Experts Ltd.* (1921), 59 D.L.R. 294.

Section 51 of the Act, as amended by 1920 (Can.), ch. 31, sec. 13, deals with the priorities of claims and provides that, subject to the provisions of sec. 52 as to rent, in the distribution of the property of the insolvent, there shall be paid in the following order of priority:—Firstly, the fees and expenses of the trustee; secondly, the costs of the execution creditor, &c., under sec. 11; thirdly, the claims of wage-earners, &c., in respect of three months' services prior to the receiving order or assignment.

Then follows certain provisions, including that in sub-sec. 4 that "subject to the provisions of this Act, all debts proved shall be paid *pari passu;*" and the section concludes with the following:—

"(6) Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws."

Then sec. 86 must also be referred to:—

"86. Save as provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of . . . a discharge, shall bind the Crown."

In dealing with the claim of the Workmen's Compensation Board I have not had the benefit of any argument on behalf of the Board, and my ruling as to their claim in this present case

ought not therefore to be considered as an authoritative decision as to the nature of the assessments made by the Board under the Workmen's Compensation Act. If such assessments are deemed to be "assessments" within the meaning of that term in the phrase "taxes, rates or assessments" in sub-sec. (6) of sec. 51, then they may be entitled to some measure of priority. By the Ontario Act of 1915, ch. 24, sec. 28 (sec. 98A) was added to the Workmen's Compensation Act of 1914, ch. 25, giving to the assessment or compensation payable under the Workmen's Compensation Act, 1914, ch. 25, priority over all other debts in the case of an assignment under the Assignments & Preferences Act, R.S.O. 1914, ch. 134, or in the case of the death of a person whose estate is insolvent under the Trustee Act, R.S.O. 1914, ch. 121, or in the winding-up of a company under the Winding up Provisions of the Ontario Companies Act, R.S.O. 1914, ch. 158. But this priority is given only in those cases in which the distribution of the debtor's property is being made under the provisions of one of the three Provincial Acts mentioned in sec. 98. That the claims of the Workmen's Compensation Board are not regarded by the Dominion Parliament as coming within the provisions of sub-sec. (6) of sec. 51 would appear from the amendment of last Session 1921 (Can.), ch. 17, sec. 39, to sub-sec. (1) of sec. 51 by which there is added to the third class above mentioned, that is, to the claims of wage-earners, &c., "all indebtedness of the bankrupt or authorised assignor under any Workmen's Compensation Act." Without definitely deciding what the priority of the Workmen's Compensation Board may really be, in view of the non-appearance of the Board on this motion I disallow the claim of the Board here to any priority over the claims of others who are claiming priority and also over the claims of ordinary unsecured creditors.

The questions of priority involved here may present a double aspect for consideration. First, dealing with each claim to priority, irrespective of the others, is the claim entitled to priority over the claims of unsecured creditors? And secondly if more than one of such claims is entitled to such priority is there any, and if so what, priority as among themselves? There is also a third question which was not argued before me, by which if there is, priority must come up for determination either in this or some other matter, namely—does the claim rank ahead of all the items provided for in sub-sec. 1 of sec. 51.

The claim of the Crown for Sales Taxes arises under the

Ont.

S.C.

RE F. E. WEST & Co.

Orde, J.

provisions of secs. 19BB. and BBB. of the Special War Revenue Act, 1915, of the Dominion Parliament, ch. 8, as enacted by sec. 2 of 1920, (Can.), ch. 71. These Acts contain no provision declaring that the taxes are to be a lien or charge upon the property of the debtor, such as appears in the Business Profits War Tax Act 1916, (Can.), ch. 11, sec. 24, but sec. 20 of the Special War Revenue Act 1915 provides for the recovery of all taxes and sums payable under the Act as a debt due to—or a right enforceable by, His Majesty in the Exchequer Court or any other Court of competent jurisdiction, and sub-sec. (3) of sec. 19BBB. contains a somewhat similar provision with respect to the taxes and penalties imposed by this section, though this special provision seems hardly necessary, as those contained in sec. 20 of the Act of 1915 must apply to the added sections. The taxes due to the Dominion Government under this Act are therefore merely debts due to the Crown now expressly charged upon the assets of the debtor.

Counsel for the Crown relied upon the judgment of the Judicial Committee in *Commissioners of Taxation for New South Wales* v. *Palmer*, [1907], A.C. 179; but, while the general principles governing the Crown's prerogative right to priority which are discussed there have some bearing here, the decision itself is of little value, because it turned almost wholly upon the fact that the New South Wales Bankruptcy Act 1898, ch. 25, did not contain any provision corresponding to sec. 150 of the English Bankruptcy Act, ch. 52 of 1883 (now section 151 of the English Bankruptcy Act of 1914, ch 59. That section is practically the same as sec. 86 above quoted from our Act. As the New South Wales Act did not bind the Crown, the Judicial Committee held that the Crown's prerogative right to a preference over the other creditors had not been affected. That prerogative right of the Crown extended to all debts, and was not limited to those of any special character, whether in the nature of taxes or otherwise.

Under our Act, sec. 86 clearly deprives the Crown of its general prerogative right to priority "save as provided in this Act," so that we must look elsewhere in the Act to see in what cases and to what extent the Crown's priority has been preserved. Observing in passing that para. (a) of sec. 61 (1) excludes from the operation of a discharge certain debts due to the Crown, the only provision under which the Crown's right to priority can be exercised appears to be sub-sec. (6) of sec. 51, quoted above.

Section 51 deals with the distribution of the insolvent's es-

tate, but as it makes no reference to secured creditors, other than the opening reference to rent, and the concluding reference to any lien or charge in respect of taxes, rates or assessments, the section is necessarily confined to those assets which come to the trustee's hands free or discharged from any encumbrances, and which, subject to prior satisfaction of the expenses and the wages claims mentioned in sub-sec. 1, are available for distribution among the ordinary or unsecured creditors.

The provisions of sub-sec. 6 are not merely confined to debts due to the Crown, but extend to all taxes, rates and assessments payable by or levied or imposed upon the debtor, or upon his property, either under any law of the Dominion or of the Province. This would include taxes due to the Province and also to any municipality. In so far as any such taxes are charged upon the property of the debtor, there is no practical difficulty because not only is such a charge preserved by the concluding words of the sub-section, but also by sub-sec. 1 of sec. 6.

In so far as sub-sec. 6 of sec. 51 is applicable to Crown debts, it is limited to those Crown debts which are for taxes, rates or assessments. It is quite clear that this sub-section does not give the Crown any priority for debts of any other character, because sec. 86 completely destroys such priority. That section places the Crown in exactly the same position under the Act as a subject (a) as to its remedies against the property of the debtor, (b) as to its priority, (c) as to the effect of a composition or scheme of arrangement, and (d) as to the effect of a discharge and that these provisions are not to be given any restricted meaning is established by the judgment in *Re Thomas, Ex parte Commissioners of Woods and Forests* (1888), 21 Q.B.D. 380. Any prerogative rights possessed by the Crown for the recovery of Crown debts, whether in the nature of taxes or otherwise, and either in respect of the remedies which is possessed against the property of the debtor in respect of any priority over the other creditors, are taken away, except in so far as they may be preserved for the purpose of enabling the Crown to collect taxes, rates or assessments under the provisions of sub-sec. 6 of sec. 51.

Sub-section 6 is not taken from any corresponding provision in the English Act, so that very little assistance in its interpretation can be derived from any English decisions directly in point. Under the English Act of 1914, taxes and rates are provided for, not by way of an exception from the operation

Ont.

S.C.

RE F. E. WEST & CO.

Orde, J.

of the Act or of any of its provisions, but by positive enactment declaring the nature and extent of their priority. Section 33 of that Act expressly gives "in the distribution" of the bankrupt's property a measure of priority to all parochial and other local rates and all assessed taxes, land tax, property and income tax.

If sub-sec. 6 had provided that "nothing *in this Act* shall interfere, etc., . . ." there would probably be no difficulty in determining that in the collection of taxes due to the Crown, the latter might resort to all the remedies and be entitled to all the priorities which is possessed before the bankruptcy or the making of the assignment. Such a provision would have constituted a complete exception, so far as taxes are concerned, to the sweeping removal of the Crown's prerogatives in respect of its remedies and its priority affected by sec. 86. But the provisions of sub-sec. 6 are "nothing *in this section* shall interfere, etc.", and it is impossible in my judgment to hold that these words are to be so construed as to exclude taxes, rates and assessments altogether from the operation of the Act. The tendency of the legislation upon bankruptcy has been towards the removal of those prerogatives of the Crown which give it any special privileges over other creditors. On the other hand, Legislatures have recognised that in some respects the claims of the public revenues are superior to those of individual creditors, and have endeavoured to provide for them by giving them some measure of priority. Hence, such provision as those in sec. 33 of the English Act of 1914 and in sub-sec. 6 of sec. 51 of our Act.

Even before the introduction into the English bankruptcy legislation of provisions binding upon the Crown, the Crown's remedies which the Crown possessed against its debtor by means of a Writ of Extent was an extremely powerful one. By its means the Crown could, without waiting to obtain judgment, seize all the property of its debtor, and in some cases even the property of one who was indebted to the Crown's debtor. But the Crown could only take under a Writ of Extent the property of the debtor at the time of the issue of the writ. If the debtor had assigned or transferred his property, the Crown could not take it; *Ex parte Postmaster-General; In re Bonham* (1879), 10 Ch. D. 595, at p. 603. For this reason it was sometimes of the utmost importance, to one side or the other, as to whether the Writ of Extent or the Commission in Bankruptcy was issued first. Lord Eldon mentions in *Wydown's* case (1807), 14 Ves. 80, at p. 87, 33 E.R. 451, having

once got out of bed to seal a commission in bankruptcy in order to prevent the Crown from issuing a Writ of Extent against the debtor's property. See the cases referred to in Robertson's Civil Proceedings by and against the Crown, pp. 164 et seq.

Having these cases in view, it is not conceivable that Parliament intended, by sub-sec. 6 of sec. 51, to preserve for the benefit of the Crown all its prerogative remedies for the collection of taxes. The fact that the property of the debtor is vested in the trustee would preclude its seizure under a writ of extent. I have already pointed out that the case of *Commissioners of Taxation for New South Wales* v. *Palmer*, [1907] A.C. 179, can have no direct application because of the fact that the statute then contained no such provision as that contained in sec. 86 of our Act. Counsel for the Crown also rely upon a recent judgment of Audette, J., in the Exchequer Court of Canada in *The King* v. *Lithwick*, (1921), 57 D.L.R. 1. The question there was whether an asssignment under the Ontario Assignments and Preferences Act affected the Crown's prerogative right to rank in priority to other creditors for Income War Tax due to the Crown by an insolvent debtor, and Audette, J., held that neither the Assignments and Preferences Act of Ontario nor any assignment under it could take away the prerogative right of the Crown in the right of the Dominion Government to preferential payment of a Crown debt. But this decision, like that in the *Palmer* case, is not very helpful in this case, because here the Crown's prerogatives are affected by sec. 86, and the real question is to what extent are they preserved, if at all, by sub-sec. 6 of sec. 51.

It is necessary, in considering the question of the Crown's prerogative in respect of Crown debts, to keep in mind that there is more than one such prerogative. There is the prerogative Writ of Extent by which the Crown is enabled before judgment to take possession of the debtor's property and thereby to improve its position and presumably to gain priority as against other creditors. Whether or not sec. 11 as amended by 1920, ch. 34, sec. 6, would apply to the case where the Crown had made a seizure under a Writ of Extent prior to the receiving order or the assignment need not be determined now. The judgment in *Ex parte Postmaster-General; In re Bonham* (1879), 10 Ch. D. 595, was prior to the passage of the English Act (corresponding to sec. 86 of our Act) and may have curtailed the effectiveness of that prerogative remedy of

Ont.

S.C.

RE F. E. WEST & Co.

Orde, J.

the Crown even after actual seizure; *In re Thomas, Ex parte Commissioners of Woods & Forests* (1888), 21 Q.B.D. 380; Baldwin on Bankruptcy, 11th ed. pp. 279, 280. But where no Writ of Extent has been issued then, as already pointed out, that prerogative remedy is gone.

There is, however, quite distinct from that of any special remedy for the enforcement of the Crown's rights, the further and wider prerogative in the Crown to preferential payment of its claims over the claims of any of its subjects, to which reference is made by Lord Macnaghten in the *Palmer* case and by Audette, J., in the *Lithwick* case, already mentioned. The judgment in *In re Henley & Co.* (1878), 9 Ch. D. 469, is expressly approved by the Judicial Committee in the *Palmer* case and serves to throw some light on the question here. There on the winding-up of a company, it was held that the Crown was not bound by the Companies Act, and that, although it had a right of distress for the taxes there in question, it was not bound to exercise its right of distress but could rely upon its prerogative right to be paid in priority. As Cotton, L.J., puts it at p. 483, "If the case is looked at as one in which the Crown submits to come in under the administration of assets in the winding-up, there is still the right which the Crown had when in competition with other creditors of being paid in priority."

It is clear that sub-sec. 6 of sec. 51 intended to preserve, for the purpose of collecting taxes, rates, and assessments, all such remedies and rights as already exist in the creditor and as are consistent with the fact that the debtor's property has passed into the hands of the trustee, and that the remedies and rights so preserved are not merely limited to cases where the tax or rate or assessment constitutes a lien or charge upon the debtor's property. To so limit the provisions of the sub-section would nullify the effect of all the earlier portion of it and restrict its operation to the last few words. These provisions, in my judgment, must be given a liberal construction, the evident intention being to enable those to whom taxes, rates or assessments are payable whether it be the Crown in the right of the Dominion, or the Crown in the right of the Province, or a corporation of a public character entitled to impose rates, taxes or assessments, such as a municipal corporation or a school board, to collect such taxes, etc., in priority to the other creditors of the law of the Dominion or of the Province so provides. And I do not think that it was intended by the words "Nothing in this section shall interfere with the collection."

that those entitled to collect are simply to be allowed to resort to some method of collection, if any such there might be, apart from the administration of the insolvent estate, and to exclude all right to demand payment from the trustee in the course of such administration. Any such ruling would practically destroy the preference which by the provisions of this section are clearly intended to be given to the public revenues, whether Federal, Provincial or Municipal. The filing of proof of the creditor's claim with the trustee and the demand for payment of the debt is a method of "collecting" the debt which is as fully contemplated by the sub-section as any other method of collection. That the Crown by the mere act of filing a claim with the trustee does not abandon its right to claim priority under its prerogative right is made clear by Lord Macnaghten in the *Palmer* case, [1907] A.C. 179, at p. 185. The effect of this view then is that any law, whether in the nature of a prerogative right or of some express statutory enactment, which gives to those entitled to the benefit of this sub-section any preferential advantage in the distribution of an insolvent debtor's estate, must be deemed to be in full force, and to be unaffected by anything in the section providing for the priority of other claims or for a *pari passu* distribution. If the taxes, rates or assessments in question are owing to the Crown, then the Crown's prerogative right to priority in the collection thereof from the trustee is wholly preserved and is in no way cut down by the provisions of sec. 86.

Is the sales tax which is payable to the Crown under the Special War Revenue Acts of 1915 and 1920, a "tax" within the meaning of that word as used in this section of the Bankruptcy Act? Apart from authority, it would have been reasonable to suppose that when Parliament describes this particular impost created by the Special War Revenue Acts as a "tax," the word "tax" as used in sub-sec. 6 of sec. 51 of the Bankruptcy Act would include such impost. In another case which raises the same question as that involved here (*Re Pathe Freres Phonograph Company of Canada Ltd.*, 20 O.W.N. 476, it was argued that the "taxes, rates and assessments" intended by sub-sec. 6 are limited to direct taxes, and that the "sales tax" is an indirect tax and is consequently not entitled to any priority without entering upon the question whether the "sales tax" is a direct or an indirect tax, I can see no ground for any such distinction. That the sales tax is a "tax" quite apart from the fact that it is called a "tax" is, I think clear. Holt, C.J., in *Brewster* v. *Kidjill* (1698), 12 Mod. 166, at p. 167, 88

Ont.

S.C.

RE F. E. WEST & CO.

Orde, J.

E.R. 1239, says "When 'taxes' are generally spoken of, if the subject matter will bear it, they will be intended Parliamentary taxes given to the Crown." Wharton's Law Lexicon defines "tax" as "an impost"; "a tribute imposed on the subject; an excise." The Imperial Dictionary defines it as "a rate or duty laid by government on the incomes or property of individuals or on the products consumed by them: the produce of any such duty or rate being placed at the disposal of government for the public good. *Tax* is a term of general import including almost every species of imposition on persons or property for supplying the public treasury, as tolls, tribute, subsidy, excise, impost or customs."

While it is true that according to the continuation of the foregoing definition in the Imperial Dictionary, the word is sometimes limited to taxation of a direct character, yet I can see no logical reason why any such distinction should be drawn here. Assuming that the sales tax, because of the fact that it is collected by the merchant from his customer, is an indirect tax, why should the moneys which have been collected from the customer for the benefit of the Crown, and which are when so collected owing by the merchant to the Crown, be in a lower position than those directly imposed upon the merchant himself. The merchant is not in the same position as a mere collector of the tax because the liability to pay the tax is by the Act imposed both upon the merchant and upon the customer.

Before considering the full extent of the Crown's priority, I pass on to the claim of the Corporation of the City of Toronto for business taxes, and for moneys due to the Toronto Hydro-Electric Commission for electric light supplied to the insolvent prior to the assignment. No authority was cited in support of the claim of the Toronto Hydro-Electric Commission to any preference. Whether or not moneys owing for electric light or power distributed through the Ontario Hydro-Electric System having been placed in the category of "taxes, rates or assessments" by some statutory enactment has not been established, and I do not feel called upon, in the absence of some reference to authority, to determine the question when the amount involved is only $14.19.

The City claims that it is entitled to priority for the amount due for business taxes under the provisions of sub-sec. (11) of sec. 190 of the Ontario Assessment Act, R.S.O. 1914, ch. 195, as enacted by the Assessment Amendment Act of 1917 (Ont.),

Ont.

S.C.

RE F. E. WEST & Co.

Orde, J.

ch. 45, sec. 10. Business taxes, which are imposed in certain cases by section 10 of the Assessment Act, are expressly declared by sub-sec. (10) of that section not to be a charge upon the land of the ratepayer, so that the liability is a personal one only. But sec. 109, sub-sec. (2), gives to the municipality a right to levy the same by distress "upon the goods and chattels wherever found within the county in which the municipality lies," and also upon goods and chattels in the possession of the person taxed where title to the same is claimed in the ways defined by para. 3 of the sub-section just referred to. But these provisions are given a strict construction, as will be seen by reference to *Donahue* v. *Campbell* (1901), 2 O.L.R. 124, where it was held that goods in the possession of a bailiff of the mortgagees of the ratepayer were not in the possession of the person assessed and so were not subject to distress for taxes. Apart from the provisions of sub-sec. 11, there is nothing in sub-sec. 2 of sec. 109 to entitle the municipality to distrain for business taxes when the goods have passed into the possession of another person and have ceased to be the goods of the person assessed. If this is the case when the transfer of title is an ordinary one, it is *a fortiori* the case when the title vests in the trustee in bankruptcy or by virtue of an authorised assignment, under the Bankruptcy Act. In so far as the city's claim to any preference for business taxes is based upon its right of distress, I must hold that it is gone, on exactly the same principle as that already dwelt on in the case for the Crown's right to seize under a writ of extent being superseded by the receiving order or assignment, namely, that the goods have ceased to be the property of the debtor and have passed out of his possession. This ruling, it is to be noted, is expressly limited to business taxes, which by the Assessment Act, are a personal liability of the taxpayer and nothing more. Just what rights may be reserved to a municipality to distrain for taxes assessed against the lands, upon goods still remaining on the lands, notwithstanding the vesting of them in the trustee, under the combined operation of sub-section (1) of sec. 190 of the Assessment Act and of sub-sec. (6) of sec. 51 of the Bankruptcy Act must remain to be determined when the question arises.

Counsel for the city relies, however, upon sub-sec. 11 of sec. 109. That sub-section as passed in 1917 gives to the municipality a preferential right to payment of such taxes when personal property liable to seizure therefor is under seizure or attachment or has been seized by the sheriff or a bailiff of any

Ont.

S.C.

RE F. E. WEST & Co.

Orde, J.

Court or is claimed by or in the possession of any assignee for the benefit of creditors or any liquidator.

It is clear that sub-sec. 6 of sec. 51 of the Bankruptcy Act intends to give effect to the provincial law or legislation which preserves for the benefit of the Crown or of a municipality any special preference or priority which the law or legislation of the Province gives in the collection of taxes, rates or assessments. But I find it difficult to see how sub-sec. 11 of section 109, as it stands at present helps the municipality here. There has of course been no "seizure or attachment" nor has the property of the insolvent been seized by "the sheriff or a bailiff of any Court." And an assignee for the benefit of creditors under the Ontario Assignments and Preferences Act, cannot be held to include a trustee appointed under a receiving order in bankruptcy or to whom an authorised assignment has been made, under the Bankruptcy Act. I am therefore forced to the conclusion that business taxes due to a municipality under the Ontario Assessment Act in respect of which no distress has been made under the provisions of sub-sec. 2 of sec. 109 are not entitled to any priority over other unsecured claims. Even a distress "not completely executed by payment" may afford no protection, under the provisions of sec. 11 of the Bankruptcy Act as enacted by 1920 (Can.), ch. 34, sec. 6. There may be some method whereby "business taxes" under the Assessment Act may be brought by means of provincial legislation within the protection intended to be afforded by sub-sec. 6 of sec. 51 of the Bankruptcy Act, but in my judgment there is no such legislation in this Province at present.

The City of Toronto not being entitled to any priority over other unsecured creditors for business taxes, no question arises as to the priority between the Crown and the City. The Crown becomes entitled to all the available funds in the hands of the trustee towards satisfaction of its claim for sales taxes, so far as the same will extend.

There is one point which was not argued before me but which I must mention. In the statement filed by the trustee, the wages due at the date of the assignment amounting to $218.80 are shewn as having been paid and are treated as a liability having priority over the claims which have been dealt with in this judgment. It may be that the Crown raises no objection in this case to the payment of such wages in priority to its claim, but I can see no ground for any such construction of the provisions of sec. 51. Sub-section 6 says that "nothing in this section shall interfere, etc.,, The priority of wages, etc., under

sub-sec. 1, must be subject to the priorities given by sub-sec. 6. Whether sub-sec. 6 gives priority over the fees and expenses of the trustee and the costs of the execution creditor, if any, may be open to question. The strict construction of sub-sec. 6, might make the payment of "taxes, rates, and assessments" paramount to all other payments provided for in the section, as in the case of the claim of the landlord for rent (see *Re Auto Experts Ltd.*, 59 D.L.R. 294) but there is this distinction between the two cases. The rent of the landlord is clearly intended to be a paramount claim, when there are sufficient distrainable goods to meet his claim. But the preference given to taxes, etc., under sub-sec. 6, is limited to the "collection" of them. If such collection must under the circumstances be made by filing a claim in the bankruptcy proceedings, then it would seem to be wholly unreasonable and unfair that the creditor, even though such creditor is the Crown and the claim is based upon the Crown's prerogative, should be entitled to take advantage of the administration of the insolvent's estate by the trustee without being subject to the expense incidental to such administration. As the question has not been argued before me, I do not care to give an authoritative decision on this point, but I would have to be convinced upon clear authority before I would hold that the Crown can collect its claim through the medium of the bankruptcy proceedings in priority to the fees and expenses of the trustee.

There will therefore be judgment declaring that His Majesty in the right of the Dominion Government, is entitled to priority over all other unsecured creditors (including those having claims for wages) for his claim in respect of sales taxes owing by the insolvent to the Crown, and further, that the claims of the City of Toronto and of the Workmen's Compensation Board are not entitled to any priority whatever.

As the moneys in the hands of the trustee will not meet the Crown's claim, it is not necessary to deal with the question of costs, except that the trustee's costs ought to be paid out of the funds in its hands, as it was quite proper to submit this question for the Court's determination.

Judgment accordingly.

Sask.

C.A.

HAGARTY v. GOETZ.

Saskatchewan Court of Appeal, Haultain, C.J.S, McKay, J.A., and MacKenzie, J.A. (ad hoc). November 14, 1921.

PARTNERSHIP (§VII—30)—ACTION FOR ACCOUNT BETWEEN—AUDITOR ORDERED TO TAKE ACCOUNTS—JUDGMENT FOR AMOUNT FOUND DUE—SASK. SUPREME COURT RULES 333, 334. APPEAL—SETTING ASIDE JUDGMENT.

Partners are not, as regards partnership dealings considered as debtor and creditor inter se until the concern is wound up or until there is a binding settlement of accounts, and one partner has therefore no right of action against another until after final settlement of the accounts. A judgment against one partner in favour of the other, on an accounting, before such final settlement will be set aside although based upon a certificate or report of an auditor ordered to be taken by the trial Judge, and not moved against by the opposite party within the time required by Rr. 333 and 334 of the Supreme Court of Saskatchewan.

APPEAL by defendant from the judgment of the trial Judge in an action for an account of the partnership dealings between the parties and that the partnership business be wound up and settled under the directions of the Court, and for judgment for assets unaccounted for. Reversed.

J. S. Rankin, for appellant; *J. W. Hill*, for respondent.

The judgment of the Court was delivered by

MCKAY, J.A.:—This is an action for an account of the partnership dealings between appellant and respondent, and that the partnership business be wound up and settled under the directions of the Court, and for judgment against appellant for respondent's share of the partnership assets unaccounted for by appellant to respondent.

At the trial the Judge ordered that the partnership books be referred to W. D. Dewar, of Humboldt, to audit and take accounts, appellant and respondent to furnish sworn statements of all transactions since the partnership was dissolved; the parties furnishing such sworn statements to attend for cross-examination on said statements only if required by the opposite party; Mr. Dewar to file his report with the Local Registrar within 30 days; leave to either party to apply for further directions.

Mr. Dewar filed his certificate, with the accounts, of his audits and accounting on December 23rd, 1920, certifying, amongst other things, that the sum of $1526.91 was due from defendant to respondent. No application was made by appellant to discharge or vary this certificate.

By notice of motion dated January 6th, 1921, the respondent notified the appellant that on March 3rd, 1921, he would apply

to the trial Judge for an order confirming the certificate of Mr. Dewar, and for a further order for judgment for respondent for the sum of $1526.91, being the amount found due to respondent by said certificate.

The appellant opposed said application on the grounds set forth in an affidavit made by his solicitor, to the effect that the said certificate of Dewar was not correct and made on wrong principles.

The trial Judge, however, made an order confirming the said certificate, and that judgment be entered for the respondent for the said sum of $1526.91 and costs.

The appellant now appeals from the said judgment.

Rules 333 and 334 of the Supreme Court of Saskatchewan, in force at the time of the happening of the matters in question herein, read as follows:

"333. Every certificate, with the accounts (if any) shall be filed by the local registrar, and shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied, upon application to a judge by motion to be made before the expiration of eight clear days after the filing of the certificate.

334. The judge may, if the special circumstances of the case require it, upon an application by motion for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties."

Counsel for respondent contends that, as appellant did not move under the foregoing rules, it is now too late for him to question the said certificate, and the trial Judge was correct in confirming it and ordering judgment against appellant.

I do not think it is too late. It is to be noted Mr. Dewar, amongst other things, certifies as follows:

"8. As Mr. Hagarty has paid all the accounts practically in connection with the firm, and the outstanding accounts, being held by the various tradesmen against Mr. Hagarty as he is the most responsible one of the firm, I find that the sum of ten hundred and fifty dollars and forty-one cents is due to Mr. Hagarty by Mr. Goetz plus the unexpended balance which is shown in the statement $476.50.

Half share Joseph Goetz share of deficit $1050.41
Unexpended balance 476.50
Mr. Goetz is liable for this amount.....$1526.91"

The "outstanding accounts" above referred to are the accounts due to different parties by the partnership firm, but the report does not state what they amount to. The sworn statement of the respondent, however, furnished to Dewar, shews

Sask.

C.A.

HAGARTY v. GOETZ.

McKay, J.A.

that these unpaid accounts at the time of the dissolution on November 11th, 1914, amounted to $3998.50, and that since dissolution respondent paid $2600.92, which would leave the unpaid account amounting to $1397.38. The partnership firm, and each member thereof, namely, the appellant and respondent, are liable to the creditors for that amount. That is, these creditors might collect this amount from appellant and yet this amount is included in the amount for which respondent already has judgment against him, and if he pays the judgment he would be paying the same debt twice.

Consequently, even if the figures of Dewar's report are correct, appellant is not due $1,526.91 to the respondent, but to the partnership firm of Hagarty & Goetz.

"Partners are not, as regards partnership dealings considered as debtor and creditor *inter se* until the concern is wound up or until there is a binding settlement of the accounts. It follows that one partner has no right of action against another for the balance owing to him until after final settlement of the accounts." 22 Hals., p. 75.

The trial Judge, in my opinion, was wrong in confirming said certificate or report and ordering judgment to be entered for appellant for $1,526.91. This judgment will therefore be set aside.

The affidavit filed by the solicitor for the appellant shews that there are matters to be inquired into, other than those referred to in Dewar's certificate or report, and that he did not have some of the items allowed proved by affidavit.

Under these circumstances there should be a further reference, and I think it will better meet the justice of the case to discharge and open up Dewar's certificate or report, and direct that all necessary inquiries and accounts be made and taken by the Local Registrar at Humboldt, to ascertain and report on the partnership accounts, and the standing of each individual partner towards the partnership or towards each other. After the filing of the Local Registrar's certificate, application may be made to the trial Judge for further directions as to winding up the partnership, or for whatever judgment the parties are entitled to.

The certificate of Dewar shows that he requested the appellant by letter to call on him while he was inquiring into the accounts, but that appellant ignored said request, and did not render any assistance, and appellant failed to move under r. 333 or 334 after the certificate was filed. Under these circumstances I think he should not get the costs of this appeal. Therefore there will be no costs to either party of this appeal.

Appeal allowed.

REX v. LANTALUM; EX PARTE OFFMAN.

N.B.

S.C.

New Brunswick Supreme Court, Appeal Division, McKeown, C.J., K.B.D., Grimmer and Crocket, JJ. April 22, 1921.

1. **Deportation (§I—5)—Order for under Immigration Act—Order to Shew Ground for Exclusion—Defective Order not in Compliance with Act—Discharge of Immigrant—Can. Stats. 1910, ch. 27, secs. 33 and 23.**

An order of deportation made under sec. 33 of the Immigration Act, Can. Stats. 1910, ch. 27, form "B," is defective if, in the reasons for granting the order, reference is made to an Order in Council instead of the reasons for rejection being stated in full as required by the Act; such an order is not an order which was given or made in accordance with the provisions of the Act, and does not therefore fall within the prohibition of sec. 23 of the Act, and an intended immigrant in the custody of the immigration authorities is entitled on habeas corpus proceedings to be discharged from custody.

[Re Thirty-nine Hindus (annotated), (1913), 15 D.L.R. 189; Re Walsh, etc. (1913), 13 D.L.R. 288; and Rex v. Barnstead (1920), 55 D.L.R. 287, 35 Can. Cr. Cas. 179, applied and followed.]

2. **Habeas Corpus (§ID—26)—Non-criminal Matter—Discharge Refused by Court of King's Bench—Jurisdiction of Appeal Division to Hear Appeal.**

Except in criminal cases, an appeal under the New Brunswick Judicature Act 1909, ch. 5, sec. 7, as amended by ch. 23, sec. 4, of the Acts of 1913, which substantially follows the English Act, may be taken to the Appeal Division from the judgment or order of a Court or Judge in matters of habeas corpus where a discharge has been refused.

[Cox v. Hakes (1890), 15 App. Cas. 506, followed; Review of authorities.]

APPEAL from a judgment of the Chief Justice of the Supreme Court of New Brunswick on the return of a writ of habeas corpus under which an intended immigrant, then in the custody of the immigration authorities, had been brought before him to test the validity of an order for deportation. Discharge ordered.

W. A. Ross and J. K. Kelly, K.C., for appellant.

F. R. Taylor, K.C., contra.

McKeown, C.J., K.B.D., (dissenting):—This is an appeal from a judgment of Hazen, C.J., on the return of a writ of habeas corpus under which Michael Offman, an intended immigrant, then in the custody of the immigration authorities of Canada at the port of St. John, N.B., had been brought before him to test the validity of an order for deportation on grounds set out below.

A preliminary question of much importance was raised by the contention of Mr. Taylor that no appeal lies from a decision of a Judge in a matter of habeas corpus except

N.B.

S.C.

REX v. LANTALUM; EX PARTE OFFMAN.

McKEOWN, C.J.

in applications for the custody of infants. Three cases from our provincial reports, namely, Ex parte Byrne (1883), 22 N.B.R. 427, McCrea v. Watson (1906), 37 N.B.R. 623, and Ex parte Kinnie (1914), 42 N.B.R. 641, were cited in support of his position, as well as certain English authorities which will be referred to below. Only one of the above named, viz.: Ex parte Kinnie arose since the passage of our Judicature Act. It was an appeal from an order of Barry, J., who had granted an order absolute for a writ of certiorari and made the writ returnable before himself. The jurisdiction of a Judge of the King's Bench Division to make such a writ returnable before himself was questioned, but the Appeal Court decided that by O. 62, Rr. 1-3 of the Judicature Act as amended by ch. 23, 1913 (N.B.), such power was given to the Judges of the King's Bench. The correctness of Barry, J.'s, decision, assuming he had power to make it, was not questioned in any way, the appeal simply concerned itself with challenging his jurisdiction as above indicated, consequently the judgment of the Court upholding his jurisdiction is of no assistance in coming to a conclusion concerning the question now raised.

The case of McCrea v. Watson is more in point, since it decided that no appeal lay from the decision made by a County Court Judge under habeas corpus proceedings, discharging a prisoner from custody for default in payment of fines imposed for offences under a liquor license Act then (1906) in force. The Court was unanimous in dismissing the appeal, Tuck, C.J., saying, at p. 625, "an appeal will not lie from any decision of the county court in a matter of habeas corpus unless given by the act, etc.", and the Chief Justice further said—"If the matter had been before a judge of the supreme court and he had granted the discharge of the defendant there would be no appeal, and in matters of habeas corpus the jurisdiction of two courts is co-ordinate."

In Ex parte Byrne the matter came before the Supreme Court by way of motion to rescind an order made by Weldon, J., discharging from custody James Byrne, then confined to the gaol of the county of Kings. The order for discharge was made under ch. 41 of the Consolidated Stats. (N.B.) 1877 being the Act respecting habeas corpus, which was re-enacted without any change as ch. 133, C.S.N.B. 1903. The Court composed of Allen, C.J., and Palmer, King, Wetmore and Weldon, JJ., was unanimously of opinion that the Court

en banc had no power to interfere with an order made by a single Judge of the Supreme Court discharging a prisoner under habeas corpus proceedings. Weldon, J., at p. 437, said—"As no authority can be found to warrant the setting aside a habeas corpus for which a Judge has issued his fiat, it is sufficient to show that we should not grant a rule nisi in this case." Allen, C.J., on the same page, said—"I agree that the fourth section of chapter 41 of the Consolidated Statutes, under which Byrne was discharged from imprisonment, was not intended to vary the principles of law applicable to proceedings under the Habeas Corpus Acts." After referring to the origin of that chapter and its scope the Judge says further, at p. 488:—"If, therefore, a Judge's order discharging a person from imprisonment on the return to a writ of habeas corpus could not be set aside or revised, neither can a like order made under our Act be interfered with." A like opinion is expressed by Palmer, J., in a comprehensive judgment. Concerning the decision in these latter cases, this must be noted—first, each sought to set aside an order discharging a prisoner from custody; and second, in neither case was it necessary for the Court to give consideration to legislation such as is contained in our present Judicature Act concerning appeals. In Earle's Rules of the Supreme Court, at p. 162, it is said—"An appeal never lies unless expressly given by statute," citing Ex parte Moore (1873), 14 N.B.R. 333, in which case Ritchie, C.J., delivering the judgment of the Court said—"It is clearly settled that an appeal can only be given by express words, or, at all events, by clear implication." There is no provision for an appeal or for a review of any kind in our Provincial Act respecting habeas corpus, whereas reference to the respective Acts concerning the Supreme Court in Equity, Courts of Probate, County Courts, Court of Divorce and Matrimonial causes and controverted elections, shews that an appeal from a judgment in any of such aforementioned Courts is expressly reserved by the provisions of each of the above named enactments.

Neither the Supreme Court Act, ch. 111, C.S.N.B. 1903, nor ch. 37 of the prior consolidation 1877 (respecting Procedure and Practice of the Supreme Court) contains any provision concerning appeals, in terms similar to, or approaching, sec. 7 of the Judicature Act 1909 or O. 58 R. 1 of the Rules of Court thereunder, and the question of a right to appeal under the circumstances now before the Court

N.B.

S.C.

REX v. LANTALUM; EX PARTE OFFMAN.

McKEOWN, C.J.

must be dealt with under our present rules and practice. Before the enactment of the Judicature Act there can be no doubt (if I may presume to say so) that the practice and procedure in habeas corpus matters were as stated in the judgments delivered in Ex parte Byrne and McCrea v. Watson, supra, as far as such practice is therein discussed. But the question we have now to consider is—does our present practice permit of an appeal in a case wherein a Judge of this Court has refused an application under a writ of habeas corpus for the discharge of a person brought before him and held in custody under the authority of a deportation order issued by the Immigration Department of the Government of Canada. For the answer to this inquiry I think we must look first at sec. 7 of the Judicature Act (N.B.) 1909, ch. 5, which, as amended by ch. 23, sec. 4, of the Acts of 1913 reads (in the part material hereto) as follows:—

"The Court of Appeal shall have and exercise appellate jurisdiction, with such original jurisdiction as may be necessary or incident to the determination of any appeal; and shall have all the jurisdiction and powers possessed by the Supreme Court, en banc, at the commencement of this Act, with appellate jurisdiction in civil and criminal causes and matters, and shall have jurisdiction and powers to hear and determine motions and appeals respecting any judgment, order or decision of any Judge or Judges of the King's Bench or Chancery Division, and of any Judge of the Court of Appeal. All appeals and motions from judgments, orders and decisions of any Court that heretofore lay or might have been made to the Supreme Court, shall hereafter be to the said Court of Appeal."

Turning now to the Rules of Court which provide machinery for carrying out the purposes of the Act, we find R. 1 of O. 58 reads thus:—

"All appeals to the Court en banc shall be by way of rehearing and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding, other than such notice of motion shall be necessary. The appellant may by notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part."

It will be noted that by the above cited section of the Act, jurisdiction is given to the Appeal Court to hear and de-

termine motions and appeals respecting any judgment, order or decision made by a Judge of the King's Bench Division or Chancery Division or of the Appeal Court itself, as well as respecting judgments and decisions of all Courts from which an appeal could formerly be taken, and the rule is correspondingly broad in scope in its reference to an appeal "from the whole or any part of any judgment, order, etc."

I have previously remarked that no appeal is given by the Act respecting habeas corpus, but that fact does not conclude the present inquiry. The decisive question must be—Is such appeal given by sec. 7 of the Judicature Act above quoted? Can the decision of a Judge in an application under the Act respecting habeas corpus be read or considered as outside of the scope and meaning of the words "any judgment order or decision of any judge, etc."?

That part of sub-sec. 1 of sec. 7 which we are now considering is, in material particulars, copied or taken from sec. 19 of the English Judicature Act 1873, ch. 66, which reads as follows:—

"19. The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice or of any Judges or Judge thereof, subject to the provisions of this Act, etc."

Rule 1 of O. 58 above quoted follows word for word the correspondingly numbered English rule. Prior to the passing of the English Judicature Act no appeal was had or taken in matters of habeas corpus, but not long after the passage of such Act with its comprehensive provisions respecting appeals, the question of the right to appeal from decisions in habeas corpus matters soon arose.

In what is known as Dale and Enraght's case (1881), 6 Q.B.D. 376, a writ of habeas corpus had issued out of the Court of Queen's Bench to bring up the body of the applicant from Holloway Gaol, and after argument an order was made by the Court refusing to discharge Dale from custody. An appeal was thereupon taken to the Court of Appeal which decided that the applicant was entitled to be discharged. The case is a lengthy one, and nowhere in the hundred pages covering the report, is the right of appeal questioned nor indeed is it mentioned at all.

In the same year (1881) the case of Green v. Lord Penzance (1881), 6 App. Cas. 657 being an appeal from an order of the Court of Appeal discharging

N.B.

S.C.

REX v. LANTALUM; EX PARTE OFFMAN.

McKeown, C.J.

a rule nisi for a writ of habeas corpus, reached the House of Lords, and after argument was dismissed. In both these cases it will be noticed that the party appealing was seeking his discharge from custody, but in the case of Ex parte Cox (1887), 20 Q.B.D. 1 the Court of Appeal consisting of Lord Esher, M.R., Bowen and Fry, L.JJ., on an appeal from the order of the Queen's Bench Division making absolute a rule nisi for habeas corpus, held that sec. 19 of the Judicature Act (1873) gives an appeal from orders made by the High Court of Justice on application for a writ of habeas corpus, whether the order appealed from grants or refuses the writ. Lord Esher in his judgment said, at pp. 13, 14:—"The first point taken on behalf of Mr. Cox is that no appeal lies." After alluding to the old practice concerning habeas corpus he goes on to say—

"But after all the question must depend on the words of the Judicature Act. The Act provides that there shall be an appeal from any judgment or order of the High Court save as thereinafter mentioned. . . It is admitted by the counsel for Mr. Cox that a prisoner whose release had been refused would have a right of appeal; but it is suggested that the person objecting to his release has no right of appeal. But how could the prisoner get the right of appeal except under the words of the Judicature Act? So that the contention must be, that the words which are admitted to give an appeal in one case do not give it in the other. The contention is, in my opinion, an altogether impossible one."

Lord Bowen at pp. 21-22 of the report says:—

"It is the first time in the history of this Court that there has been an appeal against the order of the Court below discharging a person in custody from prison on habeas corpus. It is argued in the first place that no such appeal lies. Upon consideration of the terms of the Judicature Act it appears to me that there are no words which can have the effect of excepting such an order from the general provision as to appeals; and that there must therefore be an appeal even from an order discharging the prisoner from custody."

But the view thus expressed by the Master of the Rolls and Bowen, L.J., concurred in by Fry, L.J. concerning the right to appeal from an order discharging a prisoner from custody, was disapproved by the House of Lords in the case

of Cox v. Hakes (1890), 15 App. Cas. 506, in which it was held by Halsbury, L.C., and Lords Watson, Bramwell, Herschell and Macnaghten (Lords Morris and Field dissenting) that where a prisoner has been discharged from custody by an order of the High Court under a habeas corpus, the Court of Appeal has no jurisdiction to entertain an appeal. Lord Halsbury commenced his speech at p. 514 by saying—"My Lords, probably no more important or serious question has ever come before your Lordships' House." He subjected the Judicature Act to a close scrutiny in the light of the accepted principles and canons of construction, and said, at p. 519, that he "cannot conceive it to be possible that the framers of those Acts had in their minds the dealing with such an important branch of the law of this country by the use of one word, the necessity for the use of which is amply satisfied by the other provisions of the Acts in question. It was the known and well-settled state of the law that a discharge under a writ of habeas corpus was final." His Lordship concluded that the Judicature Act has made no change in that particular, and said further, at p. 522:—

"Except so far as may be inferred from what I have said as to the argument, which would imply a repeal of the Habeas Corpus Act, I do not desire to express any opinion upon what the law would be if a refusal to discharge should be the subject of appeal."

Lord Bramwell after discussing the ground upon which he rests his judgment said at p. 526—"My reasons would, perhaps, apply to a case where the prisoner had been remanded, but I limit my opinion to where he has been discharged."

It is unnecessary to quote further from the opinions expressed by their Lordships in this case which has settled the law to be that where a prisoner has been discharged from custody by an order of the High Court under habeas corpus, the Judicature Act gives the Court of Appeal no jurisdiction to entertain an appeal.

In the following year (1892) in the case of Barnardo v. Ford, [1892] A.C. 326, an appeal was heard from an order of the Court of Appeal affirming an order absolute of the Queen's Bench Division that a writ of habeas corpus should issue, and it was held by the House of Lords that such an order was within the meaning of sec. 19 of the Judicature Act 1873, and that an appeal lay from it to the Court of Appeal.

N.B.

S.C.

REX v. LANTALUM; EX PARTE OFFMAN.

McKEOWN, C.J.

The above brief review of the leading authorities shews, that although no appeal lies from an order discharging a prisoner from custody under habeas corpus, nevertheless a refusal to discharge is properly a subject of appeal under the English Judicature Act. The matter was left open by the decision in Cox v. Hakes on the principle, apparently, that it was unnecessary to decide a question not then before the House. But the decisions shew the right of appeal exists in the case now before us where the discharge is refused.

Reference need be made to only one other case, viz., The Queen v. Jackson, [1891] 1 Q.B. 671. An explanatory note thereto shews that an application for a writ of habeas corpus had been made in the first instance to the Queen's Bench Division and refused. On application to the Court of Appeal a discussion arose as to whether such Court had jurisdiction to entertain it, but ultimately the writ was ordered by the Court of Appeal subject to the question of jurisdiction. This case arose after the decision of Cox v. Hakes and upon the return of the writ the note goes on to state — "Counsel for the husband declined to argue the question of jurisdiction, on the ground that it was not open to them in the Court of Appeal, having regard to the observations in the judgment in that Court in the case of Ex parte Bell Cox (20 Q.B.D. 1) on the question whether there is an appeal when the habeas corpus is refused, which was left open by the House of Lords in Cox v. Hakes (15 App. Cas. 506). There was, therefore, no argument on the subject of the Court's jurisdiction."

The report shews that Halsbury, L.C., sat as a member of the Court of Appeal in this case. Following the authority of the above case it is stated in Halsbury's Laws of England, vol. 10, p. 74, and in the Annual Practice 1921, p. 2022, in effect that except in criminal cases, an appeal under the provisions of the English Judicature Act may be taken from the judgment or order of a Court or Judge in matters of habeas corpus where a discharge is refused. I think that this Court should follow the opinions and judgments cited in the cases above mentioned and consequently that it has jurisdiction to hear this appeal which must now be considered upon its merits.

Dealing now with the merits of the application, it was urged before Hazen, C.J., that the order for deportation is invalid, and that the applicant should be dismissed from

custody, mainly for two reasons: In the first place, because the order for deportation (a form for which is given in the Immigration Act and Regulations) has not been followed in two particulars, viz.: Under the form so provided, the person in charge of the inquiry, whether he be chairman of a Board, as was the case in this instance, or simply an immigration officer in charge of localities where there is no Board—such person, so signing the order for deportation, should indicate in which one of the two capacities he acts. It is pointed out that under the blank left in the form for the signature, are printed the words—"Chairman of the Board of Inquiry, or Immigration officer in charge," it being thus apparent that if a man sign the deportation order as chairman of the Board of Inquiry, the words "or Immigration Officer in charge" should be struck out. But if he be the immigration officer in charge then the words "Chairman of the Board of Inquiry" should be struck out. It was urged that as the deporation order was signed by a person actually chairman of the Board, and the words "or Immigration Officer in charge" under his signature not having been struck out, the order did not shew in what capacity he was acting—whether as chairman of the Board of Inquiry, as was the fact, or as immigration officer in charge — and consequently the order is invalid.

I do not think the presence of the words "or Immigration Officer in charge" should be held to invalidate this order. The return we have before us shews that he really was the chairman of the Board, and for reasons which will be a little more amply set out in what I have to say under the non-statement of the reasons in full, it is my view that those words "or immigration officer in charge" should be considered merely as surplusage, he being, as I say, the chairman of the Board of Inquiry, and it being so stated. The second ground urged is embodied in the contention that the reasons in full should be set out in the order of deportation, and that the manner in which they were actually set out, if they could be said to be set out at all in the present ease, does not comply with the form of the order.

The order form is given on p. 45 of the Regulations. It starts with the words "Canada. The Immigration Act, section 33." It is directed first to the transportation company, and then to the person rejected; it recites the port of entry, and in what Province the port of entry is. It goes on to certify that the individual whose entrance is ques-

N.B.

S.C.

REX v. LANTALUM; EX PARTE OFFMAN.

McKEOWN, C.J.

tioned, is seeking to enter Canada by ship or train, and has been this day examined by the Board of Inquiry (or officer in charge) at that port, and has been rejected for the following reasons. Then three or four lines are left, with the explanatory words underneath: "here state reasons in full." In the present instance the only reasons stated in the order under which the applicant is held for deportation, are the letters and figures "P.C. 23."

A reference to p. 51 of the Immigration Rules and Regulations shews that "P.C. 23" is an Order in Council ("P.C. 23," standing, I presume, for the words "Privy Council"), and, that "P.C. 23" is an Order in Council passed on Wednesday, January 7, 1914, which recites that the Governor-General in Council has rescinded or revoked an Order of May 9, 1910, and has, under the authority of the Immigration Act 1910 (Can.), ch. 27, ordered as follows:—

"From and after the date hereof the landing in Canada shall be and the same is hereby prohibited of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country or prepaid in Canada."

It is evident that the applicant did not come to Canada by continuous journey from the country of which he is a native, on a through ticket purchased in that country. It was stated in the argument, and I think admitted, that there are no through tickets to Canada available in the country from which he comes, and of which he is a native.

It is apparent then, that the officer who drew the order for deportation, having knowledge of what "P.C. 23" meant, put those letters and figures in the order as the Board's reasons for deportation, notwithstanding the fact that he is advised to state the reasons in full—he put those letters and figures in there as a compliance, or an attempted compliance with the requirements of the form.

Now under these facts it cannot be said that the instructions in the deportation order form have been fully complied with. The question then arises—What is the effect of such non-compliance in full with the instructions so given to the Board of Inquiry or to the officer in charge, who deals with the intended immigrant in the way in which this man was dealt with?

This will be observed in the first place. Nothing was urged, nor could be urged, against the validity of anything

done by the Board of Inquiry in the process of its investigation in this case. The intending immigrant came to the port of St. John, he appeared before the duly constituted Board of Inquiry; he had a hearing before that Board, and as a rule of its investigation, the Board decided that he should not be admitted to citizenship, and the order for deportation, in the form in which it is found, was filled up and signed by the chairman.

Section 33 of the Act deals with the landing of passengers, and sub-sec. 5 thereof deals with the question of deportation and the order therefor. It reads partially as follows:—

"An order for deportation by a Board of Inquiry or officer in charge may be made in the form B in the schedule to this Act, and a copy of the said order shall forthwith be delivered to such passenger or other person, and a copy of the said order shall at the same time be served upon the master or owner of the ship or upon the local agent or other official of the transportation company by which such person was brought to Canada; and such person shall thereupon be deported by such company, subject to any appeal which may have been entered on his behalf under section 19 of this Act."

In passing, it is worthy of notice that when the section speaks of the form of the deportation order, it say, "It may be in the form B." It does not say "it shall be in the form B," although the word "shall" is used several times immediately following in this sec. 5, thus—the order "shall forthwith be delivered to such passenger," the order "shall at the same time be served upon the master or owner of the ship"—such person "shall thereupon be deported." The use of these two words suggests a doubt as to whether they should both be interpreted as having the same binding force. The word "may" being used in connection with the form of order for deportation, certainly lends itself to the interpretation that the form is not to be regarded as imperative or that it should be followed word for word. But I do not found my opinion on that.

When an order for deportation is made, there is an appeal to the Minister of Immigration under sec. 19 of the Act, in all cases, except those of persons afflicted with a loathsome disease, or in the case of idiots, imbeciles, feeble-minded persons, epileptic and insane persons.

In the present case the order was made in the form al-

N.B.

S.C.

REX
v.
LANTALUM;
EX PARTE
OFFMAN.

McKeown, C.J.

luded to. The proper services were made upon the intended immigrant and presumably upon the master of the ship as well. The applicant took an appeal under sec. 19, to the Minister, against the decision of the Board of Inquiry, and the matter was taken up before the Minister who disallowed the appeal, and sustained the finding of the Board of Inquiry, and the order for deportation in the form in which it was made.

There does not appear to have been any impropriety in the way the inquiry was carried on. The Board had the applicant before it, and he presumably had an opportunity —at any rate, the statute gives him the opportunity—of having counsel there to represent him. We do not know anything about that, but we do know that he took the appeal to the Minister, as he is permitted to do under the Act, which appeal was disallowed.

The Chief Justice of the Province, before whom the matter was heard, dismissed the application for discharge, and in doing so he alluded to and rested upon the provisions of sec. 23 of the Act, although of opinion, as set out in his reasons for judgment, that the order for deportation was not complete and full. But he held that it was made pursuant to the section which reads thus:—

"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."

I think the words "under the authority and in accordance with the provisions of this Act" are the pivotal words of the section as far as this application is concerned. Can an order, made in the form in which we find this deportation order, be said to have been made under the authority and in accordance with the provisions of this Act? In my view it is not to be questioned that it is made under the authority of the Act. Whatever the members of the Board did, they were acting as officers appointed by and under the Act and in no other capacity, and therefore that first requisite, I think, is clearly complied with. The contention narrows itself therefore to the inquiry whether it can be said that

an order in the present form is made in accordance with the provisions of the Act, bearing in mind the purport and intention of the Act, and construing the section in question in the light of authority and precedent. The Act itself does not say what the order shall contain; but it does say that it may be made in the form B in the schedule to the Act. Does sub-sec. 5 of sec. 33 of this Act make it imperative that the order should set out in full the reasons for deportation? Should it be interpreted as directory, or as imperative in that regard? In the case of the Liverpool Borough Bank v. Turner (1860), 2 DeG. F. & J. 502, 45 E.R. 715, Lord Campbell, speaking of the difficulty of ascertaining whether an Act should be considered directory or imperative, expresses himself thus, at pp. 507, 508: —

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

Sections of this kind, dealing with fellow-subjects and in connection with criminal matters, are, I know, given an interpretation very favourable to the rights which persons have as British subjects. I am not convinced that the same canons of construction should be carried into an Act dealing with immigrants, some of whom, for reasons I need not enlarge upon, should not be allowed to land in this country. I, therefore, would not consider myself bound to look at a conviction order or an order made under some Act imposing a penalty upon citizens of this country and impeaching or impairing their rights and liberty or property. Looking at the whole scope and purpose of the provisions of this Act, which is to exclude undesirable immigrants from Canada, it seems to me that a construction of the Act should be adopted by the Courts which would carry out such intention. In the case of Howard v. Bodington (1877), L.R. 2 P. & D. 203, Lord Penzance, at p. 211, expresses himself thus:—

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by

N.B.

S.C.

REX v. LANTALUM; EX PARTE OFFMAN.

McKEOWN, C.J.

the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

It is clear that the matter here complained of does not go to the jurisdiction of the Court, nor to the constitution of the Court, nor to the right of the intending immigrant to appear before the Court, nor to the procedure necessary to be followed while the inquiry is going on—as impairing that in any degree. The hearing was completed and the Board actually had come to a conclusion, but its decision and intention was not expressed in the form in which the Act says it may be expressed.

Maxwell on the Interpretation of Statutes (3rd ed.) at pp. 520, 521, states:—

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience; but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature..... But when a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative."

Now the Board of Inquiry, which is the Court and jury empowered to say whether this man is a proper person to be admitted into Canada, make their decision in a perfectly proper and legal way both as regards jurisdiction and procedure. They regard it as contrary to the provisions of the Immigration Act that he should be allowed to mingle with Canadian citizens, and the Minister says so too. Counsel for the applicant did not attempt to argue that Offman was not seeking admission in absolute violation of the provisions

of the Act. Admittedly he has no right to come in. He is breaking his way into Canada in utter defiance of the law respecting immigrants. It would be, to my mind, a distinct injustice to the citizens of this country, who have no control over those exercising the duty of such inquiry, to hold that this requirement as to setting out the reasons for deportation is essential and that it is imperative.

At pp. 528, 529 of the same work it is said:—

"Where the prescriptions of a statute relate to the performance of a public duty; and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, without promoting the essential aims of the Legislature, they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only."

In Endlich on the Interpretation of Statutes, sec. 437, it is said, at p. 621:—

"In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be clearly gathered from the statute construed in the light of other rules of interpretation."

Consequently, in view of the fact that this is not a question as to the rights of Canadian citizens or British subjects, but is concerned wholly with the performance of a public duty—this is, the inquiry and determination by a Board appointed to decide whether a person who comes to these shores is fit to be within Canada—I regard this provision with reference to stating the reasons in full in the order for deportation as directory and not imperative, and in my opinion the statement of the reasons as "P.C. 23" should not operate to destroy the validity of the order made by the Board of Inquiry which had full jurisdiction over the matter, for I think the order is made "in accordance with the provisions" of the Act, although it does not state the reasons for deportation fully, as the form directs, nevertheless it is, in my view, in accordance with the provisions of the Act, because "P.C. 23" means, and must have been understood by the applicant to mean, the Order in Council prohibiting an immigrant from landing in Canada under the conditions, with respect to ticket and travel, which prevail

N.B.

S.C.

REX
v.
LANTALUM;
EX PARTE
OFFMAN.

Grimmer, J.

in the case of the present applicant. I consequently think that, while the application is properly before this Court, on appeal, the motion should be dismissed and the decision of the Chief Justice should be affirmed.

Grimmer, J. (oral):—Having heard the argument and carefully considered the judgment appealed from, I have, with profound regret, reached the conclusion I am unable to agree with the judgment arrived at by Hazen, C.J., when the cause was before him. This matter, involving, as it does, the liberty of the person, requires to my mind that all the provisions of the statute which are invoked in its support and in support of the position which is taken in this case by the Board of Inquiry should be strictly performed. While the provisions of sec. 23 are very large, very conclusive, as far as the words themselves are concerned, yet, as reference has been made, they contain words which clearly point out to me at all events, that the decision which is arrived at by the officer or Board which made the inquiry into the matter must absolutely be made, had, or given under the authority and in accordance with the provisions of the Act relating to the detention or deportation of a subject whose deportation may be inquired into, and I am of the opinion that the form of the order which has been referred to, is as much a portion of the statute as any of the individual sections thereof. I am therefore of the opinion that when a person is ordered to be deported out of the country, the reasons for the deportation should be clearly stated in the order, and it is not a compliance therewith merely to refer under the instructions "Here state reasons in full" to the minutes of the Order in Council which provides the reason upon which the Board of Inquiry or immigration officer in charge may found or base its or his decision that the person or immigrant should be deported, and as, in this case, the order which made the deportation possible only used as the reason therefor the letters and figures "P.C. 23," it is in my opinion not in accordance with the provisions of the Act under which the order is made. I am also of the opinion that the words "upon any ground whatsoever" which are contained in this section and upon which the Chief Justice so far as I am able to gather largely based the conclusion he arrived at, viz., that he was prohibited from ordering the discharge which he felt ought to be made under the form of the order if it were not for these words, are confined entirely within

the limitations of the other words in the section "Had, made, or given in accordance with the provisions of the Act," and are not wider in their significance than the provisions referred to.

I am of opinion that upon the merits the order was properly made, but I am unable for the reasons I have stated, and with a great deal of regret, to agree with the judgment of the Chief Justice.

Crocket, J.:—An important question has been raised in this case by the objection of the respondent's counsel that this Court has no jurisdiction to entertain an appeal from the decision of the Chief Justice refusing to grant an order under the New Brunswick Habeas Corpus Act for the discharge of the appellant from custody.

Before the adoption of the Judicature Act in this Province the administration of the law of habeas corpus here was identical with its administration in England prior to the passage of the English Judicature Act. There was no appeal as such, either from an order granting a discharge or an order refusing a discharge. It was open to any person claiming to be held in unlawful custody to apply either for a writ of habeas corpus or for an order in the nature of a writ of habeas corpus under the Habeas Corpus Act to any one of the Judges of the Supreme Court or to a Judge of the County Court and to have the legality or illegality of his detention determined by such Judge on the return of the writ or order. If on such return the Judge granting the writ or order adjudged the applicant's detention illegal he at once ordered his release from custody. If his release was ordered the order for discharge could not afterwards be called in question. There was no power in the Supreme Court en banc, on references by the individual Judges who discharged him. If the release of the applicant was refused it was open to the applicant to at once renew his application to another Judge or to every Judge of the Court in turn, and, if in the end he succeeded in obtaining an order for his discharge, that order, no matter how erroneously or improvidently granted, could not be stayed or rescinded by an order of the Court. The reason for this, as explained by Palmer, J., in his instructive judgment in Ex Parte Byrne, 22 N.B.R. 427, where an application was made to the Court en banc to rescind an order of discharge, granted by Weldon, J., was that the allowance of an appeal or a motion to rescind in such a case would defeat the object of

N.B.

S.C.

REX v. LANTALUM; EX PARTE OFFMAN.

Crocket, J.

the Habeas Corpus Act, which was the prompt determination of the question of the legality of a prisoner's custody and his immediate release if the question was decided in his favour, and that it was apparent from the purpose and terms of the Habeas Corpus Act that no such appeal was intended. It is quite evident that practically all, if not all the reasons stated by Palmer, J., for his judgment, apply to the case of an applicant being discharged, which was the case he was considering, rather than to the case where the discharge was refused. However this may be there is no doubt that before the adoption of the Judicature Act the administration of the law of habeas corpus in this Province recognised no right of appeal, as such, to the Supreme Court en banc from any order made by any Judge on habeas corpus.

A number of habeas corpus cases have been before the Court en banc, on references by the individual Judges who granted the orders for hearing in the first instance, but none, so far as I am aware, by way of appeal or motion to rescind, other than the Byrne case, and one other case, cited by Mr. Taylor, that of McCrea v. Watson, 37 N.B.R. 623, where the Court held there was no appeal from an order of discharge made on habeas corpus by a County Court Judge under sec. 105 of the Liquor License Act, ch. 22, C.S. N.B. 1903. Although both these cases were cases of attempted appeals from orders of discharge, and although as already suggested, the reasons given for the judgment in the Byrne case, are reasons which apply to a case where the order of discharge is granted rather than to a case where it is refused, I think it must be taken that the law of habeas corpus was the same in this Province before the Judicature Act was passed as it was in England before the passage of the English Act, and that under the law as it then stood there was no appeal, as such, either from an order of discharge on habeas corpus or an order refusing a discharge.

The question is: Has the Judicature Act altered the law and provided an appeal?

In 1890 the Law Lords in the case of Cox v. Hakes, 15 App. Cas. 506, considered the question as to whether the appeal provisions of the English Act, sec. 19, gave an appeal from an order discharging a prisoner on habeas corpus. Lord Halsbury, L.C., and Lords Watson, Bramwell, Herschell and Macnaghten held (Lord Morris and Field dis-

senting) that although the words of sec. 19, literally construed, were sufficient to comprehend the case of an order of discharge on habeas corpus, the section did not in fact give an appeal from such an order or discharge. That section was as follows:—

"The said Court of Appeal shall have jurisdiction and power to hear and determine Appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice or of any Judges or Judge thereof, subject to the provisions of this Act," &c.

Habeas corpus did not come within any of the exceptions referred to in the section.

The Lord Chancellor's judgment proceeded upon the grounds that the essential and leading theory of the whole procedure in habeas corpus was the immediate determination of the right to the applicant's freedom, that it was the known and well settled state of the law that a discharge under a writ of habeas corpus was final, and that no machinery was provided by the Judicature Act for giving effect to an appeal against a discharge under a writ of habeas corpus. Lord Bramwell took the ground, at p. 526, that the absence of a specific procedure in the Judicature Act to enforce an order of reversing an order of discharge on a writ of habeas corpus would render an appeal from such an order futile, and that sec. 19 should be construed in this sense, that the Court of Appeal "shall have jurisdiction to hear appeals from any judgment or order appealable or where the Court of Appeal appealed from can execute the order or judgment of the Court of Appeal." Lord Herschell distinctly placed his judgment upon the ground that the Judicature Act made no provision to enable the Court of Appeal to enforce a judgment or order reversing an order of discharge on a writ of habeas corpus, and that it would be powerless to enforce such an order, involving the re-arrest of a prisoner already discharged from custody. Lord Watson adopted the reasons given by Lords Bramwell and Herschell, while Lord Macnaghten concurred in Lord Herschell's judgment.

It will be observed that the majority judgment is founded almost entirely upon the argument of the futility of an appeal in the case of the granting of an order of discharge on a writ of habeas corpus, and that that judgment leaves open the question as to whether an appeal lies under sec. 19 of the English Judicature Act from an order refusing a

N.B.

S.C.

REX v. LANTALUM; EX PARTE OFFMAN.

Crocket, J.

discharge. Lord Bramwell distinctly stated that except so far as might be inferred from what he had said as to the argument which would imply a repeal of the Habeas Corpus Act he did not desire to express any opinion upon what the law would be if a refusal to discharge would be the subject of appeal. Lord Bramwell, although remarking that his reasons would perhaps apply to a case where the prisoner had been remanded, expressly limited his opinion to "where he has been discharged." Lord Herschell likewise said he intended to express no opinion whether there was an appeal in such a case, but expressly pointed out that the reasoning which had led him to the conclusion that an appeal would not lie from an order discharging a person from custody under a writ of habeas corpus has no application to an appeal from an order refusing to discharge the applicant and went on to say, at pp. 535, 536:—

"That question does not arise here and any opinion expressed upon it would be extra-judicial. I refer to it only because it was suggested that if there was an appeal in the one case it was scarcely to be conceived that there should not be an appeal in the other. I do not think so. There would be to my mind nothing surprising if it should turn out that an appeal lay by one whose discharge had been refused, but that there was no appeal against a discharge from custody. It would be in strict analogy to that which has long been the law. The discharge could never be reviewed or interfered with; the refusal to discharge, on the other hand, was always open to review; and although this review was not, properly speaking, by way of appeal, its practical effect was precisely the same as if it had been."

Seeing that all the Judges who took part in the judgment were of the opinion that sec. 19 of the English Judicature Act prima facie applied to appeals from judgments or orders on habeas corpus, and that four of the five, who held that the section did not provide an appeal from an order of discharge, did so upon the distinct ground that the reversal of such an order could not be enforced and an appeal in such a case would therefore be futile, and that all five took care to point out that they were treating only of an order of discharge and not of an order refusing to discharge, I feel bound to say that I can find little support in that case for the proposition that an appeal would not lie under that section from an order refusing to discharge a prisoner on habeas corpus, and that the effect of the opinions of all

the Judges considered together is rather to support the view that an appeal, though not lying from an order of discharge, would lie from an order refusing to discharge.

If the suggestion of the respondent's counsel were well founded, that there is no provision in the New Brunswick Judicature Act similar to the appeal provision of the English Act, the dicta which I have quoted from Cox v. Hakes would have no point of relevancy in this case, but an examination of our Act has convinced me that its provisions relating to appeal are quite as wide as, and at the same time more specific and mandatory than, those of the English Act, and that, if the English Act has provided an appeal from a judgment or order refusing a discharge on habeas corpus, where there was formerly no appeal, there is equal, and indeed stronger reason for holding that our Act has similarly changed the law.

The case of Barnardo v. Ford, [1892] A.C. 326, clearly affirmed the proposition that sec. 19 of the English Judicature Act provided an appeal in habeas corpus which had not previously lain. Lord Halsbury, L.C., and Lords Watson, Herschell, Macnaghten, Morris and Hannen there affirmed a judgment of the Appeal Court sustaining on appeal a rule absolute made by the Queen's Bench Division, for an order for the issue of a writ of habeas corpus. A preliminary objection was taken that a rule absolute that a writ of habeas corpus should issue was not a "judgment or order" within the meaning of the appeal section of the Judicature Act. It was urged that it was merely a direction by the Court that process should issue and that from such an order or direction no appeal could lie; Lord Herschell, treating of the preliminary objection, said, at p. 337:—

"The appeal section is very general in its terms and it has received a wide interpretation in this House in the case of the Overseers of Walsall v. London and North Western Railway Co. (4 App. Cas. 30.) I see no safe ground for holding that it is inapplicable to the issue of a writ of habeas corpus except that suggested; namely, that such an order merely directs the issue of a process of the Court. But it seems to me that if on this ground it were held that no appeal lay the decision must logically have a much wider scope. An order for the issue of a writ of mandamus might equally be said to be a direction for the issue of the process of the Court. Before the Judicature Act no appeal lay from such an order; but it has been held that under the appeal section

N.B.

S.C.

REX
v.
LANTALUM;
EX PARTE
OFFMAN.

Crocket, J.

of the Judicature Act such an order may now be made the subject of appeal."

The Lord Chancellor was the only one of the other Judges who made any reference in his judgment to the preliminary objection. He said he had entertained grave doubts upon the point and could not say that even those doubts had been entirely removed, but that it did not seem a question upon which he should insist so strongly on his own opinion that he should differ from the rest of their Lordships. I take it therefore that the opinion of Lord Herschell, from which I have quoted the above passage, must be treated as the judgment of the House upon the preliminary objection, and that that opinion distinctly recognises that sec. 19 of the English Judicature Act gives an appeal in habeas corpus cases which did not heretofore lie.

With regard to the New Brunswick Judicature Act, sec. 3 provides that the Supreme Court of New Brunswick as constituted before the Act a Court of Common Law and Equity and possessing original and appellate jurisdiction in civil and criminal cases shall continue under the aforesaid name to constitute one Supreme Court of Judicature for New Brunswick.

Section 6, sub-sec. 3, provides that any Judge of the Court may, subject to any rules of Court, exercise in Court or Chambers all or any part of the jurisdiction by the Act vested in the Court in all such causes and matters and in all such proceedings in any causes and matters as before the passing of the Act might have been heard in Court or in Chambers respectively by a single Judge of the Court.

Under Enumeration 10 of the Interpretation section "matter" includes every proceeding in the Court not in a cause.

Section 12, sub-sec. 11, provides that a Judge assigned to either division and sitting in Chambers may dispose of all Court business not of an appellate nature, (but including reviews from inferior Courts), or appointed by rule or order to be heard by the full Court or directed by a Judge to be so heard.

Section 12, sub-sec. 12, provides that all judgments, rules, decisions and orders given, pronounced, granted or made by a Judge under the last two preceding sub-sections (of which sub-sec. 11 is of course one) shall be subject to appeal to the Court en banc, the functions of which are now exercisable by the Appeal Division.

The words of sec. 12, sub-sec. 12 are assuredly quite as broad as the words of sec. 19 of the English Judicature Act, and, indeed, as it appears to me, are broader, for no judgment, decision or order which any Judge may give, pronounce or grant at Chambers is excepted, and all such judgments, decisions or orders, it is expressly declared, shall be subject to appeal to the Court en banc.

Nothing short of a conclusive, binding decision, would lead me to hold that a judgment or order refusing a discharge on habeas corpus is not subject to appeal to the Court en banc under the statute just quoted, notwithstanding that it was not subject to such an appeal previously. In the absence of any such authority or indeed of any reported case, either in England or in Canada, wherein any Court has held that an order refusing a discharge was not appealable, and in view of the fact that the cases cited on the argument and above discussed appear to me to point the other way, I have no hesitation in holding that an appeal lies in the present instance.

I wish only to add a word with regard to the case of McCrea v. Watson already referred to. The judgment of Hannington, J., in that case shows that there is no analogy between that case and the present. Section 105 of the Liquor License Act there in question provided an appeal to the Supreme Court "from the decision, judgment or order of any Judge of a County Court upon an appeal from any conviction or order made in cases arising out of or under this chapter" and the Court held that the order of the County Court Judge discharging the appellant from custody under defective warrants of commitment issued upon convictions for different violations of that Act, was not a decision or order of the County Court Judge upon an appeal from a conviction or order made in a case arising out of or under the Liquor License Act, but an order which was made by the County Court Judge under powers conferred upon County Court as well as Supreme Court Judges by ch. 133, C.S., 1903, respecting habeas corpus.

It may appear somewhat anomalous that an appeal should lie under the appeal provisions of the Judicature Act to the Court of Appeal from the decision or order of a Judge of the Supreme Court refusing an order of discharge and that such an appeal should not lie from a Judge of the County Court exercising the same authority under ch. 133, C.S., but when it is remembered that in every case where a

N.B.

S.C.

REX v. LANTALUM; EX PARTE OFFMAN.

Crocket, J.

County Court Judge refuses an order for discharge, it is still open to the applicant to make a fresh application to a Judge of the Supreme Court, and then, if such Supreme Court Judge should also refuse to grant the discharge, to appeal, if he desires, to the Court of Appeal under the provisions of the Judicature Act the apparent anomaly entirely disappears so far as concerns the case of an order refusing a discharge, and that is the kind of an order which is here being dealt with.

With regard to the merits I fully concur in the judgment of the Chief Justice that the order for deportation, under which Offman was and is held, was defective in not stating in full, as required by form B in the schedule to the Immigration Act the reasons for rejection. With all respects, however, I am unable to agree with his conclusion that he was precluded by the terms of sec. 23 of the Immigration Act from ordering the discharge of the applicant notwithstanding the defective order under which he was detained. The prohibition of that section, applies in my judgment only to proceedings, decisions or orders "had, made or given under the authority and in accordance with the provisions of this Act." The order in question, having omitted to state the reasons for rejection, which the Act clearly requires to be stated in full, is not an order, which was made or given in accordance with the provisions of the Act, and does not therefore fall within the prohibition of sec. 23. See judgment of Hunter, C.J., of British Columbia in Re Thirty-Nine Hindus (1913), 15 D.L.R. 191, 18 B.C.R. 506, also the judgment of Graham, J., of the Supreme Court of Nova Scotia in Re Walsh etc. (1913), 13 D.L.R. 288, 22 Can. Cr. Cas. 60, and of Russell, J., of the same Court in Rex v. Barnstead (1920), 35 Can. Cr. Cas. 179, 55 D.L.R. 287, all of which dealt with defective orders of deportation and held that, being defective, they did not come within the prohibition of sec. 23.

In Rex v. Schoppelrei (1919), 31 Can. Cr. Cas. 255, 30 Man. L.R. 137, on which the respondent's counsel relied to support the opposite view, the deportation order was made upon the ground that the applicant had obtained entry into Canada by misrepresentation of his citizenship and had refused to answer questions by the Board of Inquiry. No other question was involved than the question of the applicant's citizenship or domicile. As to this the Court of Appeal on an application for release by way of habeas corpus

and certiorari held that Schoppelrei's own evidence shewed that he was born an alien and that he had not become a Canadian citizen or acquired a Canadian domicile. Having so found and there being no objection that the order was in any way defective or not in accordance with the provisions of the Act the Court dismissed the application on the ground that the applicant had not brought himself within the exception contained in sec. 23, and that that section took away "the jurisdiction of this Court to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Board of Inquiry unless the person affected is a Canadian citizen or has Canadian domicile." It will be noted that this quotation from the concluding lines of the judgment, 31 Can. Cr. Cas. at p. 257, omits the words "had, made or given under the authority and in accordance with the provisions of this Act," which appear in the section referred to and undoubtedly qualify the words, "any proceeding, decision or order." This omission obviously is due to the fact that the omitted words had no bearing upon the case, with which the Court was dealing, for the reason that the order of deportation there in question was an order, in which there was no defect and which was made in accordance with the provisions of the Act. The attention of the Court was not directed to these words which were wholly irrelevant in that case for the reasons stated, but which are all essential for the decision of the question here involved, which is this:—Is an order of deportation, which purports to be made in the form prescribed by the Immigration Act but which states no reason for rejection, though the form given in the Act requires that these reasons for rejection shall be stated in full, an order made or given in accordance with the provisions of the Act? The Manitoba case therefore has no bearing on this question.

The other three cases above cited, as already pointed out, bear directly upon the point, and cannot in my opinion be successfully distinguished from the present case so far as concerns the principle of the prohibition of sec. 23 not applying to an order for deportation, which is defective upon its face.

I think the appeal should be allowed and the applicant discharged from custody.

Appeal allowed.

B.C.

C.A.

In re SHANNON AND POINT GREY CORPORATION.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. July 4, 1921.

STATUTES (§ IIA—104)—THE MUNICIPAL ACT AMENDMENT ACT, CONSTRUCTION OF—IMPERATIVE IN ITS TERMS.

Section 219, sub-sec. 3 (c) of the Municipal Act Amendment Act (B.C.) 1919, ch. 63, is an enactment giving power to the Court of Revision to fix the assessment of blocks of land of 3 or more acres when used for agricultural purposes at their values for such purposes, without regard to their value for other purposes. The statute is clear, positive and mandatory in its language and does not confer discretionary power on the Court of Revision.

APPEAL by the Corporation of Point Grey from the judgment of Macdonald, J., setting aside an assessment of the Court of Revision on lands within the corporation. Affirmed.

J. Martin, K.C., for appellant; *D. Donaghy*, for respondent.

MACDONALD, C.J.A.:—A passage from the speech of Cairns, L. C., in *Julius* v. *Lord Bishop of Oxford*, (1880), 5 App. Cas. 214, at p. 225, was relied upon by the Judge, from whose judgment this appeal is taken, as supporting his conclusion that the statute in question here makes it obligatory upon the Court of Revision to fix the assessment of respondents' lands on the basis of their values as agricultural or horticultural lands.

The statute enacts that the Court of Revision *shall have power* to fix the assessment of blocks of land of three or more acres when used for agricultural or horticultural purposes at their values for such purposes without regard to their values for other purposes.

Prima facie the language imports discretionary power and the burden lies on the person seeking to have it held obligatory to show why that force should be attributed to it. According to the law as it stands, apart from the above enactment, the respondents had no right to have their land assessed below its actual value, which admittedly was much greater than its value as agricultural or horticultural land. The section therefore empowers the Court of Revision to displace the general standard of value fixed by the Legislature, namely, the actual value, by fixing the value of land of the character of that of the respondents' at a lower figure. While no doubt intended for the benefit of such landowners, yet it is a power to make a concession, and the question is whether the Legislature intended to compel such concession or merely to enable the Court of Revision to make it.

The language of Lord Cairns already referred to, will, it is true, bear the construction put upon it by the Judge, but I do

not think, after reading the whole of Lord Cairns' speech that that passage was intended to be anything more than a generalisation. His reference to the authorities relied upon in argument and his comments thereon, indicate that he like Lord Penzance and Lord Blackburn, thought that enabling words were to be given their *prima facie* meaning unless the person for whose benefit the power was conferred was one who could claim the exercise of the power in furtherance of a legal right, such a right as was shewn to exist in the several causes which he reviewed.

Speaking in the same case, Lord Penzance said that if the matter were to be decided by previous definitions, he should refer to that of Coleridge, J., in *Reg* v. *Tithe Commissioners for England and Wales* (1849), 19 L.J. (Q.B.), 177, 14 Jur. 290, that of Jervis, C.J., in *The York & North Midland R. Co.* v. *The Queen* (1853), 1 El & Bl. 861, 118 E.R. 657, who said that enabling words were to be understood as enabling only, unless some "absurdity or injustice" would follow if given their natural meaning. Lord Penzance, however, brushes aside all previous definitions which he mistrusted, and said at p. 231, (5 App. Cas.):

"I think it far more satisfactory that your Lordships should look at what the Courts in previous cases have done rather than what the learned Judges may have said, and I invite your Lordships' attention to the cases cited in argument."

After reviewing these he said (at p. 232), that regard must be had "above all, to the position and rights of the person or class of persons for whose benefit the power was conferred."

Lord Blackburn, at p. 241, said: "If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it;" and he illustrates the character of such right by reference to the cases above alluded to. They are such as (at p. 244), "The personal liberty of the person arrested by the sheriff, the rights of the creditors of the bankrupt to their debts, and the right of the plaintiff who had recovered judgment to his costs, the right of the constable out of pocket to be paid by the parish, the right of the creditor of the bank or of the local board to be paid," which right in every case was possessed by the person applying for relief independently altogether of the power invoked to effectuate the right.

It is therefore apparent to me that when the case of *Julius* v. *The Lord Bishop of Oxford, supra.*, is examined, it will be found to be an authority against the judgment appealed from and in

B.C.

C.A.

IN RE SHANNON AND POINT GREY CORPORATION

McPhillips, J.A.

favour of the construction which I think must be placed upon the statute, namely, that the power conferred upon a Court of Revision, being one not for the purpose of effectuating a right the respondents already possess, but for conferring a benefit upon them and others in a like situation, was a discretionary and not an obligatory one.

In my opinion, apart altogether from the authorities above referred to, it is altogether reasonable in this case to suppose that the Legislature intended to leave with the local authority full discretion to deal with cases of apparent hardship in the application of the "actual value" rule of assessment. I can see very good reason why a discretion, which the Legislature itself could not exercise, should be conferred upon some person or body of persons to relieve, in a proper case, owners of lands used for agricultural purposes from the burden of an assessment upon the basis of actual value. When lands of the actual value of $2,250 per acre are used for a purpose which will bear taxation on a value of 10% only of their actual value, the Court of Revision might well scrutinise the reason why the owner withholds such land from use for other purposes more beneficial to him and to other ratepayers whose lands are assessed at their actual values. On the other hand, the taxpayer may long have pursued his avocation of cultivator of the soil, a circumstance which coupled with other matters, might induce a Court of Revision to reduce his taxation to fit his condition.

Moreover, the object of the power is to enable a class of landowners to obtain an exemption from the full burden of taxation imposed upon landowners generally. The respondents claim such exemption as of right. The burden therefore lies upon them to shew that the exemption was granted in unmistakable terms, whereas, they are driven to contend that a meaning must be given to words the opposite of their *prima facie* meaning.

The appeal should, in my opinion, be allowed.

I am requested by my brother Galliher to say that he concurs.

MARTIN, J. A., would dismiss appeal.

GALLIHER, J.A., concurs with MACDONALD, C.J.A.

MCPHILLIPS, J.A.:—In my opinion the appeal fails—Macdonald, J., arrived at the right conclusion. The case is one of construction of statute law simply, and with deference to all contrary opinion, presents no matter of difficulty. The statute is clear and positive and is mandatory in its terms—if the Court of Revision is to be admitted to ignore the plain direction of the Legislature with regard to sec. 219, sub-sec. 3 (c), as enacted by the Municipal Act Amendment Act, 1919, (B.C.) ch. 63, it might equally as well ignore and refuse to do any of the things

that are set forth and defined by the Legislature—as the duty of the Court of Revision.

The legislation which is pertinent to the question which calls for consideration upon this appeal is that which appears under the heading "Jurisdiction and Proceedings," being the jurisdiction to be exercised and the proceedings to be had before the Court of Revision—the sections are from 219 to 222 inclusive, and read as follows:

"219. (1) Every assessment roll shall be considered and dealt with by a Court of Revision, which shall consist of the members of the Council or five members thereof appointed for that purpose by resolution at the first meeting of the Council.

(2) Every member of the Court of Revision, before entering upon his duties, shall take and subscribe before the clerk of the municipality the following oath or affirmation:

I, , do solemnly swear [or affirm] that I will, to the best of my judgment and ability, and without fear, favour, or partiality, honestly decide the complaints to the Court of Revision which may be brought before me for trial as a member of said Court.

(3) The powers of such Court shall be:

(*a*) To meet at the time or times appointed, and to try all complaints lodged with the assessor in accordance with the provisions of this Act: (*b*) To investigate the said roll and the various assessments therein made, whether complained against or not, and so adjudicate upon the same that the same shall be fair and equitable and fairly represent the actual value of each parcel of land and actual value of the land and improvements within the municipality: Provided, however, the said Court shall not during the year 1920 reduce the assessment of any parcel of land to an amount below ninety per cent. of the amount for which such parcel of land was assessed on the assessment roll next preceding: (*c*) To fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes: (*d*) To direct such alterations to be made in the assessment roll as may be necessary to give effect to their decision: (*e*) To confirm the roll either with or without amendment: (*f*) Any member of the Court may issue a summons in writing to any person to attend as a witness, and any member of the Court may administer an oath to any person or witness before his evidence is taken: (*g*) No increase in the amount of assessment and no change in classification from

B.C.

C.A.

IN RE SHANNON AND POINT GREY CORPORATION

McPhillips, J.A.

improved to wild land shall be directed until after five days' notice of the intention to direct such increase or change, and of the time and place of holding the adjourned sittings of the Court of Revision at which such direction is to be made, shall have been given by the assessor in the manner set out in section 214, to the assessed owners of the land on which the assessments are proposed to be increased or changed as to classification, and any party interested or his solicitor or agent if appearing shall be heard by the Court of Revision.

(4) The Court of Revision shall appoint a chairman, who shall preside at the meetings of the Court, and who shall, unless otherwise provided by the Court, have power to call meetings and to regulate procedure.

(5) The Court of Revision shall appoint a secretary, who may or may not be a member of the Court, who shall keep in a book, written or printed in ink, minutes of the proceedings of the Court, and the assessment roll may be altered by the secretary, the assessor, or the clerk of the municipality in accordance with the directions contained in such minutes:

(6) A majority of the members of the Court of Revision shall constitute a quorum.

(7) All questions before the Court shall be decided by a majority of the members present; the chairman shall vote as an ordinary member of the Court.

(8) On the eighth day of February in each year the Court of Revision shall hold its first annual meeting. The Court of Revision may adjourn its sessions from day to day or from time to time, but shall complete and authenticate the roll not later than the twenty-eighth day of February following its first annual meeting.

(220) If any person who has been summoned to attend the Court of Revision as a witness, and who has been tendered his actual travelling expenses and compensation for his time at the rate of two dollars a day, shall without good and sufficient reason fail to attend, he shall incur a penalty of twenty dollars, to be recoverable with costs by and to the use of any person suing for the same.

(221) The Council may from year to year, by resolution, appropriate sufficient sums out of their revenue to pay the expenses of the Court of Revision.

222 (1) It shall be the duty of the Court of Revision to see that alterations be made in the assessment roll in accordance with the directions contained in the minutes of the proceedings of the Court and after the making of such alterations, to iden-

tify, confirm and authenticate the roll by inscribing or endorsing thereon or attaching thereto a certificate which shall be signed by a majority of the members of the Court, and which may be in the following form:

The within roll [or within roll as amended] is hereby confirmed by the Court of Revision of the Corporation of, and, except as may be amended upon further appeal, is hereby certified to be the assessment roll of the Corporation of for the year .

(2) If the several pages or sheets of the assessment roll be not firmly bound in a book, the chairman of the Court shall sign his name upon each of such several pages or sheets."

The Court of Revision in plain disregard of sec. 219 sub-sec. 3 (e) assessed the lands of the respondents in this appeal without considering or giving effect to the plain intention of the Legislature, *i.e.*, where the land is held in blocks of three or more acres, (which is the fact in the case of the lands of the respondents and used solely for agricultural purposes, the assessment is to be adjusted "at the value which the same has for such purposes without regard to its value for any other purpose or purposes." (See sec. 219, sub-sec. 3 (e), ch. 63, Municipal Act Amendment Act, 1919).

It cannot be gainsaid that the Legislature has spoken in no uncertain terms, and at this Bar it was not attempted to be argued that there was any doubt of the plain intention of the Legislature—but reliance was placed wholly upon the submission that it was a matter of discretion and not mandatory.

Again, with deference to all contrary opinion, this would seem to me idle contention—The Legislature, if effect, is to be given to this submission—solemnly applies its mind to a condition known to be existent and provides a method for the remedy of what otherwise it may fairly be assumed would be the imposition of an injustice and the Court of Revision in defiance of the statutory duty imposed upon it, fails to give the relief plainly intended. It is not the province of a Court of Law to deal with the policy of Parliament in enacting legislation, when enacted it is to be construed in accordance with its plain and ordinary meaning, and as I have already pointed out, there can be no question of meaning here—and if one were to be admitted to speculate as to what actuated the passage of this particular provision, it is not difficult to surmise and to understand that in these days of real estate booms coming in cycles, lands are subdivided into blocks, and city lots at such absurd distances from any reasonable user as business or residence sites, that large

B.C.

C.A.

IN RE SHANNON AND POINT GREY CORPORATION

McPhillips, J.A.

areas which should rightly be put to agricultural purposes are, in many cases, lying idle to the detriment of the locality and the Province at large. It is evident that the Legislature by way of inducement to cultivate these lands, made it possible to have the assessment based upon the agricultural value, not upon the city or town lot value which may be, as it often is, a most fictitious value.

However, with this aspect, the Court has nothing to do. In *Cooke* v. *The Charles A. Vogeler Co.* [1901] A.C. 102 at p. 107, Lord Halsbury said:— "But a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the Legislature has said."

Can it be said for a moment that the Legislature, in enacting this provision, meant that it should be at the will of the Court of Revision to fix or not to fix the assessment at the agricultural value, when the land is solely used as the land in question is—for agricultural purposes—and in plain defiance of the statute, assess or admit of the assessment, not at its agricultural value, but its value for other purposes, which is the present case? Reason and common sense impel a negative answer.

An appeal from the Court of Revision is expressly given by the Municipal Act, ch. 63, 1919, (B.C.) sec. 223, otherwise the proceedings would have been by way of a *mandamus*. The authorities dealing with, when and under what circumstances a *mandamus* will lie, may usefully be turned to. A *mandamus* will always be granted where it is apparent upon the facts that there has been failure to exercise the conferred jurisdiction—unless, of course, it is clear that it is a matter left to the absolute discretion of the body upon which the jurisdiction has been conferred to hear or not to hear the application—if not so left, the jurisdiction conferred must be discharged—here there has been a failure to discharge it, a jurisdiction unquestionably mandatory in its nature. That it is mandatory, is clear: the language of the statute is in apt words,

"Every assessment roll shall be considered and dealt with by a Court of Revision.....(See sec. 219 (1) ch. 63, 9 Geo. V., 1919).

"Every member of the Court of Revision, before entering upon his duties, shall take and subscribe before the clerk of the municipality the following oath or affirmation:

"I, ... do solemnly swear [or affirm] that I will, to the best of my judgment and ability and without fear, favour or partiality, honestly decide the complaints to the Court of

Revision which may be brought before me for trial as a member of said Court." (See sec. 219 (2) ch. 63, 9 Geo. V., 1919).

Then we have the particular sub-section that imposes the duty upon the Court of Revision to fix the assessment when, as in the present case, it is land held in blocks of three or more acres, and used solely for agricultural purposes. (See sec. 219, sub-sec. (3) (e.), ch. 63, 1919 (B.C.))—yet we have the Court of Revision flagrantly refusing to exercise the conferred jurisdiction which has been statutorily imposed. A more glaring case could not be conceived of the denial to the respondents of the benefit of legislation passed in the way of relief and it can be reasonably said as well for the public benefit; it is plainly legislation remedial in its nature and the principles which govern in such cases may also be invoked. I would, in this connection, refer to what Farwell, L.J., said, in *The King* v. *Board of Education*, [1910] 2 K.B. 165, at p. 181:

"Further, if the Board did not proceed in a mistaken assumption of the law, but deliberately disregarded it, either on the question of the construction of the Act, or on the entire want of evidence, then I should be of opinion that they had been guilty of misconduct so flagrant as to make it impossible for their decision to stand."

The above case went to the House of Lords and Lord Loreburn, L.C., in [1911] A.C. 179, at p. 182, (*Board of Education* v. *Rice*) said:

"But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or *have not determined the question which they are required by the Act to determine*, then there is a remedy by *mandamus* and *certiorari*."

Here the remedy is as already stated by way of appeal, and the Court of Revision "have not determined the question which they are required by the Act to determine."

In the *Queen* v. *Vestry of St. Pancras*, (1890), 24 Q.B.D. 371, Fry, L.J. at p. 378, said:

"There was a duty in the vestry to consider that proposal properly and fairly; Mr. Westbrook had an actual and personal interest in the performance by the vestry of that public duty, therefore if it has not been performed a *mandamus* should go," and here, admittedly the public and statutory duty has not been performed—the fact is that it has been flouted and ignored. Also see *The King* v. *The Mayor, etc., of Stepney*, [1902] 1 K.B. 317, 71 L.J. (K.B.) 238.

Macdonald, J., referred to that passage in the speech of Earl Cairns, L.C., in *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214, at p. 225, where he said:

B.C.

C.A.

IN RE SHANNON AND POINT GREY CORPORATION

McPhillips, J.A.

"That where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised." This quotation is most apposite and pertinent to the facts of present case. Here we have in the language of the statute, the imperative wo d "shall," (See sec. 219, (3) ch. 63, 9 Geo. V., 1919): "The powers of such Court, (The Court of Revision) shall be," and Lord Blackburn in his speech in the *Julius* case, said at p. 242:

"In the judgment of the Common Pleas, Chief Justice Jervis says that 'may' was 'as we think, aptly and properly used to confer on the Court an authority,' and later states the rule to be 'that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application.' And in *Crake* v. *Powell*, Lord Campbell says, 'If the plaintiff be entitled to costs, and the Court or Judge is empowered to make a rule or order for that purpose *ex debito justitiae*, he may call upon the Court or Judge to do so.' *Morisse* v. *The Royal British Bank*, (1 C.B. (N.S.) 67; 26 L.J. (C.P.) 62) was on the same principle."

The present case is exactly within the reasoning of the last quoted principles of law. Here the respondents had the right to have the Court of Revision "fix the assessment" of the land "used solely for agricultural purposes..... and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes." (See 219 (3) (c) ch. 63, 9 Geo. V., 1919), and that authority the Court of Revision in the present case refused to exercise and proceeded—in complete defiance of the statutory mandate—imperative in its terms.

The appeal rested solely upon the point that there was an absolute discretion in the Court of Revision to fix or not to fix the assessment in the manner provided by the statute, and that the Court of Revision were competent within the purview of the statute to ignore the statutory provision. This action of the Court of Revision, in my opinion, is clearly unsupportable upon the authorities—the statutory mandate is imperative in its nature and does not admit of any discretionary power in the Court of Revision.

I am therefore of the opinion that the appeal should be dismissed. *Appeal dismissed by an equally divided Court.*

McCULLOUGH v. ELLIOTT.

Alta.

App. Div.

Alberta Supreme Court, Appellate Division, Harvey C.J., Stuart and Beck, JJ. October 31, 1921.

MORTGAGES (§IIA—35) — PRIORITY—REGISTRATION—ASSIGNMENT—SUBROGATION.

The plaintiffs having been declared by a prior judgment (1919), 45 D.L.R. 645, to be entitled to the right to subrogation, and the payments to certain first and second mortgages in regard to which the right arose, having been made out of the plaintiff's monies at a date prior to the making and registration of the defendants' third mortgage, which was taken for "what it was worth," the Court held that the right of subrogation referred to in the prior judgment, arose immediately the payments were made to the first and second mortgages and consequently was in existence and attached prior to the defendants' mortgage and should therefore take precedence over third mortgage, although had the facts been that upon a proper enquiry from the prior mortgages the defendants had received information that the prior mortgages had been reduced and that the defendants being ignorant of the plaintiffs' right of subrogation had bona fide advanced money on the assumption that the prior mortgages had been absolutely reduced by the payments made, the defendants would have been entitled to priority over the plaintiffs' claims. The defendants' mortgage was however entitled to priority over the costs of administration of the estate in which the right of subrogation arose.

[See Annotation, Subrogation, 7 D.L.R. 168.]

APPEAL from the judgment of Hyndman, J., (1921), 57 D.L.R. 696, in an application to determine the right of priority of the plaintiff by reason of the subrogation of the plaintiffs to the Guelph and Ontario Savings Co., mortgagee, and Gerald Hamilton mortgagee in two certain mortgages, by virtue of a judgment of Walsh J., affirmed (45 D.L.R. 645)—in which the said McCullough and Foster were plaintiffs and the Toronto General Trusts Corporation, administrator of the estate of Henry Marsden, Jr., deceased was defendant. Affirmed.

A. H. Clarke, K.C., and *P. A. Carson*, for appellant.

D. S. Moffat, K.C., for respondent.

HARVEY, C. J.:—After the argument of this appeal in June last it appeared to us that perhaps the administrators ought to be heard in case the result might have some effect upon their rights as declared in the judgment on the appeal reported in (1919), 45 D.L.R. 645, and we, therefore, postponed the further consideration of judgment. We are now informed that they do not wish to be heard and inasmuch as they were given notice of the appeal and moreover the result we have reached does not affect their rights, there seems no reason for further delay.

I agree that the appeal should be dismissed with costs.

It may be that in the former appeal above referred to we

Alta.

App. Div.

McCULLOUGH v. ELLIOTT.

Stuart, J.

gave the administrators in respect to their costs of administration an advantage, which under some conditions they might not have had, but for the allowance of the claim of subrogation, yet as that advantage is in no way to the prejudice of the present appellants but only, if at all, to the prejudice of the present respondents who have not questioned it, it need not be taken into consideration.

STUART, J.:—Supposing the Canadian Bank of Commerce and the Guelph and Ontario Investment and Savings Society had learned after the registration of the defendants' mortgage that the payments made to them by the deceased had been made by the plaintiffs' money, that in fact they had received misappropriated funds and had been generous enough to say to the plaintiffs, "We understand we have received moneys that were yours and did not really belong to our debtor who paid us with them," and had given the plaintiffs cheques for the amount received, can there be any doubt whatever that they could have held their mortgages good for the amounts due them before the fraudulent payments had been made? Undoubtedly they could as against their fraudulent debtor in the absence of any defence by him to the alleged fraud. Then what reason would there be for saying that they could not do so also as against the defendants who merely took their mortgage to secure a past debt after the fraudulent payments had been made?

In the appellants' factum it is stated, "There is no suggestion that the defendants upon taking their mortgage did not become *bona fide* mortgagees for value without notice of the plaintiffs' claim." But this position was not, as I recall, contended for upon the argument. There is nothing in the case to shew that the defendants either advanced any money or altered their position in any way on the faith of the value of their security. They merely took the mortgage for what it was worth for an antecedent debt and it is not suggested either that they agreed to give time or in fact remained quiescent on the faith of it when they might have been active. Nothing whatever of that sort is disclosed by the evidence. Apparently they never enquired either at the registry office or elsewhere either as to the face value of the prior encumbrances or as to the amounts actually due upon them or indeed as to their existence.

The only argument, as I see the matter, which can seriously be advanced on behalf of the defendants is that they took a legal security, acquired a legal right, the value of which they indeed were ignorant of but to the full value of which at the time they acquired it they are legally entitled and that no equitable rule

can interfere with their legal rights. But equitable rules do constantly interfere with strict legal rights. That is what equity originated in.

In my opinion the defendants can only claim what the deceased had to give them. He mortgaged his interest in the land to them. Can they really ask a Court to permit them, when they do not enjoy the rights of a purchaser, for value without notice to get a charge upon an interest of the deceased which arose, if it ever arose at all, by the fraudulent use of other people's money? The prior mortgages still stood upon the record for the full amount of the prior mortgagees' claims. The deceased had taken trust money and paid it to the mortgagees but even yet they were not paid in full. The mortgages were not yet discharged.

In my opinion the plaintiffs' right of subrogation, their right to stand in the shoes of the prior mortgagees and to the protection given by their mortgages, arose instantly the fraudulent payments were made, although it could only subsequently be proven, recognised and enforced. The Courts of equity never created rights nor did Courts of common law. They recognised and enforced them.

As was said by Lord Parker of Waddington in *Sinclair* v. *Brougham*, [1914] A.C. 398, at pp. 441, 442. "It would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money."

BECK, J.:—This is an appeal from the decision of Hyndman, J. reported (1921), 57 D.L.R. 696.

This Appellate Division had already, 45 D.L.R. 645, dealt with the question involved, but in the absence of the defendants in this action—Elliott and Pelton.

In the previous decision it was held that the plaintiffs, McCullough and Forster, were entitled to be subrogated to the rights of the Guelph & Ontario Investment Society, first mortgagees of the land in question, to the extent of $1500 paid on account of that mortgage out of the funds of the plaintiffs and to the rights of Hamilton, second mortgagee of the land, to the extent of $7,000, similarly paid on account of the Hamilton mortgage; but it was also held that the executor's costs of the administration of the estate of the deceased mortgagor must take precedence of the plaintiff's subrogated rights, because, to have held otherwise, would have been inequitable and unjust to the executors, who had undertaken the administration of the estate without knowledge of the plaintiff's right of subrogation,

Alta.

App. Div.

McCULLOUGH v. ELLIOTT.

Beck, J.

and because the right of subrogation is admitted only when it works no injury to third parties.

At the trial before Hyndman, J., it appeared that the two sums, $1,500 and $7,000, paid from the funds of the plaintiff on account of the first and second mortgages, were paid before the making and registration of the third mortgage, but also that when the defendants took the third mortgage they took it, to use a familiar expression, "for what it was worth," without having any information as to the state of the accounts upon the first or second mortgages and, as the Judge puts it, so far as the defendants are concerned, the first and second mortgages might have existed to the extent of their full face value.

Hyndman, J., then held, 57 D.L.R. at pp. 697 and 698, that the plaintiff's right to subrogation arose immediately the payment of their funds was made to the first and second mortgagees, and consequently that that right was in existence and attached prior to the defendant's mortgage and therefore should take precedence of the defendant's mortgage; adding for the sake of clearness that, had the facts been that on proper enquiry from the prior mortgagees the defendants had received information that the prior mortgages had been reduced and that the defendants, being ignorant of the plaintiff's right of subrogation, had *bona fide* advanced money on the assumption that the prior mortgages had been absolutely reduced by the payments made, the defendants would have been entitled to priority over the plaintiff's claims. Hyndman, J., also held, at p. 699, with regard to the costs of administration, that the defendant's mortgage was entitled to priority over these costs and consequently, in case the land proved to be insufficient to pay all three mortgages, including the plaintiff's subrogated claim, the costs of administration so far as not satisfied from the general assets of the estate, were chargeable against the moneys coming to the plaintiffs in respect of their subrogated claim.

I think the opinion of Hyndman, J., is in all respects correct.

Had there been no third mortgage the right of subrogation established by our former decision in favor of the plaintiffs would have been, as it of course still is, valuable to the plaintiffs as establishing in their favor a specific charge against the land in question and consequently, to the extent that the proceeds of the land will go, a claim in priority to the general creditors of the estate.

But the defendants by appealing are urging that as against them, as the holders of a legal mortgage duly registered, the plaintiffs neither have, nor can this Court give them, a priority.

In addition to the sources of information referred to in the

previous report of this case on the subject of subrogation generally reference may be made to *Meux* v. *Smith* (1840), 11 Sim. 410, at p. 427, 59 E.R. 931; *Brocklesby* v. *Temperance &c. Society*, [1895] A.C. 173, at pp. 182, 185; *Thurston* v. *Nottingham etc. Bldg. Society* [1902] 1 Ch. 1; [1903] A.C. 6; and the notes in Lawyer's Reports Annotated as follows: Vols. 23 p. 124; 58 p. 788; N.S. vol. 5, 838; vol. 11 p. 744; vol. 16 p. 470; vol. 26 p. 816; vol. 37 p. 1203; vol. 46 p. 1049; vol. 47 p. 1191; Pomeroy Eq. Jur. ed. 3, vol. iii, secs. 1211 et seq; vol. iv, sec. 1419; vol. vi (vol. ii Eq. Rem.) secs. 920 et seq; White & Tudor's Lead. Cas. Ed. 8, vol. I, pp. 152 et seq.

The only purpose and value of subrogation in any case is to give or declare a priority over some person, who appears, apart from the special facts and circumstances on which the right of subrogation is based, to rank equally with or to have priority over the person claiming subrogation. In the present case, for instance, it is beyond question, and we have so decided in our previous decision—the plaintiffs have by virtue of the principle of subrogation a right to look to the specific mortgaged property in priority to the general unsecured creditors of the mortgagor.

The English cases cited in Sheldon on Subrogation, 2 ed. sec. 13, pp. 21 and 22, were cases of persons holding partial estates in land. In *Buckinghamshire* v. *Hobart* (1818), 3 Swan. 186; 36 E.R. 824, the Court declared "a charge not extinguished *for the benefit of the estate* though satisfied by the *tenant in tail*, with the intention of extinguishing it under the erroneous supposition that he was tenant in fee simple."

Eldon, L. C., said at pp. 199, 200: "If a tenant *for life* pays off a charge on the estate, *prima facie* he is entitled to that charge for his own benefit, with the qualification of having no interest during his life; if a tenant in tail, or in fee simple pays off a charge, that payment is *prima facie* presumed to be made in favor of the estate; but the presumption may be rebutted by evidence, as by calling for an assignment or by a declaration."

In other words, *prima facie* a tenant for life, paying a charge upon the estate, is entitled to be subrogated to the rights of the holder of the charge, except as to the interest accruing during the life time of the tenant for life; that is, the charge, satisfied so far as the incumbrancer is concerned and apparently discharged, *prima facie* remains a charge against the interest of the remainderman.

In *Brown* v. *McLean* (1889), 18 O.R. 533, the plaintiff advanced money to an owner of land to pay off mortgages, taking

Alta.

App. Div.

McCULLOUGH v. ELLIOTT.

Beck, J.

a mortgage to himself; he paid off the prior mortgages and registered discharges; but at the time he took the mortgage to himself and paid off the prior mortgages, there was an execution in the hands of the sheriff against the mortgagor, of which the plaintiff was ignorant, his solicitors having neglected to search for executions. It was held that the plaintiffs were nevertheless entitled to be subrogated to the rights of the prior mortgagees.

In *Abell* v. *Morrison* (1890), 19 O.R. 669, Morrison, a purchaser of land, paid off two mortgages out of the purchase price and registered discharges. He was subrogated to the rights of the mortgagees against the claim of the plaintiff, who previously had registered a contract of lien against the land, of which Morrison had no actual notice. The case was so decided by Falconbridge, J., and on appeal (1890), 19 O.R. p. 675, in which the judgment was affirmed, Boyd, C. said at pp. 675, 676: "Unless this case can be distinguished from that in 18 O.R. the judgment should be affirmed. Mr. Langton endeavored to make a substantial distinction by contending that this being a *registered* title, it must be held that the defendant had as a fact notice of the plaintiff's lien . . The defendant did not mean to give priority to this lien of which he knew nothing in fact . . . . The Registry Act, which declares (sec. 80) that registration shall constitute a notice does not preclude enquiry as to whether there was knowledge in fact and the Act itself (sec. 82) makes the distinction between actual notice and the implied or imputed notice which in certain cases flows from registration."

McLeod v. *Wadland* (1893), 25 O.R. 118 was a case of a claim by way of subrogation over a subsequent *registered* mortgage. The claim failed only on the ground of estoppel by conduct. The cases of *Brown* v. *McLean* and *Abell* v. *Morrison* were referred to. They were assumed to have been correctly decided and to be applicable, had it not been for the estoppel.

There seem to be no other Canadian authorities touching the point. There are, however, innumerable American cases and and it is in the American Courts that the doctrine of subrogation has been so extensively developed and applied.

In *Home Saving Bank* v. *Bierstadt* (1897), 168 Ill. 618, 48 N.E. 161, the Court said that subrogation will be given effect to at p. 625, "as against a subsequent incumbrancer, whose incumbrance has not been taken or his position changed because of the record showing the discharge of the senior incumbrance."

That is the test.

If the position of the subsequent incumbrancer, as it stood at the time at which that took place which is the ground of

subrogation, is not *changed* to his prejudice (and no estoppel has subsequently arisen) then the equities are in favor of allowing subrogation.

And this, it seems to me, contains within itself the answer to the difficulty suggested as arising under the Land Titles Act, 1906 Alta. ch. 24. I see nothing in the specific provisions of that Act relating to the priority of instruments which deals with the priorities of instruments otherwise than of the date of the registration of the respective instruments.

The general law and the jurisdiction of the Court while leaving, as a rule, the priorities, so fixed, to stand, affects the rights of the respective parties as a result of subsequent dealings, as for instance, a mortgage for $10,000 on which $5,000 has been definitely paid by the real debtor stands in its proper order of priority as a mortgage for $5,000 only and the position of a subsequent incumbrance has to the extent of the payment on account been improved since the taking of his security; but in case like the present where money was paid by one, not the real debtor, the equities seem clearly to favor the right of subrogation as against the subsequent incumbrancer, and there seems nothing in the Land Titles Act, which would have the effect of magnifying the rights of the subsequent incumbrancer beyond what they were at the date of registration of his security and thus preventing effect being given to those equities.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

Re CARSON ESTATE.

Saskatchewan King's Bench, Bigelow, J. May 9, 1921.

WILLS (§IIIA—75)—GIFT OF INCOME—INDEFINITENESS—VALIDITY—CONSTRUCTION.

By will a testator directed as follows "(1) "I direct my said executors to pay the income to be derived from estate or so much thereof as may be required to my daughter . . . for her support in her station of life, and on her death the residue of my estate to her children if any survive her, or if no children, then the estate to be equally divided between my brother and sister. 2. "If my daughter should predecease me then my estate is to be divided equally between my brothers and sisters. (3) All the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto daughter . . . or if she predecease me then equally between my brothers and sisters." The Court held that the clauses constituted a gift of the income and not of the corpus, that the daughter had a right to all the income if she required it, and that she had the right to determine what amount of the income she required, and that the executors were not entitled to encroach upon the corpus of the estate for her support in case the income was inadequate.

Sask.

K.B.

RE CARSON ESTATE.

Bigelow, J.

APPLICATION by way of originating summons, to have certain portions of a will construed.

C. C. Owen for the executors and for John Carson.

T. D. Brown, K.C., for Hattie May Carson, now Hattie May Mackenzie.

H. Fisher for the unborn children of Hattie May Mackenzie.

BIGELOW, J.:—The portions of the will to be construed are as follows, which I will number for convenient reference (1), (2) and (3):—

(1) I direct my said executors to pay the income to be derived from estate or so much thereof as may be required to my daughter Hattie May Carson for her support in her station of life, and on her death the residue of my estate to her children if any surviving her, or if no children, then the estate to be divided equally between my brother and sister.

(2) If my daughter should predecease me then my estate is to be divided equally between my brothers and sisters.

(3) All the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto daughter Hattie May Carson or if she predecease me then equally between my brothers and sisters.

The daughter did not pre-decease the testator; and the testator left him surviving 4 brothers and 3 sisters. The questions submitted in the originating summons are:

(a) Is the gift of "the income to be derived from the estate or so much thereof as may be required, to my daughter Hattie May Carson for her support in her station of life" so indefinite as to be in reality a gift of the corpus of the estate in that no time is stated when the income shall be paid nor how much of the income shall be paid or for how long it shall be paid, and in that no one is given power by the said will to determine what shall be the station in life of Hattie May Carson.

(b) If the said gift of the income is not a gift of the corpus to the said Hattie May Carson, (1) Is Hattie May Carson, or are the executors under the said will to determine what shall be the station in life of Hattie May Carson? (2) Is Hattie May Carson entitled to the whole annual income from the estate of the deceased, and if not who is to determine what amount thereof shall be paid to her? (3) Are the executors entitled to encroach upon the corpus of the estate for the support of the said Hattie May Carson if the income thereof is inadequate for that purpose?

(c) The deceased left surviving him four brothers and three sisters all named as defendants herein. Is the clause in the will

which provides that if Hattie May Carson leaves no children surviving her, "then the estate is on her death to be divided equally between my brother and sister" void for uncertainty? If so, what estate does the said Hattie May Carson take under the said will?

Answers:—(a) No, it is a gift of the income. (b) (1) Hattie May Carson has the right to all the income if she requires it. She has the right to determine what amount she requires of the income. (2) Yes, if she requires it. (3) No.

Mr. Brown contends that not only the income but the whole of the estate is to go to Hattie May Carson, and cites as authority *Hodges* v. *Goodnough*, (1916), 9 S.L.R. 124. In that case the will provided, at pp. 124, 125:

"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 wife, Angie J. Goodnough, the whole of my real and personal estate to her use and benefit during her lifetime, and at her decease anything remaining to be divided share and share alike among my children (naming them). All the residue of my estate not hereinbefore disposed of I give and bequeath unto [blank]."

It was held "that the widow was entitled only to a life interest in the estate, but that there was an implied power to encroach on the capital for her maintenance."

In the case at Bar the executors are directed to pay "the income or so much thereof as may be required," etc. I do not think they are entitled to encroach on the corpus of the estate, but are limited to the income.

Mr. Brown also contends that, as paras. 1 and 3 are inconsistent as to the interest of Hattie May Carson, the posterior of the two inconsistent clauses should be preferred, and therefore Hattie May Carson should have the whole of the estate. I cannot agree with this contention. Jarman on Wills, 6th ed. 1910, vol. I, at pp. 570, 571, says:—

"But the rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render any part of it effective. In the attainment of this object the local order of the limitations is disregarded if it be possible, by the transposition of them, to deduce a consistent disposition from the entire will.'

The nearest case I can find to the one at Bar is *Blamire* v. *Geldart* (1809), 16 Ves. 314, 33 E.R. 1004, referred to in Jarman, at p. 571. There the testator gave to B a specific fund or property at the death of A, and in a subsequent clause dis-

N.B.

S.C.

EMMERSON v. CLARK.

McKeown, C.J.

posed of the whole of his property to A; and it was held that the combined effect of the several clauses was to vest the property in A for life, and after his decease, in B. So here I think the combined effect of the two clauses is to vest the income in Hattie May Carson for life, and after her death to her children, if any, surviving her, or if no children, to be divided equally between testator's brothers and sisters.

(c) The use of the words "brothers and sisters" in paras. 2 and 3 of the will indicates it to be that the testator had made a mistake in the use of the words "brother and sister" in para. 1. I think his real intention was to benefit the whole of the class. *Re Stephenson*, [1897] 1 Ch. 75.

Costs of all parties will be paid out of the estate on the middle scale.

Judgment accordingly.

EMMERSON v. CLARK.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. June 9, 1921.

INSURANCE (§ IVA—161)—ASSIGNMENT OF INSURANCE POLICY—MISREPRESENTATION AS TO PURPOSE FOR WHICH IT IS TO BE USED—NATURE OF INSTRUMENT NOT MISREPRESENTED — VALIDITY OF ASSIGNMENT.

The question whether a particular assignment is "absolute" within the meaning of sec. 19 (6) of the New Brunswick Judicature Act 1909 is not to be determined by a description written over the document itself. It is a question of the intention of the parties to be evidenced by the language used in the conveyance and each enquiry must be resolved, each case determined by reference to the wording of each individual assignment and an assignment is valid and effectual within the section, in which the whole of the debt dealt with has passed from the assignor to the assignee and full and exclusive power has been given to the assignee to give a valid discharge to the debtor.

In order to set aside an assignment of a life insurance policy it is not sufficient to shew that a misrepresentation has been made as to the contents of the instrument which it is sought to avoid, it must be shewn that it was of a character and class different from what it was represented to be. A misrepresentation as to the purpose for which it is to be used is not sufficient to avoid the instrument.

MOTION by defendant to set aside verdict for plaintiff, and to enter a verdict for the defendant, or for a new trial.

C. F. Inches for defendant; *J. C. Rand* contra.

The judgment of the Court was delivered by

MCKEOWN, C.J., K.B.D.:—This case was tried without a jury before Chandler, J., and in the form ultimately assumed

before him, it became a question concerning the ownership of certain moneys paid into Court by The Canada Life Assurance Company under a policy of insurance on the life of the late George R. Sangster, who, in his life time, was insured by the said company on a policy made payable to the defendant who now claims said moneys as the beneficiary named in said policy.

Plaintiffs base their claim upon an assignment of the policy made by the said Sangster on February 10, 1916, by which he transferred and assigned the said policy to them as security for the payment of the sum of $804.85 and interest then owing plaintiffs by the insured, as well as for payment of any further advances which might be made to him by the plaintiffs.

All the parts of this assignment material to the questions here at issue will be fully set out hereafter. It was executed under seal by the assured, Sangster, as well as by the beneficiary, the present defendant Lizzie S. Clark (then Lizzie S. Brown) although her name does not appear in the body of the document as assignor, or otherwise howsoever. It was also executed by one of the assignees namely, Julian T. Cornell, the other assignee being at the time absent from Canada on military service.

The material facts are that on February 23, 1892, the above named Sangster, being then indebted to his daughter the present defendant in the sum of $4,000, took out the policy above referred to, insuring his life for that amount in favor of the defendant as sole beneficiary thereunder, for the purpose of securing to her the payment of such indebtedness. In the year 1914, Sangster being in need of money made application for a loan to the executors of the estate of H. R. Emmerson, and at various times during that year he was accommodated by them to the extent of $400; a further loan of $100 was made by them to him in 1915, and in the following year, 1916, he applied for and received from the same source the additional sum of $304.85, all of which loans carried interest at 6% per annum. On application for further financial assistance, it appears that the executors of Mr. Emmerson's estate required security for the past loans and further advances and thereupon the assignment of the said policy of insurance, which bears date February 10, 1916, was given as and for said security, and after receiving the same, the executors continued to advance moneys at divers times to Sangster, until at the end of the year 1918 such advances amounted to $1,392.84 as principal sum, in addition to $243.21 interest. The defendant has given evidence concerning the conditions under which her signature to this assignment was obtained. She says she was advised by her father that it was

N.B.

S.C.

EMMERSON v. CLARK.

McKeown, C.J.

necessary for him to raise money for the purpose of paying the insurance premium, and that she had no idea whatever that the document she put her signature to was to be used for any other purpose, that she did not know it had anything to do with securing any past or future debt to the Emmerson estate, and she further said that the blanks in the document were not filled up at the time she signed it. Her evidence in this latter respect was contradicted by that of James Friel, a barrister, in whose office the assignment was prepared, and by that of his stenographer, who testified that the blanks were filled up before the document left the office. It is unnecessary to follow the conflict of evidence. There was ample ground for the conclusion arrived at by the trial Judge, who, in his reasons for judgment expresses himself on that point in the following words:—"There is no doubt in my mind about the defendant having signed the assignment under a misapprehension as to the purposes for which it was to be used, and I think, as already stated, that she was induced to sign the document by misrepresentation on the part of her father the assignor of the policy."

On February 20, 1919, Sangster died and the assignees of the policy claimed from the insurance company the moneys secured them by said assignment. Having received notice of claim by the defendant Lizzie S. Clark, the company hesitated in payment, with the result that on July 4, 1919, the plaintiffs issued a writ out of the Supreme Court of this Province against the Canada Life Ass'ce Co'y in which they claimed the sum of $1,392.84 for principal secured by the said assignment and $258.52 for interest to the then date, with further interest to the date of judgment and costs, etc. Plaintiffs served, together with the said writ, a statement of claim—the first paragraph whereof claimed "$1,500.10 payable by the defendant to the plaintiffs on policy of insurance for $4,000 upon the life of George R. Sangster, deceased." Further paragraphs of the said statement of claim alleged that the assured and Lizzie S. Brown, the defendant, assigned the policy to the plaintiffs by way of security, of which assignment the defendant had written notice, and that the said Sangster died on February 20, 1918, —meaning 1919.

On February 25, an interpleader summons was taken out by the defendant company, and on return of the same, W. H. Harrison, appeared for the said company, James Friel, K.C., for the plaintiffs, and C. F. Inches for the present defendant—Lizzie S. Clark. After hearing the parties an interpleader order was made substituting the present defendant Lizzie S. Clark in lieu of the then defendant—The Canada Life Ass'ce Co., and di-

recting that the defendant company forthwith pay into Court to the credit of the account the sum of $1660.70 after deducting costs to be taxed, and thereupon staying the action against the then defendant. An order for directions in the suit as then constituted, was made on application to Chandler, J., on October 6, 1919, and on October 8 a statement of claim in such action was delivered to the solicitor for the defendant Lizzie S. Clark, and a statement of defence was duly put in on her behalf. The cause was noticed for trial at the then succeeding Westmorland circuit and was taken up before Chandler, J., on October 29, 1920, as a non-jury cause. On opening the case, counsel for the plaintiffs applied for leave to amend his statement of claim. I have already hereinbefore set out the substance of the original statement of claim of the plaintiffs against The Canada Life Ass'ce Co. as served with writ the of summons, and it may be remarked that the further statement of claim filed in pursuance of the order for directions, contained the allegations set out in the original statement, together with a further allegation setting out the fact that an interpleader order had been made and the terms upon which the same was made, and that plaintiffs claimed the moneys paid into Court thereunder by The Canada Life Ass'ce Co., with costs. The amendment asked for, and allowed at the trial, set out that the defendant had wrongfully asserted to The Canada Life Ass'ce Co., that no assignment of the policy of insurance was ever made, that any instrument purporting to be such was obtained by fraud, that she had otherwise raised doubts upon the validity of plaintiffs' claim under the assignment, that defendant had made claim to the moneys payable thereunder, and had induced the assurance company in breach of its duty to plaintiffs to withhold payment to them of the moneys payable by virtue of the said assignment, whereupon plaintiffs claimed by said amendment a declaration that the policy of insurance and the moneys payable thereunder were assigned by the defendant to the plaintiffs, and that the claim of the defendant thereto was a cloud upon the title of the plaintiffs and should be declared barred. Leave was given to the defendant to reply to such statement so amended, and defendant thereby denied the material allegations so made, and also denied that the plaintiffs have any claim under the alleged assignment, or that she induced the company to withhold payment as alleged, or that there was any duty from the assurance company to the plaintiffs or any moneys payable to the plaintiffs, and she claimed that said amendment was bad in law.

A great many questions have been raised and argued on defendant's appeal, but notwithstanding any irregularities

N.B.

S.C.

EMMERSON v. CLARK.

McKeown, C.J.

there may have been in procedure, I think the result arrived at, and announced by the trial Judge in his reasons for judgment does justice between the parties, and, as far as this transaction is concerned, settles the real and only dispute between them. At the conclusion of the plaintiffs' case, Mr. Inches for defendant moved for judgment, and many of the reasons urged by him at that time are included in the grounds of appeal. It was contended on defendant's part that the pleadings disclosed no issue between the parties, and that the plaintiffs' statement of claim disclosed no cause of action. The trial Judge expressed the view that the only way to dispose of the matter between the parties before him was to try it out on an issue between the plaintiffs and defendant as to who should get the money deposited in Court by the insurance company. He stated that defendant could either stand upon her rights without putting in any evidence or could adduce testimony. The Judge further inclined to the view that the case should have been dealt with on the interpleader motion by then directing an issue, but that if the action should be dismissed on the ground that no cause of action at all was set out, it would only have to be commenced over again and all the expense would have been incurred for nothing. Whereupon Mr. Inches chose to go on with the evidence. After hearing the evidence submitted on the part of the defendant the trial Judge took time for consideration and gave judgment in favour of the plaintiffs, directing that the money paid into Court by the assurance company belonged to the plaintiffs, and directing that the same be paid to the plaintiffs or their solicitor and also the plaintiffs were entitled to the costs of this action as well as the costs incident to the interpleader application, and gave judgment for the plaintiffs accordingly.

The defendant is now moving that the judgment hereinbefore referred to in favor of plaintiffs in this action be set aside and that judgment be entered in her favor or for a new trial. A number of reasons are submitted in support of this motion, and I will notice first those under which the defendant claims that the irregularity or impropriety of the procedure has prejudiced her presentation of the matters in issue. In order that defendant's contention in this regard may be understood, I have set out the pleadings in the action somewhat at length, and the course that was taken at the trial. The defendant claims that an issue was stated to which she had no opportunity to object or to reply, that she herself was not in any way responsible for an issue not being stated at the interpleader hearing, and that if she had been afforded an opportunity to reply to a

proper statement of claim she might have introduced other material evidence. I cannot see that the plaintiffs were any more responsible for the condition of the pleadings on the day of trial than the defendant was. No issue was stated at the interpleader proceedings, it was not necessary to do so; but after the present defendant Lizzie S. Clark was substituted for The Canada Life Ass'ce Co. the original defendant, a summons for directions in the action was immediately taken out before Chandler, J., and a statement of claim filed to which the defendant replied. It is now put forward that neither in such statement of claim, nor in any amendment thereto, nor in the statement of defence, was any issue stated between the parties. If this is true, it was open to defendant to move to strike out such defective statement of claim, and at that point to get rid of attempting to reply thereto; and I conceive it would be the duty of the defendant to do so. Instead of taking such course, the defendant proceeded to answer a claim which she now says is of no legal effect, and she went down to trial thereon, instead of making application to the Judge who issued the order for directions to have the statement of claim put in such shape as to contain a well defined claim against her. It seemed to be conceded that at the opening of the trial the pleadings were faulty, and plaintiffs thereupon, by leave, made an amendment, to which defendant replied, but apparently very little was effected in the way of stating the case between them. There never was the slightest doubt as to what was the issue between the parties, the whole question was, as stated by the trial Judge, who was entitled to get the money which had been paid into Court? In order to raise this rather simple question, an order for directions was given, a statement of claim was filed and served by the plaintiffs, a statement of defence was filed and served, both statements were amended and yet apparently the real dispute was never reached. For this, both parties are responsible, and I think the trial Judge took the proper course in directing the evidence to the solution of the only possible question which the case admitted of. At the conclusion of plaintiffs' evidence the Judge gave to defendant's counsel the option of resting upon his rights without putting in any evidence or going on with his testimony, and the latter course was chosen. Neither at the beginning of the plaintiffs' case when application to amend the statement of claim was made, nor at its close did the Judge press defendant to proceed, and no application was made for delay in order that the proper issue should be more formally set out. I consequently think that there is no force in any of the objections (Nos. 8, 9, 10, 11) all of which are

N.B.

S.C.

EMMERSON v. CLARK.

McKeown, C.J.

directed against the course pursued at the trial and against the form and substance of the pleadings, for I cannot see that defendant has been prejudiced in the slightest degree thereby.

Turning now to the questions of law involved in this application, it is well, I think, to deal first with the objection to the validity of the assignment under which plaintiffs make claim. It is contended on defendant's part that plaintiffs have no right of action because the assignment relied upon is not an absolute one, and consequently it does not come within the provisions of sub-sec. 6 of sec. 19 of the Judicature Act, 1909. For support on this point both the form and wording of the assignment are put forward. The document in question is headed—"Assignment of Life Policy by way of Security only, not an Absolute Assignment."

It is an indenture under seal, made between "George R. Sangster, Moncton, N.B., (the assignor) of the first part, and Henry Read Emmerson and Julian T. Cornell, Amherst, N.S., trustees of the estate of Honourable H. R. Emmerson, deceased (the assignees) of the second part, and witnesseth that the assignor in consideration of eight hundred and four dollars and eighty-four cents to him paid by the assignees, the receipt whereof is hereby acknowledged, doth bargain, sell, assign, transfer and set over unto the assignees, all that policy of assurance, effected on the life of the assignor with the Canada Life Assurance Company dated the 22nd day of February, one thousand eight hundred and ninety-two, and numbered 54430, for securing payment of the sum of four thousand dollars, as therein mentioned and also the said sum thereby secured and all and every other sum and sums of money which shall become payable under and by virtue of the said recited policy, etc."

Full power is given to the assignees to have, hold and receive said policy and all sums of money payable thereunder as their own proper moneys and effects, with authority to said assignees to demand and sue for, recover and receive the same and to give full and valid discharge and release to the company "for the principal and other moneys hereby assigned." It was also therein agreed:

"That the assignees shall stand and be possessed of and interested in the said policy of assurance, sum and sums of money upon trust for better securing to the assignees payment of the sum of $804.05 and interest and any further advances."

It was further covenanted therein on the part of the assignor that the policy had not been forfeited, that he would keep the same in force and pay the premiums thereunder and deliver the renewal receipts therefor to the assignees, and in the event of

failure in that regard, the assignees were authorised to pay such premiums, and, until repayment by the assignor with interest, to charge such sum or sums against the policy with interest at 6% per annum, and there was also a covenant on the part of the assignees to reassign to the assignor such policy and the moneys payable thereunder as soon as the advances so secured with interest were paid. The question whether a particular assignment is "absolute," within the meaning of the sub-section, is not to be decided by a description written over the document itself. Such description I apprehend, would be no more conclusive than the indorsement which any particular document might carry. It might, or might not, correctly indicate the contents of the conveyance. It is a question of the intention of the parties as evidenced by the language used in the conveyance, and each inquiry must be resolved, each case determined, by reference to the wording of each individual assignment. Sub-section 6 of sec. 19 of our Judicature Act is a reproduction of sec. 25 sub-sec. 6 of the English Judicature Act of 1873, with a slight amendment as to the payment of money into Court. In all parts material to this discussion the sections are identical. In the case of *Durham Bros.* v. *Robertson*, [1898] 1 Q.B. 765, 67 L.J. (Q.B.) 484, Chitty, L.J., delivering the judgment of the Court of Appeal discussed the assignment of a debt under a document which the Court held did not constitute an absolute assignment within the meaning of the section referred to. He says, at pp. 771, 772:—

"To bring a case within the sub-section transferring the legal right to sue for the debt, and empowering the assignee to give a good discharge for the debt, there must be, (in the language of the sub-section), an absolute assignment not purporting to be by way of charge only. It is requisite that the assignment should be or at all events purport to be absolute, but it will not suffice if the assignment purport to be by way of charge only. It is plain that every equitable assignment in the wide sense of the term as used in equity, is not within the enactment. As the enactment requires that the assignment should be absolute the question arose whether a mortgage in the proper sense of the term and as now generally understood was within the enactment. In *Tancred* v. *Delagoa Bay Co.* (1889), 23 Q. B. D. 239, there was ..... a proviso for redemption and reassignment upon repayment. It was there held by the Divisional Court, (disapproving of a decision in *National Provincial Bank* v. *Harle* (1881), 6 Q. B. D. 626), that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional

N.B.

S.C.

EMMERSON v. CLARK.

McKeown, C.J.

Court was quite right. The assignment of the debt was absolute; it purported to pass the entire interest of the assignor in the debt to the mortgagee, and it was not an assignment purporting to be by way of charge only. The mortgagor-assignor had a right to redeem, and on repayment of the advances a right to have the assigned debt reassigned to him. Notice of the reassignment, pursuant to the sub-section, would be given to the original debtor, and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for re-assignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply a right to a re-assignment on redemption and the sub-section would apply to the case of such an absolute assignment."

I think that, in all instances, assignments have been held valid and effectual within the section in which it has been found by the document of transfer that the whole of the debt dealt with has passed from the assignor to the assignee, and also that full and exclusive power has been given to the assignee to give a valid discharge to the debtor, so that as a result of the assignment the assignor himself would be unable to proceed against the debtor. In the case above cited the assignment was held only to be conditional; it was expressed thus at p. 769:—"as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you." The decision of the Court was that as no power was given to the assignee to give a valid discharge to the debtor, the assignment did not come within the section of the Judicature Act above cited. In the case of *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 190, at p. 196, 71 L.J. (K.B.) 630—Cozens-Hardy, L.J., said:

"The question raised by this appeal is whether a document dated March 7, 1901, is 'an absolute assignment (not purporting to be by way of charge only'), within the meaning of s. 25 of the Judicature Act, 1873. Now it has been repeatedly held that the word 'absolute' does not mean absolute by way of sale, and that an assignment may be 'absolute' though by way of mortgage. See *Burlinson* v. *Hall* (1884), 12 Q.B.D. 347, and *Tancred* v. *Delagoa Bay and East Africa Ry. Co.* These were decisions of Divisional Courts but the Court of Appeal has adopted the same view. In *Durham Brothers* v. *Robertson*, [1898] 1 Q.B., 765, the Court held that the particular document in question was not absolute, but conditional."

After citing an extract from Chitty, L.J.'s, judgment, he continued at pp. 197, 198:—

"It was suggested to us in argument that this was in some way inconsistent with the subsequent case in this Court of *Mercantile Bank of London* v. *Evans*, [1899] 2 Q.B. 613. I cannot however adopt this contention. On the construction of the particular document before them the Court held there was not an assignment of the whole debt.. . . . If on the construction of the document it appears to be an absolute assignment though subject to an equity of redemption express or implied, it cannot in my opinion be material to consider what was the consideration for the assignment or whether the security was for a fixed and definite sum or for a current account. In either case the debtor can safely pay the assignee and he is not concerned to enquire into the state of accounts between the assignor and the assignee. Nor does it matter that the assignee has obtained a power of attorney and a covenant for further assurances from the assignor. . . . . The real question and in my opinion the only question is this, Does the instrument purport to be by way of charge only?"

A reference to the document which was under consideration in the above case shews that it was to be a continuing security "for all moneys due or to become due to you from me."

Mathew, L.J., in the same case says, (71 L.J. (K.B.)) at p. 632,—

"In every case of this sort it is indispensable to ascertain the meaning of the assignment. Whatever the phraseology employed, if, on the one hand, it is clear that no more than a charge was intended, the action must be brought by the assignor; if, on the other hand, all the right of the assignor is intended to pass to the assignee, the action must be brought in the name of the assignee."

After setting out the circumstances and reading the document his Lordship continues:—

"It seems to me clear that there was an intention to pass to Lloyd's Bank complete control of all moneys payable under the contract, and to place the bank for that purpose in the position of the plaintiff. That being so, unless there is some difficulty in the way in consequence of the decisions the document may be properly described as an absolute assignment, because under it all the rights of the assignor under the contract are intended to be passed to the assignees."

Speaking of the assignments under consideration in *Mercantile Bank of London* v. *Evans*, [1899] 2 Q.B. 613, 68 L.J. (Q.B.)

N.B.

S.C.

EMMERSON v. CLARK.

McKeown, C.J.

921, and *Jones* v. *Humphreys*, [1902] 1 K.B. 10, 71 L.J. (K.B.) 23, his Lordship says, 71 L.J. (K.B.) 630, at p. 633:—

"But when the documents in question in those cases are looked at it will be seen that the intention was to assign so much of a debt or chose in action as would be sufficient to provide in the one case for £200, and in the other for £22 10s. That being so it is manifest that in each case the document was a charge and a charge only."

In the case of *Mercantile Bank of London* v. *Evans* above referred to by Mathew, L.J., a document purporting to be an assignment of a debt or legal chose in action as security for the repayment of a loan, and empowering the assignee to sue in his own name or in that of the assignor, was held not to be an absolute assignment within the section. The ground of that decision was as expressed in the judgment of Smith, L.J., at p. 617:—

"There was no absolute assignment of the benefit of the contract at all, but merely an assignment sufficient to secure a repayment of the £200; that is, an assignment *pro tanto* which is not an absolute assignment of the benefit of the whole contract as contended for by the plaintiffs."

The above case, which was cited on the argument, dwells upon one of the necessary ingredients of a valid assignment namely, that the whole debt must be assigned, and as above expressed I do not think that any case can be found in which an assignment which conveys the whole debt and gives to the assignee the right to sue therefor in his own name, has been held invalid. It was argued by counsel for the appellant that the assignment before us did not come within sec. 19, sub-sec. 6 of the Judicature Act, because it only purported to secure $804.85 and interest and an indefinite additional sum for "further advances." If the document in question had only purported to assign that much of the debt (viz: "$804.85 and interest and any further advances") then I think there would be much strength in this contention. While it cannot be said to be fully settled, yet I think the weight of opinion is that the sub-section does not cover an assignment of a portion of a debt only. See remarks of Chitty, L.J. in *Durham* v. *Robertson*, [1898] 1 Q.B. 765, 67 L.J. (Q.B.) 484; Mathew, L.J., in *Hughes* v. *Pump House Co.*, [1902] 2 (K.B.) 190, 71 L.J. (K.B.) 630, and judgment of Fletcher Moulton, L.J. in *Forster* v. *Baker*, [1910] 2 K.B. 636. But in the document before us it is abundantly clear that the entire debt is assigned. This is not the case of only a certain portion

N.B.

S.C.

EMMERSON v. CLARK.

McKeown, C.J.

of a debt (namely, the amount of advances) being assigned. The whole sum accruing under the policy is made over to the assignees, who are clothed with full power to demand, sue for and discharge the insurance company from all claims thereunder. If they should receive, or have received, from the insurance company more than sufficient money to satisfy the debt secured, they will have to account to the defendant for any such excess, but that has no bearing on the question whether the full amount payable under the policy was assigned. I further think that apart from the statute, the conveyance in question operates as an equitable assignment against the defendant. Referring to this sub-section of sec. 19 of the Judicature Act, it is explained by Lord Macnaghten in the case of *Wm. Brandt's Sons & Co.*, v. *Dunlop Rubber Co.*, [1905] A.C. 454 at p. 461, 74 L.J. (K.B.) 898, that the statute in question:—

"Does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree. Where the rule of equity and the rules of the common law conflict, the laws of equity are to prevail. Before the statute there was a conflict as regards assignments of debts and other choses in action. At law it was considered necessary that the debtor should enter into some engagement with the assignee. That was never the rule in equity."

The case before us is not that of a debtor sued by a person with whom he has had no dealings, upon a claim assigned to a plaintiff under the provisions of the Judicature Act. Here the plaintiffs are seeking to recover moneys secured them by an assignment executed by defendant, which certainly constitutes an equitable assignment. I think this document comes within the provisions and fulfils the requirements of the Act regarding assignments of debts and choses in action; but, in my opinion, plaintiffs' right to recover would not be impaired if the said assignment were not within such provisions. It is valid for all purposes of this suit as an equitable assignment and, as such is binding upon the defendant.

The various objections urged by the defendant against the validity of the assignment in question are, in my opinion, all covered by the authorities above cited. Numerous cases can be found in which documents of assignment have been held to be inoperative such as *Forster* v. *Baker*, [1910] 2 K.B. 636, and *Mercantile Bank* v. *Evans*, *Durham Bros.* v. *Robertson*, above cited, but I think it will be found that the reasons for holding the particular assignments specified in the above cases to be invalid, was that they did not assign the debt in its entirety or

N.B.

S.C.

EMMERSON v. CLARK.

McKeown, C.J.

that no power was given to the assignee to discharge the debt and release the debtor. I have not deemed it necessary to set out the assignment in this case verbatim, but enough of it has been quoted to shew that it comes clearly within that class of cases in which the Court has upheld the validity of assignments such as the one now before us.

Another objection to the plaintiffs' claim is based upon misrepresentations, or false representations, made by the assured to the defendant at the time the assignment of the policy was executed by her. In discussing this ground we must take the finding of the Judge as to the facts and apply the law thereto. At p. 7 of his reasons for judgment he said:—

"The defendant Lizzie S. Clark gave evidence at the trial and stated that she had executed the assignment put in evidence at the request of her father and that her father had told her that the assignment was necessary in order to enable him to borrow from the assurance company the amount necessary to pay the annual premium then due on the policy. She stated she had never read the document and relied entirely upon what her father told her. But she went further and stated that when she executed the assignment the blanks left in the form had not been filled up with typewriting as is now the case and that what she executed was simply a blank assignment. I am quite willing to believe and do believe that Mrs. Clark was induced to execute the assignment in question by misrepresentation on the part of her father and that she relied upon the truth of what her father had told her as her reason for executing the assignment, but I think that Mrs. Clark is mistaken in stating that the assignment was executed by her in blank."

Later on the Judge thus further expressed himself upon the point:—

"There is no doubt in my mind about the defendant having signed the assignment under a misapprehension as to the purpose for which it was to be used and I think as already stated that she was induced to sign the document by misrepresentation on the part of her father, the assignor of the policy."

Numerous cases were cited by counsel upon both sides in support of the positions taken. The trial Judge has put this Court in possession of facts concerning which I think the law is settled. It is apparent that the defendant knew that she was signing a document which has reference to the policy of insurance under which she was a beneficiary, and she further knew that the assignment was for the purpose of raising money upon the policy. Having such knowledge in her possession, she is not in the position of the defendant in the *Thoroughgood*

case (1584), 2 Co. Rep. 9 b, 76 E.R. 408, or in the case of *Foster* v. *McKinnon* (1869), L.R., 4 C.P. 704. In the case of *Howatson* v. *Webb*, [1907] 1 Ch. 537, 76 L.J. (Ch.) 346, Warrington, J., discusses the many cases bearing upon this point. It is therein decided that it is not sufficient to shew that a misrepresentation has been made as to the contents of the deed which it is sought to avoid, it must be shewn that the deed was of a character and class different from what it was represented to be. After discussing a number of earlier cases Warrington, J., says at p. 549:—

"What does the evidence in the present case shew? I may go so far in the defendants' favour as to say that Webb having regard to his knowledge of Hooper, when Hooper said that the deeds were 'deeds for transferring the Edmonton property,' he was justified in believing that they were deeds such as a nominee could be called upon to execute either in favor of a new nominee or for the purpose of putting an end to his own position of nominee, and certainly not a deed creating a mortgage to another person. But in my opinion that is not enough. He was told that they were deeds relating to the property to which they did in fact relate.. His mind was therefore applied to the question of dealing with that property. The deeds did deal with that property. The misrepresentation was as to the contents of the deed and not as to the character and class of the deed. He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents. The deed contained a covenant to pay. Under those circumstances I cannot say that the deed is absolutely void. It purported to be a transfer of the property and it was a transfer of the property. If the plea of *non est factum* is to succeed the deed must be wholly and not partly void."

There is no question that the Emmerson estate is the holder for value under this assignment, and it having been executed under the conditions disclosed, and found by the trial Judge, I think the assignment must be held to be valid. See further, the case of *National Provincial Bank of England* v. *Jackson*, (1886) 33 Ch. D. 1. There is a distinct class of cases in which a person is so deceived by the misrepresentation of those procuring the execution of a deed, as to be entirely ignorant of the nature or quality of the instrument which he signs, and in such cases the deed so signed is not his deed at all, because the grantor never had any intention of executing a document of that nature. If the assignment in the present case could be brought within that class of transfers, it would not bind the defendant, but the evidence shews that she knew quite well that she was

Sask.

C.A.

CLARK v. CLARK.

executing an assignment of the policy, and I think that under the authorities, which need not be multiplied, and two of which have been above cited, defendant is bound by the assignment she has made. It was further urged that the assignment is invalid because defendant's name is not mentioned in the body thereof, although her signature and seal are thereto affixed. Having in mind the testimony in regard to the execution by defendant of the document in question, the purpose for which she admits she signed and sealed the same, and the necessity of her signature as beneficiary under the policy of insurance referred to in the assignment in order to make such assignment of any value whatever, I think it would be unjust and inequitable to hold that her whole action with reference to the instrument in question goes for nothing. The provisions of the Life Insurance Act of 1905, (N.B.) ch. 4, establish a beneficiary in a strong position with reference to insurance policies made in his or her favor. It nevertheless provides that the rights secured under a policy of insurance "otherwise inalienable" may be transferred by act of such beneficiary if he be of full age; sec. 22, sub-sec. 3. It is pointed out by the trial Judge that no particular form of assignment is made necessary by the provisions of the Act, and I think that she is estopped from denying that her signature to the document in question has any other meaning than that she consented to the transfer in question, especially as the evidence discloses that she subsequently became aware of the use the assignment was put to, and that plaintiffs kept the policy alive by payment of at least one premium after defendant knew that plaintiffs were holding it as security for her father's debt. In my opinion this appeal must be dismissed with costs.

Appeal dismissed.

CLARK v. CLARK, et al.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, and McKay, JJ.A. November 14, 1921.

MASTER AND SERVANT (§ IC—10)—AGREEMENT FOR SERVICES—MAXIMUM AND MINIMUM RATE AGREED UPON—NO AGREEMENT AS TO DEFINITE RATE—RIGHT OF SERVANT TO BE PAID A FAIR WAGE WITHIN LIMITS AGREED UPON.

When parties to a hiring agreement bind themselves to a minimum wage of $10 per day and a maximum of $15 per day, but there is no definite amount agreed upon and the servant goes to work upon the understanding that the question of wages will be left to subsequent negotiations, the servant will be allowed what the evidence shews to be a fair wage for services of the nature rendered, within these limits.

APPEAL by defendant from the judgment at the trial of an action for wages. Varied.

E. D. Noonan, for appellant; *W. M. Blain*, for respondent.

The judgment of the Court was delivered by: —

HAULTAIN, C.J.S.:—The plaintiff was employed by the defendants as engineer and fireman in charge of an engine used in connection with threshing operations. The plaintiff brought this action for the recovery of his wages for work done in the above capacity, and was awarded wages at the rate of $20 a day on a *quantum meruit* by the trial Judge.

The defendants now appeal on the ground that on the evidence the plaintiff is only entitled to be paid $10 a day, the amount which they agreed to pay. The evidence, in my opinion, does not disclose any such agreement. The defendant Milo Clark in one portion of his evidence alleges that before the work began he and the plaintiff had some discussion as to the rate of wages to be paid, in the course of which the plaintiff asked for $15 a day while he said that he would only pay $10 a day. He goes on to say that no amount was agreed on, but that the plaintiff said that he would wait and see how the engine ran before any amount was agreed to. The plaintiff admits this conversation and says that no amount was arranged before he went to work. The defendant Clark further swore that no arrangement was made with him, but that the amount of $10 a day was agreed upon by the plaintiff and Davies before the work began. Davies in his evidence stated that he never made any arrangement with the plaintiff.

This evidence satisfies me that there was no definite amount agreed on and that the plaintiff is entitled to be paid a reasonable amount for his services. In the conversation which he admits took place, he valued his services at $15 a day, while the defendant Clark was only willing to pay $10. He then went to work on the understanding that the question of wages would be left to subsequent negotiations. Under this arrangement the parties seem to me to have bound themselves to a minimum of $10 a day and a maximum of $15 a day respectively. The evidence shews that $15 a day was a fair wage for services of this nature, and that is the rate at which I think the plaintiff is entitled to be paid.

I would, therefore, vary the judgment below, by reducing the amount of $360 to $270. As the appellant rested his appeal solely on the ground of an alleged agreement to pay $10 a day, there will be no costs of appeal. *Judgment below varied.*

B.C.

C.A.

HAMILTON v. STOKES.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. June 7, 1921.

LAND TITLES (§ IV—40)—CAVEAT—REGISTERED BY REGISTRAR EX MERO MOTU—REQUISITES OF—DOES NOT LAPSE UNDER SEC. 69.

The provision in sec. 63 of the Land Registry Act, R.S.B.C. 1911, ch. 127, that caveats shall be verified by the oath of the caveator or his solicitor or agent and shall contain an address for service clearly does not apply to special caveats filed by the Registrar ex mero motu under sec. 62 nor under the statute is he bound in such caveat to state to himself the interest he claims, and such caveat being one "filed by the Registrar or lodged on behalf of the Crown," within the meaning of sec. 70 of the Act, does not lapse under sec. 69.

Section 66 of the Land Registry Act, R.S.B.C. 1911, ch. 127, is wide enough to cover the direction of an issue to determine the "question of right or title" on a summons issued under this section against the Registrar to withdraw his caveat on the sole ground that it has lapsed under sec. 69.

[See Annotation, Land Titles, Caveats, 7 D.L.R. 675.]

APPEAL from the judgment of a Judge in Chambers dismissing a petition under sec. 114 of the Land Registry Act, R.S.B.C., ch. 127, praying that the District Registrar of Titles be directed to proceed with an application for a certificate of indefeasible title, the Registrar having declined to register the title because of a caveat registered against the lands in favour of His Majesty the King; and also an appeal on a summons issued under sec. 66, against the caveator (the Registrar) to withdraw his caveat on the ground that it had lapsed under sec. 69 of the Act. Order varied by directing that an issue be tried to determine the "question of right or title" to the land.

C. R. Hamilton, K.C., for appellant.
W. D. Carter, for respondent.

MACDONALD, C.J.A.:—It is not necessary in my reading of sec. 69 and 70 of the Land Registry Act, R.S.B.C. 1911, ch. 127, to decide whether the caveat filed by the Registrar was effectually filed or not. I will assume for the purpose of this appeal that what he did in that regard was good in law.

Section 69 in effect declares that unless the person on whose behalf (in this case His Majesty the King) the caveat was lodged, within two months thereafter shall file with the Registrar evidence that he has taken proceedings to establish his title, the caveat shall be deemed to have lapsed. That this section was intended to apply to a caveat filed by the Registrar is shewn by the amendment of sec. 70 made by ch. 43 of the statutes of 1914,

sec. 31. The object of sec. 70 is to prevent a cloud remaining upon a title after the lapse of 2 months. If it were not for that section *the caveatee* would be put to the expense of going to the Court for relief, a course which I think the Legislature intended to obviate by the section, the benefit of which I do not think it intended to confine to particular classes of caveats.

The language is capable of two constructions, but I prefer to adopt the equitable and reject the narrow one. I would therefore dismiss the appeal.

MARTIN, J.A.:—These are two appeals arising out of the same caveat. The first comes up from a petition to a Judge in Chambers under sec. 114 of the Land Registry Act, R.S.B.C., ch. 127, praying that the District Registrar of Titles be directed to proceed with the appellant's application for a certificate of indefeasible title, the Registrar having declined to register the title because, according to his notice to the appellants, "there is a caveat No. 99 lodged against the lands herein in favour of His Majesty the King," which was lodged by the Registrar under power given him so to do by sec. 62A, but it is submitted that the caveat does not in essentials comply with Form H. given in sec. 63 and therefore should be wholly disregarded as not being a caveat in the proper sense. The caveat lodged is as follows:—

"Take notice that I, Elliott Seymour Stokes, District Registrar of Titles, Nelson, B.C., on behalf of His Majesty the King forbid the registration of any memorandum of transfer or other instrument affecting the East 50 feet of lots 17, 18, 19 and 20, Block 12, Trial City, Map 465, until this caveat be withdrawn by me, or by the order of a Court of competent jurisdiction or a Judge thereof. Dated this 3rd day of September, A.D. 1920. E. S. Stokes, District Registrar, E.S.S., Dist. Reg."

The Form H. which, be it noted, is directed to the Registrar, is as follows:—

"Take notice that I, A.B. of (insert residence and description), forbid the registration of any memorandum of transfer or other instrument dealing with (here describe land and refer to certificate of title) until this caveat be withdrawn by the caveator or be discharged by the order of a Court of competent jurisdiction or a Judge thereof, etc. .. .. .."

The provision in sec. 63 that caveats shall be verified by the oath of the caveator or his solicitor or agent and shall contain an address for service clearly does not, in my opinion, apply to special caveats filed by the Registrar *ex mero motu* under sec. 62, because every one must take cognisance of his "address"

B.C.

C.A.

HAMILTON v. STOKES.

Martin, J.A.

and no affidavit or verification would be required in the case of such an official who was taking steps to examine the title and at the same time protect the insurance fund in accordance with facts coming to his attention during his investigation under sec. 14 to "satisfy" himself of the goodness of the title, and as the prime object of a notice of caveat (Vide Form H) is to give notice to the Registrar himself (to whom it has to be directed) to arrest the progress of the proceedings before him or his officers, that object must be borne in mind in construing the section. If, then, no affidavit or address for service is necessary, why in strictness should the Registrar be called upon to inform himself of the "nature of the estate or interest claimed" by himself, when that is something which he already must be presumed to know? After a careful consideration of all the sections discussed I am of opinion that the statute does not require him in such a caveat to state to himself the interest he claims, and it has not been suggested that he would upon request refuse to disclose to any party interested the nature of his claim—it would, of course, be his manifest duty to do so. I am therefore of opinion that the objection to the form of this caveat cannot prevail.

Then it is submitted that it has lapsed under sec. 69, but that section does not, I think, apply to this case as being one "filed by the Registrar or lodged on behalf of the Crown," which is the first excepted class, the second (or third) (if not indeed two classes having regard to the amendment of 1914, ch. 43, sec. 31, allowing for the first time the Registrar to file) being composed of those lodged "on behalf of any *cestui que trust*, heir at law, etc." and therefore it is still in force, and hence the petition to set it aside and proceed with the registration must be dismissed.

The second appeal comes up on a summons issued under sec. 66 against the caveator—the Registrar—to withdraw his caveat on the sole ground that it has lapsed under sec. 69, and sec. 66 goes on to provide that the Court or Judge may "upon such evidence as the Court or Judge may require, make such order in the premises, either ex parte or otherwise, as to the said Court or Judge may seem fit; and where a question of right or title requires to be determined, the proceedings followed shall be as nearly as they may be in conformity with the Rules of Court in relation to civil causes."

The only order made upon the summons was the refusal of it, thus leaving matters in *statu quo* merely, and it is submitted that sec. 66 is wide enough to cover the direction of an issue to

Que.
S.C.
BLAIS
v.
C.P.R. Co.
Gibsone, J.

determine the "question of right or titles" with is undoubtedly raised on the affidavits filed. I think that the section is wide enough to cover that very necessary direction, and it is to be regretted that the Judge was not, as I understand counsel, plainly asked by either of them to make it, as I have no doubt he would have done, since it was the obvious and proper thing to do. Both sides are now, however, as I understand them, agreeable to that being done, and it is essential that it should be done, otherwise, in the face of sec. 116-A the Registrar will be unable to issue the certificate without the curial declaration required thereby and a dead-lock will be created detrimental to all concerned. The proper order to make, therefore, is to direct that the order be varied by adding a direction that an issue be tried to determine the "question of right or title," which issue would be the form of proceeding most "in conformity with the rules of Court in relation to civil causes" as said section directs.

Because of the Crown Costs Act, R.S.B.C. 1911, ch. 61, I say nothing about the costs.

GALLIHER, J.A.:—I am in agreement with my brother Martin.

Order varied by directing the trial of an issue to determine the question of right or title.

BLAIS v. C.P.R. Co.

Quebec Superior Court, Gibsone, J. March 29, 1921.

WITNESSES (§ IA—14)—DISCOVERY—OFFICIALS OF CORPORATION-LITIGANT—COMPELLING ATTENDANCE—C.C.P. PARA. 2—CONSTRUCTION. The list of officials of a corporation-litigant as contained in C.C.P. 286, para. 2 is not restrictive and other officials may be summoned provided they are officials of the corporation and the examination has reference to matters in issue between the parties to the case, and that such matters are within the scope of the witness' duties.

Moraud & Alleyn, for plaintiff.

Pentland, Gravel & Thomson, for defendant.

GIBSONE, J.:—Seeing the notice given by plaintiff in this case to the end that C. Senay, local general agent, of defendant company in Quebec be summoned on discovery and, seeing the objections upon the said notice to summon the said C. Senay;

I am of opinion that the list of officials of a corporation-litigant as contained in C.C.P. 286, para. 2, is not restrictive and that other officials may be summoned provided they be officials of the corporation and that the examination has reference to the matters in issue between the parties to the case and that such matters are within the scope of the witness' duties.

Sask.

K.B.

Re MOOSE JAW ELECTION; PASCOE v. THOMSON.

Saskatchewan King's Bench, Taylor, J. August 3, 1921.

ELECTIONS (§ IIB—50)—BALLOTS, METHOD OF MARKING—DISTINGUISHING MARKS—SUFFICIENCY OF TO INVALIDATE VOTE—SASKATCHEWAN ELECTION ACT, R.S.S. 1920, CH. 3.

Under the Saskatchewan Election Act, R.S.S. 1920, ch. 3, a ballot paper is not objectionable only on the ground that some act of the deputy returning officer affords a means of identification of the voter and the vote cannot be rejected on that ground alone, and an omission of the deputy returning officer such as not putting the number on the counterfoil, or his initials on the back of the ballot paper.

[The Monk case (1876), Hodgins E.C. 725; Jenkins v. Brecken (1883), 7 Can. S.C.R. 247, applied.]

If a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended and if there has been a fair compliance with the Act, according to any fair and reasonable construction of it, the vote ought to be allowed, and ballots marked with ink or indelible pencil in any legible manner will be counted, neither is it necesary under the Act that the mark be a cross, but any mark other than a cross is sufficient if it clearly indicates an intention to mark in favour of a name.

[Review of authorities.]

APPEALS from the District Court Judge in a recount, in an election to the Saskatchewan Legislature. Varied.

W. E. Knowles, K.C., and *W. M. Rose*, for Thomson and Bingham.

W. B. Willoughby, K.C., and *J. B. Haig*, for Pascoe.

W. G. Baker, in person.

No one for other candidates.

TAYLOR, J.:—These are appeals from the District Court Judge in an election recount in the Moose Jaw City election of June 9, 1921, to the Provincial Legislature. Two members were to be elected out of 5 candidates. By the result of the recount 2 only, Pascoe and Thomson, can be much affected. Baker has such a substantial majority over, and Fletcher and McKellar are so far behind Pascoe and Thomson, that no possible change on this recount could affect their respective positions. A large number of ballots are the subject of dispute, and so many different kinds of errors have been made that to reach a conclusion with any degree of accuracy it is necessary to study carefully the principles applicable.

I wish, first, to observe that as it is an appeal on a recount of the ballots, many matters which would be taken into consideration on a petition under the Controverted Elections Act, 1907 (Sask.), ch. 5, are excluded from consideration on this

proceeding. The Saskatchewan Election Act, R.S.S. 1920, ch. 3, makes provision for the taking of a poll by secret ballot where more candidates are properly nominated than there are members to be elected. It is enacted that in each polling division "the deputy returning officer shall count the votes" (sec. 192); he shall make out a statement of the poll after counting the ballots (sec. 197); the ballot box, ballots and all documents shall immediately be delivered to the returning officer; the returning officer adds up the votes given for each candidate from these statements of the poll and declares the candidates having the highest number of votes elected. If it is made to appear by affidavit to a Judge of the District Court that there has been an improper count by a deputy returning officer or improper addition by the returning officer, the Judge may appoint a time and place "to recount or finally add up the votes cast at the election" (sec. 210). The Judge "shall recount all the votes or ballot papers returned by the several deputy returning officers" (sec. 216), "and shall in the case of a recount proceed according to the rules for counting ballot papers at the close of the poll by a deputy returning officer, and shall verify and correct the statement of the poll" (sec. 218). On completion the Judge certifies the result to the returning officer. From the conclusions of the Judge of the District Court, there is a further appeal to a Judge of the Court of King's Bench, which may be general or limited to special ballots. In the matter now under consideration I have limited appeals from the side of each of the affected candidates. I am by the statute (sec. 224) directed to recount such of the ballot papers as are the subject of appeal and certify my decision to the Judge of the District Court.

There was much argument by counsel as to the position of a Judge in such an appeal; on the one hand, that he is therein acting in an administerial capacity, and, on the other, that he has the usual powers attributable to the judicial office. Neither contention is, to my mind, strictly correct. It is his duty to review on the appeal the decisions of the deputy returning officer and the District Court Judge, and in recounting the ballots certify that which, in his opinion, the deputy returning officer ought to have done, although in so doing it is not as in the exercise of a judicial discretion but according to fixed principles of law and the directions contained in the guiding statute. As to considering evidence *de hors* the ballot, the rule is a very limited one. In my opinion, it was correctly enunciated by Osler, J.A., in West Huron (1898), 2 E.C. (Ont.) 58, at p. 60:—

Sask.

K.B.

PASCOE v. THOMSON, RE MOOSE JAW ELECTION;

Taylor, J.

"In a proceeding of this kind the official to whom is committed the duty of counting or recounting the ballots cannot take evidence for the purpose of ascertaining whether a particular ballot is good or bad; but, whether deputy returning officer, county judge, judge sitting in appeal from the latter, I think he is at liberty to draw any inferences which are fairly capable of being drawn from the election papers before him. The County Judge and the Appellate Judge must be in the same situation in this respect as the deputy returning officer."

I find a great difficulty in the application of cases decided either in England or in Canada on particular ballots. The statutory provisions are different. There is not such a complete uniformity in legislation as to make any decision a binding authority, and from the reports of many of the cases it is impossible to any more than glean a general idea of the statutory directions under consideration, and there is the further consideration that most of these enactments consist of a main Act and many amendments, while the Saskatchewan Act is mostly to be read altogether as the Legislature passed it. But I think I can deduce certain principles which are guiding principles.

The importance of observing the secrecy of the ballot is stressed, and there is a leaning against depriving a voter of the franchise to the extent that statutory directions to election officials couched in language ordinarily construed as imperative are taken as directory only when the effect would be to deprive a voter of his franchise. They are imperative to the official; but, unless otherwise expressly declared, a failure to conform to the directions will not destroy the vote. The remedy is found, if the dereliction be gross, in a petition under the Controverted Elections Act, or the breach of duty penalised under special provisions of the governing enactment. Invariably we find that the enactment itself declares, as the Saskatchewan Election Act does in sec. 194, that for certain defects or omissions, a ballot paper shall be rejected, and this, in itself, has been construed to be an intimation that failure to comply with other directions should not avoid the ballot paper. I refer to *Ackers* v. *Howard* (1886), 16 Q.B.D. 739, at p. 753, and the *Cirencester Division* case (1893), 4 O'Mal. & H. E.C. 194, in England, and to *Jenkins* v. *Brecken* (1883), 7 Can. S.C.R. 247, in Canada.

As to secrecy—a method of identification of a ballot paper may, it is obvious, be furnished through some act or omission of the election official or of the voter himself, or may be merely accidental. Judges have differed as to the effect of an act or omission of an election official affording a means of identifica-

tion, and in some Provinces the question has been covered by special enactment. (Ontario Election Act, R.S.O. 1897, ch. 9, sec. 112, sub-sec. 3). The propriety of counting or rejecting an identified ballot is entirely a question for the Legislature. Our Saskatchewan legislation on this subject commences in 1908. (Statutes of Sask. 1908, ch. 2, sec. 170, sub-sec. (c)). The effect of which was to direct the deputy returning officer "to reject any ballot paper upon which there is any writing or mark by which the voter can be identified, but no word, letter or mark written or made or omitted to be written or made by the deputy returning officer on a ballot paper shall avoid the same or warrant its rejection." This was carried into the revision of 1909. (R.S.S. 1909, ch. 3, sec. 170, sub-sec. (c)). In 1910-11, ch. 5, sec. 30, clause (c) as I have quoted it, was repealed and the following substituted therefor:—

"(c) Any ballot paper on which anything is written or marked by the voter by which he can be identified except the mark X shall not be counted. Provided however that if an elector with an honest intention to vote in favour of one of the candidates whose name is upon a ballot paper and without any apparent intention of identification shall have marked his ballot with some mark other than a cross mark X, clearly indicating an intent to mark in favour of any name, it shall be deemed a sufficient vote for the candidate in whose favour the same is so marked; but not if the cross mark (X) be used elsewhere on the same ballot. R.S.S. 1920, ch. 3, s. 194; 1920, ch. 14, s. 10."

And this was carried into the revision of 1920 (R.S.S. 1920, ch. 3, sec. 194, sub-sec. (c)).

It was contended that this special statutory rule of construction enacted in 1908 having thus been repealed in 1910 the intention of the Legislature that marks of identification made by the deputy returning officer should invalidate the vote is thereby declared. To draw such an inference of intention is contrary to secs. 47 and 48 of the Interpretation Act (R.S.S. 1920, ch. 1) which provides:—

"47. The repeal or amendment of an Act shall not be deemed to be or involve any declaration whatsoever as to the previous state of the law.

"48. The amendment of an Act shall not be deemed to be or to involve a declaration that the law under such Act was or was considered by the Legislature to have been different from the law as it has become under such Act as so amended."

Sections somewhat similar in terms and passed for the same purpose as sec. 194 had been construed as a complete direction

Sask.

K.B.

PASCOE v. THOMSON. RE MOOSE JAW ELECTION;

Taylor, J.

to the returning officer (*Jenkins* v. *Brecken, supra*), and as pointed out by Hawkins, J., in *Ackers* v. *Howard, supra*, the section would be a false and misleading guide if the deputy returning officer was to reject other ballot papers in addition to those described in this section. The Legislature has also declared its intention by the insertion of the words "writing or mark *by the voter*" in sec. 194, and it seems to me to add thereto "or by the deputy returning officer" would be an extension of the express statutory direction to the returning officer. Therefore, so far as the ballot paper is objectionable only on the ground that some act of the deputy returning officer has afforded a means of identification of the voter I do not think it a tenable objection or that the vote can be rejected on that ground alone.

Nor would an omission of the deputy returning officer be on any different footing, unless it is otherwise directed in the statute. Thus the deputy returning officer is directed (sec. 163) to place on the back of the counterfoil a number corresponding with that placed opposite the voter's name in the poll book, and on the back of the ballot papers to place his initials so placed that when returned by the voter he can see the initials. The omission to number the counterfoil can hardly be contended to have destroyed the vote. The object of initialling is to afford a means of identification of the ballot, and where, as in one poll in this election, a deputy returning officer who should have known better, used an hieroglyphic of his own conception, not an initial, instead of his initials, that alone should not affect the vote as the vote is clearly on the ballot paper supplied by the deputy returning officer.

A ballot paper found in a ballot box, which bears no initial of the deputy returning officer or any identification mark made by him, is subject, however, to other considerations. The deputy returning officer must reject all ballot papers "which have not been supplied by him", (sec. 194). The printing of the ballot papers is done under the supervision of the returning officer (sec. 141); the printer is to make affidavit that no other such ballot papers were printed or supplied by him to anyone (Form 38); the paper therefor is furnished to the returning officer by the Clerk of the Executive Council (sec. 141, sub-sec. 4); all ballot papers shall bear the name of the printer who prints them, and are to be as nearly alike as possible (sec. 141, sub-sec. 6); the stub and counterfoil, but not the ballot itself, are numbered; the stub, counterfoil and ballot are bound in books, and as so bound are furnished to the deputy returning

officer; every ballot paper is stamped by the returning officer with a specially designed stamp furnished him for that purpose by the Clerk of the Executive Council; the stamp is on the ballot itself; before the poll opens the deputy returning officer may be required to count his ballots (sec. 155); as the voter applies for his ballot the deputy returning officer will detach it from the stub; he puts on the back of the counterfoil a number corresponding to that placed opposite the voter's name in the poll book, and is directed to place his initials on the back of the ballot (sec. 163). It would not be much of a slip to place the initial on the counterfoil instead of the ballot. The voter takes the ballot with counterfoil attached into the compartment provided, and returns the ballot with the attached counterfoil to the deputy returning officer, who is to then verify his own initials and at once deposit the same in the ballot box (sec. 167). In the directions for guidance of voters (Form 40) there is the further direction to the returning officer that when the ballot paper is returned to him he is, in the full view of those present, including the voter, to remove the counterfoil and destroy the same. To determine whether the ballot paper so returned by the voter is the one supplied by him the deputy returning officer has not only his own initials but the number on the counterfoil in his own hand-writing, as well as the general appearance of the ballot. If he has, inadvertently, put his initials on the counterfoil, the record thereof will be destroyed. He, his assistants, the representatives of the candidates have the ballot box in plain view at all times during the poll (sec. 156); before counting the ballots on the close of the poll, the deputy returning officer is to ascertain from the poll book the number of voters who have voted and to make and sign a declaration thereof (sec. 193). If everything has been done regularly this number and the number of ballot papers in the box must be the same. Now in the face of all these checks must the deputy returning officer conclude that a ballot paper found in the box at the close of the poll, which does not bear his initials, from that omission alone, that it is not a ballot paper which has been supplied by him? For the Act does not say that he is to reject ballot papers not so initialled, but those which have not been supplied by him. Such an inference would, in my opinion, be unwarranted. Nor can I see, in view of the many ways in which the omission may be regarded as an accidental slip, that it would even tend to the identification of the voter. The interpretation I have thus put on the Saskatchewan Act is entirely in accord with that put on the

SASK.
K.B.
PASCOE
v.
THOMSON.
RE MOOSE JAW ELECTION;
Taylor, J.

Dominion enactments: See *The Monk* case (1876), Hodgins E.C. 725; *Jenkins* v. *Brecken* (1883), 7 Can. S.C.R. 247, and especially Strong, J., at p. 267.

Then as to means of identification due to some error of the voter. The Courts have always taken into consideration the different types of voters and their frailties, and have attributed errors and oddities to illiteracy or weakness rather than infer fraudulent design. The English rule is stated by Hawkins, J., in the *Cirencester Division* case, 4 O'Mal. & H.E.C. 194, at p. 197:

"We ought to interpret the Ballot Act liberally, and subject to other objections, to give effect to any mark on the face of the paper, which in our opinion clearly indicated the intention of the voter, whether such mark were in the shape of a cross, or a straight line, or in any other form, and whether made with pen and ink, pencil, or even indentation made on the paper, and whether on the right or the left hand of the candidate's name, or elsewhere within his compartment on the voting paper. Of course, every deviation from the course pointed out in the rules tends to create difficulties which may be avoided by a rigid observance of it. It is highly prudent therefore to adhere to it, though we do not think it essential.

There are some marks, however, which undoubtedly gave us much trouble to discover what was the real meaning of them. Upon each one we have come to the best conclusion we could with the materials before us. There were some marks and blotches of a very irregular character which might well be mistaken as indications of temporary unsteadiness in the voters who by their unsteadiness imperilled their votes. In such cases we have done our best to discover whether, although obscured by the blots, blurs, and other marks, there existed positive indications on the part of the voter of an intention to vote without a thought of leaving behind a trace to enable him to be identified. We have not been astute to give way to objections of an unsubstantial character, but we have endeavoured to interpret the language of the Statute in the liberal spirit in which it is conceived, and to carry out the intentions of the Legislature in the spirit in which the enactments were passed, supporting every vote which we have found to be clearly indicated, except in a few cases in which the language of the Act expressly declared them void."

Coleridge, C.J., in *Woodward* v. *Sarsons*, etc (1875), L.R. 10 C.P. 733, at p. 748, puts it:—that a ballot paper "must not be marked . . . . so as to make it possible, by seeing the paper itself,

or by reference to other available facts, to identify the way in which he has voted."

The principle of these decisions has always been followed in Canada. See *In Re Wentworth Election* (1905), 9 O.L.R. 201; *In Re Lennox Provincial Election* (1902), 4 O.L.R. 378; *Rex ex rel Tolmie* v. *Campbell* (1902), 4 O.L.R. 25; *West Elgin No.* 1 (1898), 2 E.C. (Ont.) 38.

A mark of any kind on a ballot paper in addition to a cross may serve in certain circumstances, coupled with other evidence, to identify it, and a voter might even by a preconceived arrangement so make his cross, or so place it, that the cross alone would enable identification. It is obvious that the mark made by the voter which is forbidden is something different from a cross or other marking which appears, on an examination of the ballot paper only, to be the method or means adopted to vote. Anything written on a ballot is apparently considered more objectionable, though in one Canadian case writing the name of the candidate on the ballot was not considered a means of identification. *West Elgin No.* 1, 2 E.C. (Ont.) 38. Note the facsimiles of allowed and disallowed ballot papers in Rogers on Elections, 18th ed. vol. 3, pp. 220 *et seq.* Maclennan, J.A., in *West Elgin No.* 1, 2 E.C. (Ont.) 38, at p. 40, concludes that: "if a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a fair compliance with the provisions of the Act, according to any fair and reasonable construction of it, the vote ought to be allowed."

That in his opinion is the result of the authorities in Canada and in England.

As to the use of marks other than a cross (X). In *the Bothwell Election* case (1884), 8 Can. S.C.R. 676, Ritchie, C.J., at p. 696, expressed an opinion in these words:—

"After a good deal of consideration, I find it impossible to lay down a hard and fast rule by which it can be determined whether a mark is a good or bad cross. I think that whenever the mark evidences an attempt or intention, to make a cross though the cross may be in some respects imperfect, it should be counted, unless, from the peculiarity of the mark made, it can be reasonably inferred that there was not an honest design simply to make a cross but there was also an intention so to mark the paper that it could be identified, in which case the ballot should, in my opinion, be rejected. But, if the mark made indicates no design of complying with the law, but, on the contrary, a clear intent not to mark with a cross as the law

Sask.

K.B.

PASCOE v. THOMSON. RE MOOSE JAW ELECTION;

Taylor, J.

directs, as for instance, by making a straight line or a round O, then such non-compliance with the law, in my opinion, renders the ballot null. The irresistible presumption from such a plain and wilful departure from the terms of the statute being that it was so marked for a sinister purpose."

This opinion was accepted by a majority of the Court.

Our legislation, sec. 194, sub-sec. (e), (which I have already quoted), goes one step farther than the *Bothwell* case, *supra*. It is not under it necessary that the mark evidence an attempt or intention to make a cross. As the proviso to sub-sec. (e) now reads any "mark other than a cross mark, X, clearly indicating an intention to mark in favour of any name, it shall be deemed a sufficient vote for the candidate in whose favour the same is so marked"; "but not if the cross mark be used elsewhere on the same ballot," and only "if the elector with an honest intention to vote in favour of one of the candidates . . . . and without any apparent intention of identification, shall have marked his ballot . . . . " I take it that the "intention" is all to be deduced from what is to be found upon the ballot paper.

Under sec. 194, sub-sec. (b), ballot papers by which votes have been given for more or fewer candidates than are to be elected are also to be rejected. There is the further class where it is impossible to deduce from the ballot what the voter intended. In England this latter class is expressly declared void for uncertainty. Even without such express declaration such a ballot paper must be rejected. Nothing else could be done with it, before it could be counted it must clearly appear for what candidate the vote is intended.

The argument that a ballot paper marked in ink or indelible pencil is not to be counted was much pressed. The Act, sec. 163, sub-sec. 2, provides that "the deputy returning officer shall also give the voter a black lead pencil for the purpose of marking his ballot, which pencil shall after use be returned by the voter to the deputy returning officer; and (sec. 167) upon receiving the ballot paper . . . . the voter shall forthwith proceed into the room or the compartment and shall then and there mark his ballot paper in the manner mentioned in the directions to voters (Form 40) by placing a cross on any part of the ballot paper within the division containing the name of the candidate for whom he intends to vote." The Act itself does not, that I can see, actually direct the voter to use the pencil, and sec. 194 does not direct a ballot not marked with the pencil provided to be rejected, unless any other marking is to be deemed a method of identification. In the Form 40 "Direc-

tions for the guidance of voters," which is posted up in conspicuous places outside the polling place and also in each compartment within it (sec. 143), there is the direction "the voter shall go into one of the compartments *and with the black lead pencil provided* place a cross within the white space," etc.

The Imperial Ballot Act, 1872 (Imp.), ch. 33, contains a somewhat similar form. I find it in Rogers on Elections, vol. 3, 18th ed., pp. 534, 535. It reads: "The voter will go into one of the compartments, and, with the pencil provided in the compartment place a cross," etc. This form is in a schedule to the Ballot Act, as to which that Act provides, at p. 524 (in Rogers on Election, vol. 3, 18th ed.), "the schedules to this Act and the notes thereto *and directions therein* shall be construed and have effect as part of this Act." In *Woodward* v. *Sarsons*, L.R. 10 C.P. 733, which I have already observed has repeatedly been followed in Canada, Coleridge, C.J., enunciated the rule of construction as to such forms, at pp. 746, 747: "The rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing 'directions.' Comparing the sections and the rules it will be seen that for the most part, if not invariably, the rules point out the mode or manner of doing what the sections enact shall be done. And in schedule 2, the first note states that 'the forms contained in this schedule, or forms as nearly resembling the same as circumstances will admit, shall be used.' And on the ballot paper, as given in the schedule, is, 'Directions as to printing ballot paper,' and 'form of directions for the guidance of voters in voting,' etc. These observations lead us to the conclusion that the enactments as to the rules in the first schedule, and the forms in the second, are directory enactments, as distinguished from the absolute enactments in the sections in the body of the Act. And in such case, in order to determine the preliminary question, which is, whether there has been a material breach of the Act, and which must be determined before determining what effect such breach has upon a vote or on the election, the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

The decision is clearly applicable to the Saskatchewan Act, and ballots marked in ink or any legible manner are counted in England. See Hawkins, J., in the *Cirencester* case in the quotation already made. In my opinion, therefore, a ballot is not to be rejected because marked in ink or indelible pencil, and

Sask.

K.B.

PASCOE v. THOMSON. RE MOOSE JAW ELECTION;

Taylor, J.

the obvious blotting should be treated as accidental and not as a mark of identification.

To apply these principles to the ballots under appeal. The District Court Judge has numbered the objected ballots, and I will use his numbering.

Numbered Ballots: Nos. 68 to 199 inclusive. 62, 64 to 67 inclusive are appealed against on the ground that the deputy returning officer has besides his initial placed the voter's poll number on the back of the ballot, and 62 is also torn, and I deal with it later. The appeals as to all these ballots except No. 62 are dismissed. They were rightly counted in my opinion by the deputy returning officer and District Court Judge.

Ballots having no initials: Nos. 27, 30, 31, 39, 40 to 49 inclusive, 53, 54 do not bear the deputy returning officer's initials on the back. They were all counted by the deputy returning officers, and rejected by the District Court Judge. For the reasons given they should be counted, and the appeals as to these ballots are allowed.

Ballot No. 10: This is the ballot paper identified by the deputy returning officer by a mark not an initial, and the voter has in addition to the distinct crosses for two candidates just in front of and beside one of these crosses made another which he stroked through thus ✕. I do not infer an intent to identify therefrom. This ballot was counted by the deputy returning officer and District Court Judge. The appeal as to it is dismissed.

No. 50: The paper slipped in printing, so that Thomson's name appears in the black portion and is decipherable only with difficulty. The paper cannot be deemed the ballot contemplated for this election at all. It should not be counted. Appeal dismissed.

No. 52 is also badly printed, but the names of the candidates and their respective divisions are clear. The cross is sufficiently distinct. It should be counted. Appeal dismissed.

Nos. 62 and 63. From these two ballots the sides have been torn off. Nothing essential has been removed. But for the decisions in *West Elgin No.* 1, 2 E.C. (Ont.) 38, and *In re West Huron Prov. Election* (1905), 9 O.L.R. 602, I would have hesitated before allowing these ballots. No. 62 is also identified by the deputy returning officer by placing the poll number on it. The decisions quoted hold that the tearing off of a non-essential portion of the ballot paper does not justify its rejection by the deputy returning officer. The appeal as to these two ballots

is allowed. They were counted by the deputy returning officer and rejected by the District Court Judge.

Nos. 6, 8, 16 and 56 are in ink, 7 in indelible pencil instead of black lead pencil. They are not to be rejected on this ground. Appeals dismissed. No. 4 is properly marked for Baker and Pascoe, and then opposite the name of Thomson has a stroke thus:  The ballot was counted by the deputy returning officer for Baker and Pascoe, and on the recount rejected by the District Court Judge. He gave no written reasons. The mark opposite Thomson's name looks like one stroke of a cross. According to the ruling in the *Cirencester* case it would be deemed a vote for Thomson if there were no other markings, but under the *Bothwell Election* case, *supra*, it would not be a good vote for Thomson. The proviso to 194 sub-sec. (c) is inapplicable as on the ballot there is an X in another place. The stroke is well marked and not a slip. I am unable to do anything more than guess at what the voter intended and I think the ballot must be rejected for uncertainty. Appeal dismissed.

No. 9. Marked X for one candidate and 1 for another. The 1 is not under the proviso of sec 194, sub-sec. (c), a good vote as there is a good cross on the ballot. Appeal dismissed. No. 12. Marked ¶ for one candidate, 1 for another, 1 for third is uncertain. I do not know what was meant by the first. Perhaps to obliterate the stroke. Appeal dismissed.

No. 13. Marked "1st X" and "2nd X." This was rejected by the District Court Judge, and *In re Lennox Provincial Election*, 4 O.L.R. 378, 381, is cited by counsel where it is held that any written word or name upon a ballot, presumably written by the voter, ought to vitiate the ballot, as being a means by which he could be identified. I do not think the principle of that decision goes as far as to declare this vote bad. The Court there had before it a ballot with initials "S.A." on the face of it presumably written by the voter. Here the voter has to my mind without a thought of leaving behind a trace to enable him to be identified. *Cirencester* case, *supra*, added the 1st and 2nd. This intention to vote is clearly expressed. The vote should be counted, and appeal allowed. No. 14. Marked for one candidate X, for other XX, and No. 15 has X and X marks. No. 18 marked X for one X for another. No. 21 has XXX for one and X for other candidate. No. 24 1 and X for one candidate and X for another. No. 25. XX for one candidate and X for another. No. 61. An X on back of the ballot over the name of a candidate voted for on its face. These I hold good ballots. Appeals dismissed.

Sask.

K.B.

PASCOE v. THOMSON. RE MOOSE JAW ELECTION; Taylor, J.

No. 17. The voter scored through the names of two candidates heavily with the pencil. I do not think that shews a clear indication of an intent to vote. (Sec. 194, sub-sec. (c) (proviso). The vote was counted. Appeal allowed and ballot rejected. No 19. Marked with figures 1 and 2 instead of crosses. For reasons already given I think under the proviso to sub-sec. (c) of sec. 194 this should be counted. Appeal allowed.

No. 20. The X's are in the black spaces and one in a division attributable to either of two candidates. The vote is uncertain, and rightly rejected. Appeal dismissed. No. 22. Objected to on account of the faint wavering line in pencil opposite the name of candidate not voted for. The mark looks accidental. I hold it a good ballot. Appeal dismissed. No. 23. A vote by X for one candidate has been rubbed over with the pencil and two other candidates are voted for by X for each. It was rejected by the District Court Judge. I do not think it is a mark of identification, and it is clear for whom the votes are intended. Allow appeal and count the ballot. Nos. 28, 37, 58, 59. Unusual methods of placing crosses, all being allowable, cannot destroy the ballot. Appeals dismissed.

No. 32. Has a corner detached, but returned with the ballot, and some odd markings, one of which might pass for initials, on the face of the ballot as well as the votes for the two candidates. It was counted by the deputy returning officer and District Court Judge. The detached corner has on it the number of one of the candidates. There is no explanation of the tearing of the ballot, and it is evident that the whole ballot was returned to the deputy returning officer. The other marks are really indecipherable, and no intent can be drawn therefrom. I with hesitation, count the ballot. I cannot say the District Court Judge was wrong. Appeal dismissed.

No. 33. Has an indecipherable mark on it besides the votes. It may be a printer's blur. It was counted. Dismiss appeal. Nos. 34 and 35. No. 34 has on face of the ballot a faint 8 and No. 35 a faint 45. Numbers are always suspicious and afford a ready means of identification. I do not think it possible to say that a voter who puts an unexplainable number on a ballot and then votes on it, does so accidentally, and the presumption is that the ballot was blank when handed to the voter. Both vote should be rejected and appeals allowed as to both.

No. 38. Has a check mark thus √ beside the name of one candidate, as well as the votes. I hold to count it, and dismiss appeal. The appeals as to Nos. 1, 3, 5, 11, 29, 36, 37, 51, 57, and 60 were either abandoned or not pressed.

The result therefore is that all the appeals are dismissed except as to numbers 13, 17, 19, 23, 27, 30, 31, 34, 35, 39 to 40 inclusive, 53, 54, 62, 63.

And I certify to the Judge of the District Court pursuant to the statute accordingly that his count should be altered as follows: For Baker 15 more, Fletcher 3 more, McKellar 3 more, Pascoe 11 more, Thomson 4 more.

Judgment accordingly.

REX, EX REL PERRITT, v. KEILLY.

Saskatchewan King's Bench, Maclean, J. October 10, 1921.

Stated Case (§I—1)—By Justice of the Peace—Necessity of Stating Grounds on Which Proceeding is Questioned—Criminal Code secs. 761, 576.

A party applying to a Justice of the Peace for a stated case under sec. 761 of the Criminal Code must comply strictly with the provisions of that section and the Rules of Court made in that behalf under the provisions of sec. 576 of the Criminal Code. Section 761 expressly requires the applicant to set forth the grounds on which the proceeding is questioned, and an application which says merely that the applicant "desires the question of your deciding on a point of law raised at the trial" does not comply with the requirements of the section.

CASE stated by a Justice of the Peace under sec. 761 of the Criminal Code.

P. H. Gordon, for appellant.

T. A. Colclough, K.C., for respondent.

Maclean, J.:—The appellant laid an information against the respondent under the provisions of the Masters and Servants Act, R.S.S. 1920, ch. 205 and the matter was tried by T. W. Beaver, a Justice of the Peace, residing at Canora, and the complaint was dismissed with costs.

The appellant applied to the Justice of the Peace to "state a case under sec. 761 of the Crim. Code of Canada, and pursuant to the Rules of Court in that behalf made and provided." A case was stated by the Justice of the Peace. On the hearing before me, counsel for the respondent raised a number of preliminary objections to the application for the stated case.

There is a series of English decisions and Canadian decisions (The King v. Earley (1906), 10 Can. Cr. Cas. 280; R. v. Dean (1917), 37 D.L.R. 511, 28 Can. Cr. Cas. 212; The King v. Gaines (1908), 43 N.S.R. 253; R. v. Canmore Coal Co. (1920), 53 D.L.R. 115, 34 Can. Cr. Cas. 48, 15 Alta. L.R. 531), establishing beyond question that a

Can.

Ex. C.

THE KING v. MOREAU.

Audette, J.

party applying to a Justice of the Peace for a stated case must comply strictly with the provisions of sec. 761, and the Rules of Court made in that behalf under the provisions of sec. 576 of the Crim. Code of Canada, and that such provisions are not merely directory.

One of the objections raised by counsel for respondent was that the application to state a case did not set forth the grounds on which the proceeding is questioned. The application to state a case says:—"The said informant George Perritt, the appellant herein desires the question of your deciding on a point of law raised at the trial."

There is nothing to supplement the application shewing what that particular point of law was. Section 761 expressly requires the applicant to set forth the grounds on which the proceeding is questioned. The appellant has, therefore, failed to comply with that expressed requirement and the case stated cannot be looked at for the purpose of implementing the defect in the application. In any event, in this instance, the case stated does not shew clearly what point of law was raised at the trial. The appellant having failed to comply with the provisions of the section in question, I am of opinion that I have no jurisdiction to hear the appeal.

THE KING v. MOREAU.
THE KING v. ADELARD CARUFEL.

Exchequer Court of Canada, Audette, J. May 3, 1921.

EXPROPRIATION (§ IIIC—135)—COMPLETION OF BUILDING AFTER DATE OF EXPROPRIATION—EXPROPRIATION KNOWN TO OWNER—RIGHT TO COMPENSATION.

One who completes the erection of a building on land expropriated, after, and in the face of the expropriation, which is well known to him, does so at his own risk and will not be allowed compensation for anything done after such expropriation.

INFORMATION exhibited by the Att'y Gen'l for Canada to have the easement and right to flood certain lands expropriated under the Expropriation Act valued by the Court.

R. V. Sinclair, K.C., and *Louis Cousineau*, for plaintiff.

E. B. Devlin, K.C., and *J. W. Ste. Marie*, K.C., for defendant.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the right to flood the land described in the information and belonging to the defendant, was, under the provisions of the Expropriation Act, R.S.C. 1906, ch. 143, taken and expro-

priated for the purposes of the construction and operation of the Quinze Lake Dam and Reservoir, a public work of Canada, by depositing, both on October 26, 1917, and March 26, 1920, plans and descriptions of the said lands in the office of the Registrar of Deeds for the County or Registration Division of the County of Temiscaming.

The reason of the deposit of the amended plan and description of the said lands on March 26, 1920, was, as stated at Bar, because the description deposited in 1917 was not considered sufficient to comply with the requirements of the Expropriation Act. The two plans are identical.

The date of expropriation will be taken, for all purposes, to be October 26, 1917.

The Crown has tendered and by the Information offers the sum of $1,394.75 as compensation for the expropriation of this right to flood the said land and for all damages resulting from the same.

The defendant by his statement in defence claims the sum of $7,000.

The defendant's title is admitted.

After the conclusion of the hearing of the cases of *The King* v. *A. Carufel*, under No. 2606, and *The King* v. *A. Grignon*, under No. 3609, counsel at Bar, in the present case, agreed to the following admission, reading as follows, viz.:

Admission—It is hereby admitted by the defendant that all the general evidence as to value of the different classes of land in the locality in question, as testified to in the cases (viz., *The King* v. *A. Carufel*, and *The King* v. *A. Grignon*) shall be common to this case.

And it is admitted by the Crown that all the evidence of a similar nature adduced on its behalf in the two above mentioned cases, shall be common to the present case, the Crown, however, undertaking to file a statement shewing the particulars of how their expert witnesses have arrived at the amount of their valuation.

It is further admitted that the plan Ex. 5 herein, which is the particular plan applicable to this case, will be admitted without further evidence and taken as proved.

It is also agreed between counsel for the respective parties that the evidence of Robertson given in these two previous cases mentioned will be taken as also given in this case, that is according to his own view, of what would be the area of the land flooded.

To avoid unnecessary repetition, the reasons for judgment

Can.

EX. C.

THE KING v. MOREAU.

AUDETTE, J.

given this day by me in the case of *The King* v. *Adelard Caruel*, are hereby made part hereof and more especially in respect to the general observations respecting the nature of the expropriation, the area taken and the compensation so far as applicable.

The flooded area is admitted.

For the 64.85 acres of bush land affected herein, an allowance of $5 will be made, viz., $324.25; for the 9.28 acres under cultivation $60 an acre will be allowed, $558.80.

Now the total area of the farm is 91 acres out of which the Crown will now flood 74.15, leaving a balance of 16.85 acres, of which 12.13 is under cultivation and 4.74 would be rock.

The property has been destroyed as a farm and cannot now be used as such. For the damage to 12.13 acres under cultivation $50 an acre will be allowed (as allowed by the Crown's valuation), $606.50; and for the balance of 4.74 the sum of $5 an acre, $23.70; as when the defendant purchased the farm he paid under a measurement including these 4.74 acres—at any rate, I presume so—as it would be done in ordinary cases.

In the autumn of 1916 the defendant started building a house and before the expropriation, he had already dug a cellar and built the basement, including the flooring of the ground flat and for that expenditure I will allow $175—total, $1,788.25.

He further claims for the building which he continued to erect in face of the expropriation, which was well known to him. He therefore did so at his own risk and peril and by creating a new residence thereon, he assumed the full responsibility of such a course and its consequences, thus waiving in advance any right to complain in respect of the same. *Chambers* v. *London, Chatham and Dover R. Co.* (1863), 8 L.T. 235, 11 W.R. 479; *The King* v. *Thompson* (1916), 18 Can. Ex. 23; *The King* v. *Lynch's Ltd., etc.* (1920), 20 Can. Ex. 158.

There will be judgment as follows, viz.: 1. The right to flood the lands in question herein is hereby declared vested in the Crown as of the 26th October, 1917. 2. The compensation, for the right to so flood the defendant's land and for all damages resulting from the expropriation, is hereby fixed at the sum of $1,788.25 with interest thereon from the 26th October, 1917, to the date hereof. 3. The defendant, upon giving to the Crown a good and satisfactory title, free from all hypothecs, mortgages, and incumbrances whatsoever, is entitled to recover from and be paid by the plaintiff the said sum of $1,788.25 with interest as above mentioned and costs.

Judgment accordingly.

COX v. BEGG MOTOR Co. Ltd.

B.C.
C.A.

British Columbia Court of Appeal, Galliher, J.A. April 26, 1921.

COSTS (§ I—2c)—SCALE OF TAXATION ON APPEAL—AMOUNT AWARDED AND NOT AMOUNT CLAIMED—COUNTY COURTS ACT, R.S.B.C. 1911, CH. 53, SEC. 116.

Section 116 (2) of the County Courts Act, R.S.B.C. 1911, ch. 53, provides that "In appeals under section 116, where the plaintiff shall claim a sum . . . of one hundred dollars or over, but not exceeding two hundred and fifty dollars . . . the costs of such appeal shall not be allowed upon taxation at a greater sum than one hundred dollars." The Court held that the scale of taxation should be fixed by the amount awarded and not by the amount claimed, and although in the action in the Court below the plaintiff claimed $1000 he was awarded only $250 and that the costs should not exceed $100.

[*Beauvais* v. *Genge* (1916), 30 D.L.R. 625, 53 Can. S.C.R. 353, distinguished; *Allan* v. *Pratt* (1888), 13 App. Cas. 780, 57 L.J. (P.C.) 104, followed.]

APPLICATION by defendants for a review of a taxation.

N. R. Fisher, for plaintiffs; *J. B. Clearihue*, for defendants.

GALLIHER, J.A.:—This matter comes before me by way of review of a taxation by the taxing officer at Vancouver.

The action was one for fraudulent representation respecting a motor car purchased by plaintiff from defendants in which damages were claimed for $1,000. At the trial the jury awarded $250 damages and judgment was entered for this amount with costs.

The defendants appealed to this Court and the appeal was dismissed with costs. These costs were taxed at the sum of 300 odd dollars and it is this taxation that is up for review at the instance of the defendants.

The defendants' contention is that as the amount awarded by the jury does not exceed $250, the costs should, under sec. 122, sub-sec. 2 of the County Courts Act, R.S.B.C. 1911, ch. 53, be allowed at not exceeding $100—in other words, that the scale of taxation should be fixed by the amount awarded and not by the amount claimed—the plaintiff, on the other hand, contending that the amount claimed is the proper basis on which to fix the scale.

As counsel were unable to refer me to any decisions directly in point in our own Court, I thought the matter of sufficient importance to reserve it for consideration and hand down reasons.

Section 116 of the County Courts Act provides that: "An appeal shall lie to the Court of Appeal from all judgments, orders, or decrees, whether final or interlocutory, of the County

B.C.

C.A.

COX
v.
BEGG MOTOR CO. LTD.

Galliher, J.A.

Court or a Judge. (a) In any action or cause when the plaintiff shall claim a sum of, or a counterclaim shall be set up of, one hundred dollars or over."

The plaintiffs are under this sub-section. They are also, I think, under the first part of sub-sec. 2 of sec. 122 as follows:—(2) "In appeals under section 116, where the plaintiff shall claim a sum of . . . one hundred dollars or over, but not exceeding two hundred and fifty dollars . . . the costs of such appeal shall not be allowed upon taxation at a greater sum than one hundred dollars."

Defendants' counsel referred me to two cases decided by Lampman, Co. Ct. J.; *Johansen* v. *Elliott* (1908), 7 W.L.R. 785, and *Page* v. *Mitchell Motor Agency*, [1921] 1 W.W.R. 1107.

In *Johnston* v. *Hadden* (1908), 8 W.L.R. 526, Howay, Co. Ct. J., took a different view to Lampman, Co. Ct. J., and allowed costs on the scale of the whole amount recovered including the moneys paid into Court, but as that was the whole amount claimed it does not assist me in determining the question raised here; neither do the judgments of Lampman, Co. Ct. J. In these cases the County Court Judges were bound by R. 26 of Order XXII. of the County Court Rules and their difference of opinion was due to the interpretation of what could be deemed to be the amount recovered. Now, if R. 26 could be held to apply to costs of appeal, there would be no difficulty, but in my judgment that rule is only applicable to the trial below for in the County Courts Act itself, we find (sec. 122): "The costs of and consequent upon such appeals shall follow the event of the appeal, and shall, subject to the provisions contained in sub-sections (2) (I omit 1 and 3) hereof, be charged and taxed according to the scale in force . . . in the Supreme Court. . . "

Were it not for the limitation in sub-sec. 2 then under sec. 122, the costs would be charged and taxed on the Supreme Court Scale and R. 26 does not, in my opinion, apply, as I have just stated. We then get down to the language of sub-sec. 2, where a plaintiff shall claim a sum [not?] exceeding $250. The plaintiff in the action below claimed $1,000 but was awarded only $250. His claim then against the defendants, when the matter went to appeal was only $250, and it is the defendants who appeal.

It is to be noted that sec. 122 deals with the costs of appeal. The plaintiff's claim to the extent of $250 was established in the Court below, he is satisfied and does not appeal, the defendant is dissatisfied and appeals against this judgment and the question to be determined is: Do these words, "where the plain-

tiff shall claim, etc." mean claim as made in the action below or claim as determined by the judgment appealed against?

I have been referred to no direct authority but I think I can deduce from the principles enunciated in *Beauvais* v. *Genge* (1916), 30 D.L.R. 625, 53 Can. S.C.R. 353, and *Allan* v. *Pratt* (1888), 13 App. Cas. 780, 57 L.J. (P.C.) 104, the true principle which should be applied here. In the *Beauvais* case the majority of the Court held that they had jurisdiction to hear the appeal upon an application to quash an appeal for want of jurisdiction, where the sum recovered was less than $5,000, but the sum demanded in the plaintiff's declaration was $5,017.29. As I read the majority judgments of the Court, it was based largely upon the circumstances that in the Province of Quebec, by art. 2311, R.S.Q. 1888, it was provided that, at p. 632 (30 D.L.R.): "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered if they are different," and declined to follow the decision of the Privy Council in *Allan* v. *Pratt*, *supra*, on the assumption that this provision had not been called to their attention.

Anglin, J., dissented. That Judge in his judgment states at p. 639 (30 D.L.R.):—

"Having regard to the reasons assigned by the Judicial Committee in *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 181, and *Allan* v. *Pratt*, 13 App. Cas. 780, for holding that the right of appeal to the Privy Council should depend upon the amount of the appellant's interest, I would not be prepared to give to the word 'demanded' in clause 3 of art. 68, C.P.Q., the meaning 'demanded in the action' even if I were satisfied that the predecessors of art. 2311 R.S.Q. (1888), had been entirely overlooked, in those cases or had been deemed inapplicable, because, to do so, would overturn well-settled jurisprudence with revolutionary consequences, and because that is not the only meaning of which 'demanded' is reasonably susceptible."

I have, however, no such clause to consider here and I only cite the passage to shew that even with such an enactment to consider, the Judge adopted the reasoning of the Judicial Committee. It remains then to consider the case of *Allan* v. *Pratt*, *supra*, and I do so free from any such clause as in the Quebec Act.

The judgment of the Judicial Committee was delivered by the Earl of Selborne; quoting from p. 781 (13 App. Cas.):—

"Their Lordships are of opinion that the appeal is incompetent. The proper measure of value for determining the ques-

Sask.

RE THE LAND TITLES ACT.

MILLIGAN, M.T.

tion of the right of appeal is, in their judgment, the amount which has been recovered by the plaintiff in the action and against which the appeal could be brought. Their Lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by Lord Chelmsford in the case of *Macfarlane* v. *Leclaire*, 15 Moore P.C. 181, 15 E.R. 462, that is, that the judgment is to be looked at as it affects the interest of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal."

Here, as I have pointed out, it is the defendant who is appealing, and I think above principle is one that I should apply here.

I have given consideration to the further point pressed by Mr. Fisher for the plaintiff, that in any event, I should take into consideration in estimating the amount appealed against, the costs which were awarded as a consequence of the judgment but I am not prepared to take that view. The costs are not part of the amount in dispute, they simply flow from the judgment.

The application is allowed and the Registrar will be directed to tax the costs at not exceeding $100.

Application allowed.

Re THE LAND TITLES ACT.

East Saskatchewan Land Registration District, Milligan, Master of Titles. June 28, 1921.

LAND TITLES (§ III—30)—LEASE FOR PERIOD OF TWO YEARS WITH OPTION OF RENEWAL FOR FURTHER PERIOD OF TWO YEARS—REGISTRATION UNDER LAND TITLES ACT, R.S.S., CH. 67, SEC. 92—PETITION UNDER SEC. 158.

A lease for two years, with a right of renewal by the lessee for a further term of two years is not registrable under the Land Titles Act, R.S.S. 1920, ch. 67, sec. 92 (1) and the system of land registration being statutory under the provisions of that Act no instrument can be registered unless such registration is provided for in the Act and it conforms with the requirements of the Act.

PETITION under sec. 158 of the Land Titles Act from the refusal of the Registrar to register a lease for a two-year term.

MILLIGAN, M.T.:—The position by Mr. Branion, the solicitor for the petitioner, in regard to the registration of this lease, is: (1) That even if the lease is held to be only a lease for two years, it is still registrable, for while sec. 92 of the Land Titles Act, R.S.S. 1920, ch. 67, provides for a lease for a term of more than 3 years to be executed in Form M and provides

that it shall be registered, there is nothing in the Act determining that a lease for less than 3 years may not be registered; (2) That this lease is a lease for 4 years if the lessee so decides, or in other words, that the lessee has a claim on the property for 4 years if he chooses to exercise it under the terms of the lease.

Dealing with the last point first, in my opinion, this is a lease for 2 years with the right of renewal by the lessee under certain conditions for a further term of 2 years. This right of renewal does not alter the fact that the lease is only a lease for 2 years with a right of renewal.

I cannot agree with Mr. Branion's contention that any lease even for a term of less than 3 years is registrable under the Land Titles Act. The only provision in the Act for the registration of a lease is contained in sec. 92, which only concerns itself with a lease "for a life or lives or for a term of more than three years" and this is borne out by sec. 60 of the Land Titles Act, which provides: "The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to: (d) any subsisting lease or agreement for a lease for a period not exceeding three years where there is actual occupation of the land under the same."

The argument that, because leases for a term of less than 3 years are not directly prohibited from registration therefore they may be registered, is faulty for two reasons:

(1) As the Court *en banc* of this Province pointed out in *In re North-West Telephone Co.* (1909), 2 S.L.R. 379 (and approved in *Gilbert* v. *Ullerich* (1911), 17 W.L.R. 157, at p. 158): "The system of land registration in force in this Province is a statutory one, the provisions of which are set forth in 'The Land Titles Act.' No instrument can therefore be registered in a land titles office unless it is one of the instruments whose registration is provided for, and in form and execution conforms with the requirements of that Act."

The same idea was expressed by Prendergast, J., for the Court *en banc* in *In re Ebbing* (1909), 2 S.L.R. 167, at p. 172: "Certain documents, although valid in the sense of securing substantial interests in land, cannot be registered simply on account of their not being in compliance with the forms prescribed by the Act."

Ordinarily such an instrument could and should be protected by a caveat, but in the case of a lease for less than 3 years, where there is actual occupation of the land, there is no necessity for

Man.

C.A.

REX v. SCHRABA.

this, as the lessee is protected in his rights by sec. 60 of the Act without any special mention in the certificate of title.

(2) There is a very practical reason why this instrument, registration of which is determined not to be necessary, should not be registered and that is that by sub-sec. 3 of sec. 92, "upon registration of the lease, the registrar shall retain possession of the duplicate certificate of title on behalf of all persons interested in the land covered thereby."

In other words, one result of the registration of a lease is the impounding by the registrar of the duplicate certificate of title and the lessor may very reasonably object to the impounding of his duplicate certificate of title except in the case of a lease for which this is provided, namely, for a lease for a life or lives or for a term of more than 3 years. Even if a lessor consents at the time to the registration of the lease, there would seem to be nothing to prevent him repenting of his good nature and subsequently demanding back his duplicate certificate of title from the Registrar, as the registration would be at the best only a voluntary one not provided by the Act.

I am therefore of the opinion that the Registrar is justified in carrying out the terms of the Land Titles Act and refusing to register a lease which does not provide for a term of more than 3 years, as the registration of this lease can give no rights which the parties have not actually got without registration, and to attempt even by the consent of the parties to extend the Act to instruments, the registration of which is not provided for in the Act itself, can only lead to difficulties. In my opinion the Registrar is justified in his action in refusing to register this instrument.

REX v. SCHRABA.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Fullerton, JJ.A. August 2, 1921.

New Trial (§II—8) — Criminal Trial — Question of Identity of Accused—Omission of Judge in Charging Jury—No Substantial Wrong or Miscarriage.

In a prosecution on a charge of rape, there being no doubt that a rape had been committed, and the sole question being the identity of the man who had committed the crime, the identity of the accused as the guilty person is for the jury, and an omission on the part of the trial Judge to tell the jury that the complaint was not evidence of the facts complained of, and that they should not use it as such, but merely as shewing that the conduct of the prosecutrix was consistent with her story in the witness box, and that it would be dangerous to act on the evidence of the prosecutrix unless corroborated, is not ground for a new trial, where such omission did not influence them in arriving at the verdict and did not occasion any wrong or miscarriage on the trial.

[See Annotation, New Trial—Judge's Charge, 1 D.L.R. 103.]

APPEAL by accused for a new trial on the ground that the jury's verdict was against the weight of evidence and appeal by way of certain questions reserved by the trial Judge for the opinion of the Court.

Ward Hollands and J. M. Isaacs, for appellant.

John Allen, K.C., and M. G. Macneill, for the Crown.

Perdue, C.J.M.:—The accused was tried at the summer Assizes, 1921, upon an indictment for rape. The trial took place on July 4, before Mathers, C.J.K.B. and a jury. The offence was committed on June 10, 1921. The prosecutrix is a young married woman who was employed in the Garry Exchange of the Manitoba Government telephones. She lives in the municipality of Rosser outside the city of Winnipeg. Her hours of work from 5 to 11 p. m. She has her own home close to that of her father and mother. Her husband was in British Columbia. In going home she went by street car to the end of the line on Logan Ave. West and then had a 20 minutes walk to her home. On the evening in question after getting off the street car she went into a store and purchased some bananas and oranges. She had also another large parcel besides her umbrella and her purse. The wooden sidewalk she uses passes at one place over low land and is elevated 2 or 3 feet above the ground. After she had proceeded some distance and was on the elevated part of the sidewalk she met a man who seized her by the throat and threw her off the walk on to the ground, falling on top of her. According to her account of what happened, she struggled with the man and screamed, but he stuffed a handkerchief into her mouth, held her by the throat, pounded her up and down on the ground until she had no strength left and was almost senseless. He then accomplished his purpose.

The woman's condition after the assault, the bruises on her throat, body and limbs, her torn and disordered clothing, the condition of the ground with the contents of the parcels crushed upon it and turf torn up, all point to a violent struggle and a persistent and brutal attack. The fact of the rape was amply established. The only question really in issue was the identification of the accused as the man who committed the offence.

The jury having found the accused guilty, his counsel applied to and obtained leave from the Chief Justice to appeal to this Court for a new trial on the ground that the verdict was against the weight of evidence. I think the accused fails on this ground.

Man.

C.A.

REX v. SCHRABA.

Perdue, C.J.M.

The Chief Justice also reserved for the opinion of this Court the following questions:—

1. The prosecutrix, Maud Grant, having made a complaint first to Constable Donald Matheson and subsequently to her mother, Lavinia Merrifield, and the nature and particulars of said complaints having been given in evidence—should I have charged the jury that the complaint itself was admissible in evidence to shew that the conduct of the said Maud Grant at the time was consistent with her story in the witness box and as negativing consent; but that it was not evidence of the facts complained of and that the jury ought not to use the complaint as any evidence whatever of the facts complained of?

2. Did I make it sufficiently clear to the jury that they were the judge of the facts, and was I right and justified in my comments on the evidence in respect of the offence having been committed by someone ?

3. Was I right in the following portions of my charge and should the evidence referred to therein have been admitted? "Then on the next occasion—she tells you she didn't see his face on that occasion, she only saw his back and the side of his face, but she thought she identified him as the man, and that evening she told Mr. Howard she thought that was the man who had assaulted her and they arranged to go and see him on the railway track, and etc."

4. Was I right in excluding the evidence of Lewis Spivak and his wife relating to what the prosecutrix is alleged to have said in describing the person who assaulted her; and should I have permitted counsel for the defence to recall the prosecutrix in order to lay a foundation for impeaching the credit of the prosecutrix by producing the witnesses above mentioned to contradict her?

5. (a) Should I have instructed the jury that corroboration of the evidence of the said Maud Grant was not in law essential but it is in practice required? (b) And should I have pointed out to them the risk of acting on the evidence of the said Maud Grant unless corroborated? (c) Should I have pointed out to them that it was dangerous in a case of this kind to act upon the evidence of one person when directly contradicted by another person?

6. In my charge to the jury was there in any respect a failure to direct the jury or an inaccurate direction or misdirection to the jury as to the law?

In The Queen v. Lillyman, [1896] 2 Q.B. 167, 65 L.J. (M.C.) 195, it was laid down by Hawkins, J., in delivering

the judgment of himself and 5 other Judges, that on the trial of an indictment for rape a complaint made by the prosecutrix shortly after the alleged occurrence and the particulars of such complaint may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and as negativing consent on her part; but that it is the duty of the Judge to impress upon the jury in every case that they are not entitled to make use of the complaint as evidence of the facts complained of. This statement of the law was approved in The King v. Osborne, [1905] 1 K.B. 551, 74 L.J. (K.B.) 311. The reasons for the admission of proof of the woman's complaint in a case of rape are there dealt with by Ridley, J., in giving the judgment of the Court. It is a survival of the "Hue and Cry" which appears to have remained specially applicable to this class of case only Ridley, J. says at (pp. 558, 559, [1905] 1 K.B.):—

"Charges of this kind form an exceptional class, and in them such statements ought, under proper safeguards, to be admitted. Their consistency with the story told is, from the very nature of such cases, of special importance. Did the woman make a complaint at once? If so, that is consistent with her story. Did she not do so? That is inconsistent. And in either case the matter is important for the jury."

In the present case the prosecutrix made complaint to the Constable, Matheson, of what had been done to her within a few minutes after the commission of the offence. She also told her mother what had happened to her when she arrived at her mother's house. Now, in the circumstances of this case, the woman did not and could not state any facts directly implicating the accused as the guilty person. She was seized at night in a lonely place by a man who was quite unknown to her and the offence was then committed. Her complaint gave a very meagre description of the man who had assaulted her. Her complaint, as made to the constable and to her mother, and as given by them in their evidence in chief, in no way pointed to or implicated the accused. If the evidence had been left in that condition and the aspect of the case as presented by the Crown had been left unchanged, it would not neces-

Man.

C.A.

REX v. SCHRABA.

Perdue, C.J.M.

sarily, have been incumbent on the trial Judge to direct the jury that they should not make use of the complaint as evidence against the accused, although he might do so merely as a matter of precaution. The question as to the necessity for such a direction in the present case can only arise in regard to statements elicited by counsel for the accused in cross-examining the witnesses. The prosecutrix told in her examination in chief that he called to Matheson who came up a few minutes after the assault and before she had left the place where it was committed and she states: "When he came up I told him all about it." In cross-examination by counsel for accused she gave the following evidence:

Q. The man wore a dark gray suit? A. Well, it was a dark suit; it wasn't a black suit. Q. Do you remember the exact kind of moustache the accused had? A. He had a sandy moustache.

This description of the man by the prosecutrix was given as part of her evidence on the trial, not as a part of the complaint she made. In answer to questions by counsel for the accused, Matheson stated that the prosecutrix said to him that the man who assaulted her had a moustache, that he was a powerful man, but he could not remember the description she gave of the man. The mother of the prosecutrix in answer to questions put by counsel for the accused gave evidence that her daughter said the man wore a dark gray suit and soft hat; that he was a "tall stout man with stout shoulders"; that he had a "sandy moustache."

The description of her assailant given by the prosecutrix in her complaint, even when made somewhat more definite by the answers drawn from the witnesses by counsel for the defence, is of a very general character and contains nothing implicating the accused. The complaint only told of the attack and described the man who made it. Counsel for the accused cross-examined the witnesses to whom the complaint was made as to certain particulars not mentioned by them in the examination in chief. By so doing the accused made the answers his evidence and he cannot object that the trial Judge failed to tell the jury to disregard it: Phipson's Law of Evidence, 6th ed. 471, 476; Roscoe's Criminal Evidence, 14th ed. 167; Gregory v. Tavernor (1833), 6 C. & P. 280, at p. 281.

There can be no doubt that a rape was committed upon the prosecutrix. The state she was in when Matheson

came on the scene just after the man had got away, the evidence of the struggle on the ground, the marks of violence on her throat and body, her torn and stained clothing, all indicated the perpetration of the crime as told by her in her complaint to Matheson and afterwards to her mother. The sole question in the case comes down to this: Is the accused the man who committed the crime?

The offence was committed on Friday, June 10. On the following Monday the prosecutrix saw the accused in Howard's garden, and, according to her evidence, immediately recognised him as the man who had assaulted her. Howard is a provincial policeman and she was going to see him about the matter when she found the accused in conversation with him. On the same day she and her father and Howard went out to where the accused was working on the railway. Howard engaged the accused in conversation so that the prosecutrix might hear his voice and get a good view of his face. After seeing the accused for the second time and hearing him speak she had no doubt as to his identity. At the trial she positively identified him as the man who had committed the offence. He had spoken to her when committing the offence and also afterwards. The night was clear and there was a street light about 40 yards away, so that she could see his features. He was a foreigner with a peculiarity of voice. The accused lived about 200 yards from the place where the rape was committed and the prosecutrix says that when he left her he went in that direction. The question of the identity of the accused as being the guilty person was for the jury. I think the trial Judge sufficiently impressed upon the jury the gravity of the offence and the care they should exercise in arriving at their verdict. I do not think that the omission to tell the jury that the complaint was not evidence of the facts complained of and that they should not use it as such influenced them in arriving at the verdict they gave or occasioned any substantial wrong or miscarriage on the trial. Crim. Code, sec. 1019.

I think that no proper foundation had been laid in cross-examination of the prosecutrix for receiving the evidence of Lewis Spivak and his wife to contradict a previous statement of the prosecutrix, and that their evidence was properly rejected: Phipson, 476, 479. The refusal of permission to recall the prosecutrix in order to lay a foundation for the above evidence was a matter wholly in the discre-

Man.
C.A.
REX
v.
SCHRABA.
Cameron, J.A.

tion of the trial Judge and this Court would be very unwilling to interfere with the exercise of that discretion: Taylor on Evidence, 11th ed., vol. 11, para. 1477, at p. 1013; Middleton et al v. Barned et al (1849), 4 Ex. 241, 154 E.R. 1200, 18 L.J. (Ex.) 433. Her statement which it was proposed to contradict may, in so far as the record shews, have related to a matter not relevant to the issue.

I would answer question No. 1 as follows:—

It would have been prudent to charge the jury as suggested in the question, but in the circumstances of this case as above set forth the omission to do so did not in the opinion of this Court occasion any substantial wrong or miscarriage on the trial.

To question No. 2 the answer should be, Yes.

To question No. 3, I would answer: The misstatement of the evidence, if any, was immaterial.

Question No. 4: In the circumstances it was a matter wholly in the discretion of the trial Judge.

Question No. 5 (a), (b) and (c): In the circumstances of the case the charge was sufficient.

Question No. 6: This question is disposed of by the answers to the foregoing questions.

Cameron, J.A.:—In this case the accused was indicted for rape, tried before Mathers, C.J.K.B., and a jury at the last assizes for this district, found guilty and sentenced to a term of 5 years in the penitentiary. Leave was given by the Chief Justice to the accused to appeal to this Court on the ground that the verdict of the jury was against the weight of evidence, under sec. 1021 of the Crim. Code, and certain questions were reserved for the opinion of this Court which are set out in the judgment of Perdue, C.J.M.

On the hearing of the appeal this Court dismissed the appeal against the verdict as being against the weight of evidence. The question of identity was the crucial point in the case. That was eminently a question for the jury upon which they were fully instructed to act with due caution and there is ample evidence to justify their finding.

The main question involved is the allegation that the Chief Justice did not impress upon the jury that they were not entitled to use the complaints made as evidence of the facts stated in them but merely as shewing that the conduct of the prosecutrix was consistent with her story in the witness box, and that it would be dangerous to act on the evidence of the prosecutrix unless corroborated.

In the first place it is to be noted that the evidence given for the Crown was only to the effect that a criminal assault had been committed by a man unknown at the time to the prosecutrix. The prosecutrix says she saw his features and recognized him in Court. It was on her cross-examination that the description of the man was brought out, that he wore a dark suit and had a sandy moustache. So also in the case of Matheson, the constable, whom she saw a few minutes after the assault. On examination, she says she told him that a man had assaulted her and it was only on cross-examination that details of his description given by her were elicited. The same course was followed in the evidence of the mother and no attempt was made to bring out the description of the man until cross-examination. The details as so given, that he wore a dark suit, had a sandy moustache and was a tall stout man, are vague and general in themselves and not very much more liable to lead to identification than if it had been said that a man had committed the assault. But, apart from that, it would be strange if these details, brought out on cross-examination, should now be made a ground of objection by the accused. The Crown did not tender them in evidence. In the substance, all the evidence that the Crown offered was to the effect that a rape had been committed and that immediately after it the prosecutrix had made a complaint to two persons that it had been committed by a man who was unknown to her and not further identified except that she had seen his features and heard his voice and that by them she subsequently recognized him.

Now, we must consider the course of events at the trial. There was no real issue raised as to the commission of the offence. In substance the only issue before the jury was that of identity and we must keep this in view in considering the Chief Justice's charge.

"Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively." [Rex v. Stoddard, (1909), 2 Cr. App. R. 217 at p. 246.]

There can be no question whatever that in this case a rape was committed and that fact was not disputed. There was corroboration of that in the condition of the prosecutrix's clothing, the scattering of the parcels she was carrying at the time, the loss of her purse, the condition of the

Man.

C.A.

REX v. SCHABA.

Cameron, J.A.

ground and other surrounding circumstances as to all of which there was and could be no question. The prosecutrix's story as told by her on examination in chief was in fact fully corroborated. Thus the risk of accepting her story without corroboration did not arise. Wigmore on Evidence, para. 2061 at p. 2757 says:—"At common law, the testimony of the prosecutrix or injured person, in the trial of offences against the chastity of women, was alone sufficient evidence to support a conviction; neither a second witness nor corroborating circumstances were necessary."

In The Queen v. Lillyman, [1896] 2 Q.B. 167, 65 L.J. (M.C.) 195, it was established that evidence of complaint was admissible and that particulars of it may be given and it was held that the Judge should impress the jury that they were not to make use of it as evidence of the facts but only to shew the consistency of the prosecutor and as negativing consent. In The King v. Osborne, [1905] 1 K.B. 551, at p. 561, 74 L.J. (K.B.) 311, it was held that, in sexual cases, the Judge should be careful to inform the jury that the statement made by the prosecutrix is not evidence of the facts complained of and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility and, where consent is in issue, of the absence of consent.

No doubt this is the general rule but its application rests on the circumstances of each individual case. In this present case, there was no necessity to tell the jury that the statements made by the prosecutrix were not evidence of the fact of criminal assault. It would have been superfluous to do so. There was ample corroboration of that fact outside the statements she made and on that question there was no issue. It was not disputed. It is impossible to conceive that the jury were in any way misled on that point by anything the Chief Justice said or omitted to say. There was no room for doubt. The only question left for the jury to decide was that of the identity of the accused with that of the man who committed the offence. This case differs from most of those of this kind reported in that the accused was unknown to the prosecutrix at the time. Her recognition and identification of him were made in his presence subsequent to the commission of the offence and the finding of the jury on that point was unquestionably determined by them alone. I cannot imagine that the details given by Crown witnesses on cross-examination by

counsel for the accused had the slightest influence on the minds of the jury. It is no doubt the case that the Chief Justice at the trial would have put himself on the safe side by giving the standard instructions in such cases, but it seems to me they were not necessarily called for in this case. In any event this Court is not to set aside this conviction or order a new trial unless some substantial wrong or miscarriage has been occasioned by reason of what has been objected to and I cannot see that such wrong or miscarriage has taken place. The trial Judge's charge must be regarded as a whole and in the light of the conduct of the case at the trial. He gave the accused fair consideration in his directions to the jury and more especially on the issue of identity upon which he solely relied.

I agree with the judgment of the Chief Justice of this Court which I have read and would answer the questions reserved as indicated therein.

Fullerton, J.A.:—I have had an opportunity of perusing the judgments of the Chief Justice and of Cameron, J., and I agree with their conclusions and with the answers to the several questions in the reserved case as set out in the judgment of the Chief Justice.

Appeal dismissed.

MAAS v. McMAHON.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart and Beck, JJ.A. November 3, 1921.

FRAUD AND DECEIT (§ III—12)—EXCHANGE OF REAL ESTATE—FRAUDULENT MISREPRESENTATION AS TO VALUE—FINDING OF TRIAL JUDGE—QUESTION OF FACT—CONFLICTING OPINIONS—APPEAL.

It is only in exceptional circumstances that an Appellate Court will interfere with the finding of fact of the trial Judge, on conflicting opinions as to the value of property and fraudulent misrepresentation as to such value, in an exchange of properties.

LANDLORD AND TENANT (§ IIE—35)—ASSIGNMENT OF GRAZING LEASE—CONSENT OF CROWN NECESSARY—CONSENT NOT OBTAINED BEFORE TENDER OF ASSIGNMENT—ACTION TO RECOVER CONSIDERATION—ACTION PREMATURE.

If a lessee enters into an agreement to assign a lease for a valuable consideration, but the lease is only assignable with the lessor's consent, he cannot sue for the consideration on a mere tender of the assignment without having first obtained the consent. The fact that the Crown is the lessor does not make the obtaining of such consent unnecessary.

APPEAL by plaintiff from the trial judgment in an action to recover damages for deceit in connection with the sale or ex-

Alta.

App. Div.

MAAS
v.
MCMAHON.

Stuart, J.A.

change of certain properties, and also for the balance of the purchase price which was payable in money. Affirmed.

F. Ford, K.C., for plaintiff.

H. W. Menzie and *A. L. Smith*, K.C., for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—The plaintiff sued the defendant for damages for deceit in connection with a sale or exchange of property and alleged that the defendant had fraudulently misrepresented the value of the property, situate in British Columbia and in the State of Washington, which was to be transferred by the defendant to the plaintiff in partial payment for property to be transferred from plaintiff to defendant.

The trial Judge refused to find the defendant guilty of any fraud. It seems to me that if there is one case in which an Appellate Court ought to refuse to reverse such a finding it would be one like the present, where the statements complained of relate to the value of property. Of course the value of the property is a fact and I do not say that there could be no case where such statements could be found to be fraudulent. But where so much depends on opinion and where the trial Judge has before him, as he had here, evidence of conflicting opinions, some of which corroborate the statements complained of, it would be exceedingly improper in my opinion to reverse his acquittal of the defendant and make a finding of fraud. See *Nocton* v. *Lord Ashburton*, [1914] A.C. 932, at p. 957, where Haldane, L.C., said: "The Judges of the Court of Appeal appear to have taken some such view, with this difference that they found actual fraud. I think, as I have already said, that it is only in exceptional circumstances that judges of appeal who have not seen the witness in the box, ought to differ from the finding of fact of the Judge who tried the case as to the state of mind of the witness." Obviously by "the witness" he there referred to the defendant accused of fraud.

The trial Judge accepted the defendant's statements as to how the Port Angeles property was put in and if that story is true there could be no fraud. Neither, if it is true, could I see any ground for compensation on the ground of failure of consideration. If the story is true, and I think we must accept it here as true, the plaintiff himself accepted the lot blindly, as the defendant had done before him, and took a chance on its meeting satisfactorily the difference in price, amounting to $600, which was theretofore preventing him arriving at a bargain.

I would, therefore, dismiss the appeal so far as the action for damages is concerned.

The plaintiff also sued for the balance of the purchase-price which was payable in money and this claim was also dismissed on the ground that the action was premature. The defendant did not object to carrying out the agreement and was indeed apparently anxious to do so. But the trouble arose over the question whether or not the plaintiff had done all that he was bound to do under the agreement in the way of conveyancing before the defendant could be called upon to pay. The plaintiff maintained that he had done so and was entitled to be paid while the defendant contended that the plaintiff was still in default with regard to conveying title. This necessitates an examination of the facts.

The agreement was signed on October 2, 1918. By it the plaintiff agreed to sell certain chattels and also certain real estate consisting of a number of parcels. With respect to some of these there was no trouble. The parcels about which the dispute arose are two Dominion grazing leases and a certain quarter section belonging to plaintiff's sister, whose name was Ebel. The price of the whole was to be $27,500, of which $13,000 was to be paid by the transfer of the British Columbia and Washington property above referred to, $3,372 by the assumption of certain mortgages, $1,000 in cash at the date of the agreement, $2,000 "about the 12th October, 1918," $1,000 "when the Ebel transfer has come through in order," $1,000 "when all transfers and assignments have been completed in this deal," and the balance of $6,128 in three equal annual instalments in the month of December in the years 1919, 1920, and 1921.

The agreement was in one of the usual printed forms adopted in the case of the sale of land upon the instalment plan and contains the usual covenant on the part of the vendor to convey "to the purchaser the said *parcel* (*sic*) of land by deed of transfer" "on payment of the said sum of money with interest as aforesaid in the manner aforesaid." Obviously this was inconsistent with the provisions above referred to in regard to the payment of $1,000 "when the Ebel transfer has come through in order" and the payment of $1,000 "when *all* transfers and assignments have been completed in this deal." As these former provisions stand it is clear that pure credit would have had to be given for the 3 annual instalments making up the balance of $6,128. But there were afterwards added in typewriting at the end of the agreement certain stipulations shewing that, while certain of the numerous parcels were to be transferred absolutely to the defendant immediately, certain other transfers were to be held for a time in escrow. For instance

Alta.

App. Div.

MAAS v. MCMAHON.

Stuart, J.A.

there is this clause. "All instruments re H. Maas, property in Etzikom to be made right away and placed in escrow in the Union Bank at Etzikom and turned over to Mr. McMahon when the December 1st, 1919, payment has been satisfied." And also there is this clause "The Ebel property to be transferred to Mr. McMahon and held in bank in escrow for two years until December 1st, 1920, payment is made." And also this clause, "The transfer covering the Henry Maas half section to be made right away to Mr. McMahon and held by the bank in escrow until the final payments are made as per this agreement of sale."

These latter provisions shew what was meant by the stipulation above referred to that $1,000 was "to be paid when all transfers and assignments have been completed in this deal." It meant that while some transfers were to be delivered absolutely others although completed as to execution were to be held in escrow as security to the vendor.

Then the subject of security for the deferred payments was brought up again within a few days of the execution of the agreement. On October 4, *i.e.*, two days afterwards, Sergeant, the conveyancer at Etzikom who drew the agreement, wrote to the defendant saying that the plaintiff's wife was worried about the $6,000 odd balance and suggesting a mortgage back. The defendant replied on October 7, reminding Sergeant that the transfer "for the homestead and preemption" were to remain in Etzikom in the bank until final payment in full. This seems to have been satisfactory and on December 10, 1918, a document evidencing a deposit in escrow with the transfers spoken of as attached was signed by the parties and left with the bank in Etzikom.

The action was begun on March 29, 1920, and in the statement of claim it is alleged that default had been made in the payment of the two separate deferred sums of $1,000 each above referred to, and in the payment of the first of the three instalments into which the balance of $6,128 was divided, which was due on December 1, 1919.

Inasmuch as the agreement contained an acceleration clause making the whole purchase due upon default in payment of any instalment, the plaintiff sued for the whole of the price agreed to be paid in money.

It was never suggested that the contract was separable. There was one purchase price for all the property to be conveyed. There was just one piece of property of which this was not true. A few days after the execution of the agreement

the defendant interviewed Sergeant and a clause was inserted in the agreement, apparently with plaintiff's assent, that if "the Ebel deal" did not go through, by which was apparently meant if Maas did not get title to certain property to which title was to be obtained by "the Ebel transfer" the sum of $1,000 was to be deducted from the price. The document is ambiguously worded but this is apparently the meaning of the added clause. But aside from this there is no doubt that there was one purchase-price for the whole property.

Now among the parcels of property to be conveyed by the plaintiff were the two Dominion grazing leases. The plaintiff held these parcels covering 2293 acres under lease from the Dominion Government. The regulations under which they were held provided that they should not be assigned without the assent of the Crown and not in any case to an alien. The defendant was an alien. This possible difficulty was made known to the plaintiff. It was proposed to avoid it by incorporating a company to which the assignment could be made. To this the plaintiff assented but the incorporation took time. This caused delay. But delay was also caused by the plaintiff going down to Minnesota to live and leaving no one in Alberta properly instructed and authorised to represent him. As a matter of fact the Department of the Interior never approved of the assignments of the leases until a month or two after the commencement of the action. The defendant had gone into possession, however, in the meantime. There is a mass of confused correspondence in which the plaintiff blamed the defendant for delay in making his payments and in which the defendant and his solicitors pointed out that the necessary transfers and assignments had not been produced.

Really the only question involved is whether on March 29, 1920, when the action began, the plaintiff had done all that he was bound to do before demanding payments from the defendant.

In my opinion it is clear that he had not. The plaintiff agreed to assign the leases but there can be no question that this meant the giving of a valid and effective assignment. The restriction upon assignment without leave of the Crown was a possible difficulty in the way of the plaintiff fulfilling his agreement, which it was his duty, and not the defendant's, to remove. He had taken the leases on that condition. He had to do the assigning and it was to him that consent had to be given. Surely it was for him to obtain that consent. There appears throughout to have been something very closely approaching

Alta.

App. Div.

MAAS
v.
MCMAHON.

Stuart, J.A.

perversity in the plaintiff's attitude. At one stage he actually refused to execute the assignments at all until the defendant had secured from the government a consent in advance that he should do so.

If a lessee enters into an agreement to assign a lease for a valuable consideration but the lease is only assignable with the lessor's consent, certainly no one would suggest that he could sue for the consideration on a mere tender of the assignment without having first obtained that consent. And the fact that the lessor is the Crown can make no difference. The obtaining of the consent of the Crown is not merely a sort of registration. The fact that the Crown is represented in a Government office and that the assignments had to be sent there for approval and consent does not by any means make that office a registration office as in the case of the Land Titles Office where transfers are to be registered.

Then there is the very strange circumstance that the plaintiff never produced, even at the trial, any executed assignments of the leases or consent thereto by the Crown. It is true that it was asserted that he had signed them and sent them to some one but why that some one was not called to produce the documents seems to me a little difficult to understand. Certainly it was not proven that the defendant or his solicitors had them in their possession. The reference to copies in the letter to Gardiner is too uncertain and ambiguous to rest anything upon. And admittedly that letter was long before the assent of the Crown had been obtained.

If this were an action for specific performance against a defendant who refused to carry out his bargain it might be possible to overlook the fact that the Crown's consent had not been obtained when the action was begun. But the whole contest in the case is over the very question whether when the action was begun the defendant was in default for not "making his payments."

It was suggested that an assignor of a government lease ought not to be obliged to execute such an assignment and to send it to Ottawa and have consent given and the assignment there recorded so that the Department would thereafter look upon the assignee as the holder of the lease before payment of the consideration had been made because if default were made in payment the assignor would be without security other than the personal responsibility of the assignee. No doubt the distance makes it more difficult to arrange such a matter than in the case of an ordinary lease of private property, but the assignee

is as much entitled to protection as the assignor and obviously the only thing to be done is to entrust the documents to a responsible solicitor or banker and to inform the Department that the final delivery and effectiveness of the assignment is by agreement to depend upon payment of the consideration. Most of the difficulty here obviously arose from the strange reluctance of the plaintiff to have any capable and responsible person act for him when he was away in the States and sick and utterly unable to act for himself.

Then with regard to the Ebel property much the same situation existed. This was a quarter section belonging to a Mrs. Ebel, a sister of the plaintiff, who lived also in Minnesota. She had to transfer to her brother, the plaintiff, who had then to transfer to the defendant. The sum of $1,000 was to be paid "when the Ebel transfer has come through in order." The subsequent clause shews that this meant a transfer to McMahon which he could register.

Now the next strange thing about this matter is that there was never presented to the Court any proper evidence even that the Ebel to Maas transfer had been executed and registered. The plaintiff, indeed, so stated in his evidence orally but there was no certificate of title or even abstract produced. The fact that the certificate may have been held in escrow by the bank at Etzikom did not prevent its production or *subpoena duces tecum*. There is no admission by the defendant or his solicitors, that I can find, that this title was in proper shape. All this is before we reach the necessary Maas to McMahon transfer. This was not produced at the trial for the Court to decide whether it was in proper form and there is no reason given why it was not. There is, with respect to it also, no admission that it was in proper form.

This being so, it is beyond my comprehension to understand how the plaintiff can claim that he has proved default on the part of the defendant in respect to the Ebel transfer.

These matters are all that are involved in the case and therefore it seems clear that there is nothing to do but to dismiss the appeal in respect of the money payments also.

The appeal should be dismissed with costs.

Appeal dismissed.

Can.

Ex. C.

LECLERC v. THE KING.

Exchequer Court of Canada, Audette, J. December 7, 1920.

CROWN (§ III—25)—GOVERNMENT RAILWAY—LIABILITY AS COMMON CARRIER—FAILURE OF GOODS SHIPPED TO REACH DESTINATION—DAMAGES—MEASURE OF—EXCHEQUER COURT ACT, SEC. 20.

Owing to the negligence of the employees of the Canadian Government Railway, a car of potatoes shipped from St. Charles to Viger station, Montreal, failed to reach Montreal within a reasonable time and never reached its destination (Viger station) under circumstances which if the case were one between subject and subject, would render the railway liable in damages for a breach of the contract of carriage. The Court held that it was unnecessary to decide whether the Crown could now be a common carrier or not because the petitioner in his petition had alleged that he had suffered the damage occasioned "par la faute negligence et imprevoyance" of the employees of the railway, and so brought the case under the operation of sec. 20 of the Exchequer Court Act, R.S.C. 1906, ch. 140, the Crown was liable under that section without reference to any liability as a common carrier. In measuring the compensation the Crown was entitled to the benefit of a clause in the bill of lading that "the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under the bill of lading.

[*The Queen* v. *McLeod* (1883), 8 Can. S.C.R. 1; *The Queen* v. *McFarlane* (1882), 7 Can. S.C.R. 216; *Lavoie* v. *The Queen* (1892), 3 Can. Ex. 96; *Vipond* v. *Furness Withy & Co.* (1916), 35 D.L.R. 278, 54 Can. S.C.R. 521, and annotation at p. 285 thereto referred to as to whether the Crown can be a common carrier.]

PETITION OF RIGHT to recover damages caused by delay in transportation of potatoes from St. Charles de Bellechasse to Montreal.

J. A. Gagne, K.C., for suppliant.

A. Sevigny, K.C., for respondent.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $971 as representing the alleged loss suffered by him in forwarding, by the Canadian Government Railway, a car of potatoes from St. Charles de Bellechasse, P.Q., to Montreal under the following circumstances.

The suppliant having secured a car from the station master at St. Charles, loaded the same at the siding, with 674 bags of potatoes of 90lbs. each—each bag being weighed as it went on board. The loading being completed, on September 30, 1919, he went, accompanied by witness Lapointe, who had weighed the potatoes, to the station and asked the station master for a bill of lading—and at the same time placed on the agent's desk a slip of paper giving both the weight of the potatoes and the number of the car. The letter "N" on such slip stood before

the figures representing the number of the car, and the letter "P" (for poids-weight) stood before the figures representing the weight.

The agent then prepared the bill of lading, and handed to Leclerc the document filed as Ex. 1, whereby he acknowledged having received the potatoes from Leclerc, at St. Charles, on September 30, consigned to Gustave Brossard, with destination to Viger Station, Montreal, and placed upon the bill of lading, Ex. 1, as the number of the car, the figures representing the weight of the potatoes. Hence the present action.

The documents, constituting the contract of carriage in the present case, were prepared by the agent, and when Leclerc was handed Ex. 1, he placed it in his pocket without looking at it.

Leclerc contends that having enquired from the agent when the potatoes would reach their destination, he was told that the car *should or* would be in Montreal somewhere around October 3, and he went to Montreal for that date with the object of taking delivery with his consignee.

However, the agent denies having told him when he thought the car would be in Montreal, and says that Leclerc told him the number of the car and gave him the wrong figures.

Upon this latter point, both Leclerc and Lapointe, the latter a disinterested witness, swear positively that the slip of paper was duly handed to the agent, and I accept their testimony in preference to that of the agent; because, when in the witness box, although shewing honesty of design, he disclosed a very bad memory, especially in respect of what I might call the McCarthy enquiries and telegrams.

The car of potatoes left St. Charles on the following day, which was October 1, 1919, and having reached Chaudiere station, a comparatively short distance from St. Charles, it remained there according to some evidence until October 6, on account of the difficulty resulting from the wrong number on the bill of lading.

In the meantime Leclerc had gone to Montreal and several times each day had been enquiring at the Place Viger station, at the freight offices at Bonaventure station, at the freight offices of the Intercolonial Railway, the Grand Trunk, and the Canadian Pacific Railway, but he could obtain no knowledge of the car in Montreal. He then telephoned from Montreal to the agent at St. Charles de Bellechasse for the right number of the car, and was again given by the telephone the weight number. Leclerc said he knew the right number and took it that

Can.

EX. C.

LECLERC
v.
THE KING.

Audette, J.

the agent was giving the wrong number. He then on October 6 sent a telegram (Ex. "A") to the agent asking immediately for the number of the car, and on the 7th the agent sent the right number, and that telegram was received by Leclerc, at Montreal, on the morning of the 8th.

Leclerc then went again to the Place Viger station, to Bonaventure station, etc., but again was told they did not have the car. He and Brossard again and again went to the station and freight offices, and finally on the Saturday, being discouraged, he left for his home, at St. Charles, giving the address of the consignee at the freight office. Leclerc arrived at St. Charles on Saturday, the 11th, in the evening, and next day agent Rheaume and Leclerc met at church. The evidence as to how the conversation which then took place arose, is somewhat conflicting, but in the result, it amounts to the agent telling Leclerc he had better take delivery of his car and make a claim if he suffered damages; but Leclerc said, I need not bother about it, Brossard, the consignee is in Montreal, and they are going to pay me for that car. His patience by that time had graduated down to its minimum and perhaps not without some justification.

The suppliant says that on the Wednesday or Thursday following (the 15th or the 16th) he was advised by agent Rheaume, at St. Charles, that the car had been traced and that he could find it in Montreal.

Brossard, the consignee of the potatoes, confirms Leclerc as to all of these enquiries at the railway freight offices, but some difficulty appears to have arisen as to Brossard's address—a matter which will be hereafter referred to. Brossard, however, testifies he went to Viger station every day up to October 20.

Then, on October 10, witness McCarthy, an employee of the Intercolonial Railway, at Montreal, and agent of the Canadian Northern Railway at Montreal wharf, received the bill of lading or waybill, and testifies that at the time he received the way-bill he supposed the car was likely at Pointe St. Charles (Montreal) but he did not actually know. Witness McCarthy says he then endeavoured to locate Gaston (not Gustave Brossard) Brossard, the consignee, but seeing he could not succeed, he wired the station agent at St. Charles de Bellechasse (Ex. "C") for Gaston Brossard's address. After several enquiries Gustave Brossard was found on the 20th, and according to McCarthy he then refused delivery of the potatoes, as endorsed upon the document—because, says Brossard, he did not want to sign before seeing the car, and because the price of potatoes had then

gone down. The evidence is conflicting upon this point. The railway official endeavoured in part to escape liability upon the ground that they could not locate the consignee, but it must not be overlooked that they were trying to find Gaston Brossard and not Gustave Brossard. A messenger had been sent to the place where the consignee was working, and upon enquiry was told they had no Gaston Brossard in their employ. Moreover, as the destination of the car was entered upon the bill of lading, would it not appear, as a primary duty of witness McCarthy, to notify the freight office at Viger station, of the arrival of the car. Had that been done, it is obvious that Brossard would have been notified before the 20th, as he kept enquiring daily at that station, the destination of his car.

Upon Brossard refusing delivery on October 20, the potatoes were sold without any notice to the consignor, and the sum of $517.52 realised by such sale, from which the freight, $114.20, and demurrage of $55 were deducted, leaving the sum of $348.32 which was tendered the suppliant in settlement, and he refused it, standing by his rights for the full value of the potatoes.

I must not overlook mentioning that we also had in the case the hyper-expert who testified as to what might have happened, and as to what might not have happened to the potatoes while in transit at that season. However, this speculative evidence has no bearing upon the gravamen of this action.

In the result I must find that the car in question never reached its destination, Viger station, Montreal. It is true witness McCarthy when pressed to locate the car at certain dates, tried to explain that the car might not have gone to Viger station on account of the Canadian Pacific Railway embargo, on account of congestion. From his evidence, it must be found that while that year there had existed intermittent embargoes, he did not know positively whether the embargo was in force at the very time in question. Moreover, if there was such an embargo, it should have been proved in the regular manner.

The wrong number was placed upon the document prepared by the St. Charles agent, and it was his duty to ascertain the right number before placing it on the bill of lading or waybill, even if the document had been prepared by the consignor.

The evidence does not clearly disclose at what date the car actually reached Montreal. On October 10, witness McCarthy, who received the bill of lading, testified he thought the car was at Pointe St. Charles, but he was not sure—as he might very

Can.

EX. C.

LECLERC v. THE KING.

Audette, J.

well and very likely receive the way-bill or bill of lading even before the arrival of the car. The consignee was only notified on the 20th. On October 15 or 16 the consignor was notified at St. Charles de Bellechasse that the car had reached Montreal.

Did this car of potatoes reach Montreal within a reasonable time? What is a reasonable time depends upon the circumstances of each case. It was known to all concerned that the car in question was loaded with perishable goods, and therefore that all due urgency and efforts should have been made by the railway officials to forward the car to its destination with all due speed. Too much seems to have been taken for granted in allowing the car to remain at Chaudiere up to the 6th. If it took all of that time to transport potatoes over a distance of about 200 miles, railways would thus defeat their utility.

The wrong number was placed upon this bill of lading by the railway official, and he admits, in his evidence, it was his duty to corroborate and ascertain if the number was correct. The name of the consignee on the bill of lading is Gustave Brossard, and it was wrongly placed upon the notice to be served upon him. Gaston Brossard was the person sought, and not Gustave Brossard. The car did not reach Montreal within a reasonable time under the circumstances, and in fact never reached its destination, Viger station, Montreal.

Upon the facts, if the case were one between subject and subject, the respondent would be liable in damages for a breach of the contract of carriage. But in view of the decisions in this Court of *The Queen* v. *McLeod* (1883), 8 Can. S.C.R. 1, following *The Queen* v. *McFarlane* (1882), 7 Can. S.C.R. 216, and *Lavoie* v. *The Queen* (1892), 3 Can. Ex. 96, holding that the Crown cannot be a common carrier, it would be necessary for me to consider whether those decisions have not become obsolete before I could find liability in respect of the contract of carriage. (See annotation to report of *Vipond* v. *Furness Withy Co.*, 35 D.L.R. 285.) However, I am relieved from any necessity of considering the case on the theory of carrier's liability by the fact that by his petition the suppliant alleges that he suffers damage occasioned "par la faute, negligence et imprevoyance" of the employees of the railway, and so brings the case within the operation of sec. 20 of the Exchequer Court Act.

It is mentioned in the evidence that the potatoes cost $1.25 a bag at St. Charles, and were sold at Montreal for $1.50. However, under the terms and conditions of the bill of lading,

"the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under the bill of lading." *Getty* v. *The C.P.R. Co.* (1917), 22 C.R.C. 297, 40 O.L.R. 260.

The suppliant loaded his car partly with some of his own potatoes and partly with potatoes he had bought at $1 a bag. I will accept that figure.

He also charged for his board at Montreal, but I fail to see the necessity of a consignor following his goods to their destination and therefore disallow such charge.

The suppliant is therefore entitled to recover the sum of $674, with interest (*St. Louis* v. *The Queen* (1896), 25 Can. S.C.R. 649, at p. 665, and *Laine* v. *The Queen* (1896), 5 Can. Ex. 103) thereon from the date at which the petition of right was left with the Secretary of State (a date which may hereafter be established by affidavit) to the date hereof, and with costs.

Judgment accordingly.

REX v. STEEVES; EX PARTE COHEN.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. April 22, 1921.

Certiorari (§IA—9) Intoxicating Liquor Act 1916, N.B. ch. 20—Conviction for Offence under, by Magistrate—No Evidence before Magistrate of Offence having been Committed—Jurisdiction of Court of King's Bench to Quash—Right to Certiorari taken away by Statute.

Where certiorari has been taken away by statute as under the New Brunswick Intoxicating Liquor Act 1916, ch. 20, the Court of King's Bench has no jurisdiction to examine as to whether there was sufficient evidence on which the accused should have been convicted, nor to determine as to the degree and sufficiency of the evidence and the credit due to the witnesses, if there was any evidence on which the Magistrate could convict, but if there is no evidence whatever before the Court, or if the evidence is so palpably insufficient and inadequate as to be valueless the Court may quash the conviction.

[The King v. Limerick; Ex parte Dewar (1916), 31 D.L.R. 226, 44 N.B.R. 233; The King v. Vroom; Ex parte McDonald (1919), 45, D.L.R. 494, 31 Can. Cr. Cas. 316, 46 N.B.R. 214, followed.]

APPLICATION made to Crocket, J. for a writ of certiorari and an order nisi to quash a conviction made by a Police Magistrate, and which he referred to the Appeal Division. Crocket, J., advised to quash the conviction.

A. A. Allen shews cause against an order nisi.

E. Allison MacKay, contra, in support of the order.

The judgment of the Court was delivered by

McKeown, C.J., K.B.D.:—On application duly made to

N.B.

S.C.

REX v. STEEVES; EX PARTE COHEN.

McKEOWN, C.J.

Crocket, J., he ordered that a writ of certiorari issue to the Police Magistrate of the City of Moncton directing the return of a certain conviction entered in the police court in said City of Moncton together with the proceedings on which the same was based, and an order nisi to quash the same was made returnable therewith. Upon return of the said writ and order before Crocket, J., he has referred the matter to this Court for advice.

The return shews that on August 25 last, a conviction was entered against the applicant Cohen upon a charge of unlawfully having in his possession at the city of Moncton in the county of Westmorland on August 18, 1920, a quantity of intoxicating liquor in a place other than the dwelling house in which he resided, contrary to the provisions of the Intoxicating Liquor Act, 1916, (N.B.) ch. 20, and for such offence it was adjudged that the said Cohen forfeit and pay the sum of $50 and costs amounting to $2.50, and in default of such payment that he be imprisoned in the common gaol at Dorchester in the county of Westmorland for the term of 3 months, unless the said sums should be sooner paid.

Two grounds were stated for the issue of the writ as follows:—1. That the information and conviction in this case does not contain nor allege any violation of the Intoxicating Liquor Act of 1916. 2. That the Magistrate acted wholly without jurisdiction in making the said conviction, as there was absolutely no evidence given before the said Magistrate at the said trial that the defendant committed any offence whatever against any of the provisions of the Intoxicating Liquor Act, 1916.

The Judge has referred the application to this Court on the second ground stated above.

It is claimed by the applicant that no evidence at all was adduced before the convicting Magistrate by which his guilt was established or from which it could be inferred, and in order that the matter may be clearly understood, I think it well that the testimony submitted in the Magistrate's Court should be herein embodied in its entirety. Only one witness was called to prove the offence. Her evidence is as follows:—

"Ethel Edgett, sworn. I am the wife of Percy Edgett of the city of Moncton, blacksmith. I live at 39 Wesley St. with my husband. My husband's blacksmith shop is on the west side of Wesley St. I know Isadore Cohen to see him. I seen him on the 7th day of August, instant.

It was Saturday. I seen him in an alley between my husband's blacksmith shop and the meat market. I watched this boy and I seen him drive down Wesley St. and he turned in this alley by my husband's shop. I would judge he was driving a horse not a pony. I seen him in this alleyway. I asked him if he had a parcel there for Mr. Edgett my husabnd. He said he did have. I said 'I will take it.' He handed me a parcel. He got it from under the seat of the wagon."

No other witness was called or sworn. An adjournment was had until August 25, and on the reassembling of the Court, all parties being present, no defence was offered, the applicant was found guilty, and the fine above indicated was imposed with costs, with imprisonment in default of payment.

I think it must be admitted that the evidence before the committing Magistrate did not establish the offence charged, and also that there is nothing in the testimony submitted, from which the guilt of the accused can be inferred. It therefore appears that the Magistrate, having jurisdiction over the offence charged and over the offender as well, has found the accused party guilty and has sentenced him to fine and imprisonment without any evidence pointing to his guilt. The question is—will this Court interfere by way of certiorari and will it set aside such convicton so made?

A situation similar in principle was dealt with by this Court in the case of The King v. Limerick, ex parte Dewar (1916), 31 D.L.R. 226, 27 Can. Cr. Cas. 309, 44 N.B.R. 233, in which it was held that the evidence taken by a stenographer in proceedings again Dewar and others for an offence against the Canada Temperance Act R.S.C. 1906 ch. 152, could not be read or considered, because of the omission to swear the stenographer as required by sec. 683 of the Criminal Code and amendments. White, J., who with McLeod, C.J., and Grimmer, J. composed the Court of Appeal said in his judgment, at pp. 226, 227:— z

"As the statute provides a form of conviction it is now no longer requisite, as it was in former times, that the evidence shall appear in the conviction itself. But it still remains essential that there shall be a proper record of the proceedings, including evidence, in order that the Court, when the validity of the conviction is in question, may have such record before it in order to determine whether the conviction should be sustained or quashed . . . In the

N.B.

S.C.

REX v. STEEVES; EX PARTE COHEN.

McKEOWN, C.J.

case now before us there is, in effect, no evidence at all; because what is alleged to be evidence has not been recorded and verified in the mode prescribed by the statute."

Grimmer, J., at p. 229 of the report observes:—"The evidence has not been taken as provided by law, and is therefore not evidence at all, and there is nothing upon which the Magistrate can found his conviction, and the same must be quashed."

The conviction was accordingly set aside.

The exclusion of the evidence taken by the stenographer in the case above mentioned, left the Court without any testimony at all before it to substantiate the conviction; and while in the case now before us there is evidence of certain acts on the part of the defendant, yet I think it must be admitted that the guilt of the accused cannot be deduced or inferred from the testimony given by Mrs. Edgett and quoted above. I can see no difference in principle between entering a conviction with no evidence whatever to support it, as in the Dewar case, and a case like the present, in which whatever testimony there is, has absolutely no evidential value in support of the complaint.

When proceedings of an inferor tribunal are brought before this Court in obedience to a rule for certiorari, I think we are justified in dealing with them in the way indicated by Strong, J., in the case of In re Melina Trepanier (1885) 12 Can. S.C.R. 111, where that Judge says, at p. 129:—

"In Ontario, in many cases, a single Judge, sitting as a Court en banc and exercising the powers of a Court in banc, has issued a writ of habeas corpus, accompanied by a writ of certiorari, and having undoubted power to do so has quashed convictions. In such cases it is no excess of jurisdiction in the Court to look at the depositions regularly before it and see if there is any evidence of the offence charged—not re-hearing the case, as on appeal, for, no matter how strong the evidence may be for the prisoner, no matter what the preponderance may be against the prosecution, if there is any evidence whatever, the Court will refuse to interfere with the conviction."

After the Canada Temperance Act was amended so as to prohibit the carriage and delivery of liquor by express companies in certain instances, decisions of this Court touching offences against such amendment are found, of which, perhaps, the case of The King v. Hornbrook; Ex parte Morison, (1909), 39 N.B.R. 298, is the most instruc-

tive, since it elicited an important judgment from Barker, C.J., in which he reviewed some criticism which had been passed upon the case of Ex parte Daley (1888), 27 N.B.R. 129. In upholding that decision he referred to and discussed certain decisions binding on this Court, particularly the judgments in the Colonial Bank of Australasia v. Willan (1874), L.R. 5 P.C. 417, and In re Melina Trepanier cited above. In the first of these cases the Judicial Committee of the Privy Council, whose judgments must guide the decisions of this Court, had under consideration an appeal against an order of the Supreme Court of Victoria, Australia, which, upon a return to a writ of certiorari had quashed an order made by a Judge of a Court of Mines, directing that a certain mining company be wound up. The respondent who was one of the shareholders of the company, on his own behalf, as well as on behalf of a majority of the solvent shareholders, had applied to the Supreme Court of Victoria and obtained a rule absolute to quash the order to wind up the company so made by the Judge of the Court of Mines. On appeal to the Privy Council it was contended on appellant's behalf that the Supreme Court of Victoria had no right to interfere by way of certiorari with the judgment of the Court of Mines which had acted wholly within its jurisdiction, and that the power to remove winding up orders and proceedings therein into the Supreme Court, had been taken away by sec. 244 of the Mining Statute 1865.

The judgment of the Judicial Committee was delivered by Colville, J., who, after citing certain sections of the Act bearing upon winding-up orders, says at p. 442:—

"Their Lordships are therefore, of opinion that winding-up orders must be taken to be within the scope of the 244th section of the Act, and that the power to remove the proceedings relating to them in the Supreme Court has been taken away by statute. . . . . .

"Their Lordships understand the final judgment of that Court to state, as the grounds upon which the order ought to be quashed, that the Judge of the Court of Mines who made it, had acted without jurisdiction, and that he had been misled into doing so by the fraud of the petitioning creditors. The question upon this appeal is whether the materials before the Court justified either conclusion."

At p. 445 of the report His Lordship continues:—

"The first ground upon which the rule nisi to quash the winding-up order was so granted was, that there was no

N.B.

S.C.

REX v. STEEVES; EX PARTE COHEN.

McKeown, C.J.

jurisdiction to make the order, as at the time of serving the notice of demand, and of making the said order the Golden Gate Gold Mining Company registered was not indebted to the Colonial Bank of Australasia in any sum; and the judgment of the Supreme Court upon which this rule nisi was made absolute, found 'there was no petitioning creditors' debt proved, and that there was, therefore, no foundation for the winding-up order.'"

His Lordship then examined the winding-up order which he determined to be strictly regular, and which declared that the sum claimed was due from the company to the bank and proceeds thus at p. 446:—

"The order, then, was one made by a competent Judge; shewing, on the face of it, that every requirement of the statute under which it had been made, had been complied with; ordering that which the Judge, on proper grounds, had power to order; and containing an express adjudication upon a fact which, though essential to the order, the Judge was both competent and bound to decide, viz.: that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt."

In view of the regularity of the winding-up order, and of the existence of evidence to support the findings of Judge of the Court of Mines, His Lordship concluded that the Supreme Court arrived at the conclusion it expressed upon a retrial of the question of the petitioning creditors' debt upon evidence which was not before the inferior Court. "To do this," he says at p. 446, "and to quash the order upon the conclusion thus drawn is clearly contrary to the principles established by Reg. v. Bolton, 1 Q.B. 66 and that class of cases."

The report of the case discloses that in the application to the Supreme Court of Victoria evidence was adduced by affidavit upon which the Court drew a conclusion contrary to that drawn by the Judge of the Court of Mines. But it by no means appears that there was no evidence upon which to base a finding, and, as the case presents itself to me, it seems that it does not support the view that where no evidence at all is before an inferior tribunal, certiorari will not lie to the Court having the power of the Court of King's Bench. The effect of His Lordship's judgment upon that point is, that it was

improper to use the affidavits which were submitted to the Supreme Court of Victoria to induce it to come to a conclusion contrary to the finding of the Judge of Mines, who had sufficient evidence submitted to him to make a finding concerning the matter at issue. This case is cited at some length by Barker, C.J., in the case of Ex parte Morison supra, in support of the decision in Ex p. Daley, supra. The salutary rule enunciated by Lord Halsbury to the effect that no case is to be considered as an authority for anything more than it specifically decides, involves, I think, that every judgment should be read in the light of the facts proved before the Court in such instances, and I am confirmed in this view by the observation of the learned Chief Justice in the case of Rex v. Davis; Ex parte Miranda (1913) 19 D.L.R. 475, 23 Can. Cr. Cas. 33, 42 N.B.R. 338, in which he delivered the judgment of the Court on application to quash a conviction on the sole ground that there was no evidence to support it. The Chief Justice critically analysed the evidence and recited the facts. At pp. 476, 477 of the report he said:—

"No question arises as to the regularity of the proceedings, and the Magistrate's jurisdiction over the person and the offence is not disputed. He therefore had jurisdiction to enter upon the inquiry, and having done so, it is, I think, impossible for him to be ousted from that jurisdiction by any want or insufficiency of the evidence to support the charge. The determination to be reached as a result of that evidence has been given to the Justice; there is no appeal on that ground to this Court, and the right to remove such convictions by certiorari on that ground has been taken away. It does, however, exist where there has been a want or excess of jurisdiction in the Magistrate, and the applicant must bring his case within that limit in order to succeed. In order to do so his counsel has advanced the proposition that the Justice's jurisdiction is a jurisdiction to hear and determine upon evidence, and if he determines without any evidence at all, or upon evidence altogether irrelevant to the inquiry, or so palpably insufficient and inadequate for the purpose as to be valueless, he assumes a jurisdiction never conferred upon him or acts in excess of one which has been conferred upon him. When a case of that nature arises it will be time enough to consider it. A perusal of the evidence returned here has convinced me that the facts in evidence and upon which the Justice acted, fall far short of filling the conditions under which

N.B.

S.C.

REX v. STEEVES; EX PARTE COHEN.

McKeown, C.J.

it is contended the conviction would be quashed for want of jurisdiction in the Magistrate."

It is very evident that in the matter before us, a case of the nature referred to by Barker, C.J., now presents itself to the Court for decision. I further think that by the judgment in the case last mentioned, this Court has recognised that the decisions founded upon, and following Ex parte Daley in this Court, do not cover a case such as the present. The considered judgment of the Court delivered by the Chief Justice in Ex parte Miranda expresses itself at p. 477 as not covering cases where the Magistrate "determines without any evidence at all or upon evidence altogether irrelevant to the enquiry or so palpably insufficient and inadequate for the purpose as to be valueless." I think, therefore, that the decisions of this Court rendered prior to the judgment in the case of The King v. Davis; Ex parte Miranda cannot, in the light of that judgment, be considered as authority for the contention that a Magistrate has jurisdiction to enter judgment against an accused person without evidence, or upon evidence palpably insufficient or irrelevant. And it also follows, I think, that when, in the case of The King v. Hornbrook; Ex parte Morison, Barker, C.J., reviewed to some extent the Colonial Bank of Australasia v. Willan, and referred as well to The Queen v. Bolton (1841) 1 Q.B. 66, 113 E.R. 1054, and The Queen v. St. Olave's (1857), 8 El. & Bl. 529, 120 E.R. 198, he was not seeking for authority to establish the sufficiency of a conviction entered without any evidence shewing the guilt of the accused, as in the case now before us. Allen, C.J., in his judgment in Ex parte Daley (1888), 27 N.B.R. 129, first cites Regina v. Bolton, in which case an order made by Justices of the Peace for delivering up a house to parish officers under statute 59 Geo. III., 1819 (Imp.) ch. 12, was correct in form, and made on proper information, summons and hearing, whereupon the Court on certiorari refused to inquire into the reasonableness of the judgment either on affidavit or on the evidence returned with the proceedings. The judgment of the Court was delivered by Denman, C.J., who, after reciting the facts and referring to certain authorities, says, at pp. 75, 76:—

"We conclude, therefore, that the inquiry before us must be limited to this, whether the Magistrates had jurisdiction to inquire and determine, supposing the facts

alleged in the information to be true; for it has not been contended that there was any irregularity on the face of their proceedings. Now the information and the recital of it in the Magistrates' return, both state that the defendant, having been permitted to occupy a parish house belonging to the hamlet, had neglected to quit the same, or deliver up possession thereof to the church wardens, etc., within one month after notice and demand in writing, signed by, etc., that he had been served with a summons to appear and, more than seven days after, had appeared, to answer the complaint. These are all the circumstances required by the statute to found the jurisdiction; upon these it was the duty of the magistrate to proceed to inquire; and no affidavit disputes the truth of the return that such information was laid before the Magistrates, and such summons issued and served, and that such appearance took place. The return then goes on to state the substance of the evidence adduced in support of the complaint, that the defendant was heard in answer, and that the Magistrates found the complaint proved. No affidavit denies that such evidence was offered, that the defendant was heard in his defence, or that such judgment was pronounced."

While the above case is ample authority (if I may presume to say so) for the decision that the Magistrate is sole judge of the evidence, and that his decision thereon is final and binding, it cannot, I think, be relied on in support of the decision that if there is no evidence at all, the Magistrate is justified in entering a conviction. Evidence in support of the complaint was submitted to the Magistrates in The Queen v. Bolton, and their decision upon such evidence was held to be binding, and, in my opinion the case goes no farther than that. "As to the degree and sufficiency of the evidence, and the credit due to the witnesses," it is said in Paley on Convictions 8th. ed. at p. 147:—

"The Magistrates alone are the judges. In this respect they are placed in the situation of a jury, and therefore whatever the King's Bench Division, upon an inspection of the proceedings, would deem sufficient to be left to a jury, on a trial, when the evidence was set out on the face of the conviction, was considered by them adequate to sustain the conclusion drawn by the convicting Magistrates. Beyond that the Court would not exercise a judgment upon the credit or weight due to the facts from which the conclusion was drawn."

N.B.

S.C.

REX v. STEEVES; EX PARTE COHEN.

McKeown, C.J.

Cornwell v. Sanders (1862) 3 B. & S. 206, 122 E.R. 78. In the case of In re Ternan (1864), 33 L.J. (M.C.) 201, 5 B. & S. 645, 122 E.R. 971, Blackburn, J., says that the test is whether, if the case had been tried at nisi pruis the Judge would have withdrawn the case from the jury. Lord Kenyon says, in The King v. Davis (1795), 6 Term Rep. 177, at pp. 178, 179, 101 E.R. 498:—

"Here was evidence tending to prove the offence. That being the case, we have no authority to examine further and see whether the conclusion drawn by the Magistrate be, or be not, the inevitable conclusion from the evidence. It is sufficient in convictions if there were such evidence before the Magistrate as in an action would be sufficient to be left to the jury. Here we cannot say there was no evidence of the fact for the consideration of the Magistrate."

See also The King v. Smith (1800), 8 Term Rep. 588, 101 E. R. 1561.

In 10 Hals. at p. 199, under the head "Error on the Face of the Proceedings" it is said that:—

"The Superior Court will not on certiorari inquire whether the lower Court has come to a right decision on the facts. But where the evidence is set out in the conviction or order, and the Superior Court are of opinion that there was no evidence proper to be considered by the magistrates in support of some point material to the conviction or order, certiorari will be granted. If there is any evidence, the court will not examine whether the right conclusion has been drawn from it."

In the case of Ex parte Vaughan (1866), L.R. 2 Q.B. 114, which was an application for a writ of certiorari to remove in to the Court of Queen's Bench an order made by two Justices and a warrant under their hands authorising the dispossession of one John Williams from the possession of a certain tenement, Cockburn, C.J. said, at pp. 116, 117:—

"I am very far from saying that where certain facts have to be proved to justify the magistrates in issuing a warrant, and they act without evidence, the Court would not control the exercise of their authority; but where a fact is to be proved which is the very essence of the inquiry, and there is evidence before the Justices on the one side and the other, the Court will not, although they may think that upon the evidence the Justices have come to a wrong conclusion, interfere to review their

decision. In all cases in which Justices have to decide a collateral matter before they have jurisdiction, and they give themselves jurisdiction by finding facts which they are not warranted in finding, the Court will review their decision, and, if they have improperly given themselves jurisdiction, will set aside the proceedings; but where the question is a material element in the consideration of the matter they have to determine, and they, exercising their judgment as judges of the fact, have decided it on a conflict of evidence, it is contrary to our principle and practice to interfere. This is consistent with the judgment of the Court in the case of Reg. v. Bolton. It was there decided that, where the question was one of fact for the Justices, and evidence was given on the one side and the other, the decision of the Justices was final, and I think it is upon the principle upon which that case was decided that we ought to proceed when called upon to review the decision of Justices."

In the case of The King v. Glossop (1821), 4 B. & Ald. 616, 106 E.R. 1062, who was convicted before two Justices of the Peace for unlawfully conducting a certain entertainment, the conviction was removed into the Court of King's Bench by certiorari on different grounds, the first of which was that it did not sufficiently appear that the defendant had caused the play to be performed. Abbott, C.J., in delivering judgment said, at p. 618:— "As to the first objection, it is sufficient to say, that it cannot prevail, unless the evidence stated on the face of the conviction, be such as that no reasonable person could draw the conclusion, that the defendant caused this particular play to be performed."

As remarked by White, J., in The King v. Limerick, 31 D.L.R. 226, it is not necessary, as formerly, that evidence taken at the hearing should be set out in the conviction. The present statutory form of conviction dispenses with that. But sec. 1124 of the Criminal Code dealing with certiorari makes it necessary that the Magistrate's return embody the full proceedings, including the depositions, and the Court or Judge before whom the question is raised must come to a conclusion "upon perusal of the depositions." I think it is correct to say that having regard to the various statutes in force in England at different periods, as well as to our Provincial and Dominion enactments, it has always been necessary upon certiorari proceedings that the depositions should accompany the Magistrate's

N.B.

S.C.

REX v. STEEVES; EX PARTE COHEN.

McKEOWN, C.J.

return, either embodied in the conviction as referred to in some of the cases already cited, or as an integral part of the return, as our present practice provides. We are dealing here with an offence against the provisions of the Intoxicating Liquor Act 1916, sec. 111, of which concludes as follows:—"No conviction, judgment or order in respect of any offence against this Act shall be removed by certiorari."

In the above cited case of the Colonial Bank of Australasia v. Willan, it will be remembered, as regards the winding-up order complained of, that their Lordships held that, by the Mining Statute, the power to remove proceedings relating to such order into the Supreme Court had been taken away. The judgment proceeds at p. 442 as follows:—

"It is however scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari, but some of those authorities established, and none are inconsistent with, the proposition that in any such case, that Court will not quash the order removed except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

As an example of the above, Ex parte Hopwood (1850), 15 Q.B. 121, 117 E.R. 404, may be cited. This case was referred to by Allen, C.J., in Ex parte Daley supra. The report shews that certiorari had been taken away by statute, and that no intention was paid by the Court of Queen's Bench to the contention that there was no evidence to warrant the conviction, Wightman, J., saying, the Court had no right to ask whether any evidence at all was heard by the Magistrate. An example of the other class of cases (i.e. where certiorari is not taken away by statute) is furnished in the case of Rex v. Glossop, mentioned above. Many more examples of both classes might be cited if necessary; and in some of the earlier cases, the reports do not disclose whether the privative clause as to certiorari was to be found in the statute under consideration or not. But in instances where certiorari is taken away by the statute, no further authority than the judgment in part

above quoted is necessary to shew that "some of these authorities established, and none are inconsistent with the proposition that in any such case that Court (Queen's Bench) will not quash the order removed except upon the ground either of manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

A difference of opinion exists as to whether the judgment of the Judicial Committee acquiesces in the soundness of the proposition above noted, or not. In the case of Rex v. Emery (1916), 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 Alta. L.R. 139, Stuart, J., of the Supreme Court of Alberta, in a lengthy and (to me) instructive judgment, (p. 559) discusses the cases of the Colonial Bank, etc., v. Willan, and The Queen v. Bolton, both of which he thinks have, in this respect, been misunderstood. In his opinion the judgment referred to cannot be treated (p. 560) "as deciding that upon certiorari a Court will not look at the evidence to see if there is any evidence at all to support a conviction by a Magistrate for a crime," and he does not qualify his opinion by confining the right of examining the evidence, to cases in which certiorari has not been taken away by statute. Beck, J., however, adheres to the distinction suggested in that part of the judgment of the Judicial Committee immediately above quoted, and concludes that where the right to certiorari is not taken away, the Court will look at the depositions to see, at p. 571, "whether there was any evidence upon which the tribunal could properly find as it did," but, "where certiorari has been taken away by statute, the jurisdiction of the Court to consider the evidence even in this limited point of view is taken away." Scott, and Walsh, JJ., agreed with Beck, J. Inasmuch as the offence charged in Rex v. Emery was against a section of the Criminal Code, in which the right to certiorari is unimpaired, the effect of a statutory provision abridging such right, was not involved in the determination of that case. But certiorari is distinctly taken away in the Act under which proceedings in the matter now before us are taken, and if the judgment of the judicial Committee above cited is to be read as supporting the view expressed by Beck, J., in Rex v. Emery, then we have no right to look at the Magistrate's return to see what testimony (if any) was given, but we should sustain the conviction made by him. But apparently that was not the view entertained

N.B.

S.C.

REX v. STEEVES; EX PARTE COHEN.

McKeown, C.J.

by this Court when The King v. Limerick; Ex parte Dewar, 31 D.L.R. 226, and The King v. Vroom; Ex parte McDonald (1919), 45 D.L.R. 494, 31 Can. Cr. Cas. 316, 46 N.B.R. 214, were under consideration. Ex parte Dewar was a prosecution for an offence against the Canada Temperance Act, and, Ex parte McDonald for an offence against the Intoxicating Liquor Act 1916. Under both of these enactments the right to a certiorari has been taken away. As previously remarked, the exclusion of the testimony taken by the stenographer in Ex parte Dewar left the Court with no evidence at all in support of the finding of the magistrate. This Court took notice of that fact, and quashed the conviction. In Ex parte McDonald the applicant was convicted under the Intoxicating Liquor Act 1916 on a charge of having liquor in a place other than a private dwelling without license. The judgment of the Court was delivered by Hazen, C.J., who, after passing under review the testimony as it appeared in the Magistrate's return, says, at pp. 498, 499 of the report:—

"The evidence was certainly very inconclusive, if it can be said that there was any evidence at all, the only evidence being the finding of the bottle before referred to in the pantry, the contents of which were not proved; but in spite of this it was urged that in view of the decisions in Ex parte Daley (1888), 27 N.B.R. 129, and in The King v. Hornbrook; Ex parte Morison (1909), 39 N.B.R. 298, the conviction should not be interfered with, the Magistrate having jurisdiction over the person and the offence. I do not, however, deem it necessary to decide this point, although it was contended that these cases were distinguishable from the present, they having been decided under the provisions of the Canada Temperance Act, and it being a fully accepted rule that no case is authority for anything but what it actually decides."

And at p. 500 the Chief Justice says:—

"Unless it were shewn that the place in which the liquor was, was a place other than a private dwelling under the meaning of the Act, the magistrate in my opinion had no jurisdiction whatever to try the case, and as there is no evidence to this effect the defendant committed no offence under the statute and I am therefore of the opinion that the conviction should be quashed."

Following the judgments of this Court in the two cases last above cited, I think the conviction before us should be

quashed. In doing so, I am of opinion, as before suggested, that we are within the scope of the observation of Barker, C.J., in Ex parte Miranda, as we are now dealing with a case wherein the evidence relied on to support the conviction is so palpably insufficient and inadequate as to be valueless.

In my opinion Crocket, J., should be advised to quash the conviction.

Judgment accordingly.

WEINFIELD et al v. LENZ.

Quebec Superior Court, Coderre, J. February 8, 1921.

GARNISHMENT (§ III—69)—CORPORATION—ORDER TO AUTHORISE OFFICER TO PRODUCE BOOKS—DEFAULT—ORDER CONDEMNING TO PAY PERSONALLY THE AMOUNT—ATTACHMENT AFTER JUDGMENT—C.P. 363, 690.

A corporation garnishee may on motion of the seizing creditor be ordered to authorise an officer to declare and produce books and documents as demanded, and in default of so doing may be condemned to pay personally the amount of the judgment, interest and costs including subsequent costs on the attachment.

[See *Baumar* v. *Carbonneau & T.S.* (1907), 8 Que. P.R. 333.]

APPLICATION for examination and production of documents by a garnishee.

Weinfield, Sperber etc. for plaintiff.

B. Benoit, K.C. for garnishee.

CODERRE, J.:—The Court, having heard the parties by counsel upon the merits of plaintiff's motion, asking that the tiers-saisie be ordered to authorise generally one of its officers to declare under oath all monies and moveable property, it has belonging to defendant and produce all books and documents for the said purpose and in default of so doing that the tiers-saisie be condemned personally for the amount of the judgment, interest and costs including all subsequent costs on said attachment and in any event that it be condemned to pay the costs of the day;

Doth grant said motion with costs against the tiers-saisie and doth order said tiers-saisie to authorise an officer to declare and to produce books and documents as demanded and in default of so doing doth condemn tiers-saisie to pay personally the amount of the judgment, interest and costs including subsequent costs on said attachment and doth condemn it to pay the costs of the day.

Application granted.

Sask.

K.B.

THE MENNONITE LAND SALES CO. LTD. v. FRIESEN.

Saskatchewan King's Bench, MacDonald, J. October 14, 1921.

SPECIFIC PERFORMANCE (§ ID—25)—CONTRACT FOR SALE OF PROPERTY—DELIVERY OF PART OF CROP AS PART OF AGREEMENT—VALUE OF CROP EASILY ASCERTAINABLE — ADEQUATE COMPENSATION IN DAMAGES.

Specific performance of a contract for the sale and purchase of chattels will not be ordered unless there is something unique or special in their character which would render a money compensation inadequate in case of a breach of such contract.

[See Annotation, Specific Performance—Grounds for Refusing, 7 D.L.R. 340.]

ACTION (inter alia) for specific performance of a contract for delivery of a crop of grain, the agreement to deliver a part of the crop being included in an agreement for the sale and purchase of land. Specific performance refused.

Bram Thompson and *C. C. Owen*, for plaintiff.

J. F. Frame, K.C., and *D. Buckles*, K.C., for defendants.

MACDONALD, J.:—By an agreement in writing dated November 27, 1920, the defendants, as trustees of the Mennonite Reserve, in the judicial district of Swift Current, agreed to sell to one John Murphy, who agreed to purchase, certain lands known as the Mennonite Reserve, comprising 105,789 acres more or less, together with all buildings and improvements upon the said land, and all live stock, implements, fodder, personal property and furniture, with certain specified exceptions, at and for the price of $4,813,399.50, upon the terms therein set forth. By letter dated April 1, 1921, and addressed to said John Murphy, the defendants offered for acceptance by John Murphy certain amendments of the terms of agreement of sale hereinbefore referred to, namely:—

1. To reduce the purchase price of the lands therein described to $44 an acre.

2. To alter the terms of payment to read in effect as follows: (a) $5,000 cash, the receipt whereof is acknowledged. (b) The sum of $1,000,000 immediately upon the deposit with the trustee hereafter referred to, of transfers of at least 90% of the said reserve computed on the basis of the lands set out in the agreement of November 27, 1920. (c) The sum of $1,000,000 on November 1, 1921. (d) The sum of $1,000,000 on April 1, 1922. (e) The balance of the said purchase-price on July 1, 1922.

3. Nothing herein contained to affect the term of the agreement of November 27, 1920, as to the transfer of the parcels of 5,120 acres as therein specified.

Sask.

K.B.

THE MENNONITE LAND SALES CO. LTD. v. FRIESEN.

MacDonald, J.

4. That The Saskatchewan Mortgage and Trust Corp'n. Ltd. be appointed as trustee to accept the transfers referred to above, and to perform such other duties as may be required of it by the terms of a trust agreement, its fees and charges to be paid share and share alike.

5. During the year 1921 we agree to crop at least 50,000 acres of the cultivated land on the said reserve and to summer-fallow the balance of the said cultivated land (the cultivated land amounting to approximately 66,000 acres) in a husband-like manner. We agree to sow one bushel and one peck of wheat to the acre.

6. You are to receive one-fifth share of all the crops grown on the said lands during the year 1921, the said share of crop due you to be delivered in an elevator or on cars at Wymark, Blumenhof, and Neville, or such other station as may be mutually agreed upon.

Said John Murphy accepted the amendments proposed in said letter of April 1, 1921.

The agreement of November 27, 1920, contained the following clause:—

"The vendors hereby covenant and agree to transfer the said lands to the purchaser forthwith at his (the purchaser's) request, and at his (the purchaser's) option, in parcels of 5,120 acres, the first of such transfers to be of the lands adjoining the Blumenhof Public School situate on Section 28, Township 14 and Range 12, West of the 2nd Meridian, whenever and so often as a sufficient sum of money shall be paid under this agreement to fully cover the purchase price, at $45.50 per acre, of the said parcel or parcels of land so requested to be transferred and to leave thereafter a reserve fund in the hands of the vendors of $25,000."

Pursuant to the provisions of the paragraph numbered 4 in the letter of April 1, 1921, there was entered into by the plaintiff; the defendants, and The Saskatchewan Mortgage & Trust Corp'n. Ltd., a trust agreement bearing date May 12, 1921. Said trust agreement recites the agreement of November 27, 1920, the amendment thereof by said letter and its acceptance, and that, as was the fact, the said John Murphy had by indenture in writing assigned to the plaintiff herein all his right, title, claim and demand in and to the said agreement dated November 27, 1920, as altered as aforesaid, and in and to the lands, goods and chattels therein mentioned; and further recites that by an agreement in writing made between the defendants and Geddie-McKay Ltd., the defendants herein agreed to

Sask.

K.B.

THE MENNONITE LAND SALES CO. LTD. v. FRIESEN.

MacDonald, J.

pay said Geddie-McKay Ltd., for finding a purchaser the sum of 4 dollars per acre on said acreage of 105,789 acres more or less. The agreement then set forth various terms, the only ones material herein being as follows: (a) That the trustee shall receive from the vendors or their solicitors, and hold the transfers of the lands of the members of the said Mennonite colony and shall deliver them to the assignee in accordance with the terms of the said agreement for sale dated November 27, 1920, and the said accepted offer dated April 1, 1921. (b) That the said trustee shall receive and hold bills of sale of such of the said personal property as is required to be transferred by the said agreement for sale dated November 27, 1920, and more particularly described in the Book of the Mennonite Association as of date October 28, 1920, and shall release to the assignee the personal property or equipment belonging to each portion of property for which the assignee calls for title and to which the assignee may be entitled to title according to the terms of the said agreement for sale dated November, 27, 1920, and the said accepted offer dated April 1, 1921. (c) That the trustee shall pay to the said Geddie-McKay Ltd., on demand out of the monies received under the said agreement for sale dated November 27, 1920, and the said accepted offer, its said commission, and being the sum of $423,156. A written receipt shall be taken by the trustee from the said Geddie-McKay Ltd., for any and all monies paid them on the said commission, and such receipt shal be treated as cash in all settlements between the trustee and the vendors.

The plaintiff herein alleges that the defendants cropped the land in the year 1921, and that the plaintiff has not received one-fifth share of the crops grown on the said land in the year 1921, nor has it been delivered to the plaintiff at an elevator or on cars as provided in said agreement as amended, and that defendants have avowed their determination to break the said agreement or contract and not to deliver the said share of the crop; and plaintiff asks for:— (a) Specific performance of said contract for delivery of the said crop; (b) An injunction to compel defendants to deliver the share of the crop belonging to the plaintiffs under the terms of the said contract at elevators, and to restrain them and the members of the Mennonite colony whom they represent from disposing of any part of the crop grown on the said Mennonite Reserve until the plaintiffs' share of the said crop shall have been delivered to the plaintiffs: (c) The appointment of a receiver in respect of the entire crop of the defendants and of the members of the

Sask.

K.B.

THE MENNONITE LAND SALES CO. LTD. v. FRIESEN.

MacDonald, J.

Mennonite colony with power to adjust the share of the said crop belonging to the plaintiff and to take possession thereof on behalf of the plaintiff.

The defendants, in answer to the plaintiff's claim, allege among other things, default by the plaintiff in paying payments owing to the defendants, and in particular of the following payments of purchase-money:

1. In the payment of approximately $476,440 being at the rate of $44 per acre for 10,260 acres of said land and the $25,000 reserve provided for in November 27, 1920, agreement before mentioned, or alternatively in default of approximately $491,830 being at the rate of $45.50 per acre for 10,260 acres of said land and said $25,000 reserve.

2. In the payment of $1,000,000 as provided in clause 2 (b) of said amending agreement of April 1, 1921, it was a term of said agreement of November 27, 1920, and said amending agreement that time should be in every respect the essence of said contract.

Whether the plaintiff has made the defaults alleged is, among other things, the subject-matter of another action pending in this Court which has been partially tried before me, but which I have not yet disposed of, and cannot for some time dispose of, because in my opinion all parties concerned were not before the Court, and I have ordered certain other parties to be added as defendants. It would therefore be embarrassing and inconvenient if in this action I were to make any finding as to whether the plaintiff has made the alleged defaults or either of them.

But without deciding that question, the plaintiff is not in my opinion entitled to specific performance, decreeing delivery of a fifth share of the crop.

In 27 Hals., at pp. 14, 15, I find the law stated as follows:—

"The court also refuses specific performance of a contract to sell or purchase chattels which are not specific or ascertained. It may, however, specifically enforce a contract to deliver specific or ascertained chattels, and it does enforce such a contract or any other obligation to deliver chattels if the goods are of so unique or special a character that money compensation is not adequate."

And for said statement of the law various authorities are cited. In 27 Halsbury, p. 13, I find the following:—

"The ground for the interference of a court of equity by enforcing specific performance of contracts being the inadequacy of the remedy at common law, which was by payment of a sum

Sask.

K.B.

THE MENNONITE LAND SALES CO. LTD. v. FRIESEN.

MacDonald, J.

of money as damages, it follows that the court does not so interfere in cases where a money payment affords an adequate remedy."

In this case it is clear that damages will afford an adequate remedy if the defendants have committed or will commit any breach of contract by refusing to deliver one-fifth share of the crop. According to the evidence, one-fifth of the crop will amount to between two hundred thousand and two hundred and fifty thousand bushels. It is a commodity the value of which is easily ascertained, and it is clear from the provision in the contract for the delivery of the grain at elevators or on cars that the intention of the plaintiffs was to sell the crop in due course. Even assuming that it may be found that the plaintiff has not made the alleged defaults in payment of the purchase-price, there still remains unpaid under the contract, according to the evidence, the total amount of the purchase-price less $5000 paid on the execution of the agreements, and a sum of $476,440 which the plaintiff alleges to have paid but which the defendants deny, and of this sum one million dollars becomes payable on November 1, next. It is therefore clear that if the plaintiff recovers judgment against the defendants for damages for non-delivery of said portion of the crop, it will experience no difficulty in enforcing satisfaction thereof. I am therefore clearly of opinion that the plaintiff is not entitled to specific performance.

As to the claim for an injunction, it will be noted that the injunction asked for is to compel the defendants to deliver the share of the crop belonging to the plaintiff and to restrain them from disposing of *any part* of the crop, grown on the said Mennonite Reserve. So far as the first part of said prayer is concerned, it is only another mode of asking for specific performance, and so far as it seeks to restrain the defendants from disposing of any part of the crop, I can conceive of no principle on which the same could be granted, for surely the defendants would have absolute right to dispose of four-fifths of the crop which they are not required by the terms of the contract to deliver to the plaintiff at all, and even as to the one-fifth in question it is clear to me, in view of all the facts and circumstances of this case, the questions still to be decided between the plaintiff and the defendant, and which I cannot dispose of in this action, and the large amount of money still unpaid under the agreement to purchase in question, that it is neither just nor convenient that there should be an injunction.

In this case the Western Trust company was by an inter-

locutory order appointed interim receiver. The plaintiff's action will be dismissed. The said receiver shall give to the Court an account of its receivership. Out of the proceeds of the crop that may come to the hands of the receiver, the receiver shall be entitled to deduct its costs, charges and expenses, and the plaintiff shall pay to the defendants their costs of action, together with the amount that shall have been so paid to or retained by the receiver. Should any further directions be required to carry out this judgment, either the plaintiff or the defendants or the receiver may apply on notice and further directions are reserved. Decision on the defendants' counterclaim for rescission of the contract in question, alleging among other things as grounds therefor the alleged defaults in payments pleaded, is reserved. This judgment shall not prejudice the plaintiff in any action it may hereafter see fit to bring for damages for non-delivery of said share of the crop.

Action dismissed.

LEVASSEUR v. THE KING.

Exchequer Court of Canada, Audette, J. March 14, 1921.

PUBLIC WORKS (§ IV—65)—GOVERNMENT RAILWAY PLATFORM BUILT ACCORDING TO CUSTOM—LATENT DEFECT—BREAKING OF RAIL SUPPORTING — INJURY — NEGLIGENCE — DAMAGES — LIABILITY OF CROWN.

The breaking of a platform, constructed according to the usual custom and shewn to be strong enough under normal conditions for the purpose for which it was constructed, owing to a latent defect or flaw in part of the material used, does not constitute negligence in its construction on the part of an employee of the Crown for which damages will lie against the Crown.

PETITION of Right to recover $5,000 for damages as result of an accident whilst in the employ of the Intercolonial Railway. Dismissed.

Napoléon Laliberté, for suppliant.

C. V. Darveau, for respondent.

AUDETTE, J.:—This is a petition of right whereby it is sought by the suppliant, to recover the sum of $5,000 for damages, he alleges, he suffered as the result of an accident met with while in the employ of the Intercolonial Railway, a public work of Canada.

On November 22, 1917, the suppliant, as a temporary employee of the railway, formed part of an extra gang of men, under foreman Chappedelaine, engaged in the general repairs or work on the railway.

Can.

Ex. C.

LEVASSEUR v. THE KING.

Audette, J.

Travelling on a working train, these men arrived at a certain place to load some rails piled on the side of the track. They alighted from their cars upon a platform formed by these rails and the train moved on to a place opposite the rails the car upon which they were to be loaded.

While the train was being moved, the men, between 26 or 28 in number, remained on this kind of platform.

The platform was made up by placing two transversal rails running from the railway track towards the fence of the right of way. On the railway embankment, the end of the rail was placed and rested upon a tie and on the side of the fence, across the ditch, there were six ties adjusted in the manner mentioned by witness Masse upon which the other end of the rail rested. Then there were 37 rails placed upon these two transversal rails. A rail is 5 inches wide at the heel.

While the men were standing on the platform, one of the transversal rails broke, with the result that the rails, at the end, slipped to the centre—at the break—and piled on top of one another, with the result that the suppliant's right hand was caught under some of the rails and injured thereby. He lost 1 1-3 phalange of the thumb, 2 phalanges of the index and one phalange of the major.

Now it is satisfactorily established by the evidence that this pile or platform was made in the usual manner and that the rail, barring some defect, was strong enough to carry these men with even a larger quantity of rails.

No action sounding in tort will lie against the Crown, unless it is made liable therefor by statute. To succeed in the present action, the suppliant must bring his case within the ambit of sec. 20 of the Exchequer Court Act R.S.C. 1906, ch. 140, and he can only succeed, as thereby provided, when the accident is the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment. It is a law of exception.

This platform or pile of rails being made, as above mentioned, in the usual manner and it being established by uncontroverted evidence, that under normal conditions, the rail would not have broken under the weight submitted on the day of the accident, but for some defect; it must be found that the breaking was accidental or the result of a latent defect, or flaw in the cast, want of cohesion in the manufactured steel. The defect was hidden and inherent to the matter and could not be seen. To use the rail in the manner it has been used does not indicate any want of care or negligence in the circumstances in question.

The onus of establishing negligence is upon the suppliant and he has failed to do so. The accident remains unexplained. The case is not within the statute and the action fails. *Colpitts* v. *The Queen* (1899), 6 Can. Ex. 254; *Dube* v. *The Queen* (1892), 3 Can. Ex. 147.

What happened was fortuitous and unexpected. *Thompson* v. *Ashington Coal Co* (1901), 84 L.T 412, 65 J.P. 356, 17 Times L.R. 345. The event was unforeseen and unintended, or was "an unlooked-for mishap or an untoward event which was not expected or designed." *Fenton* v. *Thorley Co.*, [1903] A.C. 443, 72 L.J. (K.B.) 787, 89 L.T. 314, 52 W.R. 81. *Higgins* v. *Campbell*, etc., [1904] 1 K.B. 328. It was a personal injury by accident. In *Briscoe* v. *Metropolitan St. R. Co.* (1909), 120 So. West L.J. 1162 at p. 1165, an accident is defined as "such an unavoidable casualty as occurs without anybody being to blame for it; that is, without anybody being guilty of negligence in doing or permitting to be done, or in omitting to do, the particular things that caused such casualty."

Witness Chappedelaine, heard by the suppliant, explains the accident by hazarding the conjecture that the broken rail must have been defective from the fact that the other rail did not break, and that it happens often that there is a flaw in the rail; but that such flaw is not easy to be seen. After examining the rail at the break, he says that the rust was not evenly spread over the break,—there was a part that was darker. At first sight, he adds the defect could not be detected. Witness Patry, also heard on behalf of the suppliant, testifies that there was no means of seeing if the rail was dangerous. Then witness Massé, heard on behalf of the Crown, testifies that he examined the rail in question before using it, without however turning it over, looking underneath, and contends that if there had been a break or a split (cassure ou felure) he would have seen it; but adds that when the rail is dry, one can slip or overlook it; and that neither himself nor any one else could have detected any flaw or defect before the accident.

The want of discovering such a defect or flaw, under the circumstances of the evidence, after exercising reasonable care and skill cannot amount to negligence. *Brannigen* v. *Harrington* (1921) 37 Times L.R. 349.

Reasonable care has been used in the selection of the rail and the defect being latent and not capable of detection, as established by the evidence adduced on behalf of the suppliant, the break does not amount to negligence.

As already stated, to succeed in the present case, the sup-

B.C.

C.A.

DOMINION TRUST v. BRYDGES.

Macdonald, C.J.A.

pliant must shew affirmatively that there was negligence, the burden of proof was upon him and he has failed to do so and the action cannot be maintained,—unfortunate as the result might be. *Dube* v. *The Queen*, 3 Can. Ex. 147.

The suppliant was a temporary employee of the railway and as a condition precedent to working upon the railway had become insured by the Association and Insurance of the Railway Employees. He had received the booklet, Ex. E, whereby, by one of its clauses, terms or conditions the railway, in consideration of its financial contribution, is declared relieved from all claim for compensation in respect to injuries or death of the insured. However, in the view I take of the case, having found that no negligence has been proved, it becomes unnecessary to pass upon the question of insurance. *Conrod* v. *The King* (1914), 49 Can. S.C.R. 577; *Gingras* v. *The King* (1918), 44 D.L.R. 740, 18 Can. Ex. 248; *Gagnon* v. *The King* (1917), 41 D.L.R. 493, 17 Can. Ex. 301; *Thompson* v. *The King* (1921), 20 Can. Ex. 467.

There will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his petition of right.

Judgment accordingly.

DOMINION TRUST v. BRYDGES.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 9, 1921.

COSTS (§ I—2c)—APPEAL BOOK—RESPONDENT INSISTING ON IRRELEVANT EVIDENCE BEING INCLUDED—RIGHT OF APPELLANT TO COSTS INCURRED ALTHOUGH UNSUCCESSFUL ON APPEAL—RULE 872c.

Where an appellant has incurred costs by reason of the respondent's insisting upon the inclusion in the appeal book of a certain portion of the evidence which was irrelevant to the questions to be decided in the appeal, the Court has jurisdiction to and will order the payment of these costs to the appellant although he has been unsuccessful on the appeal.

APPLICATION by an unsuccessful appellant asking that the respondent be ordered to pay the costs of the inclusion of certain material in the appeal book . Application granted.

J. Martin, K.C. and *H. W. Bucke*, for appellant.

Chas. H. Tupper, K.C. for respondent.

MACDONALD, C.J.A.:—By Order in Council, dated July 31, 1920, the following rule was made:—

Rule 872c. "Where in the course of the preparation of the appeal book, one party objects to the inclusion of a document

or of a portion of the notes of evidence on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon it being included, the appeal book as finally prepared shall, with a view to the subsequent adjustment of the costs of and incidental to such document or notes of evidence, indicate in the index of papers or otherwise, the fact that and the party by whom the inclusion of the same was objected to."

After the dismissal of the appeal, counsel for the appellant applied to the Court for a direction that the costs incurred by his client by reason of the respondent's insistence upon the inclusion in the appeal book of a certain portion of the notes of evidence, which he contended was irrelevant to the questions to be decided in the appeal, and which I think, clearly was so, should be ordered to be paid by the respondent to the appellant. This portion of the notes of evidence had been duly indexed, pursuant to the rule. I think the only effect of the rule, if indeed it required a Rule of Court to effect that purpose, was to enable the party opposing the inclusion of the notes of evidence in the appeal book, to have the same ear-marked for identification in view of a subsequent adjustment of the costs.

It was argued that the taxing officer is the one to make such adjustment, in other words, that the taxing officer is to decide how the costs of such notes of evidence should be disposed of as between the parties. It is hardly needful to point out that the taxing officer can only tax where there is an order of the Court that one party shall recover costs from the other. When an appeal is dismissed and no special order is made by the Court disposing of the costs otherwise than to the successful party, the costs are to be taxed to the respondent and while the officer may disallow items which he shall consider irrelevant to the issues raised in the appeal, he has no power to saddle such costs upon the successful respondent. Is the party then who rightly opposes inclusion of unnecessary matter in an appeal book without means of redress for the expenditure occasioned thereby? I think not. While the general costs of the appeal are by statute directed to be given in accordance with the event, yet the Court has power, for good cause, to order that they be otherwise disposed of, and that being so, *a fortiori*, the Court has power to order that the costs of particular matters or issues, shall, for good cause, be otherwise disposed of.

With respect to the general costs of an appeal, it is, I think, the practice not to order the successful respondent to pay these to the unsuccessful appellant. He may be *deprived* of them for good cause, but it has not been the practice I think to order

B.C.

C.A.

DOMINION TRUST v. BRYDGES.

Macdonald, C.J.A.

him to *pay* them; *Thompson v. Denny*, (1917), 39 D.L.R. 421, 25 B.C.R. 29. We are not here, however, dealing with the general costs of the appeal but with particular costs. It is, I think, clear that before the Judicature Act, the Court of Chancery enjoyed and exercised jurisdiction inherent in the Court to impose costs of particular proceedings upon the party who ought to pay them, irrespective of whether he were the plaintiff or defendant. When, therefore, there is in the opinion of the Court, good cause for ordering that the costs of a particular proceeding or matter in the appeal, should be paid by the successful party, the Court has full discretion and in the exercise of that discretion, may order a respondent as well as an appellant, to pay such costs.

Jessel, M.R. in *Dicks* v. *Yates* (1880), 18 Ch. D. 76 at p. 85, after pointing out that the Court had power to *deprive* a successful defendant in an action of the costs of the action, also pointed out that the Court had "a discretion to make him pay, perhaps a greater part of the costs by giving against him the costs of the issue on which he fails or *costs in respect of misconduct by him in the course of the action.*"

The misconduct here referred to, is, I take it, legal misconduct. That was the exercise of the inherent power of the Court, a power which this Court possesses in as full a measure as did the former Court of Chancery, subject of course to the restrictions imposed by statute, which restriction is wholly removed when good cause is found. The practice which prevailed in England is considered more at large in *Thompson v. Denny*, *supra*.

The said R. 872e. neither adds to nor detracts from this inherent jurisdiction; it confers no new power upon the taxing officer, but provides, very properly, I think, a means of earmarking the particular material in the appeal book, in respect of which the Court may later be asked to give relief. This power ought I think to be exercised with due caution, having regard to the fact that it is often difficult for counsel to determine with precision, what evidence or material may or may not be regarded by the Court as of value. The Court, however, at or after the delivery of judgment in the appeal should be in a much better position to decide questions of this character than any officer of the Court, since the evidence would be fresh in our minds.

As I have already said, I think the notes of evidence in question were clearly irrelevant to the issues raised in the appeal and therefore would order that the costs of and incidental to their

inclusion in the appeal book should be paid by the respondent to the appellant, or set off against the general costs of the appeal.

MARTIN, J.A., agrees.

GALLIHER, J.A.:—This is an application by an unsuccessful appellant asking not only that we disallow the successful respondent's costs, (if any) of the inclusion of certain material in the appeal books, but that we order the respondent to pay the costs of such inclusion to the unsuccessful appellant.

The circumstances are these: In preparing the appeal book the appellant opposed the inclusion of this material and the respondent insisted on its going in and was upheld by the Registrar with the result that the appeal books as they were settled and came before us contained this material. The cost of this amounted to a considerable sum.

This Court was of the opinion that this material was not necessary or relevant to the matter to be argued before us, although it was adduced at the trial.

There can be no question as to our jurisdiction in a proper case to refuse costs to the respondent for good cause. Apart from any statute or rule governing the matter, our jurisdiction would be that which was vested in the Court of Chancery in England prior to the Judicature Act. Our rule limiting that jurisdiction is to the effect that costs follow the event unless the Court for good cause otherwise orders. But we are asked to go further here, and to award costs to an unsuccessful appellant.

It is to be noted that the costs we are asked to award are not the general costs of appeal. This I have no doubt we could not do, and I refer to the case of *Thompson* v. *Denny*, 39 D.L.R. 421, 25 B.C.R. 29, where Macdonald, C.J.A., has collected and discussed the English cases, and as I view those cases, has drawn the proper inferences therefrom.

The costs we are asked to award here are as I have before stated, not the general costs of appeal but specific costs incurred in that appeal brought about entirely by the wrongful insistence of the respondent and against the express opposition of the appellant. In other words, the appellant was burdened and wrongly so with these costs by the wrongful insistence of the respondent.

To the extent to which costs are asked here, I think we have the jurisdiction, but I feel much as Lord Justice Knight Bruce expressed it in *Dufaur* v. *Sigel* (1853), 4 DeG. M. & G. 520, 43 E.R. 610, that it is a jurisdiction or considerable delicacy and difficulty.

Can.

S.C.

TOWNSHIP OF ZONE v. MCDOWELL.

Idington, J.

No general rule could very well be laid down and the circumstances of each case would have to be considered. Both parties are entitled to have all the evidence that may be relevant to the issues in appeal included in the appeal book, or. I will go further and say, that may be fairly and reasonably considered to be so—but where as here, in my opinion, it should have been apparent that the evidence was not necessary or relevant for the purposes of appeal and the appellant against his will was forced to include it and incur unnecessary expense, he should be reimbursed those expenses by the party in fault.

I think it is a proper case in which to grant the application with costs.

MCPHILLIPS, J.A., agrees.

Application granted.

TOWNSHIP OF ZONE v. McDOWELL.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. October 11, 1921.

HIGHWAYS (§ VB—256)—LOCATION—OWNERSHIP OF STRIP OF LAND BETWEEN FENCE AND BOUNDARY OF ROAD—ALLOWANCE CLAIMED BY MUNICIPALITY—DEDICATION—SURVEY UNDER SURVEYS ACT—SEC. 478 OF MUNICIPAL ACT NOT APPLICABLE—BINDING EFFECT OF SURVEY.

What is now sec. 478 of the Municipal Act was first enacted in 1881 and the character of the provisions in the original and subsequent enactments make it reasonably certain that they were meant to apply only to roads thereafter opened and laid out, and therefore sec. 478 does not apply to a road which has been in use as a travelled highway for twenty years before the statute of 1881 was enacted, and in such a case the line surveyed and marked on the survey approved by the Minister under sec. 13 (4) of the Surveys Act is final and conclusive on all persons, and on the municipality in which the road is situate.

[*McDowell* v. *Tp. of Zone* (1920), 48 O.L.R. 459, affirming 56 D.L.R. 288, 48 O.L.R. 268, affirmed.]

APPEAL by municipality from the judgment of the Supreme Court of Ontario, Appellate Division, in an action for an injunction restraining the appellants from trespassing on and injuring respondent's property, which was claimed by the appellants to form part of the highway. Affirmed.

J. M. Pike, K.C., for appellant.

I. F. Hellmuth, K.C., for respondent.

DAVIES, C.J.:—I would dismiss this appeal with costs, and concur in the reasons for judgment as stated by Anglin, J.

IDINGTON, J.:—This case might have been so presented as to raise some important questions of law governing the rights of

litigants similarly situated, but I doubt if on the evidence any satisfactory decision of such a character can be reached.

The base line road, so called with appellant's jurisdiction, for some reason or other, or none at all so far as appears in evidence, was constructed in such irregular fashion that a contest arose between the landowners on either side claiming that those opposite them had got an advantage by reason of the actual road not being placed where it should have been. This resulted in an application being made under sec. 13 of the Surveys Act, R.S.O. 1914, ch. 166, by the appellant's council to the Lieutenant-Governor in Council to cause the concession lines to be surveyed on either side of that part of said base line now in question and to be marked by monuments as provided by said statutory provision.

The authority so applied to, duly directed such surveys, and it was proceeded with at some considerable expense and trouble.

The necessary steps to enforce the results reported by McCubbin, the surveyor chosen, were duly taken and that line so surveyed was duly established.

When it became evident what such results would be, the appellant's council sought to revoke its application, but the Minister in charge of such subject matters after due consideration declined to accede to such request.

When the process directed for establishing such concession lines had been duly completed, the respondent, as owner of several lots fronting upon said base line, moved out his fence to the McCubbin line, so established.

The appellant directed his fences to be torn down more than once.

The respondent then brought this action to restrain such conduct on appellant's part, and the trial resulted in a judgment of Orde, J., holding (1920), 56 D.L.R. 288, 48 O.L.R. 268, that appellant having appealed to the tribunal duly constituted to hear and determine such like issues, it must abide by the result, and that in accord with such result the respondent was right and appellant wrong, and granted the injunction asked by respondent against appellant's council repeating its lawless proceeding of tearing down respondent's fences placed on the McCubbin line, and to pay such damages as already done, and, if the parties could not agree on that, same to be settled by a reference, and to pay respondent's costs.

The appellant sought relief in the second Appellate Division of the Supreme Court of Ontario (1920), 48 O.L.R. 459. That Court held, that on the facts adduced in evidence, it was un-

Can.

S.C.

TOWNSHIP OF ZONE v. MCDOWELL.

Idington, J.

necessary to determine the question which may be properly raised some day, of how far the line laid down by a survey pursuant to sec. 13 of the Surveys Act can invade the actual travelled highway upon which public money has been expended in construction thereof, and dismissed the appeal.

In answering that which I think a quite correct view, if the evidence supports it, I am surprised to find that appellant does not seem to have come prepared with a case presenting evidence to meet such an obvious view of the law.

Its conception of a highway under such circumstances is not that travelled on and upon which public money has been actually expended to make it travellable, but that all that happened to exist, rightfully or wrongfully, between the fences on either side must be held to be the highway within the meaning of what we have to deal with.

Accordingly, turning to the evidence upon which it relies herein, one of the first assertions in the factum for appellant in this connection is that where plaintiff moved his fences "was on the graded portion of the road" (Case p. 18, line 13).

Turning to that page of the case I am surprised to find the following: "Q. And your fence was moved out where it would obstruct travel to some extent on the road? A. I don't think so. Q. It was on the travelled portion of the road, on the graded portion? A. Well, you could use it for a car if you wished. Q. Yes, that was over in a ditch there was on the south side? A. There was no water course on the south side. Q. So that it was really all the way that could be travelled? A. It could be travelled, but it was on grass I put the posts, not on the travelled part."

This illustrates appellant's point of view in regard to the whole case and its contention to be that despite the old definition in the Municipal Act of 1866 (Can.), ch. 51, and long before and after, being as follows:—

"315. All allowances made for roads by the Crown Surveyors in any Town, Township or place already laid out, or hereafter laid out, and also all roads laid out by virtue of any Act of the Parliament of Upper Canada, or any roads whereon the public money has been expended for opening the same, or whereon the Statute Labour hath been usually performed, or any roads passing through the Indian Lands, shall be deemed common and public highways, unless where such roads have been already altered, or may hereafter be altered according to Law."

The highway is what lands happen to be found between the two fences on either side.

I submit you cannot extend the statutory definition beyond the actual roadway unless coupled with other circumstances such as the original survey, or the dedication by someone, or some such right to claim expansion beyond that part travelled upon and or improved so as to be travelled upon.

Counsel for appellant in argument expressly renounced claim resting upon dedication.

As demonstrating appellant's contention to be such as I ascribed to it, I find a mass of evidence that does not pretend to adhere to the travelled way as the highway, but takes as the sole guide to ascertain and determine the farm fences on either side, sometimes very feeble and irregular at that, if one applies common knowledge as to conditions in this country.

The very interesting question of law of whether or not the actual travelled and graded highway in use having had public money expended upon it and been found beyond the bounds presented by a report such as that of Mr. McCubbin in question herein, can yet be declared, by virtue thereof, to be receded as it were to the rightful owner, does not seem to me to arise on the evidence presented in this case.

Apart from such question of fact giving rise to a necessary solution of that problem, there is nothing in this appeal.

I am not prepared to declare that the view of the evidence taken by the Court below is erroneous and upon the facts as in the judgment declared I am not prepared to say that Court is wrong and in regard to the relevant law applied thereto I think that Court clearly right.

I would therefore dismiss this appeal with costs.

ANGLIN, J.:—That under the original survey the strip of land in dispute formed part of lot 4 now owned by the respondent is, I think, conclusively established by the confirmation of the McCubbin survey by the Minister of Lands, Forests and Mines under sec. 13 of the Surveys Act, R.S.O. 1914, ch. 166. The appellant defendant nevertheless asserts that it is part of the highway known as the base line. It rests this claim neither on prescription nor dedication, but solely on the effect of sec. 478 of the Municipal Act, R.S.O. 1914, ch. 192, which reads as follows:—

"478. (1) Where the council of a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not wholly or partly, upon such allowance, the land occupied by the road as so opened shall be deemed to have been expropriated under a by-law of the corporation, and no person on whose land such road or any part

Can.

S.C.

TOWNSHIP OF ZONE v. MCDOWELL.

Anglin, J.

of it was opened shall be entitled to bring or maintain an action for or in respect of what was done or to recover possession of his land, but he shall be entitled to compensation under and in accordance with the provisions of this Act as for land expropriated under the powers conferred by this Act.

(2) The right to compensation shall be forever barred if the compensation is not claimed within one year after the land was first taken possession of by the corporation."

The trial Judge held that the operation of that section was superseded by the confirmation of the McCubbin survey by the Minister under sec. 13 of the Surveys Act. The Appellate Divisional Court, 48 O.L.R. 459 at p. 462, expressing no opinion on that point, based its judgment, dismissing the defendant's appeal, on the ground that because "there is no evidence shewing the performance of any statute labor or the expenditure of any public money on any portion of the strip in question; nor so far as appears has it ever been used as a highway" that strip of land had not been shewn to be part of "the land occupied by a road" opened by the municipal council by mistake within sec. 478 of the Municipal Act.

While there is, no doubt, cogent evidence given by the engineer Flater, called by the plaintiff, that the strip of land in question at no point encroached on the travelled way, with great respect there is some testimony adduced by the defendants that some of the permanent boundary posts planted by McCubbin were on the graded roadway, and there is also evidence that the ditch on the south side of the *via trita* and some small part of the latter itself were within the disputed strip.

But in the view I take of the purview of sec. 478 of the Municipal Act, it is unnecessary to rest a judgment on the determination of that issue of fact, which if found in the appellant's favour, would probably cover only a comparatively small part of the land in dispute and would render another survey necessary, unless, as held by the trial Judge, the McCubbin survey should be deemed to have fixed finally the boundaries of the highway by virtue of the provisions of the Surveys Act.

What is now sec. 478 of the Municipal Act was first enacted in 1881 (Ont.), ch. 24, secs. 15, 16:—

"15. In case it appears that any municipality in whose jurisdiction an original road, or allowance for road is situate, shall open that which they take and believe to be the true site of the same, and in case the municipality, their officers and servants shall act in good faith, and shall take all reasonable means to inform themselves of the correctness of their line and work, and

in case it appears that the road being opened, although not or not altogether upon the true line of the original road, or allowance for road, is nevertheless, from any difficulty in discovering correctly the true line, as near to or as nearly upon the true line as under the circumstances could then be ascertained, no action shall be brought by any person against the municipality, their officers or servants, for or in respect of the opening of such road or allowance for road, or for any other act or matter whatsoever connected with or arising from the same.

16. The municipality shall, however, in any case respecting the opening of an original road, or road allowance, make to any person having title to or interest in the same, reasonable compensation in full of all claims, and as a final settlement of the same: Provided the claims for such compensation shall be made within one year from the time of the laying out or taking possession of such road by the municipality or its officers, or the part thereof in respect of which compensation is claimed, and in the event of the parties not agreeing as to the amount or terms of such compensation, the same shall be ascertained and the payment thereof enforced under the provisions of the municipal Act relating to arbitrations."

The character of these provisions makes it reasonably certain that they were meant to apply only to roads thereafter opened or laid out. The verbs "shall open," "shall act," and "shall take" in the future tense so indicate, and the restriction of the provision for compensation to claims "which shall be made within one year, etc.," seems to put that beyond doubt. There is nothing to show that the municipality "opened" or "laid out" the road known as the base line. On the contrary it would rather seem that the owners of the adjoining lands on either side had erected fences on what they conceived to be the boundaries of their lots as best they could, leaving what they regarded as the road allowance between them. There is no evidence in the record that the officers and servants of the municipality "acted in good faith" or that they took "all reasonable means to inform themselves of the correctness of their line and work," or that the road opened was, "from any difficulty in discovering correctly the true line as near to or as nearly upon the true line as under the circumstances could then be ascertained."

The evidence puts it beyond doubt that the base line road had been in use as a travelled highway for about 60 years, that is for some twenty years before the statute of 1881 was enacted.

Sections 15 and 16 of the statute of 1881 were carried into the Consolidated Municipal Act of 1892 (Ont.), ch. 42, as sec.

Can.

S.C.

TOWNSHIP OF ZONE v. MCDOWELL.

Brodeur, J.

549 in substantially the same form as in the original enactment of 1881. In the Revision of 1897 (R.S.O. ch. 223, sec. 635) the future subjunctive "shall open" was replaced by the present "opens." The section was carried in the same form into the consolidation of 1903 (Ont.), ch. 19, sec. 635. "Open" was in the revision of 1913 substituted for "opens," and the conditions as to good faith, care and unavoidable error are now covered by the comprehensive phrase, sec. 478; "where the council of a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not wholly or partly upon such allowance." At the same time an idea which had theretofore been left to implication was expressed in the words "the land occupied by the road . . . . shall be deemed to have been expropriated," and the provision restricting the right to recover compensation to claims made within one year "after the land was first taken possession of by the corporation" was retained.

I have no doubt whatever that sec. 478 does not apply to the road here in question. Apart from the other reasons for that conclusion above indicated, the fact that it was opened long before there was any such statutory provision seems to me to be conclusive against the claim of the appellant.

Any difficulty presented by sec. 478 being thus removed, there appears to be no valid reason for not giving effect to the provisions of sub-sec. 4 of sec. 13 of the Surveys Act, that the lines surveyed and marked on a survey approved by the Minister under that section, "shall thereafter be the permanent boundary lines of such concession or side roads—to all intents and purposes and the order of the Minister confirming the survey shall be final and conclusive upon all persons, and shall not be questioned in any Court."

The appeal in my opinion fails and must be dismissed with costs.

BRODEUR, J.:—There had been for years a dispute as to the true location of the original road allowance of the base line in the Township of Zone. This township had been surveyed about a century ago, and the adjoining proprietors of the base line had erected fences to divide their farms from the highway.

In 1915, the council of the appellant township resolved, at McDowell's request, to bring a government engineer to establish the true line of the road allowance. The Government under the provisions of the Surveys Act sent an engineer, McCubbin, to make the survey. The survey as reported was evidently adverse to the township's claims, and the township then rescinded

its resolution asking for this official survey; but the Minister of Lands and Forests would not accede to such a request and he confirmed the survey which, according to the provisions of the law, became "final and conclusive upon all parties" and could not be questioned hereafter in any Court whatsoever.

The municipality now urges that sec. 476 of the Municipal Act should apply. This section provides that where a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be but which is not wholly or partly upon such allowance, then the land occupied by the road as so opened shall be considered as having been duly expropriated.

It seems to me that the municipality having requested the provincial authorities to determine the boundary line between its highway and the adjoining land owners is debarred from asking any other boundary than the one declared by such provincial authorities. There never was on the additional piece of land which the township now claims any statute labour nor the expenditures of any public money. It is not in evidence either that this piece of land was used as a public highway.

For these reasons the appeal should be dismissed with costs.

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

Appeal dismissed.

REX v. READ.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. October 24, 1921.

EVIDENCE (§ XIIL—995A)—COMMON BAWDY HOUSE—CONVICTION FOR KEEPING AND MAINTAINING—ROOM IN HOTEL OCCUPIED FOR ONE NIGHT—EVIDENCE—CONFESSION—ADMISSIBILITY OF.

A conviction for keeping and maintaining a common bawdy house contrary to sec. 228 of the Criminal Code cannot be sustained where the evidence is that the defendant was only an occupant of a room in a hotel for one night, there being no evidence that she had ever occupied the room before, and no evidence of any act of immorality having taken place in the room, and no evidence as to the reputation of the defendant.

Evidence of admissions made by the defendant to the police officer at the time the room was raided, held to be inadmissible there being no affirmative evidence on the part of the prosecution that the confession was free and voluntary.

[*The King* v. *Mercier* (1908), 13 Can. Cr. Cas. 475, distinguished; Authorities in *Rex* v. *Nat Bell Liquors Ltd.* (1921), 56 D.L.R. 523, referred to. See also *R.* v. *Jones* (1921), *post* p. 413.]

APPEAL by leave from judgment of IVES, J., dismissing an application in *certiorari* proceedings to quash a conviction on

Alta.

App. Div.

REX v. READ.

Clarke, J.A.

summary trial by a Police Magistrate against the defendant for keeping and maintaining a common bawdy house contrary to sec. 228 of the Criminal Code. Reversed and conviction quashed.

J. K. Paul, for appellant.

A. A. Mahaffy, for Attorney-General.

CLARKE, J.A.:—The information and conviction are regular in form, and the offence charged is within the jurisdiction of the Police Magistrate.

The main ground of attack is that there was no evidence before the Magistrate to support the conviction.

It is now settled, so far at least as this Court is concerned, that the Court will examine the evidence for the purpose of ascertaining if there was sufficient evidence to maintain the charge.

The authorities are fully discussed in *Rex* v. *Nat Bell Liquors Ltd.* (*No.* 2) (1921), 56 D.L.R. 523, 35 Can. Cr. Cas. 44, 16 Alta. L.R. 149.

Apart from the evidence of admissions or confessions by the defendant, the evidence is not in my opinion sufficient to justify a conviction notwithstanding the wide provisions of the Criminal Code as amended in 1907 (Can.), ch. 8, and 1917 (Can.), ch. 14. As it now stands a "common bawdy house" is defined as "a house, room, set of rooms, or place of any kind kept for purposes of prostitution or for the practice of acts of indecency or occupied or resorted to by one or more persons for such purposes." Shortly, the evidence, apart from the admissions above referred to, is that A., who was occupying a room at an hotel for only one night and was a stranger to the defendant, in response to an invitation from her, entered the room adjoining his and she locked the door. His statement is that he did not know what he went to the room for except that she called him. There was no chance to talk except that she asked him how he felt or something like that, when the police officers arrived about 10 o'clock p.m. and went into the room. He says he was only in her room about a minute. At the trial he was asked by one of the officers, "What happened when you went into the room?" and he replied, "Before it happen you come in." He did not have any of his clothes off. One of the police officers stated that "the defendant did not live in the room. She had no baggage; one or two towels were in her room and dress. She was not what you would call properly dressed. She was dressed as he judged for the matter of turning tricks." He also stated A. had been there probably 10 minutes before the officers went there. In this he differs from the evidence of A. This statement of the officer I take to be based on surmise, but if he is correct as to

the time, it seems to me to negative to some extent any inference which might be drawn as to the immoral purpose of the visit, for in that length of time, if such were the purpose, one would expect he would have undressed. I would not conclude from the evidence that the delay in opening the door was sufficient to enable him to appear fully dressed as he was when the officers entered. The officer also stated: "This is a hotel with a lot of these women in it." He also stated that the defendant had her waist and skirt on, but it is not clear whether this was at the time he first entered the room or not. Another officer who was present when her room was entered—by the police—gave evidence that on returning to it some time afterwards he looked in and the accused smiled to him and said: "It was unfortunate we had come so early." He also said that by her actions she seemed to be a woman of the underworld and that A. did not put up any kick about being taken to the police station; he understood it was for being in the woman's room for immoral purposes. There was no evidence of the reputation of the defendant, and the police officers had never seen her before. Upon this evidence it is not difficult to surmise that the defendant's invitation to A. to enter her room was for an immoral purpose, though not necessarily so; but assuming such to be her purpose, that is far from establishing that she was keeping a common bawdy house; the necessary ingredients of the offence are lacking; it does not shew that she was keeping the room, for all that appears so far she had never occupied the room before. Neither does it shew the room was kept for purposes of prostitution or for the practice of acts of indecency, nor that the room was occupied or resorted to for such purposes, unless the fact of a man and woman going to a room for the purpose of having carnal intercourse is sufficient to justify a finding that the room is occupied or resorted to for purposes of prostitution or for the practice of acts of indecency. To so hold would in my opinion give a meaning to the section defining "a common bawdy house" never intended by Parliament. It would constitute a single act of fornication anywhere, even in a fence corner, to be a criminal offence, and if such were intended I think Parliament would have said so in plain and express language. The nearest approach to any authority in support of the contention of the Crown is a decision of Craig, J., of the Yukon Territorial Court, in *The King* v. *Mercier* (1908), 13 Can. Cr. Cas. 475, in which it was decided that a room in a hotel habitually resorted to by any one prostitute and her paramour for purposes of prostitution is a "common bawdy house," but the charge in that case was not

Alta.

App. Div.

REX v. READ.

Clarke, J.A.

against the woman, but against the hotelkeeper as keeper of a common bawdy house by keeping and maintaining a certain house known as the "Fourth Avenue Hotel" for purposes of prostitution. At p. 483 the Judge says: "I think the word 'keep' means no more than having, keeping open, being responsible for the running of, and does not mean the forced meaning endeavoured to be put upon it of holding it out as a prostitution house, or as maintained for that purpose alone. Having the house, exercising authority over it, and allowing it to be used in any way for that purpose, to my mind satisfies the statute in that respect." Assuming that decision to be good law, it is distinguishable inasmuch as there the charge was against the hotelkeeper who controlled the house. The woman was shewn to be a prostitute, and the room was habitually resorted to. In view of the decision in *Rex* v. *Cardell* (1914), 19 D.L.R. 411, 23 Can. Cr. Cas. 271, 7 Alta. L.R. 404, in which it was held that promiscuous intercourse with men was essential to constitute prostitution, it is at least doubtful if the *Mercier* case would be followed here.

In *Rex* v. *Sands* (1915), 28 D.L.R. 375, 25 Can. Cr. Cas. 120, 25 Man. L.R. 690, the Court of Appeal in Manitoba decided that evidence of the general reputation of a house as being a house of ill-fame is not alone sufficient to convict the person whose residence it is of keeping a common bawdy house without proof that the people who go there are of ill-fame or that prostitution is there carried on.

There remains to be considered the effect of certain admissions stated to have been made by the defendant to one of the police officers at the time of raiding her apartment in answer to questions put by him, namely, that she had been living for two months at the King George Hotel and had gone down to this place because she thought she could make some money, that some of the other girls told her it was a good place down there, that she had been there for a few nights only and her baggage was up in the King George and she was stopping there under another name, and that she practically admitted what she was there for. The officer does not state what she admitted she was there for; he says he did not warn her; he asked her questions and she told him she heard from some other girls that she could make a little money down there. The evidence of admissions by the defendant was objected to by her counsel at the trial. Whether or not this additional evidence of admissions is sufficient to make out a *prima facie* case I do not decide. It is very weak. There is no evidence of any act of prostitution or of the reputation of the

defendant or of the terms under which she occupied the room or whether or not she had occupied this particular room before. It may be that on the previous nights while she was at the hotel she occupied different rooms. In my opinion the evidence of her admissions was inadmissible without a proper foundation for it being laid, which was not done, and I agree with Walsh, J., in *Rex* v. *Hughes* (1920), 55 D.L.R. 697, 35 Can. Cr. Cas. 103, that where there is not sufficient evidence without the evidence improperly received the conviction should be quashed.

Before admitting evidence of a confession made to a police officer either before or after the arrest it should be made to appear affirmatively that the confession was free and voluntary as having been made without any inducement such as a promise or threat, and the onus of proving this is upon the prosecution.

Every officer engaged in prosecuting criminal cases should be familiar with the principles clearly enunciated in *The Queen* v. *Thompson*, [1893] 2 Q.B. 12, which has been consistently followed in other cases of high authority, notably by the Privy Council in *Ibrahim* v. *The King*, [1914] A.C. 599, 83 L.J. (P.C.) 185, 24 Cox C.C. 174. Lord Sumner in the last-mentioned case at p. 609 says: "It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority," and in the *Thompson* case, [1893] 2 Q.B. 12, Cave, J., at p. 16 says:

"The material question consequently is whether the confession has been obtained by the influence of hope or fear, and the evidence on this point being in its nature preliminary is addressed to the Judge, who will require the prosecutor to shew affirmatively to his satisfaction that the statement was not made under the influence of an improper inducement and who in the event of any doubt subsisting on this head will reject the confession;" and at pp. 17, 18, 19 gives a simple test by which the admissibility of a confession may be decided by Magistrates. "They have to ask. Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority? If so and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible. . . . . In this particular case there is no reason to suppose that Mr. Crewdson's evidence was not perfectly true and accur-

Alta.

App. Div.

REX v. READ.

Clarke, J.A.

ate, but on the broad plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received. In my judgment no other principle can be safely worked by magistrates."

In *Reg.* v. *Rose* (1898), 18 Cox C.C. 717, at p. 719, Lord Russell, C.J., says: "It is to be borne in mind not only by magistrates but by prosecuting counsel and by solicitors having the charge of prosecutions that they must satisfy themselves before putting a confession in evidence that the confession was not obtained under such circumstances as to be inadmissible."

It is sought by the prosecution to remedy the want of the requisite affirmative evidence by an affidavit of the officer who received the confession filed in answer to the motion to quash in which he states that all of the admissions made to him by the defendant related by him in his evidence at the trial were made voluntarily and were made previous to the arrest.

In *Rex* v. *Graf* (1909), 15 Can. Cr. Cas. 193, Riddell, J., quotes, at p. 197, from Church on Habeas Corpus: "A Court acting within the sphere of its jurisdiction is conclusively presumed so far as all collateral inquiries are concerned to have performed its duty, and the question whether other than legal evidence was admitted in its proceedings will not be considered by a higher Court," and there being nothing in the case before him to shew that all the facts necessary to be established in order to make the evidence admissible were not proved to the satisfaction of the Magistrate, he upheld the conviction. In that case no objection was made to the admission of the evidence at the trial. If I were satisfied that the necessary facts were established in this case I would be loath to reject the evidence of the admissions, although the record returned by the Magistrate does not disclose such facts. In view, however, of the fact that the evidence was taken by a stenographer, question and answer, and appears to be a full report of all that took place at the trial, and in view of the objection made at the time and of the affidavit of the officer who gave evidence of the admissions in which he does not say that such facts were proved at the trial, I am satisfied they were not so proved, and I think it would be unfair to the defendant under the circumstances now to admit *ex parte* evidence to prove that the admissions were free and voluntary, and in any event I do not think the bald statement in the affidavit that the admissions were made voluntarily sufficient. There should at least be evidence that no inducements were held out so as to shew the admissions were voluntary in the sense defined by the authorities I have referred to. It may be that if the

whole conversation were given in evidence the Court might infer that the statements were voluntary in the sense required, as was done in *The King v. Steffoff* (1909), 15 Can. Cr. Cas. 366, but here the questions asked by the officer are not stated, and there is nothing to indicate what may have been said beyond what is given in evidence.

The record shews that no warning was given. It may be this was unnecessary if proper evidence of the admissions being voluntary were given. The authorities leave this point in considerable doubt. There are authorities of weight to the effect that where the prisoner is under arrest or virtually under arrest, in addition to evidence of the admissions being voluntary, the prisoner must be warned of the consequence of his statements, especially where they are elicited by questions.

See *The King* v. *Kay* (1904), 9 Can. Cr. Cas. 403; *Rex* v. *Knight & Thayre* (1905), 20 Cox C.C. 711.

Prosecuting officers would be well advised, therefore, to give proof of a proper warning when obtaining confession evidence in addition to proof of its being voluntary in the sense I have indicated.

I have discussed the matter at greater length than was required for the disposal of the appeal, owing to the request of the counsel for the Crown upon the hearing of the appeal that the Court should by its judgment furnish a guide for future reference in similar cases.

It follows from what I have said that the appeal should be allowed and the conviction must be quashed.

The money paid by the defendant under the conviction to be returned to her as well as the money deposited by her as security on the motion to quash. As the Magistrate acted within his jurisdiction, I think no order for protection is required, but if the Crown so desires, the usual provision for his protection may be inserted in the order of this Court as a condition of the conviction being quashed in accordance with sec. 1131 of the Criminal Code.

As to costs, the defendant is entitled to her costs of this appeal and of the motion before Ives, J., but it is not so clear against whom they should be awarded.

In *Rex* v. *Knowles* (1913), 13 D.L.R. 773, 22 Can. Cr. Cas. 66, 6 Alta. L.R. 221, Beck, J., expressed the opinion that costs could not under the Rules as they then stood be given against the Crown and he ordered them to be paid by the magistrate in the expectation that they would be borne by the Crown. Since that decision the Crown practice rules have been amended

Imp.

P.C.

ATT'Y-GEN'L OF MANITOBA v. KELLY.

as suggested in his judgment by providing that the notice of motion in *certiorari* cases be served upon the Attorney-General. He appears by his agent and undertakes the burden of upholding the conviction and thereby the Crown becomes entitled to or liable for costs under R. 844 in the discretion of the Court.

My only doubt arises from the absence of express provision in the rules making them applicable to the Crown. I think, however, that though the Crown is not expressly mentioned in the rule as to costs, the rules as to *certiorari* proceedings from their very nature apply to the Crown. The notice of motion to quash must be served upon the Attorney-General and he, by his agent, appears in support of the conviction. See *Thomas* v. *Pritchard*, [1903] 1 K.B. 209.

As in my opinion neither the Magistrate nor the informant should be held responsible for the costs of upholding the conviction, I think it preferable to award costs against the Crown, being virtually the respondent, direct, than to reach the same result indirectly by awarding them against the Magistrate or the informant in the expectation of recoupment by the Crown and I would order accordingly.

SCOTT, C.J.,, STUART and BECK, JJ.A. concurred in the opinion delivered by CLARKE, J.A.

HYNDMAN, J.A., concurred in the result.

Conviction quashed.

ATTORNEY-GENERAL OF MANITOBA v. KELLY. KELLY v. ATTORNEY-GENERAL OF MANITOBA.

Judicial Committee of the Privy Council, Lord Atkinson, Lord Sumner, Lord Parmoor, Lord Wrenbury, and Lord Phillimore. January 24, 1922.

ARBITRATION (§ III—16)—CONSENT JUDGMENT PROVIDING FOR—JURISDICTION TO SET ASIDE AWARD—"ALL LOSS BY REASON OF DEFECTIVE WORKMANSHIP AND MATERIALS INCLUDING THE REASONABLE COSTS OF ASCERTAINING AND REMEDYING SUCH DEFECTS"—MEANING OF—ADMISSIBILITY OF EVIDENCE TO SHEW WANT OF JURISDICTION OR MISCONDUCT — FINALITY OF UMPIRE'S DECISION — VALIDITY OF AWARD.

In accordance with the terms of a consent judgment arbitrators were appointed to ascertain "all loss to the plaintiff by reason of defective workmanship and materials including the reasonable costs of ascertaining and remedying such defects" in connection with the construction of certain public buildings. Their Lordships held that the words "all loss" were not restricted to out of pocket disbursements for work done but were wide enough to include an estimate of expenditure necessary to complete the repair of certain caisson foundations.

Where in a submission the parties have agreed that the decision of the umpire on the matters referred to him shall be final the Courts will not inquire whether the conclusion of the umpire on the matters referred to him is right or wrong unless an error appears on the face of the award or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact leaving it to the Court to review his decision.

That over-zealousness in supporting the claim which had to be determined by the umpire, did not amount to misconduct on the part of an appraiser. Held, also, that the umpire had not been guilty of misconduct in withholding certain evidence from the appraisers.

If an umpire has made no mistake as to the extent of the jurisdiction conferred upon him the Court cannot set aside the award unless it is shewn that there was misconduct or some other equitable ground for interference but if the umpire has exceeded his jurisdiction, and this is apparent on the face of the award, the Court can and ought to interfere.

While extrinsic evidence is admissible to shew want of jurisdiction or misconduct on the part of the umpire, it is subject to the ordinary rules applicable to the admission of evidence.

APPEAL by plaintiff from the judgment of the Manitoba Court of Appeal (1920), 56 D.L.R. 167, in so far as it varied the judgment of Curran, J. (1919), 48 D.L.R. 536, on a motion to set aside, vary or amend a report filed by an umpire acting in pursuance of a consent judgment, and cross-appeal to set aside the report of the umpire on the ground of the alleged misconduct of the umpire and appraiser. Appeal allowed. Cross-appeal dismissed and judgment of Curran, J., restored.

The judgment of the Board was delivered by

LORD PARMOOR:—The appellant, the Attorney-General of the Province of Manitoba, brought an action against the respondents, asking to have set aside a certain building contract which had been entered into between the respondents and the Province of Manitoba, for the erection of buildings in the city of Winnipeg; for the return of certain moneys alleged to have been improperly received; damages and other relief incident thereto. The action came on for hearing before Mathers, C.J., in the Court of King's Bench, and a consent judgment was entered on the 22nd March, 1917. (See judgment quoted in 48 D.L.R. 536). By the said judgment certain matters were referred to two appraisers, appointed respectively by the plaintiff and the defendants, and in the event of the appraisers not being able to agree, such matters were referred to Robert Macdonald of the city of Montreal, an architect and engineer, accepted as umpire by both parties. So far, therefore, as the appraisers agreed, they occupied the position of arbitrators; but, in the event of

Imp.

P.C.

ATT'Y-GEN'L OF MANITOBA v. KELLY.

Lord Parmoor.

disagreement, their functions terminated, and an independent jurisdiction was conferred upon Macdonald, who, throughout this judgment is referred to as umpire. The judgment further provided that the report of the umpire should be final and conclusive between the parties, and that the judgment should be a final judgment for the amount shewn in the said report. On May 25, 1917, the umpire appointed under the aforesaid order of the Court of King's Bench made his report, and on March 4, 1918, the respondents, by notice of motion, moved to set aside or vary the report on the ground that the umpire had exceeded his powers and purported to decide a matter not submitted to his jurisdiction, including among the debits charged against the respondents a sum of $615,213.00, being an "estimate of expenditure necessary to complete the repair of caisson foundations." After the hearing had begun before Curran, J. (1919), 48 D.L.R. 536, sitting as a Judge in Chambers, and also in Court, a charge of misconduct against the umpire was added by amendment. On October 3, 1919, Curran, J., dismissed the motions of the respondents. The Court of Appeal (1920), 56 D.L.R. 167, allowed the appeal of the respondents from the judgment of Curran, J., in so far as he refused to vary the report of the umpire by deducting therefrom the "estimate of expenditure necessary to complete the repair of caisson foundations $615,213.00," and ordered that the report of the umpire should be varied by striking out the said item, and that the principal sum recoverable by the appellant from the respondents be reduced to the sum of $592,138.65.

This is an appeal from so much of the judgment of the Court of Appeal, 56 D.L.R. 167, as varied the judgment of Curran, J., 48 D.L.R. 536. The respondents further cross-appeal that the report should be set aside on the ground that the appraiser for the appellant was guilty of misconduct in forwarding a certain letter and document to the umpire and that the umpire was guilty of misconduct in withholding from the appraiser appointed by the respondents the last page of a report of Bylander, the appellant's engineer, and of not stating truthfully, honestly and accurately the contents of the last page of the said report to the appraiser appointed by the respondents, or that in the alternative an item, $34,484.03, "one-half costs of the Royal Commission appointed to investigate all matters in connection with the Parliament Buildings, known as the Mathers Commission," should be disallowed.

A preliminary objection was raised before Curran, J., and the Court of Appeal, that the motions should be dismissed on

the ground that they were misconceived and could not affect the consent judgment. It was said that the report of the umpire became, on filing, an integral part of the consent judgment, making the judgment a final judgment for the amount shewn in the report, and that the judgment had not been set aside and could not be impeached except by separate action, or petition on a charge of fraud.

Curran, J., rejected any general objection to his jurisdiction, and held that he had jurisdiction to entertain the charges of alleged misconduct by the umpire, and to hear objections based on the allegations that on certain items in his report the umpire had exceeded his jurisdiction. In the Court of Appeal, Cameron, J.A., expressed a contrary opinion, and that the motions made on behalf of the respondents to set aside, or amend the report, were misconceived and futile, and should on this ground or line be dismissed. On the hearing before their Lordships, the counsel for the appellant did not press this preliminary objection, and asked their Lordships to entertain the appeal on its merits, in order that an end might be put to this unfortunate litigation. Their Lordships accordingly heard the appeal on its merits. It must not be inferred that their Lordships express any opinion adverse to that expressed by Cameron, J.A.

The report of the Board of Appraisal was issued at Winnipeg, on May 25, 1917. It shews on its face that on some items the appraisers agreed, and that on some items the decision was referred to the umpire. (See 48 D.L.R., pp. 539, 540.)

"Under paragraph 1, the appraisers have set aside all previous contracts between the parties interested.

Under paragraph 2, sub-s. (*a*), the amount therein mentioned, viz., $1,680,956.84, in which amount is included the sum of $500,000 the amount of a certain bond dated July 31, 1913, has been taken as a debit charge against the defendant.

Under paragraph 2, sub-s. (*b*), 'All loss to the plaintiff by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects.' The question was submitted to the umpire, and the following figures give the decision with respect to such loss.

DEBITS.

One-half cost of Royal Commission appointed to investigate all matters in connection with the new Parliament Buildings, known as the 'Mathers Commission,' cost item $68,968.07	$ 34,484.03
One-half cost of physical investigation made on the	

Imp.

P.C.

ATT'Y-GEN'L OF MANITOBA v. KELLY.

Lord Parmoor.

new Parliament Buildings which investigation disclosed the fact that caisson foundations were defective, cost item $10,675.03	5,337.51
Portion of cost in repairing caissons up to Feb. 28, 1917	160,306.62
Loss by reason of defective and improperly cut stonework	12,531.57
Loss by reason of sundry items of improper work	3,247.05
Estimate of expenditure necessary to complete the repair of caisson foundations	615,213.00
Under paragraph 2, sub-s. (*b*)	$831,119.78

CREDITS.

Under paragraph 3, 'The defendants shall be entitled to set-off against the amount provided in paragraph 2':—

Sub-s. (*a*) Value of work done and materials provided.		
Agreed upon by appraisers	$241,077.51	
Determined by the umpire	818,174.80	
		$1,059,252.31
Sub-s. (*b*) Value of plant and materials taken over by the Government—		
Agreed upon by appraisers	$148,730.86	
Determined by the umpire	92,281.72	
		241,012.58
Sub-s. (*c*) Value of work done and replaced by defendants on account of changes in plans—		
Agreed upon by appraisers	$ 700.00	
Determined by the umpire	3,760.08	
		4,460.08
Under paragraph 3, Total		$1,304,724.97"

On the debits and credits, as found by the Appraisal Board, there is a balance in favour of the respondents of $473,605.19, but, after bringing in the sum fixed in the judgment at $1,680,956.84, as a debit charge, against the respondents, the ultimate balance in favour of the appellant is $1,207,351.65.

In the Court of Appeal (56 D.L.R. 167) sixteen grounds of appeal were raised by the respondents; but in the argument

Imp.

P.C.

ATT'Y-GEN'L OF MANITOBA v. KELLY.

Lord Parmoor.

before their Lordships these were reduced to three:—(1) That in respect of two items debited by the umpire against the respondents, the umpire had exceeded the authority which the agreed submission conferred upon him. (2) Misconduct on the part of one of the appraisers, Oxton, and on the part of the umpire. (3) That the report was against law, evidence, and the weight of evidence.

The consent judgment, which contains the terms of the agreed submission, ordered, *inter alia* (see 48 D.L.R. 536-538):—

"(1) That all the contracts referred to in the statement of claim herein be and the same are hereby set aside.

(2) That the plaintiff do recover from the defendants.

(*a*) The sum of $1,680,956.84, in which amount is included the sum of $500,000, the amount of a certain bond dated July 31, 1913.

(*b*) All loss to the plaintiff by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects.

Provided that in ascertaining such amounts the appraisers, or in case of disagreement, the umpire, shall be the judges as to whether or not the work was defective and to what extent, and shall also be the judges as to what extent the investigations carried on for the purpose of ascertaining and remedying such defects were necessary, and what amount of money, if any, paid for that purpose shall be charged to the defendants.

(3) The defendants shall be entitled to set-off against the amount provided for in paragraph 2 hereof.

(*a*) The fair value of the work done and materials provided by the defendants on the new Parliament Buildings in the City of Winnipeg so far as erected on May 19, 1915, on the basis of a fair contractors' price (including reasonable contractors' profit) for the work done and materials furnished, having due regard to the character of the same and the purposes for which same was intended; in regard to the value of the work and material, consideration shall be had of prevailing prices at Winnipeg at the time the work was done, and in estimating the wages for men employed the fair wage schedule of the Government as it stood in July, 1913, shall be followed.

(*b*) The value of the plant and materials taken over by the Government as at the time they were placed on the ground.

(*c*) The fair value of any work which had been done and which was afterwards torn down and replaced by the defendants by order of the Provincial architect on account of and made necessary by change or changes in plan. . . . . .

Imp.

P.C.

ATT'Y-GEN'L OF MANITOBA v. KELLY.

Lord Parmoor.

(6) In the events of the appraisers not being able to agree on any of the matters herein referred to, or in the event of one of the appraisers being dissatisfied with the diligence of the other in proceeding with any matter hereunder, such matter or matters shall be referred by either appraiser to Robert MacDonald, of the City of Montreal, architect and engineer, who is hereby by both parties agreed to as umpire, and whose decision thereon shall be final.

(7) The appraisers and the umpire are to be entitled to form their own opinion as to the fair value and proper charge or allowance hereunder to be made in respect of all matters submitted hereunder from their own knowledge, inspection or examination, or from such other source as they may deem proper, and for that purpose may cause any work to be uncovered or any investigations to be made which the appraisers agree upon or the umpire desires. . . . . .

(11) The appraisal hereunder shall not be subject to the provisions of the Manitoba Arbitration Act, R.S. Man. 1913, c. 9.

(12) If on striking the balance hereunder it is found that the balance is in favour of the plaintiff, ... the defendants shall pay to the plaintiff the balance so found with interest at the rate of 5% per annum from July 1, 1914, to date of payment."

It is noticeable that, under (6), the decision of the umpire, agreed to by both parties as umpire, is to be final; and that under (7) the appraisers and the umpire respectively are entitled to form their own opinion on all matters submitted to them either from their own knowledge, inspection, or examination, or from such other sources as they may deem proper, thus constituting them judges both of the materiality and of the weight of all evidence which they deemed it proper to admit.

A voluminous mass of evidence was adduced before Curran, J. Only a small portion of this evidence is admissible or should have been admitted. The transcript of the proceedings, when the appraisers, and the umpire, met before the umpire issued his report, is not admissible unless it can be regarded as a document so closely connected with and incorporated in the report as to be considered part of the report, and to be looked at in the same way as the report itself. In the opinion of their Lordships it is not possible to accept this view. These proceedings are nothing more than informal discussions which took place before the issue of the report, and they may, or may not, have influenced the umpire in making his report. Cameron, J.A., 56 D.L.R. at p. 178, states that he is at a loss to know on what ground these

proceedings can be considered as evidence for any purpose whatever, and their Lordships concur in this opinion. No doubt extrinsic evidence is admissible on an issue, of jurisdiction, or of misconduct; but subject to the ordinary principles which apply to the admissibility of all evidence. How far, in the present case, extrinsic evidence is admissible on these issues can be more conveniently considered at a subsequent stage. It is not difficult to see that if evidence of this character should be held to be generally admissible, there would be a risk of undermining the principle of finality, which, subject to certain recognised exceptions, has long been established as a settled principle in arbitration proceedings, and on which their value largely depends.

Evidence was further adduced before Curran, J., giving the opinion of experts on the method in which the inquiry was conducted, and traversing the conclusions of the umpire, as stated in the report. In effect, the Court on this evidence was asked to review the decision of the umpire on questions submitted to him, by the parties, for his final decision. Such evidence would not be admissible in the case of an award under arbitration proceedings conducted according to ordinary practice. In the present submission, the umpire is entitled, under the terms of the submission, to form his own opinion as to the fair value and proper charge or allowance to be made in respect of all matters submitted to him from his own knowledge, inspection or examination, or from such other source as he may deem proper. Unless, therefore, the umpire has been guilty of misconduct, it is within his discretion and authority either to act on his own knowledge, inspection or examination, or to obtain information from any other source, which in his opinion he may deem proper. It is not incumbent on him to state how he has acted, and it is impossible for the Court to ascertain what considerations have affected his judgment. The matter is one which the parties have intended to withdraw from the Courts in order that the issue in the litigation may be finally determined by their chosen nominee, and all extrinsic evidence that other experts would have proceeded in a different manner, or reached a different conclusion should, in the opinion of their Lordships, have been rejected as inadmissible.

The jurisdiction of the umpire is derived solely from the agreement of the parties contained in the consent judgment. This document is a written document, which cannot be explained, and much less varied, by extrinsic evidence, of subsequent facts or events. Except so far as the pleadings in the action are of assistance in the interpretation of the document, by shewing the

Imp.
P.C.
ATT'Y-GEN'L OF MANITOBA v. KELLY.
Lord Parmoor.

surrounding conditions when the agreement was made, none of the evidence adduced before Curran, J., is admissible or should have been admitted in determining the extent of limitations of the umpire's authority. Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the Court and not with the umpire. (*Produce Brokers Co.* v. *Olympia Oil and Cake Co.*, [1916] 1 A.C. 314, pp. 327-329, 85 L.J. (K.B.) 160, 21 Com. Cas. 320). It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide, is within the submission of the parties. In the present instance there has been a difference of opinion as to the extent of the jurisdiction which has been conferred by the submission upon the umpire. The majority of the Court of Appeal, 56 D.L.R. 167, have adopted a narrower construction than Curran, J., and Cameron, J.A. The crucial paragraph in the submission is para. (2) (*a*). The words "all loss" with which the paragraph commences would naturally cover all loss ascertained or ascertainable by reason of defective workmanship and materials, irrespective of when, or whether, the defects have been remedied, and of whether, or not, out-of-pocket expenses have been incurred, at the time when the assessment of damage is made. It is open to the party in whose favour the assessment is made either to repair the damage on which his claim is based, or to take the risk of leaving the defects as they are, and to place the money to his credit as compensation. The majority of the Court of Appeal have held that, owing to the conditions under which the agreed submission was made, to the context in which the words are found, and to the terms of the interest paragraph, the words "all loss" have a limited meaning and only include such loss as had been already ascertained and in respect of which monies had been actually disbursed. Perdue, C.J.M., says in his judgment, 56 D.L.R. at p. 172, "The word 'loss' in para. (2), sub-sec. (*b*), taken in the connection in which it is found, means money loss, money out of pocket." This construction was supported in an able argument by the counsel for the respondents before their Lordships on various grounds. It was said that the interest paragraph (12), which provides that, if there is a balance in favour of the plaintiff, the defendants shall pay on such balance interest at 5% from July, 1914, to date of payment, shews that the plaintiff must be deemed to be out of pocket, in

respect of any balance found in his favour, and that this provision was not applicable, if it was open to the umpire to estimate damage in respect of a loss that might not occur, and which, if it did occur, might not be remedied. On the other hand it was argued, on behalf of the appellant, that July 1, 1914, was simply a compromise date, agreed between the parties, and that there was no reason why interest should not run from this date on the balance in favour of the plaintiff, whether that balance is based solely on out-of-pocket expenditure, or includes a sum assessed by the umpire in respect of ascertainable loss, although, so far, no expenditure in respect of such loss had been made. Suggestions were made before their Lordships as to the reasons why the date of July 1, 1914, had been chosen, but their Lordships are concerned to consider the actual language employed, and it is beyond their province to enter the region of speculation. Their Lordships cannot find in paragraph (12) any more than a provision for interest from an agreed date, in itself not inconsistent with giving to the words "all loss" in paragraph (2) (*b*) their ordinary and normal meaning.

It was further argued that the words "including the reasonable cost of ascertaining and remedying such defects" excluded an estimate of loss not based on actual out-of-pocket disbursements. Their Lordships, however, cannot construe the word "including" as connoting exclusion. The words "such defects" are equally apposite, whether they refer back to a limited loss calculated on out-of-pocket expenses, or to a loss which comprehends all sources of ascertainable damage. The respondents further relied on the word "paid" which occurs at the end of the proviso, but the context shews that the word "paid" is not applied to "loss" but to expenditure on investigations carried on for the purpose of ascertaining and remedying defects. This passage authorises the umpire to estimate to what amount money, if any, paid for the purpose of investigation, shall be charged to the debit of the respondents. It is under this provision that the umpire has debited the respondents with the sum of $34,484.03, being one-half cost of the Royal Commission, known as the Mathers Commission.

Their Lordships have considered the important matter raised prominently in the judgment of Dennistoun, J.A., 56 D.L.R. at pp. 189 *et seq.*, that unless the words "all loss" are restricted to out-of-pocket disbursements for work done, to the exclusion of any estimate of expenditure necessary to complete the repair of the caisson foundations, there is a risk that the respondents would be charged twice over for their defective workmanship

Imp.

P.C.

ATT'Y-GEN'L OF MANITOBA v. KELLY.

Lord Parmoor.

and materials in connection with the caisson foundations. The appellant denies that there is any proof that the umpire has made any such error in his report. No question was raised by the respondents as to the summary of the credits found in their favour, amounting in the aggregate to $1,304,724.77, and under each head a proportion of the total amount has been agreed by the appraisers. Of the total of $1,304,724.77, no less than $1,059,252.31 represents the value of the work done and materials provided. If the inclusion of an estimate for ascertainable damage under the word "loss" results in a double charge against the respondents for defective workmanship and materials, such double charge would only be included if, in calculating the credit amounts in favour of the respondents, the umpire had taken into account deductions for bad work or faulty material, and had in consequence of such deductions given the respondents something less than the full fair value to which they are entitled under paragraph (3) (*a*).

There is, however, no ground for any such assumption, and no evidence that the umpire has made the error attributed to him. Following the order prescribed in the submission, and adopted in the report, the umpire would consider first the debits. The suggestion is that after making a charge under the head of debits for all defective workmanship and materials, the umpire made a deduction of the same items in calculating the credits due to the respondents. It is not admissible to assume that the umpire made such a mistake, and no such mistake appears upon the face of the report. It is not immaterial that a proportion of the credits, under each item, was not determined by him, but agreed by the appraisers.

Curran, J., and Cameron, J.A., do not construe the terms of the submission in the limited sense adopted by the majority of the Court of Appeal. Curran, J., expresses has opinion with some hesitation, but Cameron, J.A., regards the terms of the consent judgment as amply wide enough to support the umpire's findings, and to include the item of estimate of expenditure necessary to complete the repair of caisson foundations. Their Lordships agreed with Cameron, J.A., and are unable to find, either in the conditions under which the agreement of submission was made, or in the context, or from the general scope of the agreement, any ground for limiting the words "all loss" to money loss, money out of pocket.

Has the umpire included in his report any items not within the terms of the agreement of reference as above construed? The report is a written document which speaks for itself and

which cannot be interpreted, or varied, or contradicted, by extrinsic evidence. If there is any doubt as to the subject matter over which the umpire was purporting to exercise jurisdiction, evidence may be given shewing what was the subject matter into which he was enquiring, in order to enable the Court to determine whether he has exceeded the limits of his jurisdiction. Such evidence may be given by the umpire himself or by any other competent witness; but it should be limited to the issue of fact, and, in the words of Lord Cairns, "it is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made), what is to be found on the face of the written instrument" (*Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418, 41 L.J. (Ex.) 137.

In the present case the umpire sets out, in the report, separate items under the heads of debits and credits. There is consequently no difficulty in determining from the language used in the award, without the aid of extrinsic evidence, the subject matter over which the umpire was exercising jurisdiction. He finds that the physical investigation made on the new Parliament buildings did disclose the fact that caisson foundations were defective, and awards in respect theeof two items; (1) Portion of cost in repairing caissons up to February 28, 1917, $160,306.62; (2) Estimate of expenditure necessary to complete the repair of caisson foundations, $615,213. It is in respect of this latter item that the respondents have raised the issue of excess of jurisdiction. They base their objections on the allegation that the estimate is one not based on actual expenditure, and therefore not a "loss" to the appellant by reason of defective workmanship and materials within the meaning of para. (2), sub-sec. (*b*) of the consent judgment. The appellant on the other hand argues that a loss of his character is within the meaning of para. (2), sub-sec. (*b*), and therefore within the jurisdiction of the umpire. Their Lordships have already stated their opinion that the contention of the appellant as to the meaning of para. (2), sub-sec. (*b*), is correct, and it follows that there was no excess of jurisdiction on the part of the umpire in including this item in his award.

The respondents further, in the cross appeal, question the item of the half cost of the Royal Commission. It was not argued at any length before their Lordships. All the Judges in the Courts below, before whom the question has come, are unanimously of opinion that the item comes within the authority

Imp.

P.C.

ATT'Y-GEN'L OF MANITOBA v. KELLY.

Lord Parmoor.

of the later portion of the proviso to para. (2) (*b*). In this opinion their Lordships concur.

On the issue of misconduct a distinction arises between the misconduct attributed to Oxton and to the umpire. There is no evidence that either of the appraisers, in exercising his duties as appraiser, acted in any way improperly. The report shews on its face that Oxton agreed certain items with Burt. On coming to this agreement his duty as an appraiser came to an end. These agreed items are incorporated in the report of the umpire. The allegation really is that Oxton acted improperly in attempting to influence the umpire after his duties as an appraiser had come to an end, and when the decision on such matters, as had not been agreed upon between the appraisers, stood referred to the umpire. The only way in which the alleged misconduct of Oxton, at this stage of the enquiry, can affect the validity of the report, is if it can be proved that such misconduct influenced in any way the decision of the umpire. On the question of misconduct both the Courts below have decided in favour of the appellant.

Under the terms of the submission, the umpire, in case of the disagreement of the appraisers, was constituted the sole judge as to whether or not the work was defective and to what extent. He was entitled to form his own opinion as to the fair value, the proper charge or allowance, to be made in respect of all matters submitted to him, from his own knowledge, inspection, or examination, or from such other source as he might deem proper. It was therefore within the competence of the umpire to consult and consider at any time any of the 5 pamphlets sent to him at Montreal by Oxton, and no objection could have been taken if he had followed this course. It makes no difference that pamphlets, which the umpire had authority to consult, were forwarded to him by Oxton. He was entitled to act as he did, and is in no way responsible for the action of Oxton. It was alleged that the umpire had read the pamphlets on his way from Montreal to Winnipeg. In the opinion of their Lordships this allegation is not important, as it was within the competence of the umpire to read the pamphlets at any time, without being subject to a charge of misconduct. The umpire, however, made an affidavit, which has been accepted as accurate, and on which he was not cross-examined (see 56 D.L.R. at p. 185):—

"I have never read the evidence before the Public Accounts Committee. I did not read the report of the Mathers Commission, nor the report of the Public Works Department prior

Imp.

P.C.

ATT'Y-GEN'L. OF MANITOBA v. KELLY.

Lord Parmoor.

to my arrival in Winnipeg, *as I preferred to keep an open mind until both sides could be heard.* The report of the Mathers Commission was on my table before us (Mr. Burt, Mr. Oxton and myself) from the beginning of the proceedings, and was referred to from time to time in the discussion."

A further charge of misconduct against the umpire is based on Oxton having supplied him with a full copy of one of Bylander's reports, whereas at the same time he supplied Burt with a copy which omitted the last page. It is alleged that the umpire falsely and dishonestly stated to Burt that the part so omitted from the Bylander report had no bearing upon the matters in question on the appraisement, whereas the part so omitted was vitally important and material. Their Lordships can find no evidence which gives any support to the allegation that any false or dishonest statement was made by the umpire to Burt, in connection with the Bylander report, or that there was anything untruthful or improper in his statement. During the discussions between the appraisers and the umpire, which preceded the making of the report of the umpire, it is manifest that Burt did know that the umpire had full copies of both the Bylander reports. The umpire states in answer to Burt that he has them both in his possession, and then occurs the following conversation, 56 D.L.R., at p. 185:—

"Mr Burt: I have the first in full, but I have not the last page of the second. Mr. Oxton: I shewed it to you, Mr. Umpire, but I didn't give Mr. Burt access to it because it concerned a question of policy that I didn't consider he would be interested in. Mr. Burt: If it is a question of policy that affects this appraisal I might be quite interested in it. The Chairman: It does not."

Even if it is assumed that the last page of the report did contain matter which might have affected the decision of the umpire, the umpire, under the wide power as to evidence contained in the terms of the submission, was entitled to take the view that the question of policy, therein discussed, did not affect the appraisal. Unless a charge of dishonesty can be established, for which in the opinion of their Lordships there is no justification, there is no foundation on which to rest a charge of misconduct. Burt, as one of the appraisers, had no right or claim to be informed of the evidence brought before the umpire, or of the weight which the umpire attached to any particular evidence, or of the extent to which the umpire acted on his own knowledge and inspection. There was no duty on the umpire to give Burt that information, and, apart from

Imp.

P.C.

ATT'Y-GEN'L OF MANITOBA v. KELLY.

Lord Parmoor.

dishonesty, no breach of duty in withholding it from him, on which a charge of misconduct could be sustained.

The appraisers did not stand in the position of ordinary arbitrators. Their functions as appraisers were discharged as soon as they had agreed on the items on which agreement was possible. The terms of the submission did not impose any further duty upon them. In the discussion before the umpire they were in the position of volunteers, although the umpire was perfectly within his authority in inviting them, or any other person, whom he might desire to consult, to state their opinions, and in listening to the reasons which they adduced in support. There may well be a difference of opinion as to the materiality of the statements contained in the last page of the Bylander report, but under the terms of the submission the materiality of evidence, as well as its weight, was left in the discretion of the umpire. If a charge of misconduct could have been established, it would be difficult, in the opinion of their Lordships, not to set aside the whole award, as infected in all its findings.

It has been convenient to deal first with the special objections to the report based on misconduct and excess of jurisdiction. The more general objection is raised, that the report is against law, evidence, and the weight of evidence. It appears that this objection was argued at considerable length in the Courts below, but it occupied less time in the argument before their Lordships. The principles applicable in arbitrations, where there are no special statutory provisions, have long been established. The submission in the consent judgment contains a special term, that the appraisal, thereunder, shall not be subject to the provisions of the Manitoba Arbitration Act, R.S.M. 1913, ch. 9.

In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final, the Courts will not enquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake in law or fact, leaving it to the Court to review his decision.

Holgate v. *Killick* (1861), 7 H. & N. 418, 158 E.R. 536, 31 L.J. (Ex.) 7, 10 W.R. 10. *Fuller* v. *Fenwick* (1846), 3 C.B. 705, 136 E.R. 282, 16 L.J. (C.P.) 79. *McRae* v. *Lemay* (1889), 8 Can. S.C.R. 280. *Adams* v. *The Great North of Scotland R. Co.*, [1891] A.C. 31. *British Westinghouse Electric and Mfg.*

Co. v. *Underground Electric Rys. Co. of London*, [1912] A.C. 673, 81 L.J. (K.B.) 1132.

This principle is approved by Baron Parke in *Phillips* v. *Evans* (1843), 12 M. & W. 309, 152 E.R. 1216, on the ground that although, possibly, injustice may be done in particular cases, it is better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door for enquiry into the merits, as this might lead to such an enquiry in almost every case. In the present case the umpire has not admitted any mistake, and there is no error on the face of the report. There is a further consideration which arises in the case of the present report owing to the special provision, as to evidence, contained in the submission. The umpire is entitled to form his own opinion in respect to all matters submitted, from his own knowledge, inspection, or examination, or from such other source as he may deem proper. The effect of this provision is that it is not possible for the Court to have before it all the material on which the umpire based his decision, and that even if the Court should remit the report it could have no effective control over the ultimate decision.

The older cases are reviewed by Lord Halsbury in *Adams* v. *The Great North of Scotland Railway*. The Lord Chancellor, referring to the case of *Knox* v. *Symmonds*, 1 Ves. 369, says at pp. 39, 40:—

"And shews that where there are real arbitrations, and where the parties have selected their judge, in such cases you have to shew a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award. And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts. In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions."

In the later case of *King* and *Duveen*, in [1913] 2 K.B. 32, 82 L.J. (K.B.) 733, Channell, J., after referring to the case of

Imp.

P.C.

ATT'Y-GEN'L OF MANITOBA v. KELLY.

Lord Parmoor.

British Westinghouse Electric and Mfg. Co. v. *Underground Electric Rys. Co. of London, Ltd.*, says, at p. 36:—

"It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator."

The Judge refers to *Stimpson* v. *Emmerson* (1847), 9 L.T. (Jo.) 199, a case which had been referred to in *Adams* v. *Great North of Scotland Railway* as a clear authority in favour of this view.

Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award; but no such issue arises in the present appeal. In *British Westinghouse Electric and Mfg. Co.* v. *Underground Electric Rys. Co. of London*, [1912] A.C. 673, it was held that where an arbitrator had made an award expressed to be made on the basis of an erroneous opinion given upon a special case stated by an arbitrator under the Arbitration Act, 1889, (Imp.), ch. 49, in regard to questions of law arising in the course of the reference, the award is subject to appeal, if that opinion is erroneous.

In the course of his judgment Lord Haldane, L.C., says, at pp. 686, 687:—

"It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well-known case of *Hodgkinson* v. *Fernie*, 3 C.B. (N.S.) 189, was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie*, to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land. I do not think that the Arbitration Act intended to make any modification of the existing rule in this respect, or that the decision in *In re Knight and the Tabernacle Permanent Building Society*, [1892] 2 Q.B. 613, is an authority for the proposition that it did. It is, therefore, competent for this House to review the law which the arbitrator, as he was bound to do, adopted from the Divisional Court and set out in his award."

The result is that the respondents fail to make good their objections to the report of the umpire or to any part thereof. The appeal succeeds and the cross appeal fails. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and in the Court of Appeal, and the cross appeal should be dismissed with costs, and that the judgment of Curran, J., should be restored.

Appeal allowed; cross appeal dismissed; judgment of Curran, J., restored.

PATTERSON v. SASKATCHEWAN CREAMERY Co., Ltd.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. November 14, 1921.

TRIAL (§ IIE—250)—MASTER AND SERVANT—INJURY—NEGLIGENCE—ANSWERS BY JURY TO QUESTIONS SUBMITTED NOT SUFFICIENTLY CLEAR—RIGHT OF TRIAL JUDGE TO ASK FOR FURTHER EXPLANATION—RIGHT TO SUBMIT FURTHER QUESTIONS.

Where in an action by an employee claiming damages for injuries received the trial Judge has submitted certain questions to the jury as to the negligence of the defendants, and the answers returned by the jury do not appear to be sufficiently clear and explanatory, the trial Judge takes the proper course in asking the jury to elucidate the matter further and also in submitting further questions to them in order to have them indicate the particular acts of negligence which they find against the defendant.

A verdict of $5,000 awarded by a jury to a workman for the loss of four fingers of his right hand is not so excessive as to justify an Appellate Court in setting aside the verdict.

[*Wabash R. Co.* v. *Follick* (1920), 56 D.L.R. 201, 60 Can. S.C.R. 375; *Gavin* v. *Kettle Valley R. Co.* (1921), 56 D.L.R. 572; *Dowson* v. *Toronto and York Radial R. Co.* (1918), 43 D.L.R. 377, 43 O.L.R. 158; referred to.]

APPEAL by defendant from the trial judgment awarding the respondent $5,000 for the loss of the four fingers of his right hand owing to the negligence of the appellants. Affirmed.

W. F. Dunn, for appellant; *N. R. Craig*, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—The respondent was a workman employed by the defendant company on and about the company's premises at Moose Jaw. On January 24, 1920, a freight elevator running from the top floor to the basement of the company's building was put out of running order for a short time in order that the shaft might be used as a convenient passage for the hoisting of some machinery. After the completion of the hoisting operation the defendant's servants proceeded to put the

Sask.

C.A.

PATTERSON v. SASK. CREAMERY CO.

TURGEON, J.A.

elevator back into running condition, when it was discovered that the compensating weight, which balances the weight of the cage, was stuck in its grooves. It therefore became necessary to set this compensating weight free. The cables which support the cage and weight wind round a drum about 19 inches in length, placed horizontally across the top of the elevator shaft. One of the results of the stoppage of the weight was the slackening of the cable to which it was attached. This cable, after leaving the drum and before reaching the weight, passes over a grooved wheel situated below the drum and to one side of the centre of the shaft. In setting the weight free, care had to be taken to see that the cable was not allowed to slip from this wheel. George Edwards, an engineer in the employ of the defendants, was in charge of the work. According to his own evidence, he called the respondent to assist him, showed him where to stand, over and behind the drum, with the cable in question in his left hand; and instructed him to hold the cable and to prevent it from slipping out of the grooved wheel.

The respondent is a labourer. At the time of the accident he had no knowledge of the machinery of the elevator, of the arrangement of the cables, or of the system of a compensating weight. He carried out Edwards' instructions by leaning over the drum and holding the cable in place. In order to steady himself he placed his right hand upon the drum.

After instructing the respondent as above set out, Edwards lowered himself down the elevator shaft and kicked the compensating weight, which thereupon dropped several inches, thus tightening the cable. In tightening, this cable descended upon the respondent's right hand with such force that it severed all four fingers.

The body which Edwards set in motion by the kick which he dealt it weighed well over one half a ton. According to Edwards' own evidence, he took no pains to explain to the respondent the exact nature of the work in which he was being called upon to take part, and gave him no warning of the weight of the body which was to fall at the end of the cable which he was holding and of the possible danger involved in the operation. He says that the idea of danger did not occur to him at the time.

At the close of the trial the trial Judge submitted the following questions to the pury:—

"1. Were the defendants guilty of negligence which contributed to the accident? 2. If so, in what respect? 3. Was the plaintiff also guilty of negligence which contributed to the

accident? 4. If so, in what respect? 5. After the plaintiff's act of negligence was their anything the defendants could have done to avoid the accident? 6. If so, what? 7. What damages, if any, do you allow?"

These questions were answered by the jury as follows:—

1. Answer in the affirmative. 2. That the company failed to take the proper method of putting the elevator in working order. 3. The question answered in the negative. 7. Amount of damages allowed $5,000.

As the answer to question No. 2 did not appear sufficiently explanatory, the trial Judge requested the jury to retire again and to answer certain supplementary questions, which, with the answers brought in by the jury, read as follows:—

"8. Q. Will you state more specificially what is meant in your answer to question 2? A. That the company failed to take the proper method of putting the elevator in working order by not blocking up the weight and taking up the slack on counterweight cable and then release the weight gradually. 9. Q. Were the defendants guilty of negligence in allowing the weight to get stuck fast? You can answer that "yes" or "no." A. Yes. 10. Q. Were the defendants guilty of negligence in not guarding the drum and cable? You can answer that "yes" or "no." A. Yes. 11. Q. Were the defendants guilty of negligence in not warning the plaintiff of danger in the operation he was called upon to perform? You can answer that "yes" or "no." A. Yes.

Upon these findings the trial Judge ordered judgment to be entered for the respondent for $5,000 and costs.

It is contended on behalf of the appellant that the trial Judge erred in submitting questions 8, 9, 10 and 11 to the jury, and that he should have proceeded to deal with the case upon the basis of the answers to the questions originally submitted.

In my opinion this contention must fail. The meaning of the original answer to question 2 was certainly far from clear, and I think the trial Judge took the right course in asking the jury to elucidate the matter further, and also in submitting further questions to them in order to have them indicate the particular acts of negligence which they found against the defendants. (Per Anglin, J., in *Wabash R. Co.* v. *Follick* (1920), 56 D.L.R. 201, 60 Can. S.C.R. 375; *Gavin* v. *Kettle Valley R. Co.* (1921), 56 D.L.R. 572; *Dowson* v. *Toronto and York Radial R. Co.* (1918), 43 D.L.R. 377, 43 O.L.R. 158).

The appellants also contend that in answering question 2 as

Can.

Ex. C.

CREELMAN AND VERGE v. THE KING.

they did the jury travelled outside the record and found negligence which was not alleged by the respondent.

In my opinion this contention is also unfounded. The jury's finding upon this question, as I take it, is to the effect that the method adopted by Edwards to release the counterweight was unsafe; that he might have adopted a less dangerous method; and that his conduct in this regard amounted to negligence. Evidence upon this point was given at the trial without any objection being taken to its admission, and the allegations of the statement of claim, in my opinion, cover it sufficiently.

In short, the jury have found specific acts of negligence against the appellants and they have found the respondent innocent of contributory negligence, and I can see no reason why their verdict in this regard should be disturbed, as in my opinion it is amply supported by the evidence.

I am of the same opinion upon the question of damages. An award of $5,000 to the respondent for the loss of four fingers of his right hand does not strike me, to say the least, as being so excessive that twelve reasonable men could not have granted it; nor do I find that the Judge's charge was defective in this regard, or that the jury took into consideration matters which they should have left aside. Under such conditions I think the verdict should be allowed to stand.

I would dismiss the appeal with costs. *Johnston* v. *Great Western R. Co.*, [1904] 2 K.B. 250.

Appeal dismissed.

CREELMAN AND VERGE v. THE KING.

Exchequer Court of Canada, Audette, J. November 15, 1920.

PUBLIC WORKS (§ II—10)—CONTRACT—PUBLIC BUILDING—TENDER—ACCEPTANCE—DELAY—LOSS—LIABILITY.

The Government is not liable for loss suffered in connection with a contract with the Crown for the erection of a public building, arising on account of the rise in the price of materials and labour between the date of the sending of the tender for the building and its acceptance by the Government, the contractor having the right to revoke or withdraw it at any time before its acceptance. A delay from August 8 to September 12 between the receiving and acceptance of a tender by the Government is not an unreasonable time when the parties are 2,000 miles apart, and considering the number of officials by whom it has to be considered before it can be accepted.

PETITION OF RIGHT to recover the amount alleged to have been lost on account of delays in connection with the acceptance of a

tender for the construction of a public building in Calgary. Dismissed.

The facts are fully stated in the reasons for judgment.

W. D. Gow, for suppliants.

I. W. McArdle and *W. S. Davidson*, for respondent.

AUDETTE, J.:—The suppliants, by their Petition of Right, seek to recover the sum of $35,453.58, the amount of a loss they allege to have suffered as hereinafter set forth, in connection with their contract with the Crown, for the construction of a drill hall, at the city of Calgary, in the Province of Alberta.

The Crown, during July, 1916, called for and invited tenders for the construction of this drill hall, under the conditions mentioned in the notice to that effect, as set forth in Ex. 1, and stating, among other things, that tenders for the same would be received at the office of the Secretary of the Department of Public Works, at Ottawa, until 4 o'clock, p.m., on August 8, 1916.

After acquainting themselves with the plans and specifications, the suppliants, on August 4, mailed their tender in the form shewn in Ex. 2, under the form supplied by the respondent.

On September 12, 1916, the suppliants were by telegram advised and notified that their tender had been accepted and the following letter, bearing same date, was sent, by the Department of Public Works, to the suppliants, viz:—

"I beg to inform you of the acceptance of your tender, at $282,051.45, for the construction of a Drill Hall, at Calgary, Alta., $9.25 per cubic yard to be paid for any additional concrete, as per specification, including all extra excavation, filling and wood forms, etc.

The contract in this connection is being prepared and will be forwarded shortly for execution.

(Sgd.) L. H. Coleman, Asst. Secy.

"Messrs. A. G. Creelman & Co.

"Calgary, Alta.

Then on September 15, the Department addressed to Mr. Leo Dowler, their resident engineer, at Calgary, the following letter:—

"Sir:—I beg to transmit to you herewith, in duplicate, the draft of contract to be entered into between His Majesty and Messrs. Creelman & Verge, for the construction of a drill hall at Calgary, Alta., and to ask you to kindly have these documents, and plans, forwarded to you under separate cover, signed by the contractors in your presence as witness.

You will please fill in the blank spaces left for the date of

Can.

Ex. C.

CREELMAN AND VERGE v. THE KING.

Audette, J.

signature and for the first names of the contractors, and return me these documents, together with the plans, for completion by the Department, after which, one of the duplicates will be returned to the contractors.

"R. C. Desrochers, Secy."

"Leo Dowler, Esq.,
"Resident Architect, P.W.D.,
"Calgary, Alta."

As may be inferred from this letter the draft of the contract, the specification and plans were being transmitted to Calgary, under separate cover.

This letter (Ex. A) appears to have been received at Calgary, on September 19, but the draft of the contract and plans, etc., which were sent by express only came several days afterwards. The resident architect testified he could not swear on what date they arrived; but he made repeated enquiries for these documents at the Express office, and on the day they came into his possession, he immediately advised the suppliants who came and signed the contract on September 29.

[His Lordship here recited certain averments of the petition as follows:—Suppliants claim that the delays in accepting their tender, in forwarding the contract for execution, in the staking and giving possession of the land for the building were unreasonable, and by reason thereof they were thrown into the winter months, when the work of excavation could not be done, and these operations had to be suspended till the following spring, and they were unable to undertake the work of construction when and in the manner contemplated by them and respondents. That the cost of labour and material was speedily increasing at all times during the construction, and, that in consequence, they suffered damages from such delays to the extent of $35,453.58.]

Can it be said, with justification, that the tender having reached Ottawa on August 8 and the notice of acceptance having emanated on September 12,—that the delay between these two dates was unreasonable and oppressive?

I must answer in the negative. The parties in question were more than 2,000 miles apart. The Crown was not obliged to accept the tender,—it had only invited the contractors to submit figures for the erection of that building; and, on the other hand, at any time, between the date of the tender and the notice of acceptance the suppliants were at liberty to revoke their tender which must be construed as speaking from day to day, expressing willingness from day to day to perform that

contract. If they found the delay in answering their tender was too long, they could at any time put an end to it; they could have withdrawn by revoking it.

Now, if the suppliants had found, at any time after August 8, that the Crown was taking too long in advising them whether their tender was accepted or rejected, it was always open to them to revoke it. If they did not do it and if they received, on September 12, the notice of acceptance without protest, and if they entered into and signed the contract on September 29 without protest, have they not acquiesced in what was done, are they not to-day estopped from setting up contentions so inconsistent with their conduct? And this would apply as well to the delay in accepting and in signing the contract.

7 Hals., pp. 346, 347.

Apart from these considerations, I find that the delay in question cannot be qualified as unreasonable and oppressive. Under normal conditions, taking into consideration that the parties were over 2,000 miles away from one another, that the Crown is necessarily a slow body to move, as a matter of this kind has first to be taken up by the officials, then by the Minister who finally takes the matter before the Governor in Council. All these contingencies are well known to experienced contractors as the suppliants.

However, in this case we have more than normal conditions to consider. In 1916 the country was engaged in this gigantic mondial war, when all the resources of the country were taxed to their limits and when all the Ministers of the Crown gave their chief and paramount attention to the innumerable questions involved in the prosecution of the war, I unhesitatingly find that the delays complained of were decidedly not oppressive, but quite reasonable and what might be expected, under the circumstances.

The suppliants were, as just said, always at liberty to revoke their tender before its acceptance, and they therefore cannot construe a right of action against the Crown for such delay. The delays which elapsed between the notice of acceptance (12th September) and the signature of the contract (29th September) were not unreasonable as far as the Crown is concerned when consideration is given to the necessary delay involved in forwarding any document from Ottawa to Calgary,—and moreover, in the present instance, the delays in the transmission of this contract, specification and plans seem to have been caused by the express company.

With respect to the complaint of delays in staking and giving

Can.
Ex. C.
CREELMAN AND VERGE v. THE KING.
Audette, J.

possession of the land upon which the building was to be erected, it must be found that there is no evidence bearing upon the delay in giving possession of the land, but only in respect of the staking, which seems to have been attended to just as soon as it was mentioned by the contractor and witness G. E. Hughes, the suppliants' manager, speaking of this delay, said: "After the receipt of the plans, I would say it (the staking) was not done promptly, but I do not object to the time it took. It was staked on October 7. It might have been staked sooner." Indeed, many things might have been done sooner; the suppliants also might have started the excavation sooner than the day they did—they might also have held their sub-contractors to their contracts, etc. However, all of these matters in the view I take of the case become unnecessary to pass upon.

This action is for the recovery of damages, under the above mentioned circumstances, and is therefore in its very essence one sounding in tort. Apart from breach of contract or from special statutory authority no such action will lie against the Crown.

The complaints made herein cannot be construed as amounting to a breach of contract for the reasons already mentioned.

By the third clause, on p. 4 of the specification, which forms part of the contract and which had been in the suppliants' possession before making any tender,—it is provided, among other things, that "no charge shall be made by the contractors for any delay or hindrance from any cause during the progress of any portion of the work embraced in his contract." The clause 44 of the contract provided that: "The contractor shall not have, nor make any claim or demand, nor bring any action or suit or petition against His Majesty for any damage which he may sustain by reasons of any delay or delays, from whatever cause arising in the progress of the work."

Failing to establish that the delays complained of were oppressive, as contemplated in the case of *Bush* v. *Trustees of Port and Town of Whitehaven* (1888), 52 J.P. 392, more fully reported in Hudson on Building Contracts, 4th ed., vol. 2, pp. 122, 130, cited at bar in the able argument presented on behalf of the suppliants,—no right of action will lie against the Crown under the circumstances. The present case is clearly distinguishable from the latter in that the works contemplated by the contract in that case were to be performed in the space of 4 months and that the delay in giving possession of the land extended for a period of 3 months and 13 days and ran into the winter.

It is true the suppliants discharged in a creditable manner

the works contracted for at the sum of $282,051.45, plus the charges for concrete, and that under the evidence adduced by both parties, the building, as erected, was worth, at the time of the trial, between $350,000 to $400,00. However, the contractors would appear to have been the victims of circumstances. In the autumn of 1916, the climatic conditions were worse than usual and the cold weather set in earlier; then the war was being carried on with all due energy with the result that the price of labour and materials kept soaring up. Had the weather been more favourable, had prices gone down instead of jumping up, the result would have been different. Did not the contractors tender at too low a price under the circumstances, when prices were so unsteady? However, these are matters that cannot be judicially weighed, the contract is the law of the parties.

Under clause 3 of the contract the works had to be fully completed by September 12, 1918. They were completed on October 25, 1918, with extras to the small amount of $940, and the Crown made no complaint in that respect. Perhaps I should not close without mentioning that there is endorsed, on the outside cover of the contract a memo, that the contract was authorised on September 9, 1916, by an Order in Council; however that may be, there has been no evidence on the record establishing that any such Order in Council was ever passed and if any were passed, the nature of the same.

The suppliants have established that they have performed their contract in good workmanship, to the satisfaction of the Crown; but they have failed to shew a right of action, under the circumstances. They have been the victims of circumstances over which neither party had any control.

There will be judgment declaring that the suppliants are not entitled to any portion of the relief sought by their petition of right. *Judgment accordingly.*

REX v. ROBERTS.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. October 29, 1921.

EVIDENCE (§ XIIL—995A)—DISORDERLY HOUSE—KEEPING FOR PURPOSES OF PROSTITUTION—ACTS OF FORNICATION—CRIMINAL CODE SECS. 225, 228.

The gist of the offence of keeping a common bawdy house under secs. 225, 228 of the Criminal Code is the keeping of the house for purposes of prostitution, not the mere act of committing fornication, and where the facts justify the Magistrate in finding that the house was kept for this purpose the conviction will be sustained, although there is no evidence of any act of fornication having taken place.

Alta.

App. Div.

REX
v.
ROBERTS.

Clarke, J.A.

APPEAL from a judgment dismissing an application by way of certiorari to quash a conviction by a Police Magistrate for keeping a common bawdy house contrary to sec. 228 of the Criminal Code. Conviction affirmed.

J. K. Paul, for appellant.

A. Mahaffy, for Attorney-General.

The judgment of the Court was delivered by

CLARKE, J.A.:—Appeal by leave from judgment of Ives, J., dismissing an application in certiorari proceedings to quash a conviction by a Police Magistrate against the defendant for keeping and maintaining a common bawdy house contrary to sec. 228 of the Criminal Code.

In my opinion, there was sufficient evidence before the Magistrate to sustain his conviction.

It is true there was no evidence of any act of fornication in the house and if that is necessary, the conviction would have to fall, but, in my view of the matter, such proof is unnecessary. The gist of the offence is the keeping of the house for purposes of prostitution, not the act of committing fornication. The house was occupied by the defendant and another woman; they beckoned to a passer-by who had previously had sexual intercourse with the defendant in another house. When the police officers entered he was found in a bedroom behind the door, although the defendant had previously denied he was in the house; there was also evidence of men going to and from the house the previous day. Upon these facts I think the Magistrate was fully justified in holding that the house was kept for purposes of prostitution. The defendant gave evidence and stated that she was taking care of the house since the morning of the day preceding the day of her arrest for a "lady" who had gone to Chicago. I think this sufficient for a finding that she was the keeper, especially in view of sec. 228 (2) of the Criminal Code, R.S.C. 1906, ch. 146, amended 1913 (Can.), ch. 13, sec. 10, which provides that anyone who appears, acts or behaves as the person having the care of the house shall be deemed to be the keeper thereof and shall be liable to be prosecuted and punished as such, although in fact, he or she is not the real owner or keeper thereof.

I would affirm the conviction and dismiss the appeal with costs.

Appeal dismissed.

BRADLEY v. BAILEY TOBACCO CO. AND JASPERSON.

Can.

S.C.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Brodeur and Mignault, JJ. June 21 1921.

DAMAGES (§IIIA—75)—SALE OF GOODS—PASSING OF PROPERTY—REFUSAL OF PURCHASER TO TAKE DELIVERY—DETERIORATION—RE-SALE—INEVITABLE LOSS—LIABILITY FOR.

Where a purchaser in breach of his contract, refuses to accept the goods purchased which are of a perishable nature, and in the state of the market it is impossible to re-sell the goods within a reasonable time and in the meantime despite the utmost care of the vendor the goods have so deteriorated between the date of the breach and the earliest possible date of the re-sale as to inevitably cause a loss, such loss should be borne by the purchaser from whose breach of contract it resulted.

[*Jamal* v. *Moolla Dawood Sons & Co.*, [1916] 1 A.C. 175, distinguished; *Bradley* v. *Bailey & Jasperson* (1920), 57 D.L.R. 673, 48 O.L.R. 612, varied. See Annotation, Acceptance or Retention of Goods Sold, 43 D.L.R. 165.]

APPEAL by vendor from the judgment of the Ontario Supreme Court, Appellate Division, in an action on a contract by which the defendants purchased his crop of tobacco. Varied.

O. L. Lewis, K.C., and *J. M. Pike*, K.C., for appellant.

J. H. Rodd, for respondent.

DAVIES, C.J.:—The questions to be decided in this case are chiefly, if not entirely, of fact. I am quite satisfied with the reasons and conclusions of the trial Judge, Latchford, J. (see 57 D.L.R. 673), and would allow the appeal with costs and restore his judgment.

IDINGTON, J.:—The appellant sued respondents on a contract by which they bought his crop of tobacco at 30 cents a pound to be delivered on or before March 31, 1919.

They accepted and paid for what was delivered in the earlier months preceding said date without objection.

But when he proposed to deliver in March they offered excuses to which he paid no heed but hauled the balance of the crop so bargained for to the place agreed on for delivery and duly tendered same on March 18.

Under the pretext that it was not of the quality they were entitled to the respondents refused to accept same.

Then the appellant tried ineffectually to induce them to accept delivery.

Something like a fortnight of time was taken up in these negotiations. Then appellant consulted a solicitor who advised giving them a formal written notice offering a week further within which to accept delivery, and threatening, default

Can.

S.C.

BRADLEY v. BAILEY TOBACCO CO.

Idington, J.

thereof, an action. This course was adopted but met with no response. Then he offered the goods to 5 different dealers but failed to induce any of them to buy. Exactly when this was done and whether within a reasonable time after the breach of contract is part of what has to be considered on the reference hereafter referred to. He ultimately sold same at six cents a pound on May 12, 1919. Thereupon this action was brought in which it was attempted to recover the full amount of the price, on the ground that the title had passed by virtue, of what had transpired in said month of March, or, alternatively, the difference in price when so sold, and the original price.

In defence the defendants set up that the goods had become damaged and were not of the quality bought.

A perusal of the evidence demonstrates that the issues so joined were fought out solely on the grounds of the quality of the goods never having been up to the standard bargained for or, at all events, had become so damaged as not to be what were bought.

The trial Judge properly found that the title had not passed and that the goods had not become when tendered so damaged as to have entitled the respondents to reject same.

He suggests what seems highly probable that the real reason was a fall in the market value, and assessed the damages on the basis of the difference between the selling price—30 cents a pound—and the 6 cents a pound realised on the resale, and added some items which seem hardly allowable in any event.

The fact would seem to be that each of these litigants was so determined to have his own way on the trial that neither directed due attention to the alternative of measuring the damages according to the legal principles applicable to such a case and tendering evidence that should have guided the Court trying the issues.

The re-sale of goods (sold at 30 cents a pound, deliverable by the end of March) for 6 cents a pound on May 12 following, hardly seemed to the Court of Appeal to be a due application of the principles of law which govern the assessment of damages in such a case, and whilst maintaining the trial Judge's judgment in all other respects, directed a re-assessment of the damages by the local Master at Chatham.

Hence this appeal which does not seem to me to be well founded; yet I doubt if the terms of the reference will exactly fit the peculiar circumstances likely to be developed in the course of the hearing thereof.

The persistent effort of respondents on the argument to raise

and obtain a rehearing as it were of the question of the goods not being up to the standard upon basis of which the bargain was made although no cross-appeal, tended rather to confusion.

Reading the evidence since then it occurs to me that it is quite possible that in the state of the market it would be impossible to re-sell the goods within any reasonable time and that meantime despite the utmost care of the appellant they may have so deteriorated between March 18, and the earliest possible date of a resale that there might have inevitably occurred a loss for which respondents should be held responsible.

I doubt if the expression in the last line or two of the first sub-section of para. 3 of the amended judgment will be understood in such a way as to cover said risk which in law should be borne by him breaking his contract.

The risk of loss despite due care of perishable and unmarketable goods in case of breach of contract clearly should be borne by him causing the loss and is a contingency which should be provided for in a clearer way than the words "value of the goods in the condition they then were."

Of course if the goods could have been readily resold there is no need to fear a miscarriage of justice on this ground.

I would leave it to the parties to submit to this Court such amendment as either may desire to be made in the formal judgment and allow them to speak to such minutes. The actual situation may need no such provision for if the goods are intrinsically just of the same quality in May when re-sold, as in March, then the suggestion I make is needless.

Default that, I think the appeal should be dismissed with costs.

DUFF, J.:—I concur in the judgment of Davies, C.J.

BRODEUR, J.:—It is a well settled principle that in a contract for sale of goods, the measure of damages for breach is the difference between the contract price and the market price at the date of the breach: *Jamal* v. *Moolla, Dawood, Sons & Co.*, [1916] 1 A.C. 175.

The breach took place in the present case on March 18. The contract price for the tobacco in question was 30 cents a pound and on May 7 it was re-sold at 6 cents a pound. The trial Judge awarded the vendor the difference between the contract price and the price at which the tobacco was subsequently sold.

The parties were so much involved in the issue as to the quality of the tobacco that they have failed to bring evidence as to the market value of the tobacco when the breach took

Can.

S.C.

BRADLEY v. BAILEY TOBACCO CO.

MIGNAULT, J.

place, viz., when the purchasers refused to accept delivery of the goods.

The evidence is not very satisfactory as to the obligation on the part of the vendor to mitigate the damages by getting the best price he can at the date of the breach. It is not clearly established either as to whether the tobacco deteriorated from the date of the breach until the date of its re-sale and to whose negligence such deterioration should be charged against.

The Appellate Division (1920), 57 D.L.R. 673, at p. 677, came to the conclusion that the breach had occurred on March 18, and that the purchasers were bound to take then the delivery of the tobacco. They confirm in those respects the findings of the trial Judge. They ordered a reference to the Master to assess the damages (at p. 682), "on the basis that the plaintiff is entitled to the difference between the contract price and the market value of the goods when they were refused on March 18, or if there was no market there then at the difference in the value of the goods in the condition they then were and the contract price."

This order of reference seems to me too wide; and though I would be willing that the order should be maintained in principle I would be in favour of amending it in such a way that the defendants respondents should also be held responsible if there was no available market value at the time of the breach for the deterioration which the goods might have incurred from the day of the breach, March 18, to the date of the resale on May 7. Benjamin on Sale, ed. 6, p. 930.

The appeal should be allowed with costs and the order of reference should be amended to cover the above mentioned modification.

MIGNAULT, J.:—This is an action claiming damages for the failure of the respondents to take delivery of 17,830 pounds of tobacco sold to them by the appellant. The contract of sale dated October 17, 1918, was in writing, and was of the appellant's crop of 30 acres of Burley leaf tobacco, grown in 1918, at 30 cents per pound, to be delivered when ready up to March 31 at Jeannette's Creek or Pain Court. The contract specified what the seller was to do to the tobacco and also required that it should be in marketable condition and not too high in case, that is to say not too moist. Payment was to be made at the time of delivery.

The appellant delivered to the respondent 14,829 pounds of this tobacco early in the year and was paid for the same. There remained a balance of some 17,830 pounds. This the appellant,

about the middle of March, 1919, placed in a warehouse at Pain Court, and wrote to the respondents, on March 18, informing them that he had about 8½ tons of burley tobacco in warehouse at Pain Court, Ont., constituting the balance of tobacco to be delivered under the contract, and he insisted that the respondents should accept the tobacco and pay for it at once in accordance with the terms of his contract.

The trial Judge found all the facts in favour of the appellant as to the condition of the tobacco when it was placed in the warehouse in Pain Court. He also found it should have been accepted and removed and paid for by the respondents within a reasonable time after they were notified of its delivery at Pain Court, or about March 18 or 19, but that the respondents allowed it to remain there during a damp and an increasingly warm season. At that season of the year, added the trial Judge, bacterial action takes place in tobacco and it becomes increasingly damp in appearance and more liable to become mouldy. The trial Judge also found that, on April 7, when the respondents had the tobacco examined, some of it was not, at least in part, in a marketable condition, but that it was delivered within the time of the contract and that it was of that time, and not of a later date, that the test of marketability is to be applied. He gave judgment for $4,701.66. It appears therefore that although the trial Judge finds that the tobacco was in a marketable condition and conformed to the contract when delivered and stored at Pain Court, it became subsequently deteriorated on account of remaining at Pain Court during a damp and increasingly warm season. The respondents claimed that the tobacco was not in good condition when delivered at Pain Court and refused to accept it on or about March 18, and confirmed this refusal after another inspection about April 7. Then the appellant made efforts to sell it, the trial Judge finds, at the best obtainable price, but could only get 6 cents a pound for it when he sold it on May 12. The trial Judge adds that about the time of the breach tobacco buying had ceased, that the buyers had packed up and gone away to other places where the seasons are different, that some had abandoned their drying machines, discharged their help and were not in a position to buy. He says: "I do not think the plaintiff could have done anything more than he did."

The judgment was reversed by the Appellate Division, Ferguson, J.A., who delivered judgment stating, at p. 679 (57 D.L.R.):—

"It is not pretended that it was intended that the property

Can.

S.C.

BRADLEY v. BAILEY TOBACCO CO.

Mignault, J.

in the goods should pass until all things stipulated in the contracts to be done to the tobacco to prepare it for the market had been done. The trial Judge has found that everything the plaintiff had to do to put the tobacco in condition for delivery was done, and that the defendants wrongfully refused to take delivery and pay. He does not, however, find that the property in the goods passed."

On the ground that the property in the tobacco had not passed to the respondents—and of course it had to be weighed and control and possession of the same given to the respondents on payment of the price—the Appellate Division decided that the risk of deterioration and depreciation in value from moulding, sweating, heating or from improper storing was the appellant's and not the respondent's risk. And the Court ordered a reassessment of the damages on the basis that the appellant was entitled to the difference between the contract price and the market value of the goods when they were refused on March 18, or if there was no market on that date, then to the difference in the value of the goods in the condition they then were and the contract price.

According to this decision, assuming that the tobacco was, on March 18, in the condition found by the trial Judge, that is to say in good marketable condition, and that the respondents wrongfully refused to accept it, the appellant will recover the difference between the contract price and either the market value on March 18 of the tobacco if there was then a market, or the value of the goods on that date. This means that the appellant cannot charge the respondents with the subsequent deterioration of the tobacco, for the judgment holds that it remained at his risk, the property not having passed to the respondents, nor the loss he suffered by reason of such deterioration which possibly affected the price which the appellant obtained for the tobacco when he sold it on May 12, at 6 cents a pound.

Can it be contended, on the facts found by the trial Judge, that the property in the tobacco warehouse at Pain Court passed to the buyers? It seems to me impossible to say that the tobacco should be weighed, for it was sold at so much a pound. But does this mean that the appellant who, the trial Judge finds, had fulfilled his part of the contract, while the respondents wrongfully refused to carry out their obligations thereunder—will, if there really was no market for the tobacco at the date of the breach, suffer the loss caused by the deterioration of the tobacco,

if it happened without his fault, and affected the selling price when he ultimately succeeded in selling it.

The rule no doubt is that the measure of damages, in case of the breach of a contract of sale by reason of the wrongful refusal of the purchaser to accept the goods when tendered to him, is the difference between the contract price and the market price of the goods at the time of the breach, the obligation of the seller being to minimise the damages by getting the best price he can upon that date. *Jamal* v. *Moolla, Dawood, Sons & Co.*, [1916] 1 A.C. 175.

But this supposes that there was a market for the goods at the time of the breach. If not, the Appellate Division holds that the measure of damages is the difference between the contract price and the value of the goods at the time of the breach. This is no doubt perfectly proper, but it seems to me that there should be a further inquiry in a case like this of the sale of goods which are subject to deterioration through climatic causes and which deterioration may occur without any fault of the vendor.

After due consideration therefore I think the judgment of the Appellate Division should be varied to the extent of amending the order of reference to cover the case of no available market coupled with deterioration in the intrinsic value of the tobacco through no fault of the appellant. The parties, if they cannot agree on the form of this amendment of the order of reference, will have leave to come before this Court to have it settled.

In view of this variance of the order of reference the appellant is entitled to his costs in this Court.

Appeal allowed; judgment varied.

THE POLAR AERATED WATER WORKS v. WINNIKOFF.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. November 5, 1921.

COURTS (§IIA—150)—DISTRICT COURTS—ALBERTA—JURISDICTION.

The fact that the cause of action did not arise in the district in which the action was brought and that the defendant does not reside therein does not deprive the District Court of that district of jurisdiction in respect of the action.

[*Reid* v. *Taber Trading Co.* (1912), 7 D.L.R. 229, followed, *Bennefield* v. *Knox* (1914), 17 D.L.R. 398; *Mayor, etc., of London* v. *Cox* (1867), L.R. 2 H.L. 239 referred to; *B. and R. Co.* v. *McLeod* (1914), 18 D.L.R. 245, 7 Alta. L.R. 349, applied.]

APPEAL from the order of the Judge of the District Court of Calgary dismissing the action of that Court.

Alta.

App. Div.

POLAR AERATED WATER WORKS v. WINNIKOFF.

SCOTT, C.J.

W. D. Gow, for plaintiff; *A. Hanna*, for defendant.

SCOTT, C.J.:—The defendant resided in the district of Acadia where the cause of action arose. The Judge did not give any reasons in writing for dismissing the action but it was submitted upon the argument of the appeal that he held that, by reason of the facts referred to, the District Court of Calgary had not jurisdiction to entertain the action.

The question involved in this appeal was dealt with by Walsh, J., in *Reid* v. *Taber Trading Co.* (1912), 7 D.L.R. 229, by Carpenter, district Judge, in *Manitoba Engines Co.* v. *Paisley* (1914), 7 W.W.R., 1097, and by the Judge now appealed from, in *De Barothy & Co.* v. *Markham & Co.* (1913), 5 W.W.R. 806.

In the first two cases referred to it was held that the fact that the cause of action did not arise in the district in which the action was brought and that the defendant did not reside therein, did not deprive the Court of that district of jurisdiction in respect of the action. In the last mentioned case the Judge now appealed from held, upon similar facts, that the Court was without jurisdiction. As we have not before us his reasons for judgment in the case at Bar, I assume that they are those stated by him in the case referred to.

Section 23 of the District Courts Act 1907 (Alta.), ch. 4, gives District Courts jurisdiction over all manner of causes of action limited only by the amount claimed or the value of the property in dispute. With the exception of sec. 23, which I will refer to later, the only provisions I can find which limits their jurisdiction over persons and property throughout the Province are those contained in sec. 32 which provides that actions for trespass to land, for partnership accounts, or in respect of wills must be brought respectively in the district in which the lands are situated, where the partnership had its principal place of business or in which the testator resided at the time of his death or in which probate of the will was issued, and sec. 41 which relates to jurisdiction in probates.

Section 32 appears to me to afford a strong indication of intention that District Courts shall have jurisdiction over persons and property through the Province, at least, irrespective of where the cause of action arose, the property is situated or the defendants reside. The fact that it provides that certain causes of action must be sued for in certain District Courts reasonably implies that all other causes of action may be sued for in any District Court.

Section 32 also indicates that a District Court has jurisdic-

tion over persons residing outside the boundaries of the district. The causes of action mentioned therein must be brought in certain districts. If the defendants did not reside therein a plaintiff in such an action would be without a remedy unless those Courts had such jurisdiction.

Section 18 provides that a District Court may require the sheriff of another district to serve and execute all its writs, summons and orders upon persons within their districts and sec. 40 provides that a District Court may issue *inter alia* writs of attachment and replevin and subpoenas into any other district. These sections afford a strong indication of intention that a District Court has jurisdiction over both persons and and property beyond its boundaries. They appear to me to be necessary provisions as I doubt whether a District Court would otherwise have jurisdiction or authority over other than the officers of its own district and they cannot reasonably be held to indicate an intention to limit the jurisdiction of such Courts over persons or property.

The provisions of the District Courts Act are largely taken from the County Courts Act of Ontario, R.S.O. 1914, ch. 59. There the jurisdiction of a County Court over persons residing outside the county or causes of action arising or property situated elsewhere, except in cases where the venue is local, has never been doubted. Carpenter, D.J., in *Manitoba Engines Co.* v. *Paisley* refers to *Mahon* v. *Nicholls* (1880), 31 U.C.C.P. 22, where Osler, J., expresses the view that a plaintiff might bring his action in any county in the Province no matter where the cause of action arose and regardless of the convenience of the defendant.

In *Ward* v. *Serrel* (1910), 3 Alta. L.R. 138, it was held by this Court that, where a statutory provision is adopted from another jurisdiction after having been in force there for a long period of time, the judicial decisions of that jurisdiction upon its interpretation should be followed unless there are very strong reasons for a contrary view. See also *Bennefield* v. *Knox* (1914), 17 D.L.R. 398, 7 Alta. L.R. 346.

Under the rules respecting small debt procedure an action brought under them may be brought in any District Court in the Province subject only to the provision that it shall be tried at the place at which a sittings of the Court is held nearest to the place where the cause of action arose or where the defendant or anyone of the defendants reside or carries on a business at the time the action is entered and that the place of trial shall be named by the plaintiff in the statement of claim.

Alta.

App. Div.

POLAR AERATED WATER WORKS v. WINNIKOFF.

Scott, C.J.

Rule 791 prescribes the time within which the defendant must pay the claim or enter a dispute (1) where the defendant resides within the district in which action is brought; (2) where the defendant resides elsewhere in the Province; and (3) where the defendant resides anywhere outside the Province and provides that in none of those cases shall it be necessary to obtain an order for service out of the jurisdiction.

At the time this rule was first promulgated the Supreme Court of the Territories was the only Court which had jurisdiction to entertain actions under that procedure. As that Court had jurisdiction over the whole Province and service anywhere within it would not be a service outside its jurisdiction the words "none of those cases" in R. 791 must be taken to refer only to cases where a defendant resides outside the Province. The fact that jurisdiction in small debt cases has been transferred to District Courts is not, in my view, a sufficient ground for holding that the rule should now receive a different interpretation. The only effect of it and the rules respecting service outside the Province is that in all cases in the District Courts other than small debt cases the plaintiff must obtain an order for such service, and set aside the order appealed against.

For the reasons I have stated, I am of opinion that the District Court of Calgary had jurisdiction to entertain this action and I would, therefore, allow the appeal with costs and with costs to the plaintiff of the application in the Court below.

Section 33 provides that an action brought by or against a District Court Judge which is within the competence of a District Court may be brought in a District Court, adjoining that in which such Judge resides.

This provision appears to be inconsistent with the views I have expressed as to the effect of the Act. If I am correct in that view such an action may be brought in any district in any District Court other than that in which such Judge resides. It appears to be taken from the Ontario Division Courts Act, R.S.O. 1914, ch. 63, and was a necessary provision therein as it provides that actions shall be brought in the division in which the cause of action arose or in which the defendant or one of the defendants resides. The fact that it is included in the District Courts Act is not in itself sufficient to indicate an intention contrary to that which I have expressed.

I am referred to two cases in the British Columbia Courts in which the jurisdiction of County Courts there was questioned on grounds similar to those arising on this appeal. Those cases

are not applicable to the case at Bar as the County Courts Act of that Province prescribes that certain causes of action shall be brought in certain Courts and that all other actions shall be brought in the Court in which the defendant or one of the defendants resided or carried on business within 6 months before action brought or in the Court within the territorial limits of which the cause of action wholly or partially arose. (See R.S. B.C., ch. 53, secs. 66, 67.)

STUART J.A.:—The question of the local jurisdiction of our District Courts in this Province has been a matter of some difference of opinion for some time past. The opinion, adopted in this case by the Judge appealed from, that there is a local limitation, seems to be based upon the fact that they are in one sense, at least, "inferior" Courts. And there are undoubtedly many precedents establishing the principle that an "inferior" Court is presumed to be so limited and that nothing shall be assumed to be within its jurisdiction unless it is expressly shewn to be so.

The strongest case seems to be *Mayor of London* v. *Cox*, (1867) L.R. 2 H.L. 239. There the defendant in error had sued for prohibition against the Mayor of London to prevent the exercise of jurisdiction by the Mayor's Court of that city. He succeeded throughout in the Court of Exchequer, the Exchequer Chamber and the House of Lords. The Judges were then called in and on their behalf a very learned and exhaustive judgment was delivered by Willes, J., which was fully adopted by the House.

It will be observed, however, upon a perusal of the judgment that it proceeded entirely upon a consideration of the true position of a very large number of Courts, existing throughout England from time immemorial mostly of feudal origin, whose jurisdiction rested upon old feudal law as part of a lord's rights over his tenants or upon old royal charters granting "liberties" to the mayor and alderman of boroughs which, being grants from the King, as superior lord (in the feudal sense) over all, were themselves essentially feudal in their theory and origin. See 9 Hals., p. 11, para. 5. The Court of the Lord Mayor of London was held to be in the same position as any other of these. Willes, J., shews that as early as the Statute of Westminster the First it was necessary in order to save the authority of the King's Courts (the Superior Courts at Westminister) to restrain these Courts within territorial limits. And Lord Westbury indeed in his few remarks

Alta.

App. Div.

POLAR AERATED WATER WORKS v. WINNIKOFF.

Stuart, J.A.

shews that there was still trouble over this in connection with the Lord Mayor's Court.

Of course if the principle of that decision must necessarily be applied to such a new statutory Court as our District Court simply because it, too, is an "inferior" Court it would be difficult to avoid the conclusion that the learned Judge appealed from was right. We are left without assistance from any decisions on the English County Courts Act because from the very beginning there was made in that Act a territorial limitation. The first County Courts Act of 1846 (Imp.) ch. 95, fixed the jurisdiction as the same as that of the historical sheriff's County Court or sheriff's "tourn" which had existed from the very earliest (even Anglo Saxon) times and which from the very nature of the sheriff's office was limited territorially in its jurisdiction. See *Tubb* v. *Woodward* (1795), 6 Term. R. 175, 101 E.R. 496; *Smith* v. *O'Kelly* (1797), 1 Bos. & P. 75, 126 E.R. 787, *Bailey* v. *Chitty* (1836), 2 M. & W. 28 at p. 31, 150 E.R. 654. And the present County Courts Act of 1888 (Imp.) ch. 43 makes a specific territorial limitation of jurisdiction.

But what we have before us here is a new Court of purely statutory origin established in a community or province where there never existed any feudal or customary inferior Courts. We have Courts created directly by Parliament (for this purpose our Provincial Legislature has the full powers of Parliament). We have Courts whose existence is recognised or anticipated in the B.N.A. Act wherein it is provided that the Judges shall be appointed by the Governor-General in Council i.e. by the Crown. We have Courts whose process is issued in the name of the Crown which was not the case with the inferior Courts referred to, or the Court dealt with, in *Mayor of London* v. *Cox*. In that case the theory was expressly repudiated that the Mayor's Court was a Royal Court. On the other hand it cannot be denied that our District Courts are Courts of the King, although their jurisdiction as to subject matter is restricted to claims or property of a certain amount of value.

It is true that in *Mayor of London* v. *Cox*, *supra*, at p. 270 Willes, J., said:—"In our local Courts the general rule is said to be that the person proceeded against must be resident." But the cases he there cites all deal with the old sheriff's County Court or with other customary Courts.

In 9 Hals. p. 9 it is said "Courts may be classified in sev-

eral ways. First they may be divided into such as are courts of the King and such as are not. The latter class includes the palatine courts where the King has parted with *jura regalia* in the county palatine, courts, baron and the old sheriff's county courts; all other courts [which would include the modern statutory county courts] are the Kings Courts."

In this situation I have grave doubt whether decisions and opinions in England referring entirely to the old customary Courts, should be applied without reserve to our District Courts.

From 1907, (Alta) ch. 4, when our District Courts were established, to 1914, (Alta), ch. 2 sec. 11., when by the new rules writs of summons were dispensed with, actions were begun both in the Supreme Court and in the District Courts by writ which was expressed to be issued in the King's name. Now ordinarily the King's writ ran throughout his dominions although no doubt, under our federal system it could only run throughout the territorial jurisdiction of the Legislature authorised to establish the Court which directed its issue or from which it issued. It may be remembered that up to 1862 the writ of *habeas corpus* issued by the Court of King's Bench in England was held to run even to Upper Canada (See *Ex parte Anderson* (1861), 3 El. & El. 487, 121 E.R. 525), and it required a statute to restrict it. (See 1862 (Imp.) ch. 20).

My view, therefore, is that inasmuch as the District Courts are the King's Courts and issue process in the King's name their authority should be presumed to extend throughout the Province, that is, throughout the territorial jurisdiction of the Legislature validly establishing them unless there is something to indicate a clear intention that their running should be restricted to a limited area. It may be that this is contrary to our preconceptions about local Courts but I feel rather confident that these preconceptions are derived from a legal tradition relating back to the local Courts in England to which I have referred.

In *Mayor of London* v. *Cox supra*, at pp. 258, 259 Willes, J. said, referring to the statute (1857) (Imp.), ch. 157, which authorised the Mayor's Court to issue its process beyond the city said "In this local Act there are neither express words nor necessary implication to produce the prerogative effect of creating a superior Court and in effect a new palatine jurisdiction. Far different was the language used in the public Act of 20 Vic. ch. 65 to put the Admiralty Court upon the footing of

Alta.

App. Div.

POLAR AERATED WATER WORKS v. WINNIKOFF.

Stuart, J.A.

the superior Courts. When this is done for the City Courts it will doubtless be by a public measure which shall associate the Judges to those of Westminster Hall and which (following the policy acted upon since the time of Henry VIII. at latest) shall vest their appointment in the Crown."

Of course it is impossible to look upon our District Courts as other than inferior Courts in one sense. Section 96 of the B.N.A. Act clearly makes the distinction between Superior Courts and District and County Courts. There is no doubt that the superintending jurisdiction by *certiorari*, prohibition, &c., is confined to the Supreme Court and may be exercised over the District Courts; but the latter do stand, in my opinion, for the reasons I have given, in quite a different position from that occupied by what were usually called "inferior" Courts in England.

There is no specific territorial limitation laid down in the District Court Act. The Act was obviously largely modelled on the Ontario County Courts Act wherein no such limitation was made, and there is no doubt that for many years in Ontario prior to the passing of our Act the Ontario Act had been universally acted upon as imposing no territorial limitation.

It is true that in one section of our Act, viz., 41, dealing with jurisdiction in probate, there is a distinct reference to the "territorial limits" of the Court. But I think there is a real sense in which the Court may be said to have a territorial limitation which still does not extend that limitation as far as is contended for by the respondent in this case. The Judge is not the Court. The Court is an institution consisting of various officers with written forms of procedure and offices where the officials do their work. There is undoubtedly a territorial limitation with respect to the operation of the institution, *i.e.*, with respect to the topographical limits within which all these officers may carry on their functions. That is to say, the Court as an institution must operate within the judicial district. That is, I think, what is meant by 1907 (Alta.), ch. 4, sec. 3, which says: "There shall be in every judicial district in the province a Court of Record to be styled the District Court of the District of (as the case may be)." The effect of the Act would thus be the erection of these institutions in each locality or district with power to operate, *i.e.*, do their work, there and there only. But this is quite a different thing from confining their jurisdiction to persons residing and causes of action arising within those territorial limits. It is perhaps somewhat analogous to the provision of Magna Charta that the Court of Common Pleas must sit in some fixed

place. That did not prevent its jurisdiction extending and its writs running throughout England.

Now there are undoubtedly sections in the Act which impliedly confirm the view that all persons residing and causes of action arising anywhere in the Province shall be under the jurisdiction of any of these District Courts. Particularly is this true of sec. 32 to which the Chief Justice has referred, and his reasoning would also apply to sec. 41. With respect to sec. 18 and sec. 40 it may, of course, be said that the inference should rather be to the contrary because if the view I have expressed is correct these sections would be quite unnecessary. But I feel convinced that these sections were inserted largely *ex majore cautela* for the purpose of removing all doubt as to the effective execution of the Courts' judgments and orders throughout the province.

I admit that there is much to be said in favour of the view adopted by the Judge below and certainly the matter is one of some uncertainty. I am finally inclined, however, for the reasons I have given and for those given by the Chief Justice in his judgment and also those given by Walsh, J., and Carpenter, Co. Ct. J., in the cases decided by them, to hold that the territorial limitation does not exist. Certainly it was assumed not to exist in Ontario under an Act in practically similar terms from which much of our statute is taken and, according to the principle adopted in such cases as *B. & R. Co. Ltd.* v. *Macleod* (1914), 18 D.L.R. 245, 7 Alta. L.R. 349, where a foreign statute having received in its forum for many years a certain interpretation is then adopted in a new jurisdiction the Courts of the new jurisdiction ought to take the statute with the old interpretation.

I would, therefore, allow the appeal with costs and set aside the order appealed from. The plaintiff should have the costs of his application upon which that order was made.

BECK, HYNDMAN and CLARKE, JJ.A., concur in the judgments of Scott, C.J., and Stuart, J.A.

Appeal allowed.

MIGNAULT v. LALANCETTE.

Court of Sessions of the Peace, Quebec, Choquette, J.
October 31, 1921.

GAME LAWS (§ I—1)—HUNTING DEER BY MEANS OF JACH-LIGHT—POSSESSION OF, AS EVIDENCE OF GUILT.

The fact that a person carries a jack-light during a hunting trip does not make him liable to be fined unless it be proved that he has really hunted with such light contrary to the Quebec statute which makes it an offence to hunt by this means.

Que.

S.P.

MIGNAULT v. LALANCETTE.

Choquette, J.

PROSECUTION under the Quebec Game Laws for illegally hunting deer with a jack-light. Dismissed.

CHOQUETTE, J.:—The defendant is charged with having, in the first days of the present month of October, in the parish of Villeroy, county of Lotbiniere, illegally hunted deer by means of a jack-light, contrary to the Quebec Game Laws, art. 2310, R.S.Q. 1909.

The proof establishes that on the occasion in question the defendant accompanied by a friend arrived at Villeroy station with a dead deer; that the game-keeper Mignault, the plaintiff, asked him for his name and what he had in a small suitcase which he was carrying; the defendant immediately gave him his name and address and told him to examine the contents of the suitcase. Thereupon the plaintiff found the jack-light, seized it as well as the carcass of the deer and the defendant's gun, and charged him with having killed the animal by means of this light. The defendant denied this, adding that it was his companion Royer, defendant in a like case, who had killed it the same morning about eight o'clock without having used this light. The facts are established beyond doubt. The sole question to be decided is whether the fact of having been found in possession of a jack-light is sufficient to find the defendant guilty of having illegally hunted.

A penal statute must be strictly interpreted; therefore, when the law clearly states that it is forbidden to use a jack-light to hunt, kill, etc., is this to be taken to mean that a person found in possession of such an instrument, when it is not proved that he used it to hunt and much less to kill deer, has nevertheless transgressed the law? I do not believe so. If such had been the intention of the Legislature, it would have been easy to say so; but the law forbidding the use of this instrument only for hunting, it devolves upon the plaintiff to show that the defendant really used it for this purpose.

To hunt means to chase for the purpose of killing or catching an animal on the earth or in the air; does this apply to a person sitting in a camp, even in the bush, or waiting at a railway station with a jacklight, a light which may be used for many other purposes than hunting. Evidently not.

The counsel for the plaintiff contended that from the moment that a person carrying such a light left his home to hunt, he is guilty of an infraction of the law. I am unable to accept this interpretation, because, as I have already said, it would have been so easy for the Legislature to have said so, if such had been its intention.

I am therefore of opinion that a person carrying a jack-light during a hunting trip is not liable to be fined unless it be proved that he has really hunted with such light, that is to say, as the word means: to chase for the purpose of killing or catching an animal.

The complaint is dismissed with costs.*

REX v. JONES.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. November 3, 1921.

EVIDENCE (§ XIIL—986)—DISORDERLY HOUSE—KEEPER OF—ADMISSIONS—THREATS OR PROMISES BY POLICE OFFICER—ADMISSIBILITY—CRIMINAL CODE SEC. 228.

It is doubtful if an admission of ownership can be treated as evidence of keeping under sec. 228 of the Criminal Code, but even if so an admission of ownership made to the officer after his arrival with a warrant to search the house, and which may have been the result of threats or promises by the police officer the Crown not having discharged the burden of proving otherwise, is inadmissible and a conviction based upon such admission will be quashed.

[*Ibrahim* v. *The King*, [1914] A.C. 599, 83 L.J. (P.C.) 185, followed. See also *R.* v. *Read* (1921), 62 D.L.R. 363.]

APPEAL from a judgment of Ives, J., dismissing a motion by way of *certiorari* to quash a conviction under sec. 228 of the Criminal Code. Appeal allowed and conviction quashed.

J. K. Paul, for appellant; *A. Mahaffy*, for the Crown.

SCOTT, C.J., concurs with STUART, J.A.

STUART, J.A.:—I think this appeal should be allowed and the conviction quashed. I concur in the reasoning of Clarke, J.A. But I think also that there would be a good deal to be said against the conviction even if the statement made to the policeman were admissible. The policeman said that the accused told him she was the "owner" of the house. I doubt very much if an admission of ownership should be treated as evidence of "keeping" under sec. 228, R.S.C. 1906, ch. 146, amended 1913 (Can.) ch. 13. In sub-sec. 2 it is made clear, it seems to me, that a keeper is the person who has the "care, government or management of any disorderly house or as assisting in such care, government or management." The sub-section enacts that any person *appearing, acting or behaving* as having such care, &c. or as assisting therein, shall be deemed the keeper. But all

(*) A similar judgment was rendered in the case of *Mignault* v. *Royer*, charged with the same offence.

Alta.

App. Div.

REX v. JONES.

Beck, J.A.

this is a very different thing from ownership. And I find nothing in the evidence of the policeman to suggest the inference that the accused appeared, acted or behaved as the person having the care, government or management of the house or as assisting therein. An owner does not necessarily do any of these things. And as for the word "occupant" the same reasoning might, to some extent, at least, apply. And it is particularly to be observed that it was the cross-examining counsel and not the witness, who used the word "occupant." If we take the words of the witness in answer to the question as a statement that the accused had told him she was the "occupant" then the question arises, just what word *did* she use? Was it the word "owner" or the word "occupant"? The officer did not attempt to give her words directly.

It might of course be said with much force in opposition to my suggestion that the other evidence shews that the accused was there in the house and was enticing, and if she was doing this and was at the same time the owner of the house the inference would be strong that she was the keeper. I should perhaps hesitate to quash on this ground alone but I am bound to say that the admission was very ambiguously reported by the officer and I should have preferred to have him give her words directly and a little more specifically before being absolutely satisfied with the admission as evidence of guilt. I think admissions ought in general to be accurately reported to the Court.

BECK, J.A.:—I concur with my brothers Stuart and Clarke in allowing the appeal and quashing the conviction.

I take this occasion to make some observations which I think it would be well for those to take into consideration who are engaged in the duty of enforcing the criminal law. The offence charged in the present case is dealt with along with a number of cognate offences under Part V. of the Criminal Code which has the title of "Offences against religion, morals, and public convenience."

The purpose of the provisions in question is obviously to check immorality and what I want to suggest is that in many cases this purpose would be much more effectively accomplished if the police authorities would dig a little deeper and thus reach those who, probably occupying a position of more or less respectability in the community, are morally more guilty—because acting coldly and deliberately—than the miserable women, who for the most part are the only ones pursued.

Though many cases come before us in which a woman is charged with being the keeper or inmate of a bawdy house, I

do not recollect a case brought under sec. 228 A. which makes it a criminal offence for any one who as landlord, lessor, tenant, occupier, agent or otherwise has charge or control of any premises and knowingly permits such premises or any part thereof to be let or used for the purposes of a disorderly house. In most cases in which a rented house is used as a bawdy house it would probably not be difficult to infer knowledge from the circumstances. I venture to add that it would be with more personal satisfaction that I should convict the one higher up than the unfortunate woman who seems commonly in practice to be thought the only sinner.

HYNDMAN, J.A. (dissenting):—This is an appeal from the judgment of Ives, J., who dismissed a motion by way of *certiorari* brought by the defendant to quash a conviction made against her on June 8, 1921, by Gilbert E. Sanders, Police Magistrate for the city of Calgary, for that the said defendant at Calgary, on June 3, 1921, and for sometime previous thereto, did unlawfully keep and maintain a disorderly house to wit, a common bawdy house, by keeping and maintaining a certain house, situate and being at—[address was specified]—Calgary, for the purpose of prostitution contrary to sec. 228 of the Criminal Code and for which offence she was adjudged to pay the sum of $150 and $25 costs or in default thereof, imprisonment for the period of four months.

A preliminary objection was taken at the opening of the trial that the defendant had been arrested without a warrant but it does not appear in the evidence that there was a warrant to search the premises although it seems not to have been filed as an exhibit. However, I do not think this can be considered at this stage for the reason that the ground was not raised in the notice of appeal unless it can be said that it arises under the general objection that "*the Magistrate had no jurisdiction to convict the accused.*"....My opinion is that this is altogether too general and if reliance is intended to be had on such a ground there should have been a clear and specific reference to it. It is perhaps hardly necessary to state that where persons taken into custody under a warrant to search issued pursuant to sec. 641 can be proceeded against without the issue of any further warrant provided a charge is promptly laid against them. *Rex* v. *Shaak* (1918), 43 D.L.R. 608, 30 Can. Cr. Cas. 290, 14 Alta. L.R. 76, which was done in this instance.

Since the argument Mr. Paul has referred us to the decision in *Rex* v. *Hing Hoy* (1917), 36 D.L.R. 765, 28 Can. Cr. Cas. 220,

Alta.

App. Div.

REX v. JONES.

Hyndman, J.A.

11 Alta. L.R. 518, as shewing that it was necessary to properly prove and file the warrant. That, however, was a charge of keeping a gaming house in which the warrant, when proved, established a *prima facie* or presumptive case against the accused as provided for in sec. 985 of the Criminal Code. No such presumption, however, is raised in the case at Bar and the necessity for its production is not of such urgency. In face of the evidence I do not see how it can be maintained that the defendant was arrested without a warrant. There was a warrant used at the trial and had there been anything of an irregular nature contained in it, doubtless counsel for the defence would have taken advantage of it. I think it ought to be presumed under the circumstances of this case that it was regular.

Another ground raised was that the Magistrate admitted evidence, namely, admissions made by the accused after arrest and before the necessary warning had been given. The only evidence, however, which was given to which objection could be taken under this ground was a statement by the defendant to the constable that she was the occupier of the house. I really am unable to see why such a question should be considered objectionable in view of the fact that she was in the house and there can be no crime in being the occupier of a house. If she had admitted that it was a house of ill fame and that she was the occupier, then it might be a very different matter. In fact only confessions or admissions of guilt are objectionable and not statements incapable of being construed as confessions of guilt. This, in my opinion, is the case here. In any event the same point is amply proven by the evidence of other witnesses.

The chief ground raised, however, were the following:—

1. There was no evidence to support the information and conviction. 2. There is no evidence that the accused was the keeper of certain house, being Ave. East Calgary. 3. There is no evidence that said house ever was or on June 3, 1921, or at any time became a disorderly house. 4. There was no evidence that said house was kept for the purpose of prostitution. 5. There was no evidence that said house was at any time a common bawdy house. 6. There was no evidence that the house was a public nuisance. 7. There was no evidence that any act of intercourse ever took place in said house or is there any evidence that any more than one man visited the house or that any more than one man had sexual intercourse with the accused. 8. There was no evidence that the said room was resorted to for the purposes of prostitution.

The facts may be summarised as follows:—

On June 3, 1921, between 8.30 and 9.20 p.m. the premises in question were under observation by Constables Davidson and another, who say in effect that the house has no furnishings upstairs. Downstairs there was only one bedroom containing a bed with no clothing except a cover on top; that no one lived there at night; that the defendant, who admitted to him she was the occupier, came there at certain times only. That a few days before it was occupied by another woman (Henderson). That whilst the constables were watching, the woman solicited about a dozen people. Some would go up and look at them and walk away, and one man went in and remained about 10 minutes. They were out at the door making motions to people and persons passing would turn round and see them beckon. The witnesses, Urvach, says that he owns a house in the vicinity, that the accused occupied the house in question with another woman. That he had the house under observation for some days. That he noticed the women taking in men occasionally every night; that he was himself asked to go in on several occasions. That on June 3, he had a conversation with the accused and one said to the other "that she had better rent the house, that if respectable people got in there they would make a kick against them." Another witness, Rhode stated that they invited him in for reasons which must be quite obvious. Their conduct on other occasions was also significant as indicating their business.

Upon this state of facts the Magistrate found that the defendant was guilty of keeping and maintaining a disorderly house. It seems to me that there was ample justification for the finding he made, in fact, I fail to appreciate how any other conclusion could be reached.

It was argued that there was no proof of any act of intercourse or that any more than one man visited the premises or had intercourse with the accused. If the fact of actual intercourse must be proved it would be a most difficult, if not an impossible task, to prove one case in many. I think it quite sufficient if facts and circumstances are established from which the only reasonable inference can be drawn that the premises are occupied and open and used for the purposes of a house of ill-fame or disorderly house and that, I think, is the case here.

I would, therefore, dismiss the appeal with costs.

CLARKE, J.A.:—Appeal by leave from judgment of Ives, J. dismissing an application in *certiorari* proceedings to quash a conviction by a Police Magistrate against the defendant for keeping and maintaining a common bawdy house contrary to sec. 228 of the Crim. Code.

It may be there was sufficient evidence to justify a finding

Alta.

App. Div.

REX v. JONES.

Clarke, J.A.

that the house in question was a common bawdy house within the meaning of sec. 228, as to which I do not express a decided opinion. But was the defendant the keeper? It is not sufficient that she was an inmate. She is not so charged and the maximum punishment in such case is less than that inflicted by the conviction in question. To sustain the conviction she must be shown to be the keeper. The evidence in support of that contention is that of Brodie Davidson, a police officer, and consists of an admission made by the defendant.

The following extracts from his evidence shew the situation.

"It is owned by this woman there; the accused Mary Jones. Mr. Paul: That admission was made after she was placed under arrest. Court: It was a statement. Witness: A few days prior to that it was owned by the other woman. Court: Why did you introduce that about an admission, nothing has been said about an admission? Mr. Paul: But it was the only way he could find out and I wish to have that noted in case the record has to go to the other Court. Court: I do not want things to go clouded to the other Court and that is what I want to stop because they are so easily confused. Witness: A few days prior to the arrest of this woman Mary Jones this Sadie Henderson (a person charged at the same time as being an inmate) was the owner of the house at the time, she turned it over to this other woman. Court: Is there anything to shew that one is the keeper more than the other? A. Just their own information. We have another witness."

And in cross-examination:

"Q. How did you find out that Mrs. Jones was the person who was the occupant of these premises? A. Because she told me. Q. After you arrived there with your warrant and read it to her? A. To search the house."

This conversation took place when the officer went to the house with an order to search and apparently after he had read the warrant to the defendant and on the occasion of her arrest.

The defendant's counsel objected to the admission of the evidence.

It does not appear that the admission was free and voluntary nor what conversation preceded it. For all that appears it may have been the result of threats or promises by the police officer; the burden of proving otherwise was upon the Crown. I think the evidence was inadmissible. The Magistrate appears to have treated the admission as a statement only and not as an admission of guilt, but in my opinion it was such an admission

as comes within the rule as to admissions which cannot be given in evidence without laying a proper foundation; it was a statement of the very fact which was necessary to establish her guilt of the offence charged. I discussed the question of confession evidence in *Rex* v. *Read*, *ante* p. 363, just decided. The following language of Lord Sumner in *Ibrahim* v. *The King*, [1914] A.C. 599, at p. 609, 83 L.J. (P.C.) 185, is apt:—

"It has long been established as a positive rule of English criminal law that no *statement* by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

I have not considered it necessary to discuss the objection that the Magistrate was without jurisdiction by reason of the failure to prove a proper order to search the house.

I think the appeal should be allowed but under the circumstances without costs and the conviction quashed with the usual order of protection to the Magistrate if desired. The moneys paid by the defendant under the conviction and as security for costs on the motion to quash to be returned to her.

Appeal allowed and conviction quashed.

HOPGOOD & SON v. FEENER.

Supreme Court of Canada, Idington, Duff, Anglin, Mignault, JJ., and Cassels, J., ad hoc. November 21, 1921.

CONTRACTS (§IVC—345)—CONSTRUCTION—REFUSAL OF ARCHITECT TO GIVE PROGRESS CERTIFICATES—NOTICE BY CONTRACTOR REFUSING TO COMPLETE UNLESS CONTRACT ALTERED—NOTICE BY OWNER TERMINATING CONTRACT—COMPLETION OF BUILDING BY OWNER—RIGHT OF CONTRACTOR TO PAYMENT ON A QUANTUM MERUIT.

The respondent undertook certain construction and repair work for the appellants under a written contract which provided that "the work and materials should be paid for in instalments, eighty per cent. of labour and materials delivered on the certificate of the architect, first payment on the value of labour amounting to five hundred dollars, other payments fortnightly as the work progresses, eighty per cent. of full amount of contract to be paid as herein provided, the final payment shall be made within thirty-three days after the contract is fulfilled." A difference arose between the parties owing to the refusal of the architect to grant progress estimates for an amount claimed by the respondent. The respondent notified the appellants that he would not continue the work unless he received the amount due according to his construction of the contract and the appellants put an end to the contract and completed the work themselves.

Can.

S.C.

HOPGOOD & SON v. FEENER.

Idington, J.

The Court held, reversing the judgment of the Supreme Court of Nova Scotia (1921), 60 D.L.R. 674, that the construction given by the architects to the contract was correct and that the "labour and materials" meant in the context the value of the labour and materials as represented by the work done, which value must be ascertained by reference to the standard furnished by the contract price. That the evidence established conclusively that the respondent desired to go on with the contract but only conditionally upon some readjustment of its terms and that he notified the appellant that otherwise he could and would not carry out his agreement. Under these conditions the respondent could not successfully allege either that he completed his contract or that he was ready and willing to do so but that he was prevented from doing so by the appellant and that this was essential to his recovery for the value of the work and materials on an implied contract for a *quantum meruit*.

[*Feener* v. *Hopgood* (1921), 60 D.L.R. 674, reversed.]

APPEAL by the defendant from the judgment of the Supreme Court of Nova Scotia reversing the judgment of Mellish, J., dismissing plaintiff's action for damages for breach of a building contract. Reversed and judgment of Mellish, J., restored.

W. C. McDonald, for appellant.

C. J. Burchell, for respondent.

IDINGTON, J:—This is an appeal from the judgment of the Supreme Court of Nova Scotia (1921), 60 D.L.R. 674, reversing a judgment of the trial Judge in an action brought by respondent upon a building contract against the appellants seeking to recover for work and material, and damages for dismissal terminating the contract.

The contract provided for payment by the appellant of $13,875 for the entire work and material "in instalments . . . of eighty per cent. of labour and materials delivered on the certificate of the architects."

When the respondent contractor had realised that he had undertaken the work at too low a price and could not induce the architects to give him progress certificates for the 80% on his own basis of what was due him he wrote letters to the appellant and the architects clearly declaring that unless the architects yielded to his wishes the work would cease.

There were negotiations and a fruitless proposal for arbitration designed to override the architects' certificate and decision as to what was due; all of which fails to touch the vital points in question herein.

Then the architects gave appellants under art. 5 of the contract which reads as follows:—

"Art. 5. Should the Contractor at any time refuse or neg-

lect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty after *three* days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this Contract; and if the Architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this Contract, of all materials, tools and appliances thereof, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this Contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the Contractor, but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties," a certificate which reads as follows:—

"Halifax, N. S., August 21st, 1919.

W. J. Hopgood & Sons,
Halifax.

Dear Sirs:

In accordance with Article 5, of signed Contract, dated 20th May, 1919, between Austin J. Feener, Contractor, and yourselves, we hereby certify that the aforesaid Contractor has stopped the work and nothing has been done on the building since Saturday last noon.

We further certify that such neglect and failure of the Contractor is sufficient ground for you to terminate the employment

Can.

S.C.

HOPGOOD & SON v. FEENER.

Idington, J.

of the contractor and to proceed as provided in Article 5, of the Contract.—Yours truly,

(*Sgd.*) Harris & Horton."

Thereupon the appellant pursuant thereto and in literal compliance therewith wrote the respondent as follows:—

"Halifax, N.S., August 22nd, 1919.

To Austin J. Feener, Esq.,
Halifax, N.S.

Sir:

We beg to enclose herewith copy of certificate of Messrs. Harris & Horton, under Article Five, of the Contract between us, dated May 20th, 1919.

Please take notice that you having stopped the work under said Contract and nothing having been done on the building since Saturday noon last, we hereby terminate your employment for the said work and will, on Wednesday morning next, August 27th, 1919, enter upon the said premises and take possession for the purpose of completing the work comprehended under said Contract, of all materials, tools and appliances therefor and will employ other person or persons to finish the work and to provide the materials therefor, and we hold you responsible for the excess of the expense incurred by us therefor over the unpaid balance of the contract price, and will also hold you reponsible for any damage incurred through your default.—Yours truly,

W. J. Hopgood & Son."

Pursuant thereto appellants after the expiration of the time specified therein and in due accordance with the terms of the contract as expressed in said art. five thereof, proceed to finish the work in question on a basis of paying therefor the cost of labour and materials plus 10%.

The work cost them in all over $20,000 instead of the contract price.

The respondent on the date following the date and delivery of appellant's letter issued the writ commencing this action and pursued it despite all the foregoing circumstances.

I am unable to understand the process of reasoning by which it is sought to overrule the absolute discretion of the architects as to the progress certificate upon which alone appellants were bound to pay and the respondent was to become entitled to recover payments unless and until the work had been duly completed.

The contention that the alleged cost of labour and materials incurred by the respondent instead of the value thereof

having regard to the total price to be paid therefor by appellants, certainly is in conflict with the express language above quoted from the written contract and with the following provision which therein followed that:—"All payments shall be made upon written certificates of the Architects to the effect that such payments have become due."

And in art. 10 of the contract there is an express provision that no such certificate "shall be conclusive evidence of the performance of the contract either wholly or in part."

This provision is evidently designed to protect the appellants against possible errors of the architects in making progress certificates and enable the architects to correct any such when coming to give the final certificate.

I think the appeal should be allowed with costs here and in the Court of Appeal below, 60 D.L.R. 674, and the judgment of the trial Judge be restored.

DUFF, J.:—I concur in the view of the contract taken by the trial Judge. "Labour and materials" means in this context, in my judgment, the value of the labour and materials as represented by the work done, which value, of course, must be ascertained by reference to the standard furnished by the contract price. That is perfectly reasonable construction of the language and it gives also reasonable effect to the intention of the parties as disclosed by the contract as a whole. The evidence seems to establish quite conclusively that the respondent found himself in a position in which he considered he was unable to proceed with the work in the absence of some readjustment of the terms. This he made known to the appellants. It is quite true that the respondent desired to go on with the contract, but conditionally upon some readjustment of its terms resulting in an arrangement more favourable to himself. There was, I think, a perfectly clear declaration by him that otherwise he could not and would not carry out his agreement.

In these circumstances the respondent cannot successfully allege either that he completed his contract or that he was ready and willing to complete it but he was prevented from doing so by the appellant. As the trial Judge says, the essential averment that he was ready and willing to perform his contract is an allegation which is negatived by the evidence. See *Forrestt & Son* v. *Aramayo* (1900), 83 L.T. 335, at p. 338, 9 Asp. M.C. 134.

ANGLIN, J.:—I am with great respect of the opinion that the construction put upon the contract between the parties to this action by the trial Judge was correct and that his judgment

Can.

S.C.

HOPGOOD & SON v. FEENER.

Anglin, J.

dismissing the plaintiff's action was therefore right and should be restored.

Read literally and taken by itself, the clause, "eighty per cent. of labour and materials delivered on the certificates of the architects," might support the plaintiff's contention—that is if the architects' certificate should not be regarded as indispensable. But the contract also contains a stipulation for a 20% draw-back payable only 33 days after completion of the work. Now the obvious purpose of inserting this latter provision was to afford reasonable security to the owner for the completion of the work by the contractor as well as to protect him against liens for wages and materials. Having regard to that purpose, the proper construction of such a provision in my opinion is that 20% of the proportion of the contract price earned shall be withheld from time to time as progress payments are made. Otherwise the owner would have no security whatever should the contractor become insolvent or make default during the progress of the work. The two clauses, one for the protection of the contractor, the other for that of the owner, must be read together. The object of the Court in construing a contract must be to ascertain and give effect to the intention of the parties gathered from the contract as a whole—not from the consideration of a single provision divorced from the context.

It is conceded that the clause providing for the payment of 80% of labour and materials is subject to the later clause providing for the 20% draw-back, to the extent that if at any time the payments made for the value of labour and materials should amount to 80% of the whole contract price the contractor shall not be entitled to receive any further payment until 33 days had expired after the completion of the work. It might be that only 50% or even less of the total work completed the actual value of labour and materials furnished would amount to 80% of the contract price. According to the plaintiff's contention he would then be entitled to be paid such 80%, leaving only 20% of the total price in the owner's hands to secure the completion of the remaining 50% or more of the work. I cannot think that a construction which would lead to such a result can be correct. It does not give to the draw-back clause the effect it was intended to have.

In my opinion the interpretation put upon the contract by the architects was sound and the contractor's right to be paid from time to time 80% of labour and materials furnished was subject to the restriction that a sum equal to 20% of the value of the work done and materials on the ground estimated in pro-

portion to the contract price for the completed work should from time to time be retained by the owner as draw-back. In other words, the contractor's right was not to receive on progress certificates 80% of the absolute value of the labour and materials furnished but of the relative or proportionate value thereof estimated on the basis of the contract price representing the total value of the completed work. Fair effect—and I am convinced, the effect intended—is thus given to both the 80% and the 20% provisions.

The plaintiff stopped work and practically refused to proceed further unless his interpretation of the contract should be accepted. The architects certified to the owner that there had been such neglect and failure of the contractor as warranted the termination of the contract under art. 5. The defendant was thereupon entitled forthwith to terminate the plaintiff's employment. As I read the contract the 3 days' notice clause applicable to an earlier provision for delay in the work does not apply to this case.

On this ground and also on the ground that the plaintiff had abandoned the work and sufficiently intimated his purpose to repudiate the contract to warrant the defendant in treating it as at an end, I think the action was rightly dismissed at the trial.

In the absence of any evidence of fraud or collusion with the defendant on the part of the architects the failure of the plaintiff to produce their certificate for the sum which he claims was due him by the owner presents a formidable obstacle to his success.

The appeal should be allowed with costs in this Court and in the Court *en banc* and the judgment of the trial Judge restored.

MIGNAULT, J. (dissenting):—The principal question here turns on the construction of clause 9 of the contract whereby the respondent undertook certain construction and repair work for the appellants for the sum of $13,875. A difference arose between the parties owing to the refusal of the architect to grant progress estimates for the amount equivalent to 80% of the labour and materials furnished by the respondent, so that the latter was deprived, during the progress of the work, of the payments to which he claimed he was entitled. The respondent having notified the appellants that he would not continue his work unless he received the amount due according to the agreement, the appellants put an end to his contract. This action was brought by the respondent for the value of his work and for damages.

Can.

S.C.

HOPGOOD & SON v. FEENER.

Mignault, J.

The material portion of clause 9 reads as follows:—

"Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be $13,875.00, Thirteen thousand eight hundred and seventy-five dollars, subject to additions and to deductions as hereinbefore provided, and that such sum shall be paid in current funds by the owner to the contractor in instalments as follows:—Eighty per cent of labour and materials delivered on the certificate of the architects. First payment on the value of labour amounting to five hundred dollars. Other payments fortnightly as the work progresses. Twenty per cent. of full amount of contract to be paid as herein provided. The final payment shall be made within thirty-three days after this contract is fulfilled. All payments shall be made upon written certificates of the architects to the effect that such payments have become due."

The construction which the architect placed upon the clause was that the payments during the work were not to be of 80% of the actual value of labour and materials, but, inasmuch as the contractor had undertaken the work for too low a price, the 80% was to be determined with reference to the portion of work executed as compared to what remained to be done. Thus if a quarter of the work contracted for was performed up to a certain date, the payment was to be of 80% of one-quarter of the contract price, and not 80% of the actual value of the labour and materials.

I cannot agree with this construction which the trial Judge adopted.

In plain English the contractor is entitled, as the work progresses, to instalments of 80% of the labour and materials furnished. There is no reference here to the proportion between what is performed and what remains to be done. The contract provides that the first payment is to be made on the value of labour amounting to $500. This clearly refers to the actual value, and in my opinion, the actual value of the work done, measured generally but not necessarily by the actual expenditure, is the basis on which the architect should have granted certificates for the fortnightly payments.

It is true that the final instalment is to be 20% of the full amount of the contract, and is payable within 33 days after completion of the work. And it is urged that, assuming the contract to be for too low a price, the contractor would receive 80% of the contract price before 80% of the work had been

completed, and that therefore the owner's security for due performance would be gone, or would be limited to the 20% retained for the final payment.

The only security which the contract provides is this 20%, and the owner remains fully entitled to it. The other objection is one which the owner should have considered before making the contract, but certainly is no reason to refuse to give effect to the plain meaning of its language. If the appellants are right, where the contract price is too low, in claiming that the 80% should be calculated on the proportion of the work done and not on the actual value of the labour and materials furnished, then when the contract price is too high, the 80% would be estimated on a similar proportion, and might conceivably exceed the actual expenditure. I cannot place so forced a construction on the plain language of this contract, so I may simply say that finding myself in entire agreement with the reasoning of Russell, J., in the Appellate Court, 60 D.L.R. 674, I would dismiss the appeal with costs.

CASSELS, J.:—I am of the opinion that this appeal should be allowed and the judgment of the trial Judge, Mellish, J., restored.

I agree entirely with the reasons of the trial Judge. He has dealt fully with the facts of the case and it is unnecessary to repeat them. If the contention of the respondent be correct, the protection of the owners in having 20% held back as security would be wiped out before half of the work was performed. The contractor might have received the whole contract price and if dishonest (not that there is any suggestion of dishonesty on the part of the present contractor), or from pecuniary troubles be unable to finish the work the owner would lose his 20% drawback. I am also of opinion that a certificate of the architect was a condition precedent to the contractor being entitled to payment. There is no allegation of fraud nor proof thereof entitling the contractor to have the architect disqualified.

Appeal allowed.

FLYNN v. CAPITAL TRUST Co. & SMALL.

Ontario Supreme Court, Middleton, J. December 28, 1921.

PARTIES (§IIA—67A)—ACTION AGAINST COMMITTEE OF ABSENTEE FOR DEBT CONTRACTED BY ABSENTEE—ABSENTEE NOT MADE A PARTY—ABSENTEE ACT 1920 (ONT.), CH. 36—LUNACY ACT, R.S.O. 1914, CH. 68—RULE 97—APPLICATION.

Ont.

S.C.

FLYNN v. CAPITAL TRUST CO.

Middleton, J.

The powers and duties of the Court and Committee appointed under the Absentee Act, 1920 (Ont.), ch. 36, to administer the property of the absentee are, under sec. 9 of the Act, the same *mutatis mutandis* as the powers and duties of the Court and Committee under the Lunacy Act, R.S.O. 1914, ch. 68, and therefore no action will lie against the committee for a debt contracted by the absentee, to which such absentee is not made a party defendant.

COURTS (§IA—9)—DELEGATION OF POWERS OF—ABSENTEE ACT, 1920, GEO. V., CH. 36 (ONT.)—LUNACY ACT, R.S.O. 1914, CH. 68—OFFICIAL REFEREE—VALIDITY OF ORDER—RIGHT OF COURT TO HEAR ACTION.

There is no provision in the Absentee Act, which speaks of a reference or delegation of the Court's powers, and there being no provision in the Lunacy Act which authorises the delegation of the powers of the Court to a Master or Referee, an order that "all such powers as are conferred upon the Court by the Absentee Act as may be necessary for the maintenance and administration of the estate of . . . . (the absentee) be delegated to the . . . . official referee" is void as unauthorised by any statute or practice, but accepting the clause at its face value it does not preclude the Court from entertaining an action.

ARGUMENT of question of law raised by the pleadings, in an action brought against the Committee of Ambrose T. Small appointed under the Absentee Act, 1920 (Ont.), ch. 36.

The facts are fully set out in the judgment following.

Boland, for plaintiff; *Hughes* for defendant.

MIDDLETON, J.:—Argument of question of law raised by the pleadings. Counsel consenting to the question now being heard and determined.

In December, 1919, Ambrose T. Small disappeared, and although every effort has been made to account for his disappearance no trace of him has been found, and it is not known whether he is alive or dead.

On May 20, 1920, Latchford, J., made an order declaring him to be an absentee within the meaning of the Absentee Act (Ont.), ch. 36, and appointing the defendants his Committee.

The plaintiff, claiming to be a creditor of Small, sues the Committee to recover $52,530. The claim may or may not be well founded, but it is clearly one calling for investigation, and which cannot be admitted.

The defendants raise certain questions of law in their defence: 1. The action should be against Mr. Small and not against the Committee. 2. That under the order made the claim must be asserted and proved before Mr. Cameron, an official referee referred to in the order.

This involves the consideration of the provision of the Absentee Act and the order made.

Section 7 of the Act provides that "The Court may make an

order for the administration of the property of an 'absentee,' and may appoint a committee for that purpose." It was argued before me that "administration" meant administration in the sense in which that word is used when what is intended is the winding-up and distribution of the estate of a deceased person and that for that reason the rules relative to administration proceedings applied. Clearly this is not so. "Administration" is used here in a sense substantially equivalent to management.

This is plain from sec. 9 which provided that the powers and duties of the Court and Committee shall be the same *mutatis mutandis* as the powers and duties of the Court and Committee under the Lunacy Act. Turning to that Act, R.S.O., ch. 68, secs. 12-23, make it plain that the powers of the Court and Committee are limited to the "management and administration" of his estate including the conservation of all assets and payment of all debts, with the right to use his property for the maintenance of his family.

When a claim is made againt a lunatic's estate which ought to be resisted, an action may be brought against him and his Committee may defend him—R. 97. No action will be against the Committee with respect of anything done by the lunatic. And the Committee is not a proper party to the action.

I can see no reason why this law should not apply in the case of an absentee. I am told that an application to add Small as a party defendant is pending; if this is done the plaintiff may yet be in trouble, as if the absentee is dead the action will not be well constituted unless his executor or administrator is before the Court. Substitutional service upon a dead man is not permissible. This is a matter of importance, because from the nature of the claim put forward it is likely to depend largely, if not altogether, upon the plaintiff's own evidence, and the plaintiff cannot succeed if his claim is against the estate of a deceased person without corroborative evidence.

The second point argued turned largely upon the misunderstanding of the term "administration," but was also based upon a provision found in the order (which it was agreed should be taken to be properly before me).

After appointing the Committee the order refers the matter to the referee to deal with the "maintenance and administration" of Small's estate. The statute used the word "administration" and the Lunacy Act the words "Management and Administration."

Then follows this provision:—

Ont.

S.C.

FLYNN v. CAPITAL TRUST CO.

Middleton, J.

"And the Court doth further order in pursuance and by virtue of the said statute that all such powers as are conferred upon the Court by the Absentee Act as may be necessary for the maintenance and administration of the estate of the said Ambrose J. Small be and the same are hereby delegated to the said J. A. C. Cameron, Esq., official referee."

There is no provision in the statute which speaks of a reference or the delegation of the Court's powers.

There is no provision in the Lunacy Act which authorises the delegation of the powers of the Court to a Master or referee and in practice such a thing is unheard of. When the Court requires information as to a lunatic's estate, before exercising its powers it may refer to a Master to devise and report a scheme for the management of his estate and his maintenance, but such report must always be before the Court for adoption before being acted upon. Such reports do not become confirmed by filing and lapse of time.

In the rules permitting certain matters to be dealt with by subordinate officers, "Proceedings as to Lunatics" is excepted from the Master's jurisdiction: Rule 208 (5). The only place referees have in our jurisprudence, under the provincial Acts, is that actions may be deferred to them under secs. 64 *et seq.* of the Judicature Act in the circumstances pointed out by these sections.

Under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, sec. 110, the Court may, subject to an appeal, refer and delegate any of its powers under the Act to any "officer of the Court," an expression wide enough to cover a reference. (See sec. 76 O.J.A., R.S.O. 1914, ch. 56).

My brother Latchford tells me he was not asked for any such order and made no such order, and is at a loss to know how this clause came to be inserted in the order by the Registrar. There is no precedent for it as this was the first order under the Act, and nothing of the kind appears in the ordinary lunacy order. The clause appears to me to be void as unauthorised by any statute or practice. But beyond this the argument now made is that the clause in the order precludes the Court from enter-

NOTE.—Section 5 of the (Ontario) Lunacy Act, 9 Edw. VII., ch. 37 (R.S.O. 1914, ch. 68) is as follows:—

"The Court may delegate to a master, official referee or other officer all or any of the powers of the Court under this Act, except the making of a declaration of lunacy."

It is difficult in view of this section to understand how the learned Judge arrived at his conclusion.

taining an action. Accepting the clause at its face value, I cannot see that it has any such effect.

The result is that the action should be dismissed as to the Committee. I say nothing as to any right of amendment nor as to any new action against Small. Costs to follow the event.

Action dismissed.

Man.

C.A.

WOODWARD & CO. v. KOEFOED.

Perdue, C.J.M.

WOODWARD & CO. v. KOEFOED.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Dennistoun, JJ.A. September 26, 1921.

BILLS AND NOTES (§IC—28)—SALE OF GRAIN—FUTURE DELIVERY—INTENTION TO MAKE ACTUAL DELIVERY—DEFAULT IN MAKING—NOTE GIVEN TO COVER MARGINS—LEGALITY—RECOVERY OF AMOUNT DUE—CRIM. CODE, SEC. 231.

Where transactions for the sale and purchase of grain are carried on by the Commission Merchants in good faith according to the rules, regulations and customs of the grain exchange and contemplate the actual receipt and delivery of the goods and payment therefor and for which the merchants make themselves responsible and the customer has on hand at time of entering into the transactions grain which is available for delivery, the transactions are not in violation of sec. 231 of the Criminal Code and the Commission Merchants may recover on a promissory note given for the balance due to them at the time the account was closed out owing to the market going against the customer. The fact that the customer went beyond his original intention and indulged in speculation makes no difference so far as the legality of the contracts is concerned, the illegality under the section only arising when both parties have the guilty intention contemplated by the section.

[*Beamish* v. *Richardson* (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595 discussed and distinguished; *Forget* v. *Ostigny*, [1895] A.C. 318; *Maloof* v. *Bickell* (1919), 50 D.L.R. 590, 59 Can. S.C.R. 429, followed; *Pearson* v. *Carpenter* (1904), 35 Can. S.C.R. 380, referred to, *Woodward* v. *Koefoed* (1921), 59 D.L.R. 562, reversed.]

APPEAL by plaintiff from the trial judgment (59 D.L.R. 562) dismissing an action to recover the amount due on a promissory note given to protect margins in transactions on the Winnipeg grain exchange. Reversed.

J. T. Thorson, for appellant.

T. A. Hunt, K.C., and *J. Auld*, for respondent.

PERDUE, C.J.M.:—This action was brought to recover the sum of $1,510.76, being the amount alleged to be due on a promissory note made by defendant in favour of Terwilliger & Wolfe for $2,000, dated February 5, 1917, and payable 30 days after date with interest at 7% per annum. Curran, J., trial Judge (1921), 59 D.L.R. 562, has found that the various endorsements were satisfactorily proved and that the plaintiff company is the legal

Man.

C.A.

WOODWARD & CO. v. KOEFOED.

Perdue, C.J.M.

holder of the note, but it is not a holder in due course, the plaintiff having become an endorsee after the maturity of the note.

The defences are: (1) Absence of consideration for the making of the note; (2) Illegality by reason of sec. 231 of the Criminal Code; (3) Want of privity between the defendant and the plaintiff, raised on the argument.

The trial Judge has fully set forth the facts surrounding the transactions in respect of which the note was given, but I feel it necessary to refer to them at some length.

The note sued on was given as a renewal of a note for a similar amount made between the same parties, dated January 6, 1917, and payable 30 days after date. When this last-mentioned note was given, the payees gave to the defendant at his request the following receipt:

"This will acknowledge receipt of note from Mr. J. C. Koefoed for $2,000 to be considered the same as money and to be used as margins on any future options purchased or sold.

Terwilliger & Wolfe, per Philip Wolfe."

Terwilliger & Wolfe were grain merchants carrying on business at Calgary, Wolfe, one of the partners, being agent for Woodward & Company, commission merchants on the grain exchange in Winnipeg. Woodward also traded as the Farm Grain Co., to whom the note sued on was indorsed. He indorsed the note to Woodward & Company. The last-mentioned firm was afterwards incorporated as Woodward & Co., Ltd., the plaintiffs in this action, the note and other assets of the firm being transferred to them.

The defendant is a farmer living near Gleichen, Alberta. He formerly resided in North Dakota and had done business on the Minneapolis Grain Exchange. He had also sold or bought grain for future delivery through the Winnipeg Grain Exchange and had had previous dealings with Wolfe and Woodward & Co. in grain trades for future delivery.

Just prior to the giving of the note of January 6, 1917, the defendant met Wolfe at his office in Calgary. Defendant then had 8,000 bushels of wheat on hand grown on the land he farmed. Wolfe told him that he believed grain was going to come down and to sell for future delivery in order to protect himself. Defendant had not ready money for margins at the time and Wolfe offered to take his note. This was agreed to and the note of January 6 was given. Defendant waited a day or two and then instead of selling to protect himself, as

Wolfe advised, he bought 10,000 bushels for May delivery. A number of transactions followed in which he either purchased or sold, through the plaintiffs as his brokers, grain for future delivery, the result being that he was a loser to a large amount.

When each transaction took place a memorandum was sent by the plaintiffs to the defendant shewing what the transaction was, whether a purchase or sale, the quantity, the time for delivery, the kind of grain and the price. These are referred to as the "confirmation slips" or the "pink slips." When a trade was closed a statement was sent by plaintiffs to defendant shewing the result. The trial Judge has found as facts that these confirmation slips were received by defendant and that he knew that they were notifications of and represented trades made on his behalf by the plaintiffs and that he did not object. The defendant also received a statement after each trade was closed shewing whether it resulted in a gain or a loss to him. The trial Judge finds that the defendant duly authorised these trades; that the note was given to protect these trades and was for the sole benefit of Woodward & Co.; that Wolfe received instructions from defendant and wired Woodward & Co., his principals, to execute the trades, which they did; that defendant was duly advised by the purchase and sales slips and confirmatory memoranda attached to Exs. 7, 8, 9, 10, 11 and 12. The trial Judge goes on to say, at pp. 565, 566:—

"He cannot plead ignorance of these transactions because each purchase and sale slip indicates clearly the particulars and also the result of the trade, whether it had made a profit or a loss to the defendant. It seems to me that the terms of the confirmation memoranda make it clear what the contractual rights and obligations of the parties were, and if the transactions in question were real and bona fide dealings in grain, as they purport to be, I can see no ground for the contention by the defendant that there is want of privity of contract. Want of privity of contract is not pleaded and even if it had been I think the provisions of the confirmation slips are a complete answer to that objection. But the crux of the whole matter in my opinion is this: Are the transactions in question such as are prohibited by sec. 231 of the Criminal Code? If they are the plaintiff cannot recover. If they are not I think the plaintiff ought to recover the money sued for."

It is plain, therefore, that the only question to be considered on this appeal is whether the transactions above referred to come within the class of dealings prohibited by sec. 231 of the Criminal Code. In discussing this phase of the case the trial

Man.

C.A.

WOODWARD & CO. v. KOEFOED.

Perdue, C.J.M.

Judge points out that the question whether these transactions are within the prohibitions of the section is one of intention and is a question of fact. He says the only evidence of the actual trades is that afforded by Exs. 7, 8, 9, 10, 11 and 12. He says at p. 566 (59 D.L.R.): "The actual contracts, if there were any, are not produced. The names and identity of the other contracting parties, that is, purchasers [sellers?] and buyers, as the case may be, are not disclosed."

Now it was shewn in the evidence of Woodward that the trades in question were "actually executed upon the grain exchange by either Mr. Woodward or Mr. Hale." The documents shewing the particulars of each contract, and the vendor and purchaser in each case, have been lost or destroyed. The defendant received an advice in each transaction giving these particulars, but as the trial Judge finds, defendant wilfully destroyed them. An attempt was made to put in secondary evidence of the documents but this was not allowed. However, I do not think it is necessary in considering the question of illegality that the plaintiff should give the names of the parties buying or selling, if it is shewn that the transactions were actual purchases or sales, as was done in this case. This view was adopted by the trial Judge. I would, however, call attention to the fact that the trial Judge was in error in stating what Wolfe said in regard to the intention to deliver wheat. It is clear from Wolfe's evidence that defendant could ship and deliver his own wheat—the wheat he had grown—if he had it, to fill a contract for future delivery, and, if he had not the wheat, he could buy it on the market and fill the contract with the wheat so purchased.

Curran, J., decided that the contract was illegal on the authority of *Beamish* v. *Richardson* (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595, 23 Can. Cr. Cas. 394. His main reason for so holding is stated in these words, at p. 568 (59 D.L.R.):—In my opinion the evidence shews quite clearly that the transactions in question were such as the Code inhibited and declared to be illgal because neither party intended that there should be actual delivery made or received of the grain to which the purchase or sales relate."

The Judge had made in an earlier part of his judgment the following finding, at p. 567:—

"The confirmation slips contained the material terms and conditions of each transaction and I have already held that the defendant had notice of these by delivery to him of duplicates; that he made no objection to and is bound by them."

These confirmation slips contain a printed heading and are as follows, the earliest sent being given as a sample of all, on pp. 567, 568:

"Memorandum.

Woodward & Company,

Winnipeg.....19..... Commission Merchants,

M..... Grain Exchange.

We have made the following transactions for your account and risk, under the by-laws, rules, regulations and customs of the Winnipeg Grain Exchange and also those of the Winnipeg Grain and Produce Exchange Clearing Ass'n.

All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor. On all marginal business we reserve the right to close transactions when margins are running out without further notice. We also reserve the privilege of substituting other responsible parties as principals with you in these transactions at any time until closed, in accordance with the rules of the Winnipeg Grain Exchange, where the transactions are made, and to clear all transactions through clearing associations from day to day in accordance with the usage prevailing at the time.

This trade has been, or may be, cleared through the said clearing association, and on being so cleared, we will be the only persons responsible for the carrying out of this trade or trades, and furthermore we will be the only persons against whom you will have any recourse for the fulfilment thereof.

Bought or sold. Quantity. Delivery. Kind of Price. Transac-
property. tions with."

An outstanding term of the above contract is that commencing the second paragraph: "All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor." This, as the trial Judge has found, binds the defendant. The defendant cannot say that it means something else, something contradictory of the written document, something which he claims to be illegal and therefore not binding on him.

The evidence of Woodward and Hale shews that the transactions in question were actually executed by them on the Winnipeg Grain Exchange. They were real transactions put through in the ordinary way in the exchange. They went through the clearing house and were there dealt with as actual contracts. Each of them, as Mr. Woodward states, "affected the market." The broker had to make good the contract and look to his principal for reimbursement. It seems to me that

Man.

C.A.

WOODWARD & Co. v. KOEFOED.

Perdue, C.J.M.

the language used by the Lord Chancellor in giving the judgment of the Privy Council in *Forget* v. *Ostigny*, [1895] A.C. 318, at p. 323, 64 L.J. (P.C.) 62, 43 W.R. 590, is appropriate to the present case. It is as follows:—

"It may well be that the appellant was aware that in directing a purchase to be made the respondent did not intend to keep the shares purchased, but to sell them when, as he anticipated would be the case, they rose in value; that his object was not investment but speculation. To enter into such transactions with such an object is sometimes spoken of as "gambling on the Stock Exchange"; but it certainly does not follow that the transactions involve any gaming contract. A contract cannot properly be so described 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 realising a profit by its resale. Such dealings are of every-day occurrence in commerce. The legal aspect of the case is the same whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint-stock company. Nor, again, do such purchases and sales become gaming contracts because the person purchasing is not possessed of the money required to pay for his purchases, but obtains the requisite funds in a large measure by means of advances on the security of the stocks or goods he has purchased. This, also, is an every-day commercial transaction. For example, a merchant who has to pay the price of a cargo purchased before he resells it obtains in ordinary course the means of doing so by pledging the bill of lading."

Forget v. *Ostigny* was not decided under sec. 231 of the Criminal Code. The case turned upon a provision in the Civil Code of the Province of Quebec, art. 1927, declaring that, "there is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet." It is quite as effective as sec. 231 in depriving a party to a gaming contract of a right to recover his gains.

Forget v. *Ostigny* was an action by a broker who had been buying shares in the stock exchange for the defendant. The shares were actually bought in each case, but only a small portion of the price was furnished by the defendant, the remainder being obtained by loan from a bank on security of the shares. It was a real purchase of shares on a margin and the shares were never asked for or received. Defendant was, as in this case, buying a commodity which he expected would rise in price and which he would then sell at a profit.

In giving judgment in *Forget* v. *Ostigny*, the Lord Chancellor referred to the Dominion Act, 1888 (Can.), ch. 42, being the legislative enactment now known as sec. 231 of the Criminal Code (although I understand it did not apply to the *Forget* case) and called attention to the proviso which corresponds to para. 2 of the present section, which is as follows:—2. It is not an offence under this section if the broker of the purchaser receives delivery, on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.

Upon this saving clause the Lord Chancellor made the following comment at p. 324 ([1895] A.C.):—

"Their Lordships think this proviso was enacted by way of precaution only inasmuch as they cannot doubt that, where a real contract of purchase has been made and carried out by a broker on behalf of a principal delivery to the broker is delivery to the principal just as much as if it had been actually made to himself."

Now, Woodward & Co. bound themselves to make delivery of the grain sold by the plaintiff and to take delivery of the grain bought by him, and actually did so under the by-laws and rules of the Winnipeg Grain Exchange and the Winnipeg Grain and Produce Exchange Clearing Ass'n. They had to stand behind the plaintiff in every one of the transactions in question and make them good. This they did and they now sue for the money expended in so carrying out his trades.

The trial Judge decided this case largely upon the authority of *Beamish* v. *Richardson*, 16 D.L.R. 855. But the authority of that case, in so far as the defence under sec. 231 of the Criminal Code is concerned, has been weakened, if not wholly displaced, by the later decision of the Supreme Court of Canada in *Maloof* v. *Bickell* (1919), 50 D.L.R. 590, 59 Can. S.C.R. 429, a decision which, I understand was not brought to the attention of the trial Judge. *Maloof* v. *Bickell* was an action brought by the plaintiff whose business was that of a miner against a firm of brokers in Toronto who acted as his brokers in the purchase and sale of grain on the market, to recover the moneys shewn to have been to his credit in defendants' books on August 23, 1916, amounting to $2,023.97, and the profit he would have made if defendants had not sold 25,000 bushels of grain when they did, without awaiting his instructions. The dealings were in "futures" and on margin. The action arose out of a dispute as to an order given to defendants on plaintiff's behalf by one Symmes by telephone on August 26 to buy 50,000 bushels of

Man.

C.A.

WOODWARD & Co. v. KOLFOED.

Perdue, C.J.M.

corn. The corn was to be bought on the Chicago Grain Exchange. The defendants filled the order in plaintiff's name. On August 28 the price of "future" corn was rapidly declining and defendants telegraphed to plaintiff for $2,000. The telegram did not reach plaintiff until later and defendants sold the grain bought on August 26 and also the 25,000 bushels he previously held. The sales resulted in a loss and exhausted the money of the plaintiff in defendants' hands. The plaintiff sued for above balance and loss of profit. Defendants counterclaimed for a balance alleged to be due to them. The trial Judge held that the dealings between the parties were similar to those in *Beamish* v. *Richardson, supra*, and that he was bound by the judgment of the Supreme Court in that case. He dismissed the suit and the counterclaim. See *Maloof* v. *Bickell* (1917), 13 O.W.N. 4. The case was appealed and the judgment of the Appellate Division was given by Ferguson, J.A. I have been unable to find the full report of the decision and must rely upon the summary contained in 14 O.W.N. 289. The portion of the judgment bearing upon the question now before this Court is reported as follows, at p. 290:—

The learned trial Judge was of opinion that the transactions disclosed in evidence were within the prohibitions of sec. 231 of the Criminal Code, and that that was the effect of the decision in *Beamish* v. *James Richardson*. The learned Judge of Appeal was unable to agree in either of these conclusions.

Reference was made to *Pearson* v. *Carpenter* (1904), 35 Can. S.C.R. 380; *Forget* v. *Ostigny, supra; Buitenlandsche Bankvereeniging* v. *Hildesheim* (1903), 19 Times L.R. 641, 27 Hals., pp. 258-260. Both action and counterclaim were dismissed.

From the above decision the plaintiff appealed to the Supreme Court of Canada, 50 D.L.R. 590, 59 Can. S.C.R. 429. The Chief Justice held that the purchase and sale of the grain in question at the times and in the manner in which it was bought and sold were *bona fide* transactions authorised by the plaintiff and were not illegal gambling transactions within sec. 231 of the Criminal Code. He cited *Forget* v. *Ostigny, supra*.

Idington, J., concurred in dismissing the appeal, but he adhered to the view he expressed in *Beamish* v. *Richardson*, 16 D.L.R. 855, relative to the law applicable thereto in circumstances such as in evidence in that case.

Duff, J., agreed with the finding of the Appellate Division. In regard to the question of illegality he said at pp. 595, 596 (50 D.L.R.):—"It seems necessary to add a reference to the opinion of the trial Judge that on the authority of *Beamish* v.

Richardson, 16 D.L.R. 855, 49 Can. S.C.R. 595, the orders given by the appellant were illegal under sec. 231 of the Criminal Code.

I am by no means certain that the transactions contemplated by the appellant's orders were in any relevant sense distinguishable from the transactions which certain members of this Court held to be illegal in *Beamish* v. *Richardson*. The purchases authorised by the appellant's orders were to be purchases in the corn pit of the Chicago Board of Trade and in the usual course of business, that is to say, by agents in Chicago, with the consequence that in the absence of agreement to the contrary, the agents would contract as principals and not as representatives, in other words the purchases and sales would be purchases and sales enforceable only by the agent. *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802.

The contracts which were the subject of discussion in *Beamish* v. *Richardson* were contracts subject to the "rules, regulations and customs" of the Winnipeg Grain Exchange and the Winnipeg Clearing House Association, and were contracts in which, by virtue of the rules of the Exchange, the brokers were necessarily principals on the one hand as buyers or sellers and the Clearing House Association on the other as seller or buyer; and it was made quite clear in the evidence that the vast majority of transactions in grain in Winnipeg at that time took place through the instrumentality of the Grain Exchange and the Clearing House Association; in other words, that the Grain Exchange and the Clearing House Association were not merely conveniences for speculation, but together constituted a large market where a great deal of the grain and provision business in Canada were transacted; the brokers, Richardson & Co., being commission merchants trading very largely on their own account on this market. It was made quite clear also that a commission merchant entering into a contract with the Clearing House Association to buy or sell would understand that he must carry out that contract either by actual payment or delivery or by set-off payments against exigible obligations under some other real contract. Such a system of carrying on business of course affords opportunities for speculation and must largely be used for that purpose; and the contracts in question being of the character mentioned, it was held by some members of this Court in *Beamish* v. *Richardson*, *supra*, that because the customer's intention was by means of such contracts to speculate in futures merely, with no expectation either of delivery or taking delivery in kind of any commodity, the transactions fell under the ban of the section

Man.

C.A.

WOODWARD & CO. v. KOEFOED.

Perdue, C.J.M.

of the Criminal Code above referred to. *Beamish* v. *Richardson*, nevertheless, is not a decision upon any point as to the application of that section. My brother Idington and my brother Brodeur based their judgment, it is true, upon the view just explained of the effect of the Code, but my brother Anglin, though expressing an inclination of opinion in the same direction explicitly stated that he did not rest his judgment upon that ground; while the remaining members of the Court (Davies, C.J., and myself) took the opposite view."

In these circumstances I should not consider these opinions (which did not form in whole or in part the *ratio decidendi*) to be binding on me judicially, and I should not feel at liberty to act as if they relieved me from the responsibility of forming and giving effect to my own view. *Ex parte Willey, In re Wright* (1883), 23 Ch. D. 118, at p. 127, 52 L.J. (Ch.) 546.

I may add that I entirely concur in the opinion expressed in the judgment of Ferguson, J.A., that sec. 231 of the Criminal Code does not reach the transactions under consideration on this appeal.

Anglin, J., agreed with the reasons stated by Ferguson, J.A., in the Appellate Division.

Brodeur, J., also agreed in dismissing the appeal. In regard to the question raised under the Criminal Code, he was of opinion that the case could not be distinguished from *Beamish* v. *Richardson*, but that it was not necessary for him to base his judgment upon that ground.

Mignault, J., agreed in dismissing the appeal. As to the question of illegality he expressed his view as follows at pp. 599, 600 (50 D.L.R.):—

"The trial Judge dismissed the appellant's action and the respondents' counterclaim for $156.62 on the ground that the transactions in question amounted to gambling transactions, prohibited as such by sec. 231 of the Criminal Code. The Appellate Division, 14 O.W.N. 289, on the contrary, decided that they were real purchases and sales under the authority of *Forget* v. *Ostigny*, [1895] A.C. 318, and similar cases. In this I agree, but I think, for the reasons stated above, that the appellant's appeal here fails. The counterclaim of the respondents is no longer in question, the latter not having appealed from the judgment of the trial Court by which it was dismissed.

"I would refer to the judgment of Duff, J., in *Beamish* v. *Richardson* and adopt it, if I may, as being particularly applicable in the present case. I would add to the American authori-

ties he cites the following quotation from *Clews* v. *Jamieson* (1901), 182 U.S. 461, at pp. 489, 491:—

"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. The law does not, in the absence of proof, presume that the parties are gambling."

The cases of *Richardson* v. *Gilbertson* (1917), 39 D.L.R. 56, 39 O.L.R. 423, 28 Can. Cr. Cas. 431, and *Medicine Hat Wheat Co.* v. *Norris Commission Co.* (1919), 45 D.L.R. 114, 14 Alta. L.R. 235, cited by the trial Judge, were decided on the assumption that the decision of the Supreme Court of Canada in *Beamish* v. *Richardson, supra,* was a binding authority on the question of illegality under sec. 231 of the Criminal Code.

Another case relied upon by the trial Judge is *Universal Stock Exchange* v. *Strachan,* [1896] A.C. 166, 65 L.J. (Q.B.) 429. In that case, the facts in which were tried with a jury, the jury found that the whole transactions were gambling transactions and that the securities lodged with the brokers should be returned to the plaintiff. The only questions before the House of Lords were: (1) Did the trial Judge misdirect the jury? (2) Was there evidence to go to the jury sufficient to support the verdict?

In re Gieve, [1899] 1 Q.B. 794, 68 L.J. (Q.B.) 509, also cited by the trial Judge, was a case in which the Court of Appeal in England held that the form of the agreement evidencing each transaction shewed on its face that it was a gambling transaction, a wagering for differences; that even if there were a superadded option given to the purchaser of purchasing the stock, it was none the less an agreement for gaming or wagering. In my view the decision does not afford any assistance in the present case.

I think the appeal should be allowed, the judgment already entered set aside and judgment entered for the plaintiff for $1,510.76 and interest from ..... at 5% per annum. The defendant must pay to the plaintiff the costs of this appeal and also the plaintiff's costs of suit in the Court of King's Bench, including examination for discovery.

CAMERON, J.A., concurs in allowing the appeal.

DENNISTOUN, J.A.:—The plaintiff seeks to recover from the defendant a sum of money represented by a promissory note

Man.

C.A.

WOODWARD & CO. v. KOEFOED.

Dennistoun, J.A.

given to protect "margins" on trading in wheat for future delivery.

The plaintiffs are grain brokers doing business on the Winnipeg Grain Exchange, and the defendant is a farmer in a large way. The defendant's relations with the plaintiffs were through their agents at Calgary, Terwilliger & Wolfe. At the time the defendant opened an account with the plaintiffs for trading in wheat for future delivery, he informed Terwilliger & Wolfe that he had 7,000 bushels of wheat on his farm, and the trial Judge (59 D.L.R. 562) finds that he had the wheat, but that it was of low grades which could not be utilised in satisfaction of contracts for the sale of wheat made on the Exchange. In this I think, with respect, that he was wrong. The evidence is quite clear that the lower grades of wheat which the defendant had, could be tendered and must be accepted in satisfaction of sales made in accordance with the rules of the Winnipeg Grain Exchange, subject to deductions corresponding with the difference between the market-price of the grade of wheat sold and the grades delivered.

It would appear from a careful perusal of the judgment appealed from that this error was the basis of that judgment, and if the trial Judge had realised that when the defendant began trading in wheat for future delivery he had available 7,000 bushels of marketable grades he would not have come to the conclusion that the defendant did not contemplate delivery or acceptance of the wheat which he sold or bought. The trial Judge finds all other facts in favour of the plaintiffs except one —and that is a matter of inference from the conduct of the parties. He finds that the trading which took place was in violation of the provisions of sec. 231 of the Criminal Code, and was therefore unlawful and the contract based upon it unenforceable.

He draws this inference from the finding referred to that the defendant had no wheat to deliver and from the magnitude of the transactions entered into which involved the purchase and sale of 110,000 bushels.

The fact is that the defendant did own a large quantity of wheat in a deliverable state and told the brokers' agents he intended to "hedge" it, a prudent and legitimate thing for the holder of wheat to do under certain circumstances. In carrying out this intention he made sales and purchases which were carried on concurrently as the market fluctuated, and his account with the brokers shews that he was as a rule some 10,000 bushels "long" on May wheat and a corresponding quantity "short"

on July wheat. That was the condition of the defendant's account when it was closed and he was called upon by his brokers to make good his loss, amounting to $1,510.76.

There is evidence that at the time the "hedging" was resorted to the plaintiff was unable to market his wheat owing to shortage of railway cars in his locality, and he gave this as his reason to the brokers' agents for opening an account. He wished to protect himself against a fall in prices and might legitimately adopt the practice of selling for future delivery which is generally recognised as sound business in this and other wheat-producing countries. Fluctuations in the price of wheat may influence a seller for future delivery to relinquish his "hedge," which he may do by a purchase for future acceptance, and the one trade may be set off against the other, through the agency of the Winnipeg Clearing House Ass'n.

The trial Judge finds that the trades in question were actually carried out on the floor of the Winnipeg Grain Exchange. There is no suggestion of fraud or misrepresentation, or even of ignorance, for the defendant knew what he was doing and had done it before. His judgment was at fault and a loss resulted, but that was in no way attributable to any misconduct on the part of the brokers, who had no direct communication with the defendant, but acted promptly in accordance with his instructions and with the rules of the Exchange and of the Clearing House, to which the contracts made were subject by agreement.

When the market went against the defendant his trades were in default, and the brokers closed out his account and now call upon him to pay this promissory note which represents his loss.

The brokers made no profit and no loss by the market fluctuations. They were earning a commission on the trades which they put through the Exchange and had no further interest in the transaction except the responsibility which was theirs to make good to the Clearing House trades made in their name. When a broker clears his customers' trades he makes himself personally responsible to the Clearing House for the performance of them and must then look to his customer for indemnity. That is what the plaintiffs are doing in this case.

With regard to the illegality of the contract under sec. 231, it seems to me that the contract can only be illegal if both parties to it have the guilty intention contemplated by the section. If one party is honestly intending to carry out his contract to the letter and has no knowledge that the other party is engaged in a purely speculative transaction without intention to either take or give delivery of wheat bought or sold, the contract is not

Man.

C.A.

WOODWARD & CO. v. KOEFOED.

Dennistoun, J.A.

unlawful and may be enforced against the person who seeks to escape liability by setting up his own violation of the criminal law. It must be shewn that the plaintiffs were *participes criminis* in order to deprive them of their rights under the contract, and with respect I do not find any evidence in this case to shew that Woodward & Co. have done anything to bring themselves within the purview of sec. 231, and go further for that matter, and say there is no evidence to shew that the defendant had any unlawful intention when he gave orders to buy and sell wheat for future delivery.

When an honest broker is doing business with the general public he has a right to assume that his customer is an honest trader, and it would be placing an intolerable burden upon the broker to say that it is his duty to ascertain what may be the customer's real intention before undertaking any business on his behalf. No broker could safely carry on business if its legality depended upon such a contingency.

The case of *Beamish* v. *Richardson*, 16 D.L.R. 855, 49 Can. S.C.R. 595, 23 Can. Cr. Cas. 394, was relied upon by defendant's counsel as a decision of the Supreme Court of Canada binding upon this Court to the effect that a customer who speculates in futures, with no expectation either of delivering or taking delivery in kind of any commodity, falls under the ban of sec. 231 of the Criminal Code. It is only necessary to point to the judgment of Duff, J., in *Maloof* v. *Bickell*, 50 D.L.R. 590 at pp. 594-596, 59 Can. S.C.R. 429, in refutation of this argument. Moreover the facts in the case at Bar distinguish it from *Beamish* v. *Richardson* in two important particulars.

The documents referred to in that case made no reference to the Winnipeg Clearing House Ass'n. In this case the parties expressly contracted under the by-laws, rules, regulations and customs of the Winnipeg Grain Exchange and those of the Winnipeg Grain and Produce Exchange Clearing House Ass'n. as pointed out in the judgment of Curran, J., who tried the case.

Secondly, in this case the defendant had in his possession and under his control 7,000 bushels of wheat when he began to trade in futures. That wheat was available to implement the contracts which he made, and even assuming that the defendant intended to defraud his creditors and evade making delivery in performance of his contracts, by disposing of his wheat in some other manner, that would not in my opinion invalidate the contract under sec. 231 of the Criminal Code as against the other party who had a *bona fide* intention to make or receive delivery in accordance with the rules of the Clearing House Ass'n.

That the defendant went beyond his original intention of "hedging" the wheat which he had on hand and was unable to market, and indulged the tendency to speculate against which he had been warned by his wife, is probably true, but makes no difference so far as the legality of the contracts is concerned. It is not incumbent upon a broker to ascertain with the making of each contract the exact intention of the customer. If the broker conducts his business honestly according to the ordinary methods of trade and the law of principal and agent he does all that can be expected of him.

In this case it is not shewn that Woodward & Co. did anything they should not have done. The defendant comes forward to say, "I never intended to deliver or accept the wheat which I sold and bought and will not pay the losses sustained because by sec. 231, I was violating the criminal law," but he fails to prove anything of a like kind against the brokers. He cannot succeed, for in my judgment that section of the Code does not apply to such a case.

I respectfully agree with the reasons for judgment of Perdue, C.J.M., and concur in his conclusion and his disposition of the appeal.

Appeal allowed.

NICHOLSON v. MUSTARD.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. December 17, 1921.

MASTER AND SERVANT (§IA—4a)—PROSPECTING TRIP—HIRING OF SHIP'S CAPTAIN FOR TRIP—NO SPECIAL AGREEMENT AS TO LOCATING CLAIMS—KNOWLEDGE OF PURPOSE OF TRIP—USE OF EMPLOYER'S SERVANTS IN LOCATING CLAIMS—EMPLOYER ENTITLED TO BENEFICIAL INTEREST IN CLAIMS LOCATED.

Even in the absence of any special agreement between the plaintiff and the defendant, at the time of hiring that the defendant would locate and stake mineral claims for the plaintiff, during a prospecting trip for which he was hired as ship's captain, the Court held that as the defendant knew of the object of the trip before locating claims, and not only took advantage of the general expedition organised and paid for by the plaintiff, but at the time of locating the claims took advantage of the services and skill of the plaintiff's employers, in locating the claims, the plaintiff was entitled to the full beneficial interest in the claims located by the defendant.

[*Williscroft* v. *Nicholson*, unreported, in which the Supreme Court of Canada without written reasons and without counsel for the respondent being called upon, affirmed the judgment of the Supreme Court of Alberta, Appellate Division (1921), 59 D.L.R. 138, followed; *Nicholson* v. *Mustard* (1921), 61 D.L.R. 156, reversed.]

Alta.

App. Div.

NICHOLSON v. MUSTARD.

Stuart, J.A.

APPEAL by plaintiff from the trial judgment (1921), 61 D.L.R. 156, dismissing an action to enforce an alleged oral contract whereby the defendant was to become an employee of the plaintiff at a fixed salary, and was required to assist in prospecting for petroleum, and whereby the defendant agreed to record the locations with the proper mining recorder, and to transfer the claims so located to the plaintiff. Reversed.

Frank Ford, K.C., for appellant.

J. F. Lymburn, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—The plaintiff brought this action to enforce an agreement alleged to have been made between himself and the defendant whereby the defendant was to accompany the plaintiff as a member of a prospecting party organised by the plaintiff to search for and locate oil claims in the neighbourhood of Great Slave Lake and whereby, so it was alleged, the defendant had agreed to locate a claim holding it in trust for the plaintiff, and then to make the necessary filing at the proper office and to assign the claim to the plaintiff.

The defendant did accompany the plaintiff upon the expedition and did locate and file upon certain claims but he alleged that he went purely in the capacity of ship's captain and without any obligation to locate a claim for the plaintiff, that he located his claim purely in his own personal interest and that he had never agreed and was not bound to hold the same for the plaintiff.

The trial Judge, Simmons, J., found in favour of the defendant and dismissed the action (1921), 61 D.L.R. 156, and the plaintiff appeals.

In his written reasons for judgment the trial Judge said this, at p. 158:—

"There is a direct conflict of evidence between the plaintiff and his agent George, and the defendant in regard to the terms of the oral contract, and after hearing them and hearing other witnesses called on each side I have no difficulty in arriving at the conclusion that the defendant's version of the said contract is substantially correct and in the result I find there was no oral agreement to either stake claims or assign the same, nor was there any communication made to the defendant when the said contract was entered into which would give him any intimation that staking of claims or recording them or assigning them would be a part of his duties. It was represented to him by the plaintiff and by his agent, George, that the services of a

certified captain were very necessary for the expedition and that was the reason they wished him to go."

It seems to me to be impossible for us to reverse this finding of fact. But nevertheless, in view of the decision of the Supreme Court of Canada in the somewhat analogous case of *Williscroft* v. *Nicholson* and the principle upon which it proceeded, it by no means necessarily follows that the defendant in this case can hold his judgment. We have asked the Supreme Court of Canada to furnish us with a statement of the view which they took of the *Williscroft* case and we have in answer been furnished with a short memorandum which reads as follows:—

"This appeal was dismissed without counsel for the respondent being called upon. The Court was of the opinion that having regard to all the circumstances of the appellant's employment there was an obligation on his part, if he should stake claims at all during the trip for which he was engaged, to stake them for and on account of his employer, and that, in so far as it so provided, the agreement subsequently signed by him in the course of the trip merely evidenced such pre-existing obligation."

In the *Williscroft* case the defendant signed at Windy Point a certain written agreement. The present defendant signed none and was never asked to do so. In the former case it was common ground that before the contract of employment Williscroft was asked to agree to stake claims for his employer although his testimony was that he had refused to do so and the witness who could have contradicted him, George, was not called. In the present case we have the direct conflict of testimony as to an antecedent agreement to stake and assign and we have the trial Judge's adoption of the defendant's story. And we have moreover the emphatic assertion of the defendant that he did not know of the purpose of the expedition until it was well on its way. The defendant testified that George merely told him that the party was to consist of surveyors, geologists and chemists and that prospecting for oil was never spoken of. When asked what he thought the party was going north for, he stated that was a thing that he didn't bother about. He said that he was never told what they were going north for, and that he thought that he first heard that they were intending to stake oil claims when they were on the way down the Slave River.

It seems to me rather difficult, in view of the credit given to the defendant's testimony by the trial Judge, to say that these statements should be rejected, extremely improbable though they

Alta.

App. Div.

NICHOLSON v. MUSTARD.

Stuart, J.A.

may seem to be. At least this can be said, however, that there is no direct finding in the reasons for judgment in favour of the truth of these particular assertions.

There may seem at first blush to be some difference between "all the circumstances of the (defendant's) employment" in this case and those existing in the *Williscroft* case; but, in my opinion, there are no facts which ought really to distinguish it. The fact that Williscroft knew before making his contract that the purpose of the expedition was to locate oil claims may have been a strong circumstance tending to prevent him taking advantage of the trip for private purposes of his own of the same nature. But assuming that Mustard did not know beforehand the object of the expedition he certainly learned of it, as he said, when going down the Slave River. He learned then, or, at least when the party divided at Windy Point, that practically every one on the expedition was expected to file a claim.

So long as there is no evidence that the defendant before making his contract of employment either reserved any right to locate a claim for himself personally or even entertained any thought of doing such a thing, it seems to me to be in conformity with the principle of the decision in *Williscroft* v. *Nicholson* to say that he was under any obligation, if he did locate a claim, to stake it for and on account of this employer, and this even without reference to the special circumstances connected with the actual location of the claims in question.

But the manner of the actual location is also of grave importance. It appears from Mustard's own evidence that Ellis, a surveyor, in the employ of the plaintiff, ran the lines for the claims, that the party helping Ellis, all employees of the plaintiff, cut the lines through the bush and that the defendant merely walked from one post to another, although here and there he cut a little brush but this was not in cutting the lines but merely at the posts and in walking from one to the other. The defendant, referring to what Ellis did, said: "He was there for that purpose," and the context shews that he was referring to the general work of the expedition. In answer to a special question as to what he himself did, he said, "Oh, I was working. I was keeping the post and clearing away brush there as much as ever they were. Somebody had to stay at the post and they gave me the preference of staying at the post simply because there was so much brush to walk over." He said that he did not even put the stakes down but that the others did this. He even said that it was Ellis who took him to the place and shewed

him the lines he had run. He also said that it was Ellis who suggested to him to stake a claim.

So that it appears that the defendant not only took advantage of the general expedition organised and paid for by the plaintiff but at the very time of locating the claims he took advantage of the services of the plaintiff's employees, the surveyor and others and had them do practically all the work, merely putting his name on the stakes.

Indeed I do not think that it would be going too far to say that it is very easy to infer, from the defendant's account of the way the thing was done, that the location of the defendant's claims was looked upon by Ellis and the others as simply part of the work which they were left there by Nicholson to do, and that the defendant at the time probably understood that he was being asked by Ellis to do just what all the other members of the party had done. At the moment he may have had some thought of the possibility of his having a purely personal right to the claims but even if he did I think upon the principle of the decision above referred to he had no right to take advantage of the work, skill and time of the plaintiff's employees for that purpose without, at least, making it quite clear that he was asking them to do this work for him personally and individually and without leaving it to them to say whether in the circumstances they would assist him upon such a basis and understanding. There is no evidence that he took or attempted to take this precaution.

For these reasons I think the result must be the same as in the *Williscroft* case.

It appears from the reasons for judgment of the trial Judge, that the point was raised before him in argument after the evidence was taken that the defendant's position as an employee of the plaintiff would give the plaintiff a claim upon his locations but the trial Judge rejected the contention. The judgment in the *Williscroft* case was of course not then before him. If it had been I think he would have probably followed it.

The case of *Sheppard Publishing Co.* v. *Harkins* (1905), 9 O.L.R. 504, is I think not strictly analogous although the discussion in it is of some assistance upon the general subject. The appeal should be allowed with costs, the judgment below should be set aside and judgment should be entered for the plaintiff granting an injunction as prayed for, declaring the plaintiff entitled to the full beneficial interest in the locations in question subject to the payment of any proper expenses incurred by the defendant in filing his claims and if so desired by the plaintiff

Can.
Ex. C.

directing the defendant to execute proper assignments of the claims.

The plaintiff should have the costs of the action.

Appeal allowed.

LOCOMOTIVE STOKER Co. v. COMMISSIONER OF PATENTS.

Exchequer Court of Canada, Cassels, J. November 19, 1920.

PATENTS (§III—28)—APPLICATION FOR—TREATY OF PEACE (GERMANY), APRIL 14, 1920—EXTENSION OF TIME—APPLICATION TO SECS. 7 & 8 OF PATENT ACT.

Section 83 of the Treaty of Peace (Germany), Order, April 14, 1920, which extends the time fixed by sec. 8 of the Patent Act, R.S.C. 1906, ch. 69, until July 11, 1920, applies equally to sec. 7 of the Act and the time between August 1, 1914, and July 20, 1920, must not be taken into consideration in deciding whether the invention has or has not been in public use or on sale with the consent or allowance of the inventor for more than one year previously to his application for patent.

APPEAL from the following decision of the Commissioner of Patents for Canada: "The Office understands that sec. 83 of the Treaty of Peace (Germany), Order, April 14th, 1920, extends the time fixed by section 8 of the Patent Act until the 11th July, 1920, but does not abrogate the other requirements of the Patent Act, notably those of section 7."

The facts are stated in the reasons for judgment.

A. W. Anglin, K.C., for the Locomotive Stoker Corporation.

R. V. Sinclair, K.C., for the Commissioner of Patents.

CASSELS, J.:—The questions involved in the four cases are identical. The questions of law in all four cases were argued together.

Section 7 of the Patent Act, R.S.C. 1906, ch. 69, provides that "Any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition, etc."

I deal with the Locomotive Stoker case argued by Mr. Anglin. The Commissioner of Patents has refused to entertain the applications for patents, and the appeal is brought to this Court under the provisions of the statute, 1913 (Can.), ch. 17, which reads as follows: "23*a*. Every applicant for a patent under the Patent

Act who has failed to obtain a patent by reason of the objection of the Commissioner of Patents as in the said Act provided may, at any time within six months after notice thereof has been mailed, by registered letter, addressed to him or his agent, appeal from the decision of the said commissioner to the Exchequer Court. 2. The Exchequer Court shall have exclusive jurisdiction to hear and determine any such appeal."

By virtue of that statute appeals from the ruling of the Commissioner will have to be dealt with by the Exchequer Court, instead of by the Governor in Council. Under this statute these appeals were set down for hearing and came on to be argued on November 10. Mr. Sinclair, K.C., argued the case on behalf of the Commissioner.

Shortly, the point in the case is as follows: The petition dated June 23, 1920, was filed on June 30, 1920. It must be borne in mind that the applicants for patents in all four cases are citizens of the United States. On June 30, 1920, the application in the Stoker case was, as I have mentioned, filed in the patent office. On August 1, 1914, when war was declared, the invention was not in public use or on sale with the consent or allowance of the inventor for more than one year previous to August 1, 1914.

At the time of the filing of the application for the patent, namely, June 30, 1920, if the ruling of the patent office is correct, more than the year had elapsed.

The contention of the appellant is that under certain orders and treaties, which I will refer to, a period of time between August 1 and July 11, 1920, has to be eliminated from the consideration of whether or not the year had elapsed before the application for the patent on June 30, 1920.

The Patent Office have ruled as follows: It is referred to in their letter of August 5, 1920, in which they state: "The Office understands that section 83 of the Treaty of Peace (Germany), Order, April 14th, 1920, extends the time fixed by section 8 of the Patent Act until the 11th July, 1920, but does not abrogate the other requirements of the Patent Act, notably those of section 7."

If that view is the proper view to be taken of the meaning of the order, then the judgment of the Commissioner of Patents is correct. If, on the other hand, the view or the opinion of the Commissioner of Patents is erroneous, his judgment should be reversed and the matter should be left to the Commissioner to proceed with the applications in the usual way.

After listening to the carefully prepared arguments of counsel for the appellant and also for the Commissioner, I am of opinion

Can.

EX. C.

LOCOMOTIVE STOKER CO. v. COMMISSIONER OF PATENTS.

CASSELS, J.

that the Commissioner has erred in the view he takes limiting the meaning of the Order in Council merely to section 8. I think it should equally apply to section 7,—and if I am correct in the view I have formed, then the time between August 1 and July 20, 1920, should be eliminated from the consideration of the case, and if this view is correct, at the time of the application for the patent the year had not elapsed as provided for by sec. 7 of the Patent Act.

The statute of the Dominion, 1920, ch. 30, was assented to on November 10, 1919. It provides: "I. (i) The Governor in Council may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to Him to be necessary for carrying out the said Treaties and for giving effect to any of the provisions of the said Treaties."

The Order in Council bears date April 14, 1920. It recites the fact that whereas at Versailles, on June 20, 1919, the Treaty of Peace, etc., between the allied and associate powers and Germany, was signed on behalf of His Majesty acting for Canada by plenipotentiaries. The important sections of this Order in Council are to be found in Part IV.—they are secs. 81, 82, 83 and 84. The main section, and which is the one in question here, is sec. 83, which reads as follows:—

"83. The rights of priority, provided by Article 4 of the International Convention of Paris for the Protection of Industrial Property, of March 20, 1883, revised at Washington in 1911, or by any other Convention or Statute, for the filing or registration of applications for patents or models of utility, and for the registration of trade marks, designs and models which had not expired on the first day of August, 1914, and those which have arisen during the war, or would have arisen but for the war, shall be extended in favour of all nationals of Germany, and of the Powers allied or associated during the war with His Majesty, until the eleventh day of July, 1920."

The words "rights of priority" evidently mean that the status of the applicant should not be lost by any act of omission or commission, if the right had not expired on August 1, 1914.

The first international convention, as far as I can ascertain, for the protection of industrial property, was signed at Paris on March 20, 1883. A copy is to be found in Frost on Patents, ed. 4, vol. 2, commencing at p. 308. There was an additional convention which modified the industrial property convention of March 20, 1883, signed at Brussels on December 14, 1900. The original French text commences in Frost, at p. 328, and the English translation at p. 329.

It may be of importance, as pointed out by Mr. Anglin, that the words in this latter convention omit in the new article IV. the words "*par un tiers.*" If these words had not been omitted, an argument would be raised that this clause of the convention or treaty, if read as in the former convention of 1883, would limit this application to public use by a third party, and not by the applicant for the patent.

By Article IV. of the International Convention signed at Washington on June 2, 1911, and ratified by Great Britain on April 1, 1913, the words "*par un tiers*" (by a third party) are carried into the English translation of this convention, although in the French copy of the convention the words "*par un tiers*" are omitted, translating the section in the French text as if similar to the previous text of the convention of 1883. I think the contention put forward by Mr. Anglin is correct that the treaty is the treaty as set out in the French version, and the translator has in the English translation of it inserted these words "by a third party" by mistake.

This may be of importance. The question of whether or not Canada was bound by this Convention of 1911, is one of interest but not material for the consideration of this case. It is a debatable question whether or not when His Majesty the King of Great Britain and Ireland and of the British Dominions entered into a treaty, Canada is not bound by the terms of the treaty. That is a question which has been very much debated both for and against the view that Canada is bound. It is not, however, of importance at present.

Section 83, which I have quoted refers to the rights of priority provided by Art. 4 of the International Convention of Paris of 1883, as revised in 1911. It is unquestioned that the United States were allied or associated during the war with His Majesty.

I fail to see why the Commissioner should have held that the effect of this sec. 83, or the Order in Council should be limited so as to apply to sec. 8 of the Patent Act, and not to sec. 7. I think the matter should be referred back to the Patent Office for consideration of the applications.

There should be no order for costs.

Que.

K.B.

MONTREAL TRAMWAYS Co. v. SOFIO.

Quebec King's Bench, Martin, Greenshields, Guerin, Allard and Howard, JJ. February 28, 1921.

APPEAL (§VIIL—470)—ACCIDENT—QUESTION OF FACTS—WEIGHT OF EVIDENCE—VALUE GIVEN TO FINDING OF TRIAL JUDGE.

In forming its opinion as to the credibility of witnesses, the Court is not bound to accept the evidence given on any side because there are more witnesses on that side than on the other. It is the function of the Court to consider, weigh and pass upon any evidence adduced and then accept or reject it according to its discretion.

When a case is tried under the Quebec system of "*enquete and merits*," the trial Judge who is both Judge and jury, speaks with preponderating authority when he determines the weight to be given to contradictory testimony, and in a case of direct conflict of testimony the finding of the primary Judge is to be regarded as decisive and should not be overturned in appeal by Judges who have not had the advantage of seeing the witnesses, and observing their demeanour under examination.

[*The Picton* (1879), 4 Can. S.C.R. 648, followed.]

APPEAL by defendant from the judgment of the Court of Review, reversing the decision of the Superior Court, and awarding the plaintiff damages for injuries sustained while about to board appellant's street car. Reversed and action dismissed.

The facts of the case are as follows:—

The respondent alleges in substance, that as he was about to step on one of the appellant's street cars, having his right foot on the step of the car, his left foot on the ground and his right hand holding the rear hand rail, he heard a woman cry behind him and turned his head. At that moment, the conductor rang the bell and the car hastily started. He fell heavily to the ground, suffering bodily injuries for which he claims compensation.

The Superior Court dismissed the action. In Review, the Court granted $200.

On the merits, this case is only question of facts. But there are to be found in it certain principles of law regarding the appreciation of evidence and the appeal on facts which are worth being reported.

Meredith, Holden & Co., for plaintiff.

Berard, Beaulieu & Co., for respondent.

MARTIN, J.:—This appeal does not involve the consideration of any important principle of law and the amount involved hardly justifies the necessity of nine Judges expressing an

opinion upon the facts. See *Village of Granby* v. *Menard* (1899), 6 Rev. de Jur. 342; (1900) 31 Can. S.C.R. 14.

I would maintain the present appeal and restore the judgment of the Trial Court with costs.

GREENSHIELDS, J.:—It would, perhaps seem unfortunate, that on a pure question of fact, where the amount involved is so small, all the Courts of the Province should be called upon to determine a question of fact, where, under the system of this Province, a trial Judge sitting at what is called "Enquete & Merits" is really in the position of a jury, and his finding of fact should receive the same weighty consideration as a jury's answer to questions submitted to it. However, under art. 498 C. C. P., sub-para. 4, where the finding of the jury—it is stated —is clearly against the weight of evidence, an Appellate Court may and should grant relief to the party appealing.

Giving application to this provision of the Code, I take it that this Court will have to weigh the evidence in the case under consideration, and decide as best it can, whether the finding of the trial Judge, supported by one of his brother Judges in Review, or the two Judges who gave the judgment of the Court of Review were in the right.

I should reverse the judgment of the Court of Review and restore that of the trial Judge, with costs in all the Courts.

GUERIN, J.:—The only question referred to in both these judgments, and the only question discussed by counsel is the evidence. The appreciation to be made of this evidence has caused much contradiction of opinion between the Judges.

One of the Judges in Review dissented, so the case stands before the Court of Appeal with two Judges of the Superior Court favoring the plaintiff, and two Judges of the same Court favoring the defendant.

The facts that three witnesses favored the plaintiff's pretentions will not of itself determine that the evidence of the defendant's one witness should not be accepted in preference to the three who contradicted him. In forming its opinion as to the credibility of witnesses, the Court is not bound to accept the evidence given on any side because there are more witnesses on that side than on the other. It is the function of the Court to consider, weigh and pass upon any evidence adduced and then accept it or reject it according to discretion.

There is not any hard and fast rule which a Court of Appeal must follow in deciding a case upon a question of fact. In *Hood* v. *Eden* (1905), 36 Can. S.C.R. 476, at pp. 483-4,

Que.
K.B.
MONTREAL TRAMWAYS v. SOFIO.
Guerin, J.

Taschereau, C. J., speaks, apparently with veiled contempt as follows:—

"The respondent has not failed to resort to the stock argument on appeals of this class of cases that upon a question of fact he has the concurrent finding of three Courts below in his favor. . . When the statute gives an appeal to any court, it never imposes the condition that the judgment must not be reversed.

We have had repeatedly to reverse on questions of fact: *Russell* v. *Lefrancois* (1882), 8 Can. S.C.R. 335, at p. 366. *The North British & Mercantile Ins. Co.* v. *Tourville* (1895), 25 Can. S.C.R. 177. *Dempster* v. *Lewis* (1903), 33 Can. S.C.R. 292, and the cases there cited; and as long as the right to appeal as to findings of fact exists, we have to continue to do so every time that we are convinced that there is error in the judgment complained of, whatever may be the number of courts or of Judges that the respondent has previously succeeded in leading into error."

It is true none the less that when a case is tried under our system of enquete and merits, the trial Judge who is both Judge and jury, speaks with preponderating authority when he determines the weight to be given to contradictory testimony. In *Grasett* v. *Carter* (1884), 10 Can. S. C. R., 105, which unanimously reversed the judgment of the Court of Ontario, and restored the first judgment, Strong, J., at p. 125, expresses himself as follows:—

"The judgment in this court in the case of *The Picton*, 4 Can. S. C. R., 648, and the authorities there referred to, especially the case of *Gray* v. *Turnbull*, in the House of Lords, L. R., 2 Sc. App. 53, which are binding upon us, show that in a case of direct conflict of testimony. . . . . the finding of the primary judge is to be regarded as decisive, and should not be overturned in appeal by judges who have not had the advantage as the judge at the trial had, of seeing the witnesses, and observing their demeanor under examination."

In *Robb* v. *Stafford* (1906), Coutlee's Cases, 411 at p. 416, where the Supreme Court reversed the Court of Appeal of Quebec and restored the judgment of Tellier, J., in the Superior Court, Fitzpatrick, C. J., delivering the judgment of the Supreme Court remarks:—

"It is quite true that to some extent the evidence is conflicting, but I am of opinion that the finding of the trial judge who heard the witnesses *viva voce*, and had an opportunity to appre-

ciate their demeanor and manner should not be disturbed, and I am clearly satisfied that the judgment of the Court of Appeal is erroneous and should be reversed, and that is the opinion of the court."

There is a Montreal case of 1885 which bears much analogy to the present one. It is not found in the regular reports of the Supreme Court, but is noted in Cassells' Digest of Supreme Court decisions, pp. 731 & 732, *Parker* v. *Montreal City Passenger Ry. Co.*, 1885. The plaintiff, a driver, while crossing the defendant's track on Place d'Armes opposite the Church of Notre Dame, was thrown out of the waggon which he was driving by the breaking of the rear axle. He suffered injuries and took action against the company. Torrance, J., found that the track was in bad order, and granted the plaintiff $2,500 damages. The Court of Appeal reversed this judgment and dismissed the action. The Supreme Court of Canada held that the questions to be decided were purely matters of fact, and that the judgment of the first Court should not have been disturbed. The plaintiff's appeal was allowed with costs. In this case, the Privy Council refused the company's petition to be allowed to appeal from the decision of the Supreme Court of Canada.

As to the merits of the present case, it does seem that the trial Judge appreciated the evidence properly and that the accident was not due to the fault of the defendant. Were I hesitating between the two opinions as to the determinating effect of the evidence, the law would favor the defendant.

I would therefore favor a judgment reversing the Court of Review and restoring the first judgment with all costs against the plaintiff, present respondent.

JUDGMENT:—Considering the plaintiff-respondent has failed to prove any fault on the part of the defendant company, which caused the accident to plaintiff; that there is error in the judgment rendered by the Court of Review, sitting at Montreal on April 3, 1920: doth set aside said judgment, and, proceeding to render the judgment which the said Court should have rendered, doth confirm the judgment rendered by the Superior Court on October 20, 1918, with costs in the three Courts against respondent.

HOWARD, J., dissented.

Action dismissed.

Sask.

C.A.

IMPERIAL LUMBER YARDS v. SAXTON.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay and Turgeon, JJ.A. November 14, 1921.

MECHANICS' LIENS (§VIII—63)—WRONG DATE AS TO WHEN LAST MATERIALS FURNISHED—LIEN NOT FILED WITHIN 30 DAYS—VALIDITY OF LIEN—R.S.S. 1909, CH. 150, SECS. 22, 19, AND 23—CONSTRUCTION.

The fact that a mechanic's lien wrongfully recites that the last materials were furnished on the 14th day of August, 1919, instead of the 14th day of September, 1916, and that the lien was filed long after the expiration of the thirty days within which liens are to be filed as prescribed by sec. 22 of ch. 150 R.S.S. 1909, does not necessarily invalidate the lien. By sec. 19 the lien is not invalidated where no person has been prejudiced by the wrong date, and by sec. 23 the failure to file the lien within the thirty days does not defeat the lien except as against intervening parties becoming entitled to liens or charges whose claims are registered prior to the registration of the lien, or in respect of payments made by an owner to a contractor after the expiration of the 30 days and before the lien is filed or notice thereof given to the owner. A writ of execution registered against a homestead is a lien and charge against it.

[*Robock* v. *Peters* (1900), 13 Man. L.R. 124; *Advance Rumely Thresher Co.* v. *Bolley* (1920), 55 D.L.R. 308, 13 S.L.R. 447, applied.]

APPEAL from the District Court Judge of the judicial district of Cypress dismissing the appellant's claim in so far as it claimed any right under the mechanic's lien filed, on the ground that said lien was defective and could not be cured by the Court.

J. W. Gorman, for appellant; no one contra.

The judgment of the Court was delivered by

MCKAY, J.:—The said lien is dated February 19, 1919, and was filed in the proper Land Titles Office in that behalf on February 22, 1919, against the north-east quarter of sect. 4 in tp. 8 in range 17, west of the 3rd meridian.

The said lien wrongly recites that the last materials were furnished on August 14, 1919, instead of September 14, 1916, as the fact is, and the lien was filed long after the expiration of the thirty days within which liens are to be filed, as prescribed by sec. 22 of ch. 150, R.S.S. 1909, and these, apparently, are the defects referred to by the District Court Judge.

1. As to reciting the wrong date when last materials were furnished. By sec. 17, sub-sec. (1) (a) of ch. 150 of R.S.S. 1909, the Mechanics' Lien Act, as amended by 1913 (Sask.), ch. 38, sec. 3, it is required that the claim for lien, amongst

other things, shall set out the date upon which the last material was furnished.

The lien as filed did not comply with this requirement, and the date given was manifestly wrong, as the lien was filed on February 22, 1919, and it sets forth that the last materials were furnished on a date nearly 6 months before that date had arrived, namely "August 14, 1919."

Section 19 (1) of said ch. 150, R.S.S. 1909, states:—

"19. A substantial compliance with sections 17 and 18 of this Act shall only be required and no lien shall be invalidated by reason of failure to comply with any of the requisites of the said sections unless in the opinion of the Court or Judge who has power to try an action under this Act the owner, contractor or sub-contractor, mortgagee or other person, as the case may be, is prejudiced thereby and then only to the extent to which he is thereby prejudiced."

It is to be noted that this section expressly says, "no lien shall be invalidated by reason of failure to comply with any of the requirements of the said secs. (17 and 18) unless, etc."

In *Robock* v. *Peters* (1900), 13 Man. L.R. 124, at pp. 140-141, Killam, C.J., is thus reported:—

"Objection is made to the registration of Stewart's claim on the ground that the statement registered alleged that the materials were furnished between the 1st August and the 27th October, whereas Stewart now claims for goods supplied before the 1st August.

By section 15, a claim for lien is to state, *inter alia*, the time or periods within which the work was, or was to be, done, or the materials furnished or placed. But, by section 17, 'A substantial compliance only with sections 15 and 16 of this Act shall be required, and no lien shall be invalidated by reason of failure to comply with any of the requisities of sections 15 and 16 of this Act, unless in the opinion of the Court, Judge, or Local Judge, who has power to try an action under this Act, the owner, contractor, or sub-contractor, mortgagee or other person, as the case may be, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.'

This latter clause appears divisible into two parts. First, only substantial compliance with sections 15 and 16 is required; and, secondly, no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some party is prejudiced, provided there is registration of a claim.

I think that the onus on the question of prejudice is upon the party objecting to the registered claim. The defect is not

Sask.

C.A.

IMPERIAL LUMBER YARDS v. SAXTON.

McKay, J.

to invalidate the lien, unless, in the opinion of the Judge, there is prejudice to some one. That is, the Judge must positively form the opinion, for which purpose he must have some evidence, either direct or arising out of the circumstances and the nature of the defect."

See also *Scratch* v. *Anderson* (1909), 16 W.L.R. 145, at p. 148, and *Nobbs* v. *C.P.R.* (1913), 6 W.W.R. 759.

There is no evidence in the case at bar that any of the respondents or any other person or persons were prejudiced by the wrong date.

With deference to the District Court Judge, in my opinion, as far as this defect is concerned, the lien is sufficient and valid, by virtue of said sec. 19.

2. As to the time of filing the lien. While sec. 22 gives 30 days after the furnishing of the last materials within which the claim for lien may be filed, sec. 23, as amended, stated that:—

"The failure to file such claim or to commence such action within the times mentioned in this and the preceding section shall not defeat such lien, except as against intervening parties becoming entitled to a lien or charge upon such land whose claim with respect to said land is registered prior to the registration of such lien or as against an owner in respect of payments made in good faith to a contractor after the expiration of said period of thirty days and before any claim of lien is filed or notice thereof given to the owner."

Under this section the lien is good and valid as against respondent Saxton, as there is no evidence of any payments to the contractor after the expiration of the 30 days or otherwise. Does it take priority as against the other respondents?

The land in question against which the lien herein is filed is the homestead of the respondent Saxton. Each of the other respondents registered a writ of execution against the said land prior to the filing or registration of appellant's lien.

Did the respondents thereby become entitled to a lien or charge upon said homestead? In my opinion they did.

In *Advance Rumely Thresher Co.* v. *Bolley* (1920), 55 D.L.R. 308, 13 S.L.R. 447, the Court of Appeal held that a writ of execution registered against a homestead was a lien and charge against it. Newlands, J.A., is reported as follows, at p. 309:—

"The Exemptions Act freed this land from the operation of any writ of execution against the lands of the debtor. Under this Act he could dispose of it as he saw fit free from any such

execution. *Northwest Thresher Co.* v. *Fredericks* (1911), 44 Can. S.C.R. 318. Since this decision, however, the Land Titles Act has been amended, 8 Geo. V. 1917 (2nd Sess. Sask.), ch. 18. Sec. 149 of that Act, sub-sec. 2, reads:—'(2) Such writ shall from and only from the receipt of a certified copy thereof by the registrar for the land registration district in which the lands affected thereby is situated bind and form a lien and charge on all the lands of which the debtor may be or become registered owner situate within the judicial district the sheriff of which transmits such copy, including lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution, but subject, nevertheless, to such equities, charges, or incumbrances as exist against the execution debtor in such land at the time of such receipt. Provided that nothing herein contained shall be taken to authorise the sheriff to sell any lands declared by the Exemptions Act, to be free from seizure by virtue of writs of execution.' The execution of the plaintiffs therefore, when registered, would bind and form a lien and charge upon the land, but, while it remained the defendant Phillip Bolley's homestead, it could not be sold to satisfy such debt."

As these two respondents had a lien and charge against the land in question under their writs of execution, the appellant can sell only subject to said writs of execution under the circumstances of this case.

The District Court Judge's judgment will, therefore, be set aside, and the appellant will be entitled to personal judgment against respondent Saxton for the sum of $70.30, with interest on $60.30 from September 14, 1916, at the rate of 10% per annum, with costs of the action, and to the usual order for sale of the said land, subject to said respondents' executions and liens in favour of His Majesty the King, in default of payment of said judgment and costs, within three months from the signing of the judgment herein.

The appellant will be at liberty to apply to the District Court Judge of the judicial district of Cypress to the fix the time and place and other terms of sale and for further directions herein.

There will be no costs of this appeal against the respondents.

Appeal allowed.

N.S.

S.C.

REX v CROSSAN.

Nova Scotia Supreme Court, Harris, C.J., and Russell, Chisholm and Mellish, JJ. December 10, 1921.

CRIMINAL LAW (§IIB—49)—PART XVIII CRIMINAL CODE—ELECTION AS TO TRIAL BY JUDGE—AMENDMENT OF CHARGE BY JUDGE DURING HEARING—RIGHT OF ACCUSED TO ELECT AS TO AMENDED CHARGE.

Where an accused has elected to be tried by the Judge under Part XVIII of the Criminal Code, the trial Judge may during the course of the hearing amend the charge for one for which a greater punishment is provided by the Code, but the accused must be given the option of electing as to the amended charge, and where this option has not been given to him a conviction on the charge as amended will be set aside.

[*Goodman* v. *Regina* (1883), 3 O.R. 18, followed.]

CASE reserved for the opinion of the Court by a County Court Judge as to his right to amend a criminal charge after the accused had elected to be tried by the Judge on the charge as originally laid. Reversed.

The facts of the case are fully set out in the judgments.

The question reserved for the Court was whether the Judge had the right to amend the charge as he did.

W. J. O'Hearn, K.C., and *A. W. Jones*, for the prisoner.

S. Jenks, K.C., for the Crown.

HARRIS, C.J.:—The accused elected under the provisions of Part XVIII. of the Criminal Code to be tried before the County Court Judge at Halifax, on a charge that he, "Did unlawfully steal the sum of Three Thousand Dollars or thereabouts of lawful money of Canada the property of one A. L. Pelton."

He was arraigned and pleaded not guilty and the case proceeded. After a number of witnesses had been called by the Crown Prosecutor, but before closing his case, an amendment of the charge was asked for and allowed, against the objection of the prisoner's counsel, and the amended charge was as follows:—

"Who saith that William H. Crossan, lately of Halifax in the County of Halifax, during the months of May and June, A.D. 1921, at Halifax in the County aforesaid having theretofore received from this deponent certain motor cars on terms requiring him (Crossan) to account to this deponent for the proceeds of the sale thereof and to pay over to this deponent such proceeds, fraudulently omitted to account for and pay over such proceeds or part thereof which he was required to account for as aforesaid and fraudulently converted such proceeds or part thereof to his own use and did thereby steal the same

amounting to the sum of about Three Thousand Dollars of lawful money of Canada."

The prisoner was not given the option of electing to be tried by a jury on this amended charge.

Counsel for the prisoner applied at the close of the trial to have the amended charge dismissed and the trial Judge refused this application and convicted the accused of the offence in the amended charge. He granted a reserved case upon the question: "Had I the power to amend the charge as I did?"

The case was argued on the assumption that the case stated involved the question as to whether or not the accused should have been given the option of a trial by jury on the amended charge, and I deal with it accordingly.

The charge upon which the accused was committed and upon which he elected to be tried by the Judge of the County Court was presumably one punishable under sec. 386 of the Code by 7 years' imprisonment, and the offence contained in the amended charge was under sec. 355 punishable by imprisonment for a period of 14 years.

In *Goodman* v. *Regina*, 3 O.R. 18, at p. 21, Hagarty, C.J., said:—

"We think it clear that where a man consents to waive his right to a jury, and to be tried summarily by the Judge on a charge which on its face would only warrant an imprisonment less than one year, he ought not by any implication to be held as assenting to waive such right as to any charge that the law may allow to be substituted therefor which might render him liable to a larger punishment, and that his assent to be summarily tried on the substituted charge should be obtained and recorded."

This case has been cited with approval in *The King* v. *Walsh* (1904), 8 Can. Cr. Cas. 101; *Rex* v. *Lacelle* (1905), 11 O.L.R. 74; *The King* v. *Douglas* (1906), 12 Can. Cr. Cas. 120; and in a number of other cases, and is, I think, to be taken as a correct statement of the law applicable to this case.

It is unnecessary to consider the question as to whether the accused might have been convicted under sec. 386 without the amendment. That is not before us.

The answer to the question reserved should, I think, be "Yes, provided the prisoner had been given the option of electing to be tried by a jury upon the amended charge."

There must be a new trial. The accused must be surrendered to custody and be given his election to be tried by jury upon the charge as amended.

Can.

S.C.

ST. JOHN AND QUEBEC R. CO. v. JONES.

RUSSELL and CHISHOLM, JJ., concurred.

MELLISH, J.:—The accused was charged before the County Court Judge at Halifax with "stealing three thousand dollars or thereabouts of lawful money of Canada." He consented to be tried before said Judge on such charge.

After the trial had proceeded some time, he was charged by way of amendment and against his protests with stealing the "proceeds" of the sale of certain motor cars which he had received on terms requiring him to account "amounting to the sum of about three thousand dollars of lawful money of Canada." He was refused the option of being tried on this latter charge by a jury and the Judge tried him and convicted him on it.

The question reserved for the Court by the Judge is: "Had I the power to amend the charge as I did?" I would answer, "Not without giving the accused the option of election."

Whenever it is considered necessary to amend the form of the charge against a prisoner in such a way as this, and under such circumstances as herein disclosed, I think it follows as a matter of course that the accused should have the right of another election.

The amendment was objected to on behalf of the accused and under the circumstances could have no purpose unless it was intended to substitute a different offence in the second charge from that contained in the first.

The language of the second charge if not necessarily involving a different offence from the first is quite capable of so doing.

The conviction should be set aside and the accused given an option of election.

Conviction set aside and new trial ordered with option to prisoner to elect.

ST. JOHN AND QUEBEC R. Co. v. JONES.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Brodeur and Mignault, JJ. June 7, 1921.

CONSTITUTIONAL LAW (§IIB—208)—PROVINCIAL RAILWAY—LEASE AND CONTROL BY DOMINION—B.N.A. ACT SEC. 92 (10c)—TRANSFER TO DOMINION—WORK FOR THE GENERAL ADVANTAGE OF CANADA—EXPRESS DECLARATION NECESSARY.

The declaration which the B.N.A. Act authorises the Federal Parliament to make that a provincial railway is a "work for the general advantage of Canada" must be made in express terms and cannot be implied from federal statutes, authorising the Dominion Government to lease and operate such railway.

COMPANIES (§VIC—330)—PROVINCIAL RAILWAY—GOVERNMENT CONTROL—DISMISSAL OF DIRECTORS AND APPOINTMENT OF OTHERS—POWERS OF PROVINCIAL GOVERNMENT.

The act of a provincial Legislature in dispossesing and dismissing the directors of a provincial railway over which it is authorised to assume control is *intra vires* its powers.

[*Royal Bank of Canada* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, referred to; *St. John and Quebec R. Co.* v. *Jones* (1921), 57 D.L.R. 477, affirmed. See Annotation 9 D.L.R. 346.]

Can.

S.C.

ST. JOHN AND QUEBEC R. CO. v. JONES.

Davies, C.J.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick (1921), 57 D.L.R. 477, affirming the order of the Chief Justice who set aside the writ of summons in the cause as having been issued without authority. Affirmed.

Two questions were raised on this appeal. One that the lease of the railway to the Dominion Government made it a "work for the general advantage of Canada," and the government of New Brunswick had, therefore, no power to remove the directors. The other was that the Act of the Legislature authorising the provincial Governments to assume control and take over the stock was *ultra vires* as affecting the civil rights of the bondholders. As to this two of their Lordships held that the facts of the case did not bring it within the principle of the decision of the Judicial Committee of the Privy Council in *Royal Bank of Canada* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, 82 L.J. (P.C.) 33, relied on by the appellant, and two, that this question could not be raised. The remaining Judge did not deal with it.

J. J. F. Winslow, for appellant.

W. P. Jones, K.C., and *P. J. Hughes*, for the respondent, were not called.

DAVIES, C.J.:—This action was one brought in the name of the St. John & Quebec Railway Co. at the instance of Arthur P. Gould and his associates claiming to be the legal directors of the said company to restrain the defendants, the *de facto* directors, from acting as directors and for an account.

Hazen, C.J. of New Brunswick, on an application made to him in Chambers to set aside the writ of summons in this case on the ground that the same had been issued without the authority of the defendants who claimed to be the legal directors of the plaintiff company, granted the application and set aside the writ with costs to be paid by the plaintiffs (appellants') solicitors.

On appeal to the Appeal Division of the Supreme Court of

Can.

S.C.

ST. JOHN AND QUEBEC R. CO. v. JONES.

Davies, C.J.

New Brunswick, 57 D.L.R. 477, the judgment or order of the Chief Justice was unanimously upheld in a judgment delivered by Crocket, J., with costs to be paid by the plaintiffs' solicitors.

From this latter judgment this appeal was taken to this Court.

At the conclusion of the argument of Mr. Winslow for the appellant the Court, being unanimously of the opinion that the appeal failed, did not call upon the respondents' counsel, but dismissed the appeal with costs to be paid by the appellant plaintiffs' solicitors.

The main points to determine were:

First, whether the Act of the Provincial Legislature in 1915, (N.B.) ch. 9, dispossessing and dismissing the then directors of the road, and providing for the appointment of other directors in their place, was legislation *intra vires* of the Legislature of that Province. This hardly was or could be contested unless it was shewn that the railroad had previously passed from being a provincial road by Dominion legislation declaring it to be one for the general advantage of Canada. The contention was that the Dominion Act of 1911, ch. 11, authorising the Dominion to take a lease of the road and the subsequent taking of that lease, combined with the statute of 1912 (Can.), ch. 49, as amended by the Act of 1914 (Can.), ch. 52, providing that the Dominion might build and own bridges on and over the road, amounted impliedly to a statutory "declaration that the work was one for the general advantage of Canada." We were quite unable to accept or accede to that argument. It has never yet been decided by any Court that the declaration required by the B.N.A. Act to change a provincial road into a Dominion one can be implied by or from such legislation as is here relied on, legislation which is quite consistent with the work in question being and remaining, as in fact it was and is, a purely provincial one. Nor have I ever been able to hold that anything short of the statutory declaration the Confederation Act requires can accomplish such a transfer.

The remaining point Mr. Winslow pressed was that laid down by the Privy Council in the case of the *Royal Bank of Canada* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, 82 L.J. (P.C.) 33, that provincial legislation affecting civil rights outside of the Province was *ultra vires*.

The difficulty counsel here had was to establish facts at all analogous to those in the case which he cited and relied on. In fact no such analogous or other facts existed in this case

Can.

S.C.

ST. JOHN AND QUEBEC R. CO. v. JONES.

Idington, J.

which brought it within the principle on which the *Royal Bank of Canada* v. *The King* was decided.

The appeal is, therefore, dismissed with costs to be paid by the appellants' solicitor.

IDINGTON, J.:—The appellant was incorporated by the Legislature of New Brunswick for the purpose of contructing a railway in that Province. In course of time five directors were appointed. The management of the adventure produced such results that in 1915 the Legislature saw fit for what seemed to it good and sufficient reasons to declare shares of the capital stock of the said appellant company to be vested in His Majesty the King, in behalf of the Province of New Brunswick, and at the same time authorised the Lieutenant-Governor in Council to nominate, in place of the then directors, others whom he should be advised to so name. The original directors being those then in office were, by virtue of the said legislation, and the action of the Lieutenant-Governor in Council, absolutely displaced from their respective offices as directors. From time to time, from thenceforward till this action was brought, the office of director of appellant was filled by the Lieutenant-Governor in Council or by legislative enactment of the Legislature of the Province. Very important steps by way of carrying out the enterprise have been entered upon since, amongst others an agreement to enter into a lease of the whole line of railway, when fully constructed and equipped, to His Majesty the King on behalf of the Dominion of Canada.

The appellant, moved by some parties other than the *de facto* directors appointed in the manner above stated, instituted this action to remove the said *de facto* directors. The writ of summons was set aside by the order of the Chief Justice of the Province. His judgment in that regard was upheld on appeal to the Court of Appeal for New Brunswick, 57 D.L.R. 477, and from that judgment the present appeal is taken. The pretension is set up that what was done by the legislature of the Province of New Brunswick as above recited was *ultra vires* and hence that the old original directors had never been displaced. The colour of pretension for this is alleged to be the leasing, or agreement to lease, to His Majesty the King on behalf of the Dominion of Canada. It is not pretended that there was any declaration such as required by the B.N.A. Act by the Dominion Parliament declaring the work in question to be a work for the general advantage of Canada or for the advantage of two or more of the Provinces. It is merely pretended that such is to be implied from the fact of the agreement to lease

Can.

S.C.

ST. JOHN AND QUEBEC R. CO. v. JONES.

Duff, J.

or leasing above referred to. It is my opinion that there is no foundation in fact or in law upon which to rest such alleged implication, in any event at the time when the appellant company's directors were displaced by the order of the Lieutenant-Governor in Council pursuant to the above enactment.

There can be no doubt but that the said Legislature had then full power over appellant and its organisation.

The other questions sought to be raised as to the legislation which accompanied the displacement of the directors and the reconstituting of the board of directors of appellant on the ground that these other enactments were *ultra vires*, can have nothing to do with what is involved in the bare question of the reconstitution of the board. The attempt made to bring this action, under all the attendant circumstances, as disclosed in the history of the road in the past four or five years, seems rather a bold attempt and one which should not be encouraged.

The appeal should be dismissed and the costs be paid by those who promoted this litigation.

DUFF, J.:—The Legislature of New Brunswick had full authority to enact legislation touching the ownership of the shares in this company which was a provincial company. There is nothing in the arrangement made between the company and the Dominion of Canada or in the Dominion legislation which affects this jurisdiction. The company's railway is nowhere declared in terms to be a work for the general advantage of Canada; and assuming that, in the absence of a declaration in terms to that effect, an intention to characterise a particular work as a work for the general advantage of Canada manifested by necessary implication from the language of a Dominion enactment could take effect under sec. 92 (10) of the B.N.A. Act and give to the Dominion Parliament exclusive jurisdiction under sec. 91 (29) and the provisions of sec. 92 (10)—assuming this I am still clearly of the opinion that no such implication arises from the provisions of the Dominion enactments in question. On the contrary the intention of Parliament appears to be to treat the company's railway as a provincial work.

The appeal should be dismissed with costs.

BRODEUR, J.:—The present action is to restrain the defendants respondents, Jones et al., from acting as directors of the St. John and Quebec Railway Company.

The defendants were appointed under legislation passed in 1915, ch. 9, by the Legislature of New Brunswick. It is contended by the appellant company that the railway was originally a local work and was then under the legislative control of

the Province but that it was later on operated under lease by the Dominion of Canada and was impliedly declared to be a "work for the general advantage of Canada," and that the provincial Legislature had lost its jurisdiction concerning the company which was the owner of that railway.

It is contended also by the appellant that the provincial Legislature could not legislate as to bonds which had been issued by the company when it was under provincial control because they are situate outside the Province, and it relies in support of this ground on the authority of *The Royal Bank* v. *The King*, 9 D.L.R. 337, [1913] A.C. 283, 82 L.J. (P.C.) 33.

On this latter point raised by the appellant I may say that it cannot be validly raised in the present action which is instituted for the purpose of testing the validity of the election on the appointment of the respondents as directors of the appellant company. The Act of the Legislature which authorised the election of the respondents might be *ultra vires* in that respect; but we are not concerned as to whether some other dispositions of the Act as to the bonds are legal or not. This is a suit involving the internal management of the company, and if the Legislature had still in 1915 legislative control over the undertaking of the company, then its legislation concerning the status of directors is valid.

It is common ground that there never was any formal federal enactment declaring the railway in question to be a "work for the general advantage of Canada" under the provisions of sub-sec. 10, item (c) of sec. 92 B.N.A. Act. The appellant contends that such an implied declaration is to be found in some federal statutes, which authorised the Dominion Government to lease the railway and granted some railway subsidies. The power of the federal authorities to operate a provincial railway should not be construed as divesting the provincial authorities of any legislative authority as to this railway. There is nothing in the Railway Subsidies Act, 1913 (Can.), ch. 46, which should be considered as a declaration that the railway is declared a work for the general advantage of Canada. The different subsidy Acts of the federal Parliament provide not only for the subsidising of federal railways but of local railways as well.

I am of the view that the declaration which the B.N.A. Act authorises the federal Parliament to make concerning a provincial work, should be made in express terms. It should be done in such a way that there should be no doubt as to the

Alta.

App. Div.

REX v. POWER.

will of the federal Parliament to assume legislative control over a provincial work.

The point was discussed in the case of *Hewson* v. *Ontario Power Co.* (1905), 36 Can. S.C.R. 596, and there it was stated by Davies, J., who is now the Chief Justice of this Court, that he was inclined to think that with respect to a work of a purely provincial kind solely within the jurisdiction of the provincial legislature, a declaration by the federal Parliament to assume jurisdiction should not be inferred from its terms or deduced from recitals of the promoters in the preamble, but should be substantially enacted by the Parliament.

I agree with such a proposition of law. I consider that the declaration should be a formal one.

As I am unable to find in the statutes quoted by the appellant company such a formal declaration its appeal should be dismissed with costs.

MIGNAULT, J., concurs with DAVIES, C.J.

Appeal dismissed.

REX v. POWER.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 18, 1922.

SUMMARY CONVICTIONS (§II—20)—THEFT FROM RAILWAY CAR—VALUE OF GOODS STOLEN NOT OVER $10—CHARGE LAID UNDER SEC. 386 OF CRIM. CODE—JURISDICTION OF MAGISTRATE TO TRY SUMMARILY —JURISDICTION IF CHARGE LAID UNDER SEC. 384.

The summary jurisdiction created by sec. 777 (5) of the Criminal Code as enacted by 8-9 Edw. VII., ch. 9, sec. 2, arises in case of a person charged with theft of an article not exceeding $10 in value and this absolute jurisdiction extends to the case of theft from a vehicle on a railway as set out in sec. 384, the offence still being theft although a different punishment is provided, and the magistrate has absolute jurisdiction over the charge whether laid under sec. 384 or 386.

The Magistrate may act on his own judgment of the value of the goods, at least in the first instance, and unless and until other evidence is adduced, and if the information states the value of the property to be $10 or less, the Magistrate, at any rate where accused is represented by counsel, is entitled to proceed unless and until either from observation of the property or from other evidence the value is put in question.

APPEAL from the judgment of Walsh, J., refusing an order prohibiting a magistrate from trying summarily under sec. 777 (5) of the Criminal Code without the consent of the accused and against his protest, a charge of stealing a pair of

shoes of the value of about $5, the evidence shewing that if theft was committed at all it was from a railway car and therefore really an offence against sec. 384 although the charge was laid under sec. 386. Affirmed.

The judgment appealed from is as follows:—

"The accused is on his trial before the Police Magistrate for Calgary on a charge of stealing a pair of shoes of the value of about $5. The Magistrate is trying the charge summarily under sub-sec. 5 of sec. 777 of the Code, without the consent of the accused and against his protest that he cannot be tried summarily without his consent. The accused moves for an order prohibiting the Magistrate from thus trying the charge.

When the motion came before me there was no evidence whatever before the Magistrate as to the value of these shoes. As his absolute jurisdiction to thus summarily try the charge arises only when the value of the property alleged to have been stolen does not in his judgment exceed $10. I would have felt obliged upon that ground to grant the order, if nothing more had happened, for in my opinion his judgment as to the value must be reached in the same way as his judgment upon any other fact essential to be proved, namely by proper evidence of it. Since the argument, however, he has permitted evidence to be given proving the value of the shoes, upon which he has found it to be less than $10, and so that reason for this motion can no longer prevail with me.

The substantial ground for this application is that though the charge is laid under sec. 386 of the Code, the evidence for the prosecution shews that if a theft was committed at all it was from a railway car and it is, therefore, really an offence against sec. 384, which makes it an indictable offence to steal anything from any vehicle of any kind on a railway. The argument is that the right to summarily try under sec. 777 (5) does not extend to a charge of theft from a railway car and that the laying of the charge under sec. 386 cannot avail the prosecution to bring the case within the Magistrate's absolute jurisdiction when the evidence discloses an offence against sec. 384. For the purposes of this argument I will deal with the question as if the charge was laid under sec. 384.

This brings me face to face with a question which the trial Judges of this Court have often had to meet under sec. 66 of the North West Territories Act. Under it, an accused charged with the theft of property, the value of which does not in the opinion of the Judge exceed $200, is not entitled to be tried by a jury. Charges of stealing from railway cars are not un-

Alta.

App. Div.

REX v. POWER.

common in this Province and the question has often arisen on the arraignment of one committed for trial upon such a charge as to whether or not in view of the above section he could elect for a trial by jury, even if the value of the stolen goods was less than $200. The contention has been that stealing from a railway car is a special offence provided against by the Code, which is not included in the simple expression "theft." Harvey, C.J., in an unreported case of *Rex* v. *French*, some years ago gave effect to this view and held that a man charged with theft from a railway car was entitled to a jury regardless of the value of the stolen property. This judgment has been followed since without much, if any, independent consideration by some of the other Judges, including myself. I have, however, given the question closer study in disposing of this motion.

The summary jurisdiction created by sec. 777 (5) arises in the case of a person charged with the theft of an article not exceeding $10 in value. Stealing from a railway car is theft. It is theft committed from a particular place, but it is none the less theft. A special punishment is provided for it but that is true of every other class of stealing. We have grouped in the Code under the heading "Punishment of theft," secs. 358 to 388 inclusive, each of which, except 386, provides for the punishment of theft of certain kinds of property or from certain places or from certain people. Section 386 is an omnibus clause enacted, as its language shows, to provide a punishment for every theft that is not covered by these other sections. The combined effect of this group of sections is to provide a punishment for every kind of offence that is included in the generic term "theft." The division of this group into sections is not in my opinion made in every case for the purpose of making the offences named in them crimes, but in some instances for the purpose of providing in varying degrees the appropriate punishment for what would without them be crimes. Surely it would be theft to steal from a railway car even without sec. 384, and if that is so, the only effect of that section is to fix the maximum punishment for it and not to create a new crime. To say that it creates a special offence to which the summary jurisdiction conferred by sec. 777 (5) does not attach is to exclude from that jurisdiction every other indictable offence included in the above sections, except 386. Amongst them is sec. 369 which says "Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle." This is the exact language of sec. 384,

mutatis mutandis, and so it must be that if this contention of the accused prevails a man charged with the theft of an animal, worth $25 is entitled to be tried by a jury. The Supreme Court *en banc* of the North West Territories held in *The Queen* v. *Pachal* (1899), 4 Terr. L.R. 310, that a person charged with the theft of cattle the value of which in the opinion of the trial Judge did not exceed $200 had not the right to be tried by a jury, the judgment stating that "the nature of the offence and the value of the property stolen are the only matters which can be taken into consideration in ascertaining whether the charge is within the section referred to." This judgment has been followed in this Province ever since and no counsel has, to my knowledge, ever been known to assert his right to a jury in a case where the value of the stolen cattle was established as being less than $200. If I should be obliged to hold that theft of a $5 article from a railway car could not be tried summarily by a Police Magistrate without the consent of the accused, I should feel myself bound to allow the next man who appears before me on a charge of stealing a $10 calf to be tried by a jury is he so desired.

This very question that I am now considering came before the Appellate Division in *Rex* v. *Stayk* (1920), 16 A.L.R. 92, except that it arose there upon the refusal of the trial Judge to allow the defendant a trial by jury. The charge preferred was theft of a barrel of liquor, neither the charge nor the depositions on the preliminary revealing its value. These depositions disclosed, however, that if the defendant had committed any offence it was the offence of theft from a railway carriage. The trial Judge, before proceeding with the trial, reserved for the opinion of the Appellate Division the question as to whether or not he was right in directing that the trial should proceed without a jury. The case sets out the grounds upon which defendant's counsel objected to his decision, one of them being that the offence was one not triable by a Judge alone under sec. 66 of the North West Territories Act and another being that it was not competent for the Crown by preferring a lesser charge than that disclosed by the depositions to deprive the defendant of his right to a trial by jury. The Court seems to have disposed of the case on the spot by holding that "the Judge presiding at the trial of a charge of theft should enquire into the value before denying the accused a trial by jury." The inference that I draw from this is that the Court did not seriously regard either of the two grounds of objection which I have above referred to, for surely if it had thought that upon

Alta.

App. Div.

REX v. POWER.

Stuart, J.A.

these facts the defendant was entitled to a jury regardless of the value of the stolen goods, it would not have in effect directed the trial Judge to make an enquiry as to their value to determine his right. My brother Simmons, who afterwards tried the case, authorises me to say that that is how both he and the defendant's counsel interpreted the judgment, for he disposed of the case without a jury and without further objection from counsel when he found on the evidence that the liquor in question was worth less than $200.

It has been suggested to me that the word "theft" in sec. 66 of the N.W.T. Act, R.S.C. 1886, ch. 50, should not include the offence of stealing from a railway car because when it was passed there was no such offence, the present sec. 384 having been first enacted by sec. 351 of ch. 29 of the statutes of 1892, several years after the passing of the N.W.T. Act. Personally I think that this argument is not well founded. After sec. 384 of the Code was enacted sec. 66 of the Act was amended by sec. 14 of ch. 28 of the statutes of 1897 by the substitution of the word "theft" for the word "larceny" and that amendment would, I should think, make the section cover every form of theft then known. Even if that is not so that argument could not apply to sec. 777 (5) of the Code which was first passed long after sec. 384, it having been enacted by sec. 2 of ch. 9 of the statutes of 1909, at which time theft from a railway car was an indictable offence. In my opinion the Magistrate's jurisdiction over this charge is absolute even if it was laid under sec. 384, and so I must refuse the motion. The matter is one of great importance, however, and I know that there is a divided opinion upon it amongst my brothers. For this reason, I give the accused leave, without special application, to appeal if he so desires. In that event, though I have no power to order a stay, I am sure that the Police Magistrate will hold his hand until the appeal is determined, for apart from this particular case it is of importance to him that he should have his jurisdiction in this respect authoritatively defined for him by the highest tribunal in the Province."

S. J. Helman, for the accused.

James Short, K.C., for the Crown.

H. Clapperton, of the Legal Dept. of the C.P.R. Co., for the informant.

STUART, J.A.:—I agree with the opinion of my brother Beck in this case.

With respect to the question of the value of the goods alleged to have been stolen I would like to add that, in my opinion, it

it is the duty of the Magistrate to address his mind to that subject as soon as the case opens or at any rate during the evidence for the prosecution and to form an opinion thereon. This duty seems to me to be a little more imperative where the accused is not represented by counsel and may be entirely ignorant of the legal limitation of the Magistrate's jurisdiction. In such a case absence of objection or questions ought not, in my opinion, to take the place of a definite enquiry by the Magistrate, although I quite agree that, in the case of an insignificant article such as a knife or a pen, whose ordinary value is well known to everyone, the Magistrate ought to be at liberty to form an opinion without the taking of formal evidence.

I also want to add that Walsh, J., in his judgment in this case was led into a misapprehension by an erroneous report of the case of *Rex* v. *Stayk* (1920), 16 Alta. L.R. 92. The Court gave no decision in that case and nothing should have been reported except that the Court refused to entertain a reserved case because there had been no trial and no verdict and, therefore, the Court of Appeal under the Code had no jurisdiction to entertain it. It is true that some expressions of opinion such as are reported on p. 93 were made by individual members of the Court, but as soon as the exact situation was discovered, the Court stopped the case and refused to deal with it for the reason I have given.

BECK, J.A.:—The defendant moved before a Judge in Chambers for an order prohibiting the Police Magistrate at Calgary from proceeding with the trial of the defendant, by way of a summary trial of an indictable offence without giving him the right to elect whether he wished to be tried before the Magistrate without the intervention of a jury or to be tried in the ordinary way by a Court having criminal jurisdiction.

The charge, upon which the defendant was being tried, was: that he did on or about January 6, 1921, at Calgary, unlawfully steal one pair of gent's broadway shoes of the value of $5 in which the Canadian Pacific Railway had a special property or interest as common carrier, contrary to sec. 386 of the Criminal Code, R.S.C. 1906, ch. 146. Section 386 reads:—

"Everyone is guilty of an indictable offence and liable to seven years imprisonment who steals anything for the stealing of which no punishment is otherwise provided, etc."

The motion for prohibition came before Walsh, J., on January 7th.

Alta.

App. Div.

REX v. POWER.

Beck, J.A.

[The judgment referred to by the learned Judge is reported herewith.]

Sub-sec. 5 of 777 enacts that:

"The jurisdiction of the Magistrate . . . is absolute and does not depend upon the consent of the accused, in the case of any person charged with *theft*, or with obtaining property by false pretences, or with unlawfully receiving stolen property where the value of the property alleged to have been stolen, obtained or received does not, in the judgment of the Magistrate, exceed ten dollars."

The main question we have to decide is whether Walsh, J., was right or wrong in holding as he did, that the word "theft," in the above sub-section, is intended to include all kinds of theft, irrespective of circumstances which appear to be circumstances of aggravation and consequently in respect of which in most instances a greater maximum punishment is authorised to be imposed. To find the answer to this it is well to examine the Code.

Part VII is entitled "Offences against rights of property and rights arising out of contracts and offences connected with trade."

Under this caption secs. 335 to 343 are entitled "Interpretation," followed by the titles "Theft defined," secs. 344 to 357, "Punishment of theft," secs. 358 to 389; "Offences resembling theft," secs. 389 to 398; "Receiving stolen goods," secs. 399 to 403; "False pretences," secs. 404 to 407; &c.

The first thing to be noted is that the three classes of offences designated in sub-sec. 5 of sec. 777, viz.: theft, obtaining money by false pretences, unlawfully receiving stolen property are also separate titles in the Code. When we come to examine the sections falling under the title, "Punishment of theft"; and compare them with other sections, we find that it is these sections only which constitute the offences. Some of these sections provide for punishment on summary conviction; all the others begin with the words: "everyone is guilty of an indictable offence and liable to, &c."

Again, all the sections constituting indictable offences, except sec. 386 already quoted, constitute as the offence, an offence which is theft, distinguished by the circumstances of the character of the property stolen or by the circumstances of the theft. The maximum punishment is in most cases in excess of that stated in sec. 386, though in some instances it is less.

For the defendant it is urged that "theft" in sec. 777 (5)

is to be limited to "simple larceny" as it was understood, recognized and defined in the old common law. In Blackstones Commentaries Bk. IV. p. 229, for instance, it is said: "Larceny or theft.....is distinguished by the law into two sorts; the one called *simple* larceny or plain theft unaccompanied with any other atrocious circumstances; and *mixed* or *compound* larceny, which also includes in it the aggravation of a taking from one's house of person."

Cyc. Vo. 25, having at pp. 11 and 12 stated the same distinction, says at p. 63: "Statutes have been passed in most jurisdictions adding to the common law offence of larceny, new offences of an aggravated sort, consisting of larceny with some additional element." In other words, the class of mixed or compound larceny has been enlarged beyond the two common law instances of stealing from one's house or person. This is what the Code has done.

There is nothing that I can find in the Code which leads to the conclusion that it was intended to preserve or restore the more or less technical distinction, the growth of the common law, between "simple larceny" and "mixed or compound larceny" any more than the other distinction of simple larceny itself into *grand* larceny, where the goods stolen exceeded the value of twelve pence, and *petit* larceny, where the goods did not exceed that value. (Blackstone, *ubi supra.*)

My brother Hyndman has suggested examining the Acts prior to the Code.

The first Canadian Act dealing with the subject of larceny was the Larceny Act of 1869, ch. 21. It was substantially a copy of the English Larceny Act of 1861, ch. 96. Both these Acts expressly abolished the distinction between simple larceny and petit larceny.

Neither Act, although retaining the expression simple larceny, anywhere uses a contrasted expression, *e.g.*, compound, mixed or aggravated larceny; and in Stephen's History of the Criminal Law, Vol. III., p. 147, the opinion is expressed that the retention of the word "simple" is meaningless. So that all distinction of classes of larceny appear to have been, in effect, abolished even before the Code.

There seems to be no case in which the distinction between simple and mixed or compound larceny would be of the slightest consequence *under the Code* except in the case we are now considering; and I am of opinion that the triviality of the value of the goods is the sole ground for giving the Magistrate jurisdiction, just as, in secs. 370, 375, 376 and 385, that is the

Alta.

App. Div.

REX v. POWER.

Beck, J.A.

criterion upon which authority is given in some cases to an ordinary Justice of the Peace to deal with the case on summary conviction.

Treating the charge as if laid under sec. 384, as Walsh, J., did, I agree with him that the Magistrate had absolute jurisdiction.

Under the provisions of the former North West Territories Act, R.S.C. 1906, ch. 62, maintained in force by the Alberta Act until repealed by Order in Council, the conclusion would not be necessarily the same; but I think it should be the same for the reasons given by Walsh, J.

Having decided that the jurisdiction of the Magistrate was absolute, that is, that he had jurisdiction to try the defendant without the defendant's consent and that, therefore, the defendant had no right of election, a further question raised upon the motion calls for consideration: the question of the value of the goods, sec. 777 (5) giving jurisdiction to the Magistrate in cases where the value of the property "does not, in the judgment of the Magistrate, exceed $10."

"Judgment" here means, I have no doubt, opinion—opinion based upon something not necessarily technically legal evidence adduced by the prosecution or defence.

For instance, if the property is before the Magistrate and is an article the value of which can fairly be judged by an ordinary individual, I should think the Magistrate could act upon his own judgment of its value, at least in the first instance and unless and until other evidence is adduced. Again if the information states the value of the property to be $10 or less I think that would be sufficient, at any rate where the accused is represented by counsel, to entitle the Magistrate to proceed unless and until either from observation of the property itself or from other evidence the value is put in question. It seems to me that it is not a condition precedent to the taking of any evidence directed to the truth or falsity of the charge that the value of the property should first be determined, but that it is sufficient if it be made to appear, either by such *prima facie* evidence as I have suggested, or by the evidence of witnesses, at some time during the course of the case for the prosecution. This seems to be the proper deduction to be drawn from the terms of sec. 784 which reads:

"If.....it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, *or from any other circumstances*, ought to be made the subject of prosecution by indictment rather than to be disposed of

summarily such Magistrate may decide.....not to adjudicate summarily upon the case."

In the present case the information stated that the value of the property—a pair of boots—was of the value of $5, the property was produced so that it was open to the inspection of the Magistrate; evidence was given that the accused when arrested said that he had bought them for $7 or $8. This was, in my opinion, sufficient to enable the Magistrate to form a judgment upon the value of the goods and upon it he did in effect decide them to be of a value of less than $10. The evidence subsequently given upon the adjournment of the hearing relating to the value of the boots was not, in my opinion, such as to make it an unreasonable judgment of the Magistrate to retain, as he did, the judgment he had already formed that the value did not exceed $10.00.

I would, therefore, affirm the judgment refusing prohibition and dismiss the appeal.

SCOTT, C.J., HYNDMAN and CLARKE JJ.A., concurred with BECK, J.A.

Appeal dismissed.

THE KING v. TESSIER.

Quebec Court of Sessions of the Peace, Choquette, J. November 8, 1921.

BANKRUPTCY (§VII—65) — FRAUDULENT CONCEALMENT OF ASSETS—LIABILITY—INTENT TO DEFRAUD—BANKRUPTCY ACT, SEC. 89 (D).

Where the facts proved and the documents produced establish that a bankrupt has within the six months preceding the filing of her statement transferred to her brothers, property and an automobile for which promissory notes were given, which were afterwards deposited in the bank to secure a debt, and of which no mention was made in the statement, the Court will look at the circumstances and may infer therefrom the "intent to defraud" which makes the bankrupt liable under sec. 89 (D) of the Bankruptcy Act.

[See Annotations, 53 D.L.R. 135; 59 D.L.R. 1.]

INDICTMENT for fraudulent concealment of assets contrary to sec. 89 of the Bankruptcy Act.

CHOQUETTE, J.:—The defendant is charged with having, within the 6 months which preceded May 25, 1921, when the assignment was made, concealed and abstracted property exceeding in value $5,000, and also with not having delivered with the property she assigned to the authorised trustee, pro-

Que.

C.S.P.

THE KING v. TESSIER.

Choquette, J.

missory notes to the amount of $2,500, the whole in contravention to the Bankruptcy Act, 1919 (Can.), ch. 36, and thereby rendering herself guilty of an offence and liable to a fine not exceeding $1,000 or to a term not exceeding 2 years' imprisonment or to both such fine and such imprisonment.

The proof establishes that at the time of the assignment on May 25 last, the defendant did not mention that on April 6 and 22, previous she had transferred to her brothers, property and goods consisting of an automobile vehicles, etc., exceeding in value $5,000; that though it was mentioned in the said deeds of sale that the properties had been sold for cash, the fact is that promissory notes were given instead of cash, which promissory notes were later transferred to the Hochelaga Bank to guarantee a debt of about $3,000, besides which the Bank also had hypothees on the said properties by agreement with the purchaser. The Crown rightly alleges that according to art. 89 (d) of the Bankruptcy Act, 1919, the defendant has committed an offence which renders her liable to the penalties therein mentioned.

The defendant pleads that the facts proved and the deeds produced establish that she had within the 6 months preceding the filing of her statement, transferred to her brothers the property in question, but do not establish that she did it with the intent to defraud. According to this art. 89 of the Bankruptcy Act, the defendant has to prove that she had no intention to defraud.

Taking all the circumstances into consideration, the relationship, the short interval between the transactions and the assignment, the defendant must have known that what she did was of a nature to defraud her creditors, and that in any case, when she would have sold these properties for more than $6,000, which were guaranteeing a debt to the bank of only $3,100, she should have declared in her statement that when the bank would be paid, the remainder would be for the benefit of the creditors.

It was stated that the defendant was not a business woman, that it was her husband who looked after everything. How comes it then that she herself has stated that she looked after the store making purchases and sales. There is no doubt in the Court's mind that she knew the nature of the transaction she was making with her brother, she is supposed to know the law and she must be held responsible in law for what the Court considers to be a fraudulent act towards her creditors.

The defence further pleaded that the charge was laid not in

virtue of the criminal law, but of a penal statute, which should be strictly interpreted. This is true, but in interpreting it with the utmost strictness, the Court can come to no other conclusion than that the defendant has infringed this statute and must be declared guilty. However, in view of the defendant's general conduct, the trouble she has had, the sickness of her husband as well as of her mother who lives with her as do some orphans; further, in view of the fact that she has been doing business for three years with only a deficit of $4,000 to be found in her statement; and the many lawsuits that have been taken against her, the costs of which she has to pay, the Court condemns her to a fine of $25 only.

Judgment accordingly.

PACHAL v. LUDWIG et al.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 14, 1921.

PLEADING (§IN—118)—STATUTE OF FRAUDS AS DEFENCE—NOT SPECIFICALLY PLEADED—PLAINTIFF NOT TAKEN BY SURPRISE—AMENDMENT, SO AS TO SPECIFICALLY SET UP.

Where in his pleading the defendant does not specifically plead the Statute of Frauds but it is evident from the pleadings that he intended to raise this defence, and the pleadings are so drawn that the plaintiff could not possibly have been taken by surprise, the defendant will be allowed on appeal to amend his pleadings so as to specificially set up this defence.

[*Clarke* v. *Callow* (1876), 46 L.J. (Q.B.) 53, distinguished.]

CONTRACTS (§IE—87)—LEASE OF BUTCHER SHOP—INTEREST IN LANDS—NECESSITY OF WRITING.

A contract to grant a lease of a butcher shop, is a contract concerning an interest in land within sec. 4 of the Statute of Frauds and must be in writing where possession is not taken by the tenant.

[*Thursby* v. *Eccles* (1900), 70 L.J. (Q.B.) 91, followed.]

APPEAL by plaintiff from the trial judgment in an action to recover rent alleged to be due on an alleged verbal lease made on August 5, 1920, to commence on August 10, 1920, whereby the plaintiff leased to the defendants a butcher shop in the village of Kipling, Saskatchewan.

E. C. Grant, for appellant; *L. L. Dawson*, for respondents.

HAULTAIN, C.J.S., and TURGEON, J.A., concur with MCKAY, J.A.

MCKAY, J.A.—The defence denies the making of any lease, and says that there was a verbal agreement to rent the said premises for one month, and it was at respondents' option to con-

Sask.

C.A.

PACHAL v. LUDWIG.

McKay, J.

tinue for a longer period, and that respondents and nobody on their behalf ever entered into possession or occupied the said premises.

By para. 11 of the defence, respondents plead that the appellant has not disclosed any ground for his action, and that they did not enter into any written agreement to bind themselves to rent the said premises.

The trial Judge found that the alleged lease was not a lease, but an agreement for a lease, and that appellant was to have a lease prepared, but did not do so, and that respondents did not enter into possession of the premises, and that above referred to para. 11 is a sufficient pleading of the Statute of Frauds, and dismissed the action.

The appellant now appeals from the said decision, but does not appeal from the findings that the alleged verbal lease was only an agreement for a lease and that respondents did not enter into possession. In any event, there is ample evidence on which the trial Judge could make these findings and this Court should not disturb them. He, however, contends that the trial Judge was wrong in his decision as to para. 11.

At the opening of argument on this appeal, respondents' counsel, on notice given to the appellant, asked to amend the defence by adding para. 12 specifically pleading the Statute of Frauds. I think this application should be allowed under the circumstances of the case. Our R. 155 says as follows:

"155. The defendant or plaintiff, as the case may be must raise by his pleadings all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, statute of limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

This rule is for the purpose of preventing plaintiff or defendant being taken by surprise.

The appellant alleges a verbal lease which is good as a lease under the Statute of Frauds, and the respondent alleges an agreement for a lease upon which an action cannot be maintained unless it is in writing, owing to sec. 4 of the Statute of Frauds, and say they did not sign anything in writing. It seems to me the respondents intended by this to raise the

Statute of Frauds, and by the wording of the paragraph the appellant surely could not be taken by surprise when respondents claim that by this paragraph they meant to take advantage of the Statute of Frauds.

This case is altogether different from *Clarke* v. *Callow*, (1876), 46 L.J. (Q.B.) 53. There the defendant did not plead the Statute of Frauds or anything that would indicate it, but contended that as the plaintiff by his claim anticipated the defence of the Statute of Frauds, it was not necessary for him (defendant) to plead it. In the case at Bar the respondents plead that the agreement is not in writing, but omit to mention the Statute of Frauds. But it seems to me they could not have intended to refer to anything else, and the appellant could not be taken by surprise. I am, therefore, of the opinion the amendment should be allowed.

As the trial Judge has found the alleged lease was only an agreement for a lease and there was no possession by defendants, and the evidence does not show any part performance, and the agreement was not in writing, the case at Bar comes within *Thursby* v. *Eccles* (1900), 70 L.J. (Q.B.) 91, where Bigham, J., held that a contract to grant a lease of a furnished flat is a contract concerning an interest in land within sec. 4 of the Statute of Frauds, and part payment of rent is not, unless possession is taken by the tenants, such a part performance as to take the case out of the operation of the section.

The appeal will, therefore, be dismissed, but without costs, because I think the respondents are partly to blame for the appeal, in that they did not specifically plead the Statute of Frauds, as there is no denying para. 11 is very loosely worded, and very likely there would have been no appeal had they pleaded correctly in the first instance.

Appeal dismissed.

BROWN v. MOORE.

Supreme Court of Canada, Idington, Duff, Anglin, Mignault, JJ., and Cassels, J., ad hoc. November 21, 1921.

COMPANIES (§ IVE—95)—PULP AND PAPER COMPANY—POWER IN CHARTER TO PURCHASE AND HOLD LANDS—IMPLIED POWER TO SELL.

Where the charter of a company gives it the power to manufacture wood, pulp and paper in the Province, to purchase and hold lands, mill privileges, growing timber and other property . . . and to transact all business in connection therewith; the company has the power to sell any land which it has acquired so long as it does not dispose of its whole undertaking.

Can.

S.C.

BROWN v. MOORE.

Duff, J.

SPECIFIC PERFORMANCE (§ IC—24A)—LEASE OF REAL AND PERSONAL PROPERTY OF COMPANY—OPTION TO PURCHASE—AGREEMENT TO CONVEY ONE-QUARTER INTEREST IF OPTION EXERCISED—OPTION NOT FORMALLY EXERCISED BUT ENOUGH STOCK ACQUIRED TO CONTROL.

One who has acquired a lease of all the real and personal property of a company, with an option to purchase the same at any time during the term and who agrees that in the event of his exercising the option he will convey one quarter interest in the property acquired, will be compelled to carry out his agreement and convey the one quarter interest although he has not formally exercised his option if he has acquired enough stock in the company to give him control, especially where the transaction has been put in this form with the intention of defrauding the other party of the interest which he has contracted to give him.

APPEAL from a decision of the Supreme Court of Nova Scotia (1921), 59 D.L.R. 642, affirming the judgment at the trial in favour of the plaintiff. Affirmed.

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

L. A. Lovett, K.C., for respondent.

IDINGTON, J.:—I agree for the reasons assigned in the Courts below that this appeal should be dismissed with costs.

I do not think however, that the resort to a voluntary winding up of the company is at all necessary or the only means of enforcing the contract.

The appellant is just as much bound to procure the conveyance to the respondent of what he is entitled to as if he had procured, pursuant to his agreement with the company's covenant with the respondent, the conveyance of the property to his own attorney or any one else he chose to select.

The court below can, no doubt, if necessary, find other means of enforcing the execution by the appellant of his obligation to the respondent.

DUFF, J.: (dissenting)—The Nova Scotia Wood, Pulp and Paper Company, Ltd., was incorporated by a Nova Scotia Statute, 1881., ch. 71, "for the purpose of manufacturing wood pulp and paper" in Nova Scotia "and of purchasing and holding lands, mill privileges, growing timber and other property at and near Mill Village and elsewhere in the County of Queens, and for transacting all business in connection therewith."

The company was (sec. 7) invested with power to expropriate "lands and woods contiguous to or connected with lands and works of the company." The municipality of Queen's County (sec. 10) was empowered to exempt the company from taxation.

By a lease dated October 2, 1916, the company leased to the respondent all its "mills, buildings, machinery and all its lands, tenements, privileges easements and appurtenances situate in the County of Queen's;" and by the same instrument it was provided that the appellant should have "the sole and exclusive option at any time during the existence of this lease, of purchasing the fee simple of the lands, tenements, easements and appurtenances hereby demised together with all buildings, plant and machinery thereon" on certain specified terms. On the same date the respondent assigned this lease to the appellant and again on the same date the appellant and the respondent executed an agreement by which the appellant agreed to engage the respondent as his manager upon certain terms as to remuneration and it was further provided:—

"4.—If at any time Frank K. Brown purchases the said premises described in the said lease out of the aggregate net earnings as set forth above in this agreement then and immediately thereafter the said Phil. H. Moore is to become the owner of 25 per cent. thereof and the said Frank K. Brown is to assign and transfer to the said Phil. H. Moore 25 per cent or one quarter interest therein by good and sufficient deeds thereof always conveying only such title as he may have acquired from the said Nova Scotia Wood, Pulp and Paper Company, Limited.

5.—In the event of the said Frank K. Brown being desirious to purchase the said property before the said aggregate net earnings as hereinbefore referred to, are sufficient to complete the amount of the said purchase price, the said Phil. H. Moore shall have the option of drawing from the said capital account of the said company his proportion of the profits to that date or of purchasing with his said proportion of profits and any other money which he may desire to invest in the said property an interest in the same not to exceed 25 per cent of the said property at the same valuation as the said Frank K. Brown will pay to the Nova Scotia Wood, Pulp and Paper Company, Limited, for the purchase of the said property, namely $30,000.00."

The respondent during the currency of the lease purchased from the shareholders of the company the whole of the shares of the company and the appellant thereupon demanded a transfer of a one-fourth interest in the property comprised in the lease and tendered one quarter of the purchase price paid. This the respondent refused offering at the same time to transfer one quarter of the shares purchased. The respondent there-

Can.

S.C.

BROWN v. MOORE.

Duff, J.

upon brought this action and the Courts of Nova Scotia upheld his claim that he is entitled to a conveyance from the appellant of an undivided one-fourth interest in the property comprised in the lease.

The purchase by the respondent was not technically a purchase in pursuance of the option. It was nevertheless, I think, a transaction within the scope and intendment of arts. 4 and 5 of the agreement between the appellant and the respondent.

Article 4 provides that the respondent is to participate in the fruits of the exercise of the option upon the same footing as the appellant. If the conditions are fulfilled under which that article is to come into play, then whatever title or interest the appellant acquires by the exercise of the option is immediately to be effected by a trust in favour of the respondent. The article treats the appellant as a trustee, it treats the rights under the option as trust property held for the benefit of the appellant and the respondent, and it is from this point of view also that we must construe art. 5. Article 5 was intended to apply to every interest acquired by the appellant which (if the conditions of art. 4 had happened), would have been of such a character that the trust thereby declared would have captured it.

The respondent's rights under these articles could not be affected by the form of the transaction between the appellant and the company. If what was done was done for the purpose of effectually securing, so far as possible, the benefits of the option, then the interest, whatever form it might take, of which the appellant was the recipient was to be subject to the respondent's rights as declared by these articles.

The respondent was to be entitled under the terms of art. 5 to have transferred to him a one-fourth interest in what the appellant acquired and it is important to note that it was his right to demand an interest which, while differing in quantity from that of the appellant, should in point of quality be identical with the appellant's. He was entitled to be put in point of quality upon the same footing as the appellant.

Now it is quite obvious that what the appellant offered the respondent, namely, one quarter of the shares acquired by him, was not an interest which the appellant was bound to accept as in satisfaction of his rights. The acceptance of the appellant's offer would place him in the position of a minority shareholder, a position in which he might well find that share for share what he had accepted was not equal in value to that the appellant had retained.

He was clearly entitled to have a transfer of an undivided one-fourth interest in every share acquired by the appellant or at all events a declaration of trust by the appellant in respect of such a one-fourth interest.

On the other hand the claim made by the respondent which has been admitted in the Court below, 59 D.L.R. 642, is, I think, an inadmissible one. There can be no doubt that the method adopted by the appellant for securing the fruits of the option was adopted in good faith. There were at least two most cogent reasons for pursuing the course that was taken. 1st, it was gravely questionable (so much is admitted and I shall point out in a moment that the option was *ultra vires* and unenforceable) whether a conveyance literally in execution of the terms of the option would not be wholly inoperative at law, and 2nd, assuming such a conveyance could have any operation, it would have the effect of divesting the title to the company's properties from the company and depriving the purchasers consequently of the benefits of the compulsory powers given by the Act of incorporation as well as of the privilege in respect of taxation. That the parties were alive to these considerations is proved by the evidence of the respondent himself who says he pointed out the "value" of the "charter" and the importance of securing it. His precise words are:—"I pointed out the value of the charter and that we should get that with other assets when he exercised his option."

In these circumstances the respondent is in this dilemma. The shares acquired by the appellant are within the contemplation of arts. 4 and 5 or they are not. If they are not he has no claim upon them or upon the appellant under art. 5. If they are, and I have stated the reasons for concluding that they are, then these shares are the subject in respect of which the respondent's rights under arts. 4 and 5 are exercisable. Indeed, the conduct of the respondent as disclosed by the evidence just quoted, especially in a proceeding in which he invokes the equitable powers of the Court, would preclude him from denying it.

This is sufficient to dispose of the questions raised by the appeal but it is not right, I think, that I should take leave of the appeal without expressing the opinion I have definitely formed after a most careful consideration of the subject that the option was *ultra vires* (I express no opinion about the validity of the lease itself) and that by the express terms of the articles the respondent is precluded from demanding from the appellant a title which the appellant did not and could not acquire from the company. As to the last mentioned point

Can.

S.C.

BROWN v. MOORE.

Duff, J.

the words of art. 4. are express, and, as I have already said, it is quite clear that the subject dealt with in art. 5, that is to say, the subject of the rights vested in the respondent under art. 5 is the same as that in respect of which rights are given him by art. 4.

The general rule as to the powers of the modern statutory companies is stated by Lord Blackburn in *Attorney General* v. *Great Eastern R. Co.* (1880), 5 App. Cas. 473 at p. 481, in these words "where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited;" and where extraordinary powers are conferred such as compulsory powers to take land or such as a right to treat with a municipality for exemption from taxes, a stricter rule is applied. Such powers are presumed to be conferred in the public interest, and it is conclusively presumed that the undertaking is one in which the public has an interest and any dealing with the property of the company which interferes with the carrying out of the undertaking as authorised by the legislature is deemed (in the absence of some provision to the contrary effect) to be prohibited and rendered inoperative if attempted.

In *Esquimalt Water-works Co.* v. *The Corp. of the City of Victoria*, (1906), 12 B.C.R. 302 at p. 318, I stated the principle thus:—

"The power to dispose of its property is, in the case of a quasi public corporation, created by special Act of Parliament, such as the plaintiff company (see *Proprietors of Staffordshire and Worcestershire Canal Navigation* v. *Proprietors of Birmingham Canal Navigation* [(1886) L.R. 1. H.L. 254 and *Reg.* v. *South Wales Railway Co.* (1850) 14 Q.B. 902], a limited power. It is limited by this rule, namely, that apart from authority expressly given or appearing by necessary implication from its incorporating Act such as a corporation may not dispose of its property if by such disposition it should disable itself from carrying its objects (in which the public have an interest) for which its special powers were conferred upon it." To the cases cited in this passage may be added *Mulliner* v. *Midland R. Co.* (1879), 11 Ch. D. 611, at p. 622.

The option now before us was in form a contract by which the company professed to agree upon certain conditions to dispose of property constituting the whole substratum of its undertaking. I do not think it is affirmatively established in the evidence that the company was not in possession of other prop-

erty—it may have had, for example, a bank account: but the power to acquire property given by the statute, that is to say power to acquire lands, etc., was limited in its territorial operation to the county of Queens and the lease professes to deal with the whole of the company's landed property in that county. Such a virtual alienation of all its property would be beyond the power of a trading company possessing powers of selling its property in the course of its business in the absence of authority given by its charter or by statute. *Simpson* v. *Directors of the Westminster Palace Hotel Co.* (1860), 8 H.L. Cas. 712, 11 E.R. 608, 6 Jur. (N.S.) 985, a disability which can in some cases where the undertaking is not affected by a public interest be overcome by the consent of all the shareholders. Where the transaction, however, concerns an undertaking of the class to which that now in question belongs, namely, an undertaking in which the public is conclusively presumed to have an interest by reason of the extraordinary powers given to the corporation authorised to carry it out, the consent of the shareholders is of no effect.

There are one or two subsidiary points to which perhaps one ought to refer. It was suggested by Mr. Lovett in the course of his ingenious argument that there were cases in which the proprietor of a "one man company" had been directed to bring about the winding up of the company in order to carry out an agreement to convey property. Such cases may be quite intelligible where a public interest is not involved but obviously they have no sort of application to an undertaking of the class with which we are now dealing.

Further I cannot help observing that it seems a strange misapplication of equitable powers to exert them in lending assistance to the design of the respondent to dismember this undertaking, to deprive it of very important elements of value (on that his own evidence is conclusive) by separating the ownership of the property from the valuable privileges vested in the company itself by statute. Under arts. 4 and 5 the respondent, as I have said, is entitled to be put as regards the quality of his interest in the same case with the appellant, he is entitled to have his share of every kind of economic benefit which the ownership of shares gives; but, by the articles themselves as well as by his own conduct, and as well indeed by the plain dictates of justice, he seems to be precluded from demanding that which he had demanded in this litigation.

ANGLIN, J.:—It has been found by the trial Judge and the Court *en banc* that in acquiring the stock of the Nova Scotia

Can.

S.C.

BROWN v. MOORE.

Anglin, J.

Wood, Pulp, and Paper Co., and thus obtaining control of its property and assets the defendant in fact exercised an option which he held to purchase that company's mills, buildings, machinery and lands for $30,000. It has further been held by the Supreme Court of Nova Scotia that in putting the transaction for the acquisition of the property from the company into this form, the defendant acted in bad faith, i.e., as I understand it, with the intent of defrauding the plaintiff of the interests he had contracted to give him in the property to be acquired from the company in the event of the option to purchase it being exercised. It is not possible to set aside these findings. There is evidence to warrant them. The principal question in issue is whether the plaintiff by the device to which he resorted has created a situation that renders the Court impotent to give to the plaintiff the relief of specific performance which he claims.

Two obstacles were urged by counsel for the appellant (a) that while the Nova Scotia Wood, Pulp and Paper Co. has statutory power to acquire lands, it has not the power to sell them; (b) that the property in question is vested, not in the defendant, but in the company.

As to the first objection, I think the power to sell its lands and other property (short of disposing of its whole undertaking and it is not established that the option covered the entire undertaking of the company) is implied in the nature of the business which the company was incorporated to carry on. *Re Kingsbury Collieries, and Moore's Contract*, [1907] 2 Ch. 259.

As to the second objection, I do not see sufficient reason for presently reversing the decision of the Supreme Court of Nova Scotia, 59 D.L.R. 642, that its jurisdiction *in personam* should be exercised to thwart the dishonest purpose of the defendant and compel him to fulfil his obligation to the plaintiff on the ground that the decree pronounced may prove to be *brutum fulmen*. Having secured complete control of the company the defendant can, and may be forced to probably procure the execution by it of any conveyances necessary to vest in the plaintiff the one-quarter interest to which he has been found entitled. Should any insuperable difficulty to carrying out the decree supervene, it will be within the power of the Court, under the reservation of further consideration, to order an assessment of damages in lieu of specific performance or to award the plaintiff such other alternate relief as the circumstances may call for. *Vide* N.S. Rules Nos. 517 and 538.

I would dismiss the appeal.

MIGNAULT, J.:—The only question in this case which requires consideration is the objection of the appellant that he is asked to do something which cannot legally be done, to wit, to assign or cause to be assigned to the respondent one quarter interest in the properties mentioned in the lease and option. His objection that he has acquired only the shares of the Nova Scotia Wood, Pulp and Paper Co. and that that company alone can dispose of these properties, does not impress me, for the appellant, as owner of all the shares, can certainly cause such an assignment to be made by the company. But would the assignment, if made by the company, be of legal effect?

The objection of the appellant is that while this company can acquire lands it has not the power to sell them. I have examined the company's charter, 1881, (Nova Scotia), ch. 71. It gives the company the power to manufacture wood, pulp and paper in the Province, to purchase and hold lands, mill privileges, growing timber and other property at and near Mill Village and elsewhere in the county of Queens, and to transact all business in connection therewith. In my opinion, such a company has the power to sell any land which it has acquired, this power being implied in the authority given it to purchase and hold lands, mill privileges, growing timber and other property and to transact all business in connection therewith. *Re Kingsbury's Collieries*, [1907] 2 Ch. 259. Any other decision would force the company to hold in perpetuity or until its dissolution the property acquired by it.

But here the evidence shews that the properties mentioned in the lease and option to purchase were all the properties belonging to the company. All the shares in the Nova Scotia Wood, Pulp and Paper Co. several years before had been acquired by one Davison, and after his death belonged to his son and two daughters. For some time the company's operations had not been carried on and the mill property was in a somewhat dilapidated condition, and no doubt the lease in question was made for the purpose of securing some one who would carry on the business, improve the property and who might eventually purchase the mill property.

If this lease had conferred an option to purchase the whole undertaking of the company with its charter as well as its properties, it might well be beyond its powers. But the option is an offer to sell for $30,000 the fee simple of the lands, tenements, easements and appurtenances demised by the lease, together with all buildings, plant and machinery thereon. The lease covered all the mills, buildings, machinery and all the

Can.
S.C.
BROWN
v.
MOORE.
Cassels, J.

lands, tenements, privileges, easements and appurtenances of the company situate in the county of Queens and more particularly described in some 24 deeds. I think such an offer of sale comes well within the decision in *Wilson* v. *Miers* (1861), 10 C.B. (N.S.) 348, 142 E.R. 486, where a navigation company had agreed to sell its entire fleet of 12 ships, and it was held that such a sale was within the powers of the directors. Under the clauses of settlement of the company the directors were authorised to sell, let, to hire and charter the company's vessels. In the present case the power to sell the properties of the company, I have said, must be implied, while in the case of *Wilson* v. *Miers*, *supra*, it was expressed, but the point here is that there is a distinction between selling the business of a company as a whole and selling all its existing goods and chattels. See Lindley, Law of Companies, 6th ed., 1902, vol. 1, p. 256. I therefore think that a sale can legally be made to the respondent of one quarter interest in the fee simple of the properties covered by the lease and option to purchase.

On the other points I accept the findings of the two Courts that the appellant acquired all the stock of the company under the terms of the original agreement, and that, as between him and the respondent, he must be held to have purchase the property within the meaning of the agreement between them. In the opinion of Ritchie, E.J., in the Appellate Court, 59 D.L.R. 642, at p. 643, the appellant acted in bad faith and is subject to the control of a court of equity. The trial Court, after declaring that the respondent is entitled to have the appellant assign and transfer or cause to be assigned and transferred to the respondent one quarter interest in the premises by good and sufficient deeds thereof, retained further consideration of the action, so that it will no doubt be able to make any additional order which may be necessary to give effect to its decree, the action being one *in personam*.

I would therefore dismiss the appeal with costs.

CASSELS, J.:—(dissenting):—With all respect I am unable to arrive at the conclusions come to by the trial Judge, Mellish, J., and the Judges in the Court of Appeal, 59 D.L.R. 642.

The Nova Scotia Wood, Pulp and Paper Co. Ltd., were incorporated by special charter, ch. 71, (1881). They were incorporated for the purpose of manufacturing wood pulp and paper in the Province of Nova Scotia, and purchasing and holding lands, mill privileges, growing timber and other property at and near Mill Village and elsewhere in the county of Queens, and for transacting all business in connection therewith.

On October, 2, 1916, the Nova Scotia Wood, Pulp and Paper Co. Ltd, leased with the present respondent, Phil. H. Moore, the properties set out and described in the statement of claim. By the terms of the lease, the lessee was to hold the said lands, premises, easements and appurtenances, for the term of 3 years from October 1, 1916, paying the rent provided for in the said lease. The lease further provided as follows:—

"The lessee shall have the sole and exclusive option at any time during the existence of this lease of purchasing the fee simple of the lands, tenements, easements and appurtenances hereby demised together with all buildings, plant and machinery thereon at and for the sum of $30,000.00 with the proviso that all monies paid on account of said yearly rentals of $2,000 shall be credited on the said purchase price."

It is also provided as follows:—"And it is hereby declared and agreed that this indenture and everything herein contained shall enure to the benefit of and be binding on the parties hereto, their heirs, executors, administrators, successors and assigns respectively."

On October 2, 1916, the same date as the lease an agreement in writing was made between the plaintiff, Moore, and the defendant, Brown, which is set out in the statement of claim.

By this agreement Moore assigned and delivered the said lease and option to said Frank K. Brown. The fourth clause of this agreement provides as follows:—

"4. If at any time the said Frank K. Brown purchases the said premises described in the said lease out of the aggregate net earnings as set forth above in this agreement then and immediately thereafter the said Phil. H. Moore is to become the owner of 25 per cent thereof and the said Frank K. Brown is to assign and transfer to the said Phil. H. Moore 25 per cent or one quarter interest therein by good and sufficient deeds thereof always conveying only such title as he may have acquired from the said Nova Scotia Wood, Pulp and Paper Co. Ltd."

There is no covenant or agreement binding Brown to exercise the option of purchase.

I quote a few sentences from the evidence of Moore:—

"Q.—Now about this option, did you have any conversation with Brown about exercising the option at any time? A.—Yes, we discussed it a number of times. Q.—As to the method of transfer of the properties, did you have any discussion with Brown about that prior to the end of the option? A.—Yes, I pointed out the value of the charter and that we should get that with other assets when he exercised his option. Q.—Did

Can.

S.C.

BROWN v. MOORE.

Cassels, J.

you discuss the way the property should be taken over under the option? A.—I don't think we went into details about that; it was to be transferred by some method satisfactory to the two parties. Q.—Was any different method of transfer discussed with Brown? A.—No, not with me."

At the hearing of this appeal a very elaborate argument was presented by Mr. Paton, as to the power of the company to sell these assets. In the view I take of the case, it is unnecessary to consider these nice questions of law.

In point of fact Brown never did exercise the option. What happened was, that, very likely acting on the suggestion of Moore, he acquired practically the whole of the stock of the company, and it would appear from the argument and the statement that Brown is quite willing to assign to Moore one quarter in value of the stock subject to payment by Moore of the amount due to him. The ownership of the stock would carry with it the ownership of the assets.

It is said on behalf of Moore that the ownership of one quarter of the stock is not the same thing as the ownership of one quarter of the assets. This may be so, but Brown not having exercised the option, is not in a position to convey 25% of the assets. The right of Moore to the 25% of the assets is necessarily based upon the option being exercised by Brown.

I am of the opinion that the offer made by Brown to transfer 25% of the stock is a reasonable one and will practically give Moore one fourth interest. It will also prevent the breaking up of the company and will enable the company to carry on the business for which they were incorporated.

I would allow the appeal with costs of the trial and of the appeal to the Court of Appeal in Nova Scotia, 59 D.L.R. 642, and also to the appeal to this Court.

I think the judgment should contain an undertaking on the part of the appellant Brown to transfer to Moore 25% of the stock upon Moore paying what is properly due by him, if not already paid. In other respects, the judgment should stand.

Appeal dismissed.

CAREFOOT v. NICHOLS & SHEPARD Co.

Sask.

K.B.

Saskatchewan King's Bench, Embury, J. March 30, 1921.

STATUTES (§ IIA—104)—FARM IMPLEMENT ACT, R.S.S. 1920, CH. 128—CONSTRUCTION—TEN DAYS' TRIAL—EIGHT DAYS' NOTICE—MEANING OF.

Paragraph 2 of Form A of the Farm Implement Act, R.S.S. 1920, ch. 128, contemplates that the ten days given the purchaser in which to make the machinery perform the work for which it was intended, shall be ten days of actual trial, and in computing this time Sunday is necessarily excluded as no trial can take place on that day, but the 8 days in which the vendor has in which to make it work satisfactorily from the receipt of the notice from the purchaser, is 8 days of time (not trial) and in computing this time Sunday must be counted.

ACTION under the Farm Implement Act, R.S.S. 1920, ch. 128.

C. E. Gregory, K.C., for plaintiff.

F. L. Bastedo, for defendant.

EMBURY J.:—The question to be decided in this case is dependent on what construction is placed on a certain portion of Form A in the Farm Implement Act, being the R.S.S. 1920, ch. 128. Part of para. 2 of Form A to the schedule of the Act reads:—

"Provided however that if the purchaser cannot make said machinery perform well the work for which it was intended upon a ten days' trial of the same he shall within the said ten days or within two days after the expiration of the same give notice in writing to the vendor or to his agent at . . . If the purchaser gives such notice the vendor shall have eight days from the receipt of such notice to make it perform well the work for which it was intended. If within the said eight days the vendor does not make it perform well such work either by replacing the parts or otherwise the purchaser . . ." etc.

The wording the interpretation of which is in question is:—

"The vendor shall have eight days from the receipt of such notice to make it perform well the work for which it was intended. If within the said eight days the vendor does not make it perform well such work . . ." (etc.).

It is contended by the plaintiff that in computing the eight days the Sundays should be excluded, the contention being that the nature of the work which would require to be done to put the implement in good working order was such as would make it necessary to interpret the "eight days" as eight working days. In this connection the plaintiff relied upon *Harper*

Sask.

K.B.

CAREFOOT v. NICHOLS & SHEPARD CO.

Embury, J.

v. *M'Carthy* (1806), 2 Bos. & P. (N.R.) 258, 127 E.R. 625; *London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76, at 81; *Commercial Steamship Co.* v. *Boulton* (1875), L.R. 10 Q.B. 346.

The rule with regard to computation of time in such cases is as set out in 27 Hals., p. 453, as follows:—

"Where a period is fixed within which some act must be done, Sundays and holidays in general count like other days, and it makes no difference that the last day of the period falls on a Sunday."

But with regard to cases where the time limited by an act for the doing of anything expires on a Sunday, see the Saskatchewan Interpretation Act, R.S.S. 1920, ch. 1, which provides that the time limited in such cases shall be extended to the following day. This is the only provision in the Saskatchewan Interpretation Act which provides for the exclusion of Sundays and holidays from the computation of time, and accordingly where in any particular statute a contrary intention is to be deduced it can be deduced only where the intention of the Legislature is clear and unequivocal. In the words above quoted from Form A, two periods of time are provided for; one is a period during which the purchaser of an implement may test the machine, and the wording is "ten days' trial," not ten days from a fixed time, but ten days' trial, meaning thereby that the days shall be actual periods for trying the machine. But when it comes to providing for the period for making the implement perform well the work, the wording is quite different. The Statute does not say if after eight days' work thereon the vendor is unable to make it perform well, etc., following the form of the wording in the previous sentence, but sets out that he shall have eight days from the receipt of the notice within which to produce a certain result, meaning thereby that he shall have eight days' time, not eight days' trial, or eight days of effort; and so it seems to me that the intention of the Legislature was clear from the manner of the wording that the ten days should be actually ten days of trial while the eight days should be merely eight days of time.

The plaintiff's claim will be dismissed with costs, and the defendants' counterclaim allowed with costs.

Judgment accordingly.

COLPMAN v. CANADIAN NATIONAL RAILWAYS.

Alta.

App. Div.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman, and Clarke, JJ.A. October 6, 1921.

STATUTES (§ IIA—104)—RAILWAY ACT, 1919 (CAN.), CH. 68, SEC. 386 —"LANDS," MEANING OF.

The word "lands" in sec. 386 of the Railway Act, 1919 (Can.), ch. 68, does not include the portion of land comprising the company's right-of-way over a highway.

[See Annotations 32 D.L.R. 397; 33 D.L.R. 423; 35 D.L.R. 481.]

APPEAL from the judgment of Walsh, J., dismissing the plaintiff's action which was brought to recover damages for the loss of 100 sheep killed by a train on the defendant's railway when crossing a highway, on which the sheep were being driven. Affirmed.

H. H. Parlee, for plaintiff.

N. D. Maclean, for defendant.

SCOTT, C.J., concurs with CLARKE, J.A.

STUART, J.A.:—I agree that this appeal should be dismissed. To the reasons given by the other members of the Court in which I concur I would like to add a word or two. Mr. Parlee attempted to make a strict application of the definition of the word "lands," as given in sec. 2, sub-sec. (15) of the Act, 1919 (Can.), ch. 68, to that word as used in the second line of sub-sec. (1) of sec. 386 so as to make it include the "right" of the railway company to construct and operate its railway across a highway. With respect, I think this cannot properly be done. The interpretation section contains, as usual, the phrase "unless the context otherwise requires." Now sec. 386 contains two main sub-sections. The first deals with the liability of the company where animals get upon the "lands" of the company; and there are five sub-clauses, (a) to (e), of these (a) and (b) deal with farm crossings; (c) deals with the taking down of a railway fence and it is notorious that there never is such a fence at the sides of the track where it crosses a highway, for otherwise it would not be a highway; (d) deals with turning animals into the "enclosure" of any railway. There is never an "enclosure" at a highway crossing. (e) deals with the case of a person without the consent of the company driving animals "upon any railways and within the fence guards and gates thereof." Obviously this language has no reference to a highway crossing where the consent of the company is never required. Clearly, therefore, the whole condition or all the conditions following the word "unless" in the first

Alta.

App. Div.

COLPMAN v. C.N.R.

Beck, J.A.

sub-section upon which the freedom from liability of the company is made to depend are referable to the right-of-way of the company and not to the highway crossing. This view is strengthened again by the consideration that sub-sec. 2 proceeds to deal specificially with the case of the killing of animals at a highway crossing. It seems to me that these two circumstances are quite sufficient to justify one in saying that the context requires that the definition of "lands" in sec. 2, sub-sec. (15) should be applied to sec. 386, sub-sec. 1, in its very widest meaning.

The language of sub-sec. (2) of sec. 386 is perhaps rather confused, but it seems to me, on a reading of the whole section, to be fairly clear that the words "in any other case" mean in any other case of animals being at large upon the highway contrary to sec. 278 than the case in which they are killed by a train at the point of intersection of the highway with the railway at rail level. For instance animals might be at large upon the highway in contravention of sec. 278 and yet get through the fence adjoining the highway which is crossed by the railway and separating it from the right-of-way, or, to take another case, a highway leading into the highway which is crossed by the railway might be contiguous to the right-of-way but parallel to it. In these latter cases, which are "other cases" the liability of the railway would exist unless negligence of the owner was shewn, or other defences set forth in (a) to (e) of sub-sec. 1 established, because the animals would have then got upon the "lands" of the railway in the sense in which I think that word is used in sub-sec. (1).

BECK, J.A.:—I agree with the opinion of my brother Clarke, that the word "lands" in sec. 386 does not include the portion of land comprising the company's right-of-way over a highway.

This, it seems to me, is made clearer than perhaps it otherwise would be by observing the different settings of the two sections—sec. 278 and sec. 386—in the Railway Act of 1919 (Can.), ch. 68. The first sec. 278, is placed and is the first section—under a caption "Safety and Care of Roadway." Under this caption are placed seven sections, all having reference primarily to the railway right-of-way; and sec. 278, like each of the seven sections, has an additional subcaption; its subcaption being: "Animals not to be at large near Highway Crossings." These seven sections deal specifically and primarily with the railway right-of-way. Section 278, the first of them, deals specifically

with that portion of the railway right-of-way crossing a highway.

Section 386 is placed, under the caption "Actions for Damages" dealing generally with the liability of a railway company in a variety of cases, not confined to cases where animals get upon the lands of the railway. The general words occurring under this latter caption are properly controlled by the specific words occurring under the earlier caption.

Section 278 reads as follows:—

"278. (1). No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection.

(2). All horses, sheep, swine, or other cattle found at large contrary to the provisions of this section may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found, and the pound-keeper with whom the same are impounded shall detain them in like manner, and subject to like regulations as to the care and disposal thereof as in the case of cattle impounded for trespass on private property. R.S., c. 37, s. 294 (1) (2). Am."

The first sub-section is a prohibition against the permitting of animals to be within half a mile of a rail-level railway crossing unless the animals are in charge of some competent person or persons to prevent their loitering or stopping on the crossing.

The second section sub-section authorizes the impounding of animals found not to be so in charge.

There two sub-sections, that is the whole of sec. 278, is a repetition of the first two sub-sections of sec. 294 of the Railway Act, R.S.C., ch. 37.

Sub-section 2 of sec. 386 says in effect (1) that if animals, by reason of being within half a mile of a rail-level railway crossing while not in charge of competent persons to prevent their loitering or stopping on the crossing, are killed or injured by a train at the crossing, the owner of the animals shall have no right of action against the railway company. This is in substance a repetition of sub-sec. 3 of sec. 294 of ch. 37.

(2) That the fact that the animals are not in charge of competent persons shall not prevent the owner recovering in respect of the killing or injuring of the animals elsewhere than at a crossing. This is in substance a repetition of sub-sec. 5 of sec. 294 of ch. 37.

Alta.

App. Div.

COLPMAN v. C.N.R.

Clarke, J.A.

(3) The fact that the company is not negligent shall not relieve the company from liability if the animals get on the lands of the company elsewhere than at the point of intersection.

The Act does not explicitly deal with the case of animals being killed or injured at a rail-level crossing when in charge of competent persons.

In such a case, it seems to me, the liability depends upon the ordinary law of negligence. If the railway company were shown to be negligent—the burden being upon the plaintiff—the company would be liable; the rule as to contributory negligence being also applicable.

The trial Judge has found no negligence on the company's part. The fault, if any, seems to have been that of the persons in charge of the animals.

I, therefore, agree that the appeal should be dismissed with costs.

HYNDMAN, J.A., concurs with CLARKE, J.A.

CLARKE, J.A.:—Appeal from the judgment of Walsh, J., dismissing the plaintiff's action which was brought to recover damages for the loss of 100 sheep killed by a train on the defendant's railway when crossing a highway near the town of Vegreville, on which the sheep were being driven. The trial Judge found that the sheep were in charge of competent persons within the meaning of sec. 278 of the Railway Act, 1919. This finding is contested by the defendant but without passing upon it I assume for the purposes of this judgment that it is correct. The trial Judge also found that there was no negligence on the defendant's part which conduced to the accident, and his finding is well supported by the evidence.

The plaintiffs contended unsuccessfully at the trial and contend on this appeal that the defendant is liable irrespective of negligence by virtue of the provisions of sec. 386 of the said Act (ch. 68, 1919 (Can)), which reads as follows:—

"386. (1) When any horses, sheep, swine or other cattle whether at large or not, get upon the lands of the company and by reason thereof damage is caused to or by such animal, the person suffering such damage shall be entitled to recover the amount of such damage against the company in any action in any Court of competent jurisdiction unless the company establishes that such damage was caused by reason of—

(a) any person for whose use any farm crossing is furnished or his servant or agent, or the person claiming such damage or his servant or agent, wilfully or negligently failing

to keep the gates at each side of the railway closed when not in use; or,

(b) any person other than an officer, agent, employee or contractor of the company wilfully opening and leaving open any gate, on either side of the railway provided for the use of any farm crossing, without some one being at or near such gate to prevent animals from passing through the gate on to the railway; or,

(c) any person other than an officer, agent, employee or contractor of the company taking down any part of a railway fence; or,

(d) any person other than an officer, agent, employee or contractor of the company turning any such animal upon or within the enclosure of any railway, except for the purpose of and while crossing the railway in charge of some competent person using all reasonable care and precaution to avoid accidents; or,

(e) any person other than an officer, agent, employee or contractor of the company except as authorised by this Act, without the consent of the company, riding, leading or driving any such animal or wilfully suffering the same to enter upon any railway, and within the fences, guards and gates thereof.

(2) Where any such animal, by reason of being at large within half a mile of the intersection of a highway with any railway at rail level contrary to the provisions of section two hundred and seventy-eight, is killed or injured by any train at such point of intersection, the owner of such animal shall not have any right of action against any company in respect of the same being so killed or injured; but contravention of the said section shall not in any other case, nor shall the fact that the company is not guilty of any negligence or breach of duty, prevent any person from recovering damage from the company under this section.

(3) Nothing in this section shall be construed as relieving any person from the penalties imposed by section four hundred and six of this Act. R.S., c. 37, ss. 294 (3)-(5), 295; 1910, c. 50, ss. 8 and 9. Am."

The plaintiff's contention is largely based upon the use of the word "lands" in the section, which did not appear in previous Acts and argues that the word should be given the interpretation given in sec. 2 (15), which reads as follows:

"2. In this Act and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires:—

Alta.

App. Div.

COLPMAN v. C.N.R.

Clarke, J.A.

(15) 'lands' mean the lands, the acquiring, taking or using of which is authorised by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure, and any easement, servitude, right, privilege or interest in, to, upon, over or in respect of the same;"

It will be seen that this interpretation is to be given "unless the context otherwise requires" and having regard thereto the trial Judge held, and I think rightly, that the context does otherwise require and that the word "lands" where used in the section does not refer to the portion of the highway crossed by the railway. The same word "lands" is used in sec. 274 (3) which reads as follows:

274 (3). Such fences, gates and cattle guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway lands."

If the interpretation contended for were given to it in this section, cattle would be absolutely prevented from crossing the railway on the highway, and some surprising results would also arise under such an interpretation when applied to sec. 386. Under sub-sec. 1, the company would be liable without any negligence on its part, whether the animal was or was not in charge of any person so long as it was at large, however negligent the owner may have been, and even if he had wilfully turned the animal upon the highway within the prohibited distance of the intersection provided only that the damage was caused to the animal by reason of its getting upon the railway crossing, unless sub-sec. 2 is treated as creating an exception to the general liability created by sub-sec. 1, so as to exempt the company from liability in case of an animal being at large in contravention of sec. 278 and being killed or injured by any train at the point of intersection; but even so treating it the exception would only arise in case the animal is killed or injured by a train still leaving the company liable under sub-sec. 1 for damage, otherwise caused to the animals. Sub-section 2 does not purport to qualify sub-sec. 1. In my opinion sub-sec. 1 refers only to animals getting upon the enclosed lands of the company and by reason thereof receiving damage and not to animals upon an open highway intersected by the railway. In the latter case it is still necessary to prove negligence or breach of duty on the part of the company in order to hold it liable for damages.

Under the Railway Act R.S.C. ch. 37, sec. 294, as amended by ch. 50, 1910 (Can.), the company could relieve itself from liability for damages to animals at large which got upon the

property of the company by establishing that the animals got at large through the negligence or wilful act or omission of the owner or his agent or of the custodian of such animal or his agent. But under the Act of 1919, sec. 386 (1) such negligence or wilful act or omission of the owner in respect of animals at large does not prevent his recovery where the damage is done by reason of the animal getting upon the lands of the company and this notwithstanding the provisions of sec. 278 and notwithstanding the fact that the company is not guilty of any negligence or breach of duty as is made clear by the latter part of sub-sec. 2 of 386, this is a considerable increase of responsibility upon the company over its liability under former Acts. I cannot think Parliament intended to impose upon the company the still greater liability of being responsible without any fault on its part for damages sustained upon the open highway crossing by animals over which it has no control.

I would dismiss the appeal with costs.

Appeal dismissed.

QUEBEC LIQUOR COMMISSION v. MENARD.

Quebec Court of Sessions of the Peace, Choquette, J. November 23, 1921.

CRIMINAL LAW (§ IIG—71)—FORMER JEOPARDY—WHAT CONSTITUTES AN ACQUITTAL.

When a defendant is before a competent Court to undergo his trial on a case which has been regularly inscribed for hearing and the counsel for both parties are prepared to proceed, and the attorney for the plaintiff asks permission to withdraw the complaint each party paying his own costs, and the defendant consenting thereto the case is consequently dismissed practically on its own merits without mention of any recourse; the defendant is justified in a subsequent trial for the same offence in entering a plea of *autrefois acquit*.

INFORMATION and complaint against accused for having sold alcoholic liquors, the defence being "*autrefois acquit.*"

Power, for plaintiff; *Corriveau*, for defendant.

CHOQUETTE, J.S.P.:—The defendant is accused of having, on June 21 last, unlawfully sold alcoholic liquors at St. Louis de Courville, in this district.

The action was returned on October 5 last, and defendant, through his attorney Mr. Corriveau entered a plea of "autrefois acquit," the offence for which he is sued being the same one for which he has already been sued under No. 933 of the

Que.
C.S.P.
QUE. LIQUOR COMMISSION v. MENARD.
Choquette, J.

records of this Court, and of which he has been acquitted by judgment given on August 10 last.

It was established at the hearing of the case that on July 8, last, defendant was prosecuted for having in the said parish of St. Louis de Courville, sold alcoholic liquors "within the delay allowed by law for the institution of such prosecution," *i.e.*, 4 months, but without mentioning any date.

This complaint, No. 933, was returned in Court on July 13, last, and the same attorney appeared for defendant.

After several adjournments at the request of the plaintiff as well as the defendant, the case was finally inscribed for hearing for August 10, last.

On that date, it appears that the attorney for plaintiff, Mr. Power, when the case was called to be proceeded with, witnesses on both sides being present, addressed the Court which was presided over by myself and "stated he withdrew the complaint, upon instructions to that effect, and with the consent of the parties and their attorneys, the application for permission to withdraw the case was granted, each party paying its own costs."

All these facts appear in the record of the present case, as well as in that of the first case bearing No. 933.

With all these facts in view, is the plea of "autrefois acquit" made by the defendant well founded?

According to law and authorities, it is held that when a defendant is "in jeopardy," that is to say when he is before a competent Court, there to undergo his trial, that a valid judgment intervenes, and that the acquittal of the defendant is backed by the merits of the case, either by verdict or trial, or by the dismissal of the case in a summary affair, the defendant, in these cases has really been acquitted. (See C.C. Que. arts. 905, etc., and Russell on Crimes, vol. 2, ed. 7, pp. 1982, etc.).

In the present case, it appears that on August 10, last, both sides being well prepared, appeared before a Court which had jurisdiction in the matter. The case had been regularly inscribed for hearing, and the attorney for the complainant then asked for permission to withdraw the complaint, each party paying its own costs, and the defendant consented thereto, and the complainant was consequently dismissed in the manner prayed.

So, complaint No. 933 was decided practically on its own merits, without mention of any recourse, and at the request of both parties, and, consequently the defendant so discharged was right in pleading "*autrefois acquit*," as he has done.

If, in order to withdraw her complaint, the complainant had invoked reasons of form, jurisdiction, or irregularities so important that judgment could not have been given on the merits of the case, the question would be different, but no such thing has been alleged, the plea of "*autrefois acquit*" appears to me to be well founded, and the case is dismissed with costs.

Action dismissed.

ZEREBESKY v. POWELL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon, J.A., and Brown, C.J., K.B. November 14, 1921.

PRINCIPAL AND AGENT (§ I—2)—REVOCATION OF AGENT'S AUTHORITY—THIRD PARTY DEALING WITH AGENT SIX MONTHS AFTER—NOTICE—HOLDING OUT—RIGHT AND LIABILITIES OF PARTIES.

Where a principal after the revocation of an agent's authority has allowed things to continue in such a state that a "holding out" on his part must be found against him in favour of third parties, he is still bound by the acts of the agent, but the person seeking to take advantage of such alleged "holding out" must show either a holding out made to himself directly or circumstances of publicity which reached him and upon which he acted. Where such third party has not been led astray by anything the owner did or by his failure to do anything which in reason he ought to have done is not entitled to have a contract entered into with the agent more than six months after the revocation of such agent's authority ratified by the principal.

[*Watson* v. *Powell* (1921), 58 D.L.R. 615, 14 S.L.R 424; *Trueman* v. *Loder* (1840), 11 Ad. & El. 589, 113 E.R. 539, 9 L.J. (Q.B.) 165, applied.]

APPEAL by plaintiff from the trial judgment dismissing an action to enforce an agreement for the sale and purchase of land. Affirmed.

F. F. MacDermid, for appellant.

G. A. Cruise, for respondent.

HAULTAIN, C.J.S.:—I would dismiss this appeal for the reasons given by the trial Judge in his judgment dismissing the plaintiff's action.

Appeal dismissed with costs.

TURGEON, J.A.:—The respondent was the owner of large tracts of land in the north-western part of the Province. During the period between May, 1912 and January 31, 1918, the firm of F. W. Hodson & Co. of North Battleford were the respondent's agents for the sale of these lands and held a power of attorney from him empowering them to execute contracts for the disposal of the lands and to collect all purchase moneys

Sask.

C.A.

ZEREBESKY v. POWELL.

Turgeon, J.A.

payable under such contracts. According to the evidence admitted at the trial, this relationship of principal and agent between t respondent and the F. W. Hodson & Co. terminated on January 31, 1918, aforesaid. Hodson & Co. employed among others, one Hoffman, a real estate agent residing at Borden, to find purchasers for these lands of the respondent situated in his district. The practice followed by Hoffman when he had a purchaser in view for a parcel of land was to enquire of Hodson & Co. whether the land in question was still unsold; if so, he would collect the first payment from the purchaser and forward it to Hodson & Co., after deducting his commission there from, together with the agreement for sale to be signed by them as agents and attorneys for the respondent. It was necessary for him to obtain specific instructions in regard to each parcel of land to be sold, as his contract with Hodson & Co. did not constitute him the sole salesman of the land in his district and any particular piece of land might have been sold by Hodson & Co. themselves, or by them through the instrumentality of another agent. Hoffman had no dealings whatsoever with respondent directly in regard to these lands, excepting that in one instance, before he had begun to act for Hodson & Co., he made an enquiry of the respondent regarding the selling price of some of the land and was referred by him to Hodson & Co. This incident must have occurred before July 29, 1914, the date on which Hoffman received authority to act for Hodson & Co. as set out above, and there is no evidence that it was anything more than an intimation made by the respondent to a casual inquirer that in negotiating for any of the lands he would have to deal with Hodson & Co., the respondent's sole agents.

In July, 1918, the appellants approached Hoffman with a view of purchasing the north-east quarter of 31-41-8-W2nd, the land which forms the subject-matter of this litigation and which belonged to the respondent. The appellant did not know who owned the land, but he had been informed that Hoffman had the selling of it. In fact the appellant says that he did not discover that the respondent was the owner of the land until about January, 1919. He offered Hoffman $13 per acre for the land. Hoffman consulted Hodson & Co., who shortly afterwards instructed him to let the land go to the appellant at that figure. Acting upon these instructions Hoffman closed the deal with the appellant and the contract which it is now sought to have enforced was executed on July 23, 1918, by the

appellant as purchaser and by F. W. Hodson & Co., who purported to act as attorneys for the respondent.

According to Hoffman's evidence, Hodson & Co. concealed from him the fact that their power to act for the respondent had been revoked, and he did not become aware of it until he was so informed by the respondent himself in October, 1918.

At the time of the execution of the contract the appellant made a cash payment of $1,000, which went to Hodson & Co. after Hoffman had deducted $80 as his commission. In January, 1919, he paid the balance of the purchase money ($1,080) to Hoffman. Hoffman forwarded this sum to the Union Trust Co. at Winnipeg, to be held by them in trust, as he says, until title should be obtained from the respondent. In forwarding this money to the Union Trust Co., Hoffman followed the practice which had been established in all cases of the sale of the respondent's lands. These lands were covered by a mortgage made by the respondent in favour of the Great West Land Co., and by its terms all monies accruing from the sale of the lands were to be forwarded to the Union Trust Co., as trustees, to be applied upon the mortgage. Hoffman's instructions from Hodson & Co. were to forward all sums collected by him as final payments on contracts to the Trust Co. In this particular case Hoffman knew that there was some doubt about the title being obtained from the appellant, and for that reason he attached the aforesaid trust condition to his remittance. It may be well to state here that the Union Trust Co. by letter dated March 26, 1919, advised Hoffman that they held this sum of $1,082, but that they had been advised that the respondent refused to confirm the sale to the appellant. They also stated that the first payment of $1,000 (less commission) had not been forwarded to them by Hodson & Co. in accordance with the terms of the aforesaid mortgage. Apparently things are still in that condition: the cash payment made by the appellant has not been shown to have reached the respondent (and under the circumstances I think the onus was on the appellant to show this); his second and final payment of $1,080 is still being held in trust by the Union Trust Co., and the respondent refuses to ratify, or to recognise the validity of the agreement for sale. The question to be determined, therefore, is whether in the circumstances above set out, the contract dated July 23, 1918, is binding upon the respondent.

It is admitted that Hodson & Co. had no power to execute this contract on that date, their authority to act for the respondent having expired on January 31, 1918. Such being the

Sask.

C.A.

ZEREBESKY v. POWELL.

Turgeon, J.A.

case, it remains only to be seen whether the respondent has placed himself by some act or omission of his own in a position which compels him to accept the contract and to carry out its terms.

There are, of course, cases where a principal, even after the revocation of the agent's authority, is still bound by his acts by reason of his having allowed things to continue in such a state that a "holding out" on his part must be found against him in favour of third parties. But the person seeking to take advantage of an alleged "holding out" must show something else than a holding out "to the world"; he must show a holding out made either to himself directly or by circumstances of publicity which reached him and upon which he acted. (Per Parke, J., in *Dickinson* v. *Valpy* (1829), 10 B. & C. 128, 109 E.R. 399). This matter was dealt with to some extent by the Court in the recent case of *Watson* v. *Powell* (who is the respondent in this case) reported in (1921) 58 D.L.R. 615, 14 S.L.R. 424, and is fully gone into in the judgment of Denman, C.J., in *Trueman* v. *Loder* (1840), 11 Ad. & El. 589, 113 E.R. 539, 9 L.J. (Q.B.) 165.

In the case at Bar we are bound by the evidence, I take it, to assume that Hodson & Co.'s agency terminated on January 31, 1918. In dealing then with the respective rights and responsibilities of the respondent, on the one hand, and third parties with whom Hodson & Co. dealt after that date on the other hand, each case must depend entirely on its own special circumstances. Or to express the matter differently, it seems to me, in the light of the evidence we have here, that we have to determine which of the parties to this action must suffer on account of the wrongful act of Hodson & Co. in purporting to act for the respondent more than six months after their authority to do so had been revoked. *Prima facie*, the appellant must suffer, because Hodson & Co. did not have the power to make the contract which he sets up, and I agree with the trial Judge that no act or omission of the respondent has been shown to exist which will shift the liability to him. The appellant did not know the respondent in the transaction at all, according to his own evidence. He was not led astray by anything which the respondent did or by his failure to do anything which in reason he ought to have done. He accepted Hodson & Co.'s representation that they had power to sell the land for the owner without inquiry and without even ascertaining who the owner was, and I see no reason why he should now be entitled to call upon the respondent to ratify the contract.

It is contended on behalf of the appellant that the respondent's revocation of Hodson & Co.'s authority does not suffice to relieve him, but that he should have taken steps to advise Hoffman of such revocation; that his failure to do this was the reason why Hoffman accepted the appellant's money and had him execute the contract, and that, therefore, he is bound by Hoffman's acts. I cannot agree with this. It is not shown that the respondent knew that Hoffman was acting for Hodson & Co., and, in any event, I do not believe it was his duty to get in touch with all the persons whom Hodson & Co. may have employed to put them in contact with prospective purchasers in order to advise such persons of the termination of their agency.

I think the appeal should be dismissed with costs.

BROWN, C.J., K.B., concurs with TURGEON, J.A.

Appeal dismissed.

MYALL v. QUICK.

Alberta Supreme Court, McCarthy, J. November 15, 1921.

NEGLIGENCE (§ IIC—97)—AUTOMOBILE—DRIVER CUTTING CORNER IN TURNING FROM ONE STREET INTO ANOTHER—OTHER DRIVER ON RIGHT SIDE OF STREET—BREACH OF STATUTE—COLLISION—LIABILITY.

It is evidence of negligence for the driver of an automobile in turning from one street into another to cut the corner instead of keeping to the right of the centre of the intersection as required by statute to do and where this breach of statutory duty places another driver who is on his right side of the road in a position in which he must make a decision in a second of time such other driver is not guilty of contributory negligence if he makes an error in judgment and causes a collision. The driver who is acting in breach of the statutory duty is liable for the resulting damage.

[*Rex* v. *Wilson* (1919), 50 D.L.R. 117, 32 Can. Cr. Cas. 96, 15 Alta. L.R. 159, followed. See Annotation, Criminal Responsibility for Negligence in Motor Car Cases, 61 D.L.R. 170.]

ACTION for damages for negligence brought by the plaintiffs, father and son, against the defendant arising out of the collision between a motor cycle ridden by the infant plaintiff and an automobile driven by the defendant at the corner of 111th Ave. and 92nd St. in the city of Edmonton. Judgment for plaintiff.

R. L. Marks, for plaintiffs.

H. C. Macdonald, K.C., for defendant.

MCCARTHY, J.:—There was no evidence of any damage sus-

Alta.

S.C.

MYALL v. QUICK.

McCarthy, J.

tained by the plaintiff, John Myall, Sr., and the claim therefore will be limited to the damages suffered by the plaintiff, John Myall, Jr.

At the conclusion of the plaintiffs' case the defendant moved for non-suit, and judgment thereon was reserved until the conclusion of the evidence. Upon the application I must hold against the defendant.

I had the opportunity of viewing the *locus in quo* with counsel for both parties. The facts in connection with the collision are briefly as follows: That on the evening in question the infant plaintiff was proceeding on his motor cycle westerly on 111th Ave., and the defendant was proceeding easterly. The infant plaintiff says that he first saw the defendant about 100 ft. westerly from the corner of 111th Ave. and 92nd St., he at that time being about the same distance to the east from the intersection of the same street. The defendant was intending to turn up 92nd St. to a lane on the west side of the street about 60 ft. to the north from the corner of 111th Ave. and 92nd St., as shewn in Ex. 1. The infant plaintiff says that he was on the right-hand side of the road, and as to that I have no doubt. The result was that the defendant cut the corner at the intersection of the said streets as shewn in Ex. 9, a sketch prepared by the defendant, wherein he depicts the course he took from "X" to "A" shewn on the exhibit. The infant plaintiff apparently thought that he could get around the defendant's automobile in front of it, and the collision occurred, the motor cycle hitting the left-hand mud-guard of the defendant's automobile when it was partly on the boulevard on the west side of 92nd St., close to the corner where 92nd St. meets 111th Ave. The plaintiff was thrown violently a distance of about 15 ft. up against the steps of the building on the corner of 111th Ave. and 92nd St., sustaining personal injuries, concussion of the brain, scar on his nose, and subsequent ailments which I am satisfied from the medical evidence adduced were occasional by the accident.

The onus of proving negligence, of course, is upon the plaintiffs. Both the motor-cycle and the automobile come under the operation of the Motor Vehicles Act with regard to shifting the onus of proof so that the evidence will proceed as if the section relating to the shifting of the onus of proof did not appear. Section 28 of the Motor Vehicles Act, 1911-12 (Alta.), ch. 6, provides as follows:—

"The Highways Act shall *mutatis mutandis* apply to motor vehicles."

Alta.

S.C.

MYALL v. QUICK.

McCarthy, J.

Section 3 of the Highways Act, 1911-1912 (Alta.), ch. 5, is as follows:

"If a person travelling or being upon a highway in charge of a motor vehicle or of a vehicle drawn by one or more horses, or on one or more other animals, meets another motor vehicle or a vehicle drawn as aforesaid, he shall turn out to the right from the centre of the road, allowing to the motor vehicle or vehicle so met one-half of the road.

(2) If a person travelling or being upon a highway in charge of a motor vehicle or of a vehicle as aforesaid meets a person travelling on a bicycle or tricycle he shall, where practicable allow the person travelling upon the bicycle or tricycle sufficient room on the travelled portion of the highway to pass to the right."

The by-law in force regulating the traffic on highways in the city of Edmonton at the time of the accident is By-law No. 29, 1917. Section 130 in part is as follows:—

"Every person driving or riding any horse or other animal *or riding or driving any vehicle* shall *as far as is practicable having regard to its condition* travel upon that portion of the highway which is to the right of the centre line of the street, and in turning from one street to another *shall keep to the right of the centre line* of the highway *from which and also* of the one *to which* he may be riding or driving."

This by-law was amended by By-law No. 20 in 1918, the amendment inserted being underlined. Subsequently a by-law was passed on May 27, 1920, which gave to the person using the highway coming from the right the right of way. As this by-law was passed subsequently to the date of the accident, the plaintiff is thrown back on By-law 29 as amended. The accident occurred on May 14, 1920, the new by-law being passed on May 27, 1920, and counsel agree that at the date of the accident By-law 29 as amended was the by-law in force, so that the man approaching from the right had no superior rights as to the highway. The by-law says: "And in turning from one street to another shall keep to the right of the centre line of the highway 'from which' and also of the one 'to which' he may be riding or driving."

It is quite apparent from Ex. 9 that the defendant did not keep to the right or did not turn at a point in the centre of the street at the intersection of 111th Ave. and 92nd St., but cut the corner as shewn in Ex. 9 from "X" to "Y." That is, I take it a breach of a statutory duty, or as it is aptly put by counsel, the defendant was in prohibited territory at the time

Alta.

S.C.

MYALL v. QUICK.

McCarthy, J.

of the collision. His excuse for that is that he turned sharply in order to avoid the accident.

I have already expressed my view of the law briefly in the case of *Rex* v. *Wilson* (1919), 50 D.L.R. 117, at pp. 121, 122, 32 Can. Cr. Cas. 96, 15 Alta. L.R. 159, as follows:—

"When accidents happen as incidents to the reasonable use of a highway the law affords no redress by criminal or civil proceedings.....Operators of motor vehicles in addition to exercising reasonable care and caution for the safety of others who have the right to use the highways, should do whatever the statute law or municipal law of the jurisdiction requires whenever the conditions therein referred to arise, and failure to comply with the regulations imposed by statute or by by-law may in itself be evidence of negligence."

Breach of the statutory duty or by-law may in itself be evidence of negligence, but the plaintiffs' action is founded on negligence. Had it not been there was a breach of the statutory duty or by-law on the part of the defendant I would be inclined to express the opinion that probably the infant plaintiff took his chances, somewhat similar to a man seeing an express train coming along a line approaching a level crossing and choosing to cross the line in front of it taking the chance of getting across in time, which might be putting him under the maxim *volenti non fit injuria*, but this defence is not available where the injury arises from the breach of a statutory duty; see *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, 56 L.J. (Q.B.) 501. Nor would the maxim *res ipsa loquitur* apply. But although there are conflicting authorities the better opinion seems to be that the defence of contributory negligence is open to the defendant; see Underhill on Torts, 3rd Canadian Edition at pp. 76c and 76d, referring to the case of *Deyo* v. *Kingston & Pembroke R. W. Co.* (1904), 8 O.L.R. 588, 4 C.R.C. 42.

As to contributory negligence I find that the plaintiff was not guilty, that he was on his right side of the street and met with the situation in which he cannot be held responsible for not making very fine distinctions. Negligence briefly is the absence of care more or less according to the circumstances. The questions I have to decide in this case are, is the injury caused (1) by the defendant's negligence (2) by the plaintiff's negligence (3) the negligence of both (4) by accident, or in other words, whose negligence really caused the accident and as the defendant was in breach of the statute or by-law, and that in itself is evidence of negligence, I cannot hold that the defendant has satisfied me from the evidence that the infant

plaintiff was guilty of contributory negligence, although he may have been guilty of an error in judgment.

There are peculiar local conditions at the point where the accident occurred. It will be observed from the plan that 111th Ave. east of 92nd St. does not run at right angles to 92nd St., but at the easterly corner where 92nd intersects 111th is an acute angle, the number of degrees I am unable to say, but with the result that the defendant in order to comply with the by-law turning out of 92nd St. would himself be obliged to make an acute angle while turning. I am satisfied from the evidence that the defendant was not proceeding at an unreasonable rate of speed, and could not turn on to 92nd St. and turn into the lane on 92nd St. as shewn on Ex. 9 going at any great speed, as the lane was only 60 ft. from 111th Ave. I am satisfied he was not proceeding at an unreasonable rate of speed, nor do I think the plaintiff was proceeding at an unreasonable rate of speed. Although he saw the defendant 200 ft. away, and the defendant ought to have seen him, or at least heard a motor cycle that distance away. It is difficult to say with any degree of certainty the real cause of the accident, unless both parties became very much confused. At the intersection of 92nd St. and 111th Ave. there is no manhole to act as a guide to parties turning the corner, nor is there any sign or indicator. It is a dangerous corner. The defendant if he had been looking out could have heard or seen the motor cycle and could have slackened up his car, or could have brought it to a stop. This he did not do but proceeded to turn in on 92nd St. for the purpose of going to the lane, which would take him to his residence in Block 41. From the view it is quite apparent at the present time that it is the general practice of traffic to cut that corner turning from 111th Ave. northerly on to 92nd St. One of the witnesses for the defendant testified that it had always been the practice to cut that corner. The defendant contended that the plaintiff could either have turned in on 92nd St. and avoided the accident as his car was on the westerly boulevard and that the defendant practically had the whole width of the street, namely, 26 ft. to turn in, or that he could have gone behind the automobile, that is to the south of the automobile, as it was turning northerly on 92nd St. But as Stuart J., says in *Thomas* v. *Ward* (1913), 11 D.L.R. 231, 7 A.L.R. 79, "It would be putting the plaintiff to the difficulty of making a decision on a sudden," or as Harvey, C.J., says in *Jackson* v. *Lynch*, [1920] 3 W.W.R. 884, at p. 885, "in a second of time," or as

Alta.

S.C.

MYALL v. QUICK.

McCarthy, J.

Prendergast, J., in *Wales* v. *Harper* (1911), 17 W.L.R. 623, at p. 630, says, "In *Busher* v. *New York Transportation Co.*, 106 N.Y. App. Div. 493, reviewed in Berry's Law of Automobiles, the Court held that a pedestrian had the right to assume that the driver of an automobile would slacken speed in turning a corner and would exercise due care and respect the rights of pedestrians. In the present case, what the plaintiff had the right to assume, was not that the defendant would slacken his speed, but that he would not cross at all on the north side of the projection of Water Street, where he then was."

The contention of the defendant would mean placing upon the infant plaintiff the duty to make very fine distinctions as to whether he would turn to the right or to the left and not attempt to get in ahead of the defendant's automobile in a moment of peril. This I do not think he can do. I therefore must hold for the plaintiff. On the question of damages the medical evidence is that the plaintiff at the present time is suffering from neurasthenia. The scar on his nose is quite apparent and will be permanent. He claims to be suffering from headaches, swelling feet and dizziness. The particulars of the damages are set out in the statement of claim, from which I will deduct $50 charged for nursing by the infant plaintiff's mother, and I will allow the damages to the motor cycle at $100 as the evidence was that he had it on sale for $150 and subsequently sold it for $50. I will disallow the charge for incidental expenses, leaving the damages at $564.75. The infant plaintiff's father expressed at the trial that he did not desire heavy damages as general damages and I will allow the infant plaintiff for pain and suffering, loss of time and injuries sustained the sum of $500.

There will therefore be judgment for the infant plaintiff against the defendant for the sum of $1,064.75, with costs. The action of the father of the infant plaintiff in his individual capacity will be dismissed without costs. There will be a thirty days' stay.

Judgment for plaintiff.

Note—Since dictating the above my attention has been called to the decision of the Court of Appeal in *McGinitie* v. *Goudreau* (1921), 59 D.L.R. 552, but the distinction between that case and the present one is that in the former both were guilty of a breach of the provisions of the Motor Vehicles Act, as I read the decision.

BURLAND v. THE KING.
ALLEYN-SHARPLES v. BARTHE.

Imp.
P.C.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Viscount Cave, Lord Phillimore, and Lord Carson. November 25, 1921.

CONSTITUTIONAL LAW (§ IB—50)—SUCCESSION DUTY ACT (QUE.)—ULTRA VIRES AS BEING INDIRECT TAXATION—CURATIVE ACT—APPLICATION—APPEAL PENDING—MEANING OF—PLEADING INFIRMITY OF STATUTE.

According to the rules of pleading an allegation of infirmity in any statute on the ground of *ultra vires* is sufficient without assigning further reasons, and an appeal is pending within the meaning of sec. 3 of the Statute 1914 (Que.), ch. 11, which is an Act interpreting former laws concerning succession duties, although the appellants do not raise in express terms the ground on which they base their contention, if they state that the Government had no right to charge taxes on property outside the Province and that the laws and statutes which authorised the Government to raise such taxes were *ultra vires* and of no effect and claim for repayment of such taxes. As regards a case pending within the meaning of sec. 3 of the stat. 1914 (Que.), ch. 10, the stat. 1914 (Que.), chs. 9, 10 and 11, do not become operative and the law as expressed in *Cotton* v. *The King* (1913), 15 D.L.R. 283, [1914] A.C. 176, is not affected.

[*Burland* v. *The King* (1914), 46 Que. S.C. 430, which was affirmed by the Court of King's Bench, reversed.]

TAXES (§ II—97)—QUEBEC SUCCESSION DUTY ACT—SITUS OF PROPERTY—DIRECT TAXATION WITHIN THE PROVINCE—B.N.A. ACT, SEC. 92.

Where proceedings in regard to the recovery of succession duties paid under the preceding Quebec statutes (which were held in *Cotton* v. *The King* (1913), 15 D.L.R. 283, [1914] A.C. 176, to be *ultra vires* the Quebec Legislature) were not pending when Statute 1914 (Que.), ch. 11, became operative, this and 1914 (Que.), ch. 9 and ch. 10 statutes, have effectively met the difficulty in the case of *Cotton* v. *The King* as to the taxation being indirect, and are therefore within the power of the Province to enact under the powers conferred by sec. 92 of the B.N.A. Act. The taxation attaches to the property outside the Province under two conditions: (1) that the transmission must be within the Province, and (2) that it must be due to the death of a person within the Province. The first of these conditions can only be satisfied if the person to whom the property is transmitted is either domiciled or ordinarily resident within the Province.

[*Barthe* v. *Alleyn-Sharples* (1920), 54 D.L.R. 89, affirmed.]

APPEAL (Burland's case) from the judgment of the Quebec Court of King's Bench, appeal side, in an action for repayment of certain succession taxes. Reversed.

APPEAL (Sharples' case) from a judgment of the Supreme Court of Canada (1920), 54 D.L.R. 89, 60 Can. S.C.R. 1, in an action for repayment of certain succession taxes. Affirmed.

Imp.

P.C.

BURLAND v. THE KING; ALLEYN SHARPLES v. BARTHE.

Lord Phillimore.

The judgment of the Board was delivered by

LORD PHILLIMORE:—The B.N.A. Act of 1867, in sections that have been the subject of much criticism and explanation, defined and apportioned as between each Province and the Dominion of Canada, the various powers of taxation that each element of the Constitution was to exercise and enjoy. With regard to the Provinces the powers were conferred by sec. 92 in words which had the appearance of simplicity, and by these exclusive power was given to the Provinces to make laws for "Direct taxation within the province in order to the raising of a revenue for provincial purposes."

This power knows no limits save those prescribed in the section, but the endless variety of methods by which taxation can be imposed have from time to time caused the attempted use of this authority to be challenged, and the resulting decisions have not been free from criticism. One of such cases has recently come before the Board for consideration—*Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176, 110 L.T. 276—and its bearing on the present dispute will be plain when the facts of that case are once more analysed and compared with the circumstances in which the present appeals have arisen.

These appeals are two in number, independent in their history, but both have been heard together before this Board and can be dealt with together in one judgment although the considerations affecting their decision are not the same.

George Burland died on May 22, 1907, at and domiciled in Montreal in the Province of Quebec and appointed Jeffrey Hale Burland, the appellant in the appeal No. 102 of 1919, which for convenience will be referred to as the Burland appeal, and William M. Walbank, executors of his will and codicil. The said J. H. Burland was one of the universal legatees under the will, and he made the declaration required by art. 1191 g (1), 1906 (Que.), ch. 11, as to the value of the property owned by the deceased that was situate both within and without the Province. He was accordingly required to pay a sum for succession duty on the whole estate by the deputy collector of provincial revenue and this amount was paid by the executors under protest.

On September 23, 1909, the executors preferred a petition of right claiming payment back of the duties paid in respect of the properties that were situate outside the Province, and also further sums representing the higher rate at which property within the Province had been taxed by reason of its

being aggregated with that outside. The petition was part heard by the Superior Court on July 20, 1911, but it was ordered that the proceedings should be suspended until the decision of the Supreme Court of Canada on the appeal taken from the decision in the case of *Cotton* v. *The King*. The case of *Cotton* v. *The King* ultimately came before the Board, who, on November 11, 1913, decided against the Crown. Burland's case then came again before the Superior Court on June 26, 1914, when the petition was dismissed (1914), 46 Que. S.C. 430, and on appeal to the Court of King's Bench this judgment was affirmed, Cross, J., and Pelletier, J., dissenting from the other Judges. The appeal in Burland's case is brought from that decision.

With regard to the other appeal, which will be referred to as Sharples' appeal, it relates to the property of the Hon. J. Sharples, who died on July 30, 1913, also domiciled in Quebec; he appointed the appellant, Dame Margaret Alleyn Sharples, his universal legatee and executrix of his will jointly with the other two appellants.

On October 15, 1913, the executors lodged their declaration, enumerating the property of the deceased, and including therein shares in various companies whose head offices were outside the Province of Quebec. A claim was made on May 26, 1915, for duties in respect of the whole estate similar to the claim that was made in the case of Burland. These claims, so far as they related to the property outside the Province, were resisted and proceedings were instituted on August 12, 1915, by the respondent as Collector of the Revenue against the executors to recover payment. Lemieux, C.J., by whom the action was tried in the Supreme Court (1918), 55 Que. S.C. 301, decided against the appellants, who appealed to the Court of King's Bench, and that Court by a majority of three to two decided in the appellants' favour. The respondent then appealed to the Supreme Court of Canada (1920), 54 D.L.R. 89, 60 Can. S.C.R. 1, who on February 3, 1920, unanimously decided against the appellants, and from their judgment this second appeal has been brought.

In order that the narrative of facts may be perfectly clear, their Lordships have hitherto avoided consideration of the statutes under which the taxes were claimed, and these must now be examined in detail. Though, as will be seen, different considerations apply to the two cases owing to the difference in the relevant dates, yet the defence of the appellants is in

Imp.
P.C.
BURLAND
v.
THE KING;
ALLEYN
SHARPLES
v.
BARTHE.
Lord
Phillimore.

each case identical, and is that the taxing statutes under which the money is claimed are *ultra vires* of the Provincial Government.

So far as Burland's case is concerned, the relevant statute is that of 1906 (Que.), ch. 11, amended by 1907 (Que.), ch. 14. Article 1191 b enacted by sec. 1 of the former statute, provides that:—

"All transmissions, owing to death, of the property in, or the usufruct or enjoyment of, moveable and immoveable property in the Province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death."

By art. 1191c the word "property" is defined as follows:—

"1191 c. The word 'property,' within the meaning of this section, shall include all property, whether moveable or immoveable, actually situate or owing within the Province, whether the deceased at the time of his death had his domicile within or without the Province, or whether the debt is payable within or without the Province, or whether the transmission takes place within or without the Province, and all moveables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death."

By 1907 (Que.), ch. 14, assented to on March 14, 1907, art. 1191 b was amended by replacing the words "in the Province" by the words "as defined in art. 1191 c."

The first only of these two statutes was applicable in the case of *Cotton* v. *The King*, for Henry Cotton, whose estate was the subject of the dispute, had died on December 26, 1906, domiciled in Montreal, and the question raised was whether or no the property outside the Province was liable to the tax imposed by the statute 1906 (Que.), ch. 11. It was decided that the property was not so liable for two distinct reasons—the one that art. 1191 b of sec. 1, 1906 (Que.), ch. 11, was the real taxing section, and imposed duties upon moveable property "In the Province"—the extended meaning given to the word "property" in art. 1191 c, being held by the Board to be insufficient to bring property outside the Province within the operation of the tax expressly imposed by the earlier section on property within the Province. Had the decision rested only on this ground, it would have provided little help towards reaching a right conclusion in Burland's case, as the subsequent statute, 1907 (Que.), ch. 14, struck at the root of this part of the decision by deliberately incorporating the definition in the taxing

articles. But there was a further and wholly independent ground of decision, and that was that by art. 1191 g, the tax might be payable in the first instance by a class of persons, who recouped themselves for the payment from the legatees; and, therefore, in accordance with a distinction between direct and indirect taxation traceable to a definition given by John Stuart Mill, and acted upon by the Board in the cases of *The Att'y-Gen'l for Quebec* v. *Reed* (1884), 10 App. Cas. 141, *The Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, and *The Brewers' and Maltsters' Ass'n of Ontario* v. *The Att'y-Gen'l for Ontario*, [1897] A.C. 231, the taxation was held to be indirect and outside the power of the province.

In the course of the judgment of the Board, it was stated at p. 293 (15 D.L.R.), that the provisions of the statute entitled the Collector of Inland Revenue "to collect the whole of the duties on the estate from the person making the declaration, who may (and, as we understand, in most cases will) be the notary before whom the will is executed and who must recover the amounts so paid from the assets of the estate, or, more accurately, from the person interested therein." Now the statute though mentioning the notary exempts him from obligation to transmit the declaration, and consequently from the liability to pay, which by sec. 3 is imposed on the declarant; but it appears from the report that their Lordships were informed that in point of practice the notary frequently did make the declaration himself, and so bring himself within the provisions of the statute. It is now stated that this information was not a common practice for the notary to make the declaration, if indeed, he ever makes it; and so, the illustration drawn from the case of the notary cannot be taken to have been a reliable one. But the principle remains the same and could equally well have been illustrated by the cases of the executor, or administrator, or legatee by a particular title. The error does not affect the force of the decision, though their Lordships have thought it right to make this explanation, as it has evidently given rise to misunderstanding in the Province.

Unless, therefore, the case can be distinguished, it completely covers the appeal in Burland's case. The respondent tries to escape down two avenues of reasoning; the one that the point was not necessary for the decision in Cotton's case, which had already been determined by other independent considerations, and the other that subsequent legislation made

Imp.
P.C.
BURLAND v. THE KING; ALLEYN SHARPLES v. BARTHE.
Lord Phillimore.

retrospective removes the protection which Cotton's case affords. As to the first, the road is not open. The decision that the statute was *ultra vires* was in no sense a wayside dictum; it was just as complete and fundamental as the decision that bore on the construction of the statute; the words used in the judgment itself make this clear. After stating the nature of the two questions, it continues in these words at p. 287:—

"These are the two questions which this Board has to resolve, and though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case and that they should base their judgment equally on the answers to be given to the one and to the other."

As to the second, the position is less clear. Legislation followed swiftly upon the decision of *Cotton* v. *The King*, and three statutes 1914 (Que.) ch. 9, 1914, (Que.) ch. 10, 1914, (Que.) ch. 11 received the Royal Assent on February 19, 1914. They will need examination in Sharples' appeal, but so far as Burland's case is concerned the critical statute is 1914, (Que.) ch. 11, as in each of the other two statutes there is a provision that, so far as regards property transmitted before the passing of the statute, they only apply where the taxes previously imposed remained unpaid. The statute 1914 (Que.), ch. 11, after reference to the mistake in the case of *Cotton* v. *The King*, and a series of recitals which make it obvious that the purpose of the Act is as far as possible to remedy the provisions of former statutes which had led to the decision and to prevent the inequalities which might arise as between those who had paid and those who had not paid the taxes declared by Cotton's case to be unlawfully imposed, enacted that (sec. 1):—

"The intent and meaning of all the acts of the Legislature imposing succession duties, was and is, that every person to whom property or any interest therein was transmitted owing to death, should pay to the Government directly, and without having a recourse against any other person, a tax calculated upon the value of the property so transferred"; and after a provision to prevent action for recovery of taxes paid on the ground that such taxes were not direct provided by sec. 3 that—

"This Act shall not apply to pending or decided cases."

The question, therefore, is whether Burland's case was a "pending case" within the meaning of sec. 3. Lemieux, C.J., regarded the point as closed to the appellants, as they had in

fact paid taxes on the property within the Province, and did not ask for their repayment. In his words, 46 Que. S.C., at pp. 441, 442 (translated):—"The petitioners have not in any other way, directly or indirectly, maintained that the tax was illegal, because this tax was indirect, that is to say—contrary to the Constitutional Act which only allows Parliament to impose direct taxes. On the contrary the Burland heir admits that the tax is direct and because she has paid $71,622,65 taxes on property in the province and for this she asks no recovery."

And again, on same page (translated):—"If the direct tax question is not contested, but on the contrary is admitted, the tribunal hardly need consider the question."

It is undoubtedly the fact that the appellants in Burland's appeal did not raise in express terms the ground of the taxation being indirect and base their relief on this contention but they stated that the Government had no right to charge taxes on property outside the Province, and that the laws and statutes which authorised the Government to raise such taxes were *ultra vires* and of no effect. This was the exact position in the case of *Cotton* v. *The King;* there also the claim was only for repayment of the taxes on the extra territorial property, and the claim was in similar words, but the fact that the authority to pass the law was challenged, though only associated with a limited relief and a special cause, was regarded as sufficient to compel the Board to consider the question of *ultra vires* in its widest application and not to bind themselves to consider only the one assigned reason of invalidity. According to the rules of pleading, an allegation of infirmity in any statute on the ground of *ultra vires* is sufficient without assigning further reasons.

Their Lordships cannot, therefore, agree with Lemieux, C.J., and equally they differ from Archambeault, C.J., Lavergne, J., and Carroll, J. The first of these Judges bases his judgment, not indeed on the ground of admission of liability, but on that of defect in the pleadings. He says (translated):—

"This case itself was pending when the law was passed. As I said in the case of *Oliver* v. *Jolin* (25 B.R. p. 537) the law of 1914 has had for its purpose that of interpreting former laws concerning succession duties, and declaring whether these taxes were direct or indirect. Article 3 cannot, as a result be applied to these cases where this question has been particularly stressed. In this case, the appellants have obtained from the Crown, a petition of right where the question was not referred to at all." and Carroll, J., appears to regard the reservation as inoperative (*vide* p. 133), and no reasons were filed by Lavergne, J. Pel-

Imp.
P.C.
BURLAND
v.
THE KING;
ALLEYN
SHARPLES
v.
BARTHE.
Lord
Phillimore.

letier, J., who differed, does not deal with the effect of the statute 1914 (Que.), ch. 11, and Cross, J., the other Judge who dissented, assigned no reasons.

Their Lordships think that Burland's appeal was a pending case within the meaning of sec. 3. It was a case in which the claim for repayment was being made and the validity of the statute was in issue.

This being so the case cannot be distinguished from *Cotton* v. *The King*, and the appeal must be allowed, and the judgments of the two Courts below set aside and judgment entered for the appellants with costs here and in those Courts, and they will so humbly advise His Majesty.

Turning now to Sharples' appeal, different considerations and different statutes are involved.

Proceedings there commenced on August 12, 1915, and they were, therefore, not pending when 1914 (Que.), ch. 11, became operative, and it becomes necessary to examine the effect of that and the preceding statutes.

The statute 1914 (Que.), ch. 9, provides by art. 1375, that "all property moveable or immoveable, the ownership, usufruct or enjoyment whereof, is transmitted owing to death, shall be liable to the following taxes calculated upon the value of the property transmitted." Article 1376 says that the word "property" included all property moveable or immoveable actually situate within the Province, and that whether the deceased was domiciled within or without, or the transmission took place within or without; an exemption was given by art. 1380 to a notary, executor, trustee or administrator from personal liability for the duties imposed. This, as will be seen, does not affect moveable property outside the Province, and of course does not touch the property in the present instance; but by 1914 (Que.), ch. 10, it is expressly provided by art. 1387b that:—

"1387b. All transmissions within the Province, owing to the death of a person domiciled therein, of moveable property locally situate outside the Province at the time of such death, shall be liable to the following taxes calculated upon the value of the property so transmitted, after deducting debts and charges as hereinafter mentioned,"

And by art. 1387g, it is provided that the person to whom as heir, universal legatee, legatee by general or particular title, or donee under a gift in contemplation of death, moveable property outside the Province is transmitted, is personally liable for the

duties in respect of such properties, and no more; and it concludes:—

"No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails to do so may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only."

These statutes have effectively met the difficulty which was pointed out in the case of *Cotton* v. *The King* as to the taxation imposed by the earlier statutes being indirect, and it only remains to be considered whether the taxation is within the Province. For this purpose 1914 (Que.), ch. 10, is the relevant statute. The conditions there stated upon which taxation attaches to property outside the Province are two: (1) That the transmission must be within the Province; and (2) That it must be due to the death of a person domiciled within the Province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is as the universal legatee in this case was either domiciled or ordinarily resident within the Province; for in the connection in which the words are found no other meaning can be attached to the words "within the province" which modify and limit the word "transmission." So regarded, the taxation is clearly within the powers of the Province. It is, however, pointed out that art. 1387g refers to "every person" to whom moveable property outside the Province is transmitted as liable for the duty, but this must refer to every person on whom the duties are imposed, and those persons are, as has already been shewn, persons within the Province.

On this construction the statute is clearly within the powers conferred by the B.N.A. Act and the taxes in dispute were rightly claimed. Their Lordships, therefore, are of opinion that this appeal should fail, and they will humbly advise His Majesty that it should be dismissed with costs.

Burland's appeal allowed; Sharples' appeal dismissed.

N.S.

S.C.

DOMINISKY v. FITZGERALD.

Nova Scotia Supreme Court, Harris, C.J., and Russell, Chisholm and McIlish, JJ. December 10, 1921.

TAXES (§IIIF—114A)—SALE OF LAND FOR CHARTER OF CITY OF SYDNEY, N.S., REGARDING—IRREGULARITIES IN PROCEEDINGS LEADING UP TO SALE—CURATIVE SECTIONS—DESCRIPTION OF LAND IN DEED INSUFFICIENT—VALIDITY OF DEED.

Section 195 of the charter of the City of Sydney, N.S., provides: "Such deed shall be conclusive evidence that all the provisions of this Act with reference to the sale of the land therein described have been fully complied with, and that every act and thing necessary for the legal perfection of such sale have been fully performed, and shall have the effect of vesting the said land in the grantee, his heirs or assigns, in fee simple, free and discharged from all encumbrances." Held that this curative section can only operate to make the deed available to cure defects in the proceedings connected with the sale of the land for taxes, and does not cover the failure to give notice of assessment required before the taxes can be imposed.

Assuming that the curative sections of the charter of the City of Sydney, N.S., referring to the sales of land upon which the city has a lien for taxes, covers the irregularities referred to prior to the deed mentioned in sec. 195, and assuming that the deed can give an entirely new and different description from that contained in all the documents leading up to the sale, such deed can only be "conclusive evidence" where the description in the deed "particularly and fully describes the land." Held also that the description of the land in the deed in the present case was so vague and uncertain as to be fatal.

[*O'Brien* v. *Cogswell* (1890), 17 Can. S.C.R. 420, followed.]

APPEAL from the judgment of Longley, J., in favour of plaintiff in an action to set aside a deed executed by the mayor and city clerk of the City of Sydney to the defendant Fitzgerald as illegal and void against plaintiff and to have the registration of said deed cancelled.

The property in question was sold by the city for $11 and some cents taxes and the main grounds relied upon in attacking the sale were that the notice required by the Act to be served upon the owner of the property was not given and that the description in the deed from the city to Fitzgerald did not cover the plaintiff's property.

T. R. Robertson, K.C., and *F. McDonald*, K.C., for appellant.

C. B. Smith, for respondent.

HARRIS, C.J.:—The plaintiff in his statement of claim alleges himself to be the owner of a lot of land in Sydney, C.B., described as follows:—

"All that lot of land at Sydney, Cape Breton, on the Eastern side of Sydney Harbour, beginning at the junction of the Low

Point Road, now Victoria Road, and the northern line of the lands of the Bridgeport Railway; thence northerly along the said Low Point Road twenty-five feet; thence Easterly along a right of way one hundred and one feet; thence Southerly fifty feet to the line of said Bridgeport Railway, and thence westerly along the line of the Bridgeport railway one hundred and one feet to the place of beginning and containing 3787 square feet, together with a right of way along the northern side of said lot from Victoria Road easterly to the rear of said lot and for its full depth."

And he alleges that on or about October 31, 1919, a deed was executed by William Fitzgerald, mayor, and James J. Curry, city clerk, to defendant Fitzgerald, which was registered by him and under which he took possession of a part of the lands of the plaintiff and claimed to own the whole of such lands. The plaintiff alleges the deed to be illegal and void and made without authority and claims a declaration that it is illegal and void and that the registration be cancelled as a blot on his title and that he is entitled to possession of the property.

The city solicitor appears for both defendants and files separate defences—that of Fitzgerald merely states that he purchased the land "at public auction and duly deposited the amount of said purchase with the City Treasurer of the city of Sydney" and that he "duly received a deed of the said property which is the matter complained of."

It seems obvious that this was no defence at all and so far as the defendant Fitzgerald is concerned the case was practically undefended.

The defence of the City of Sydney I quote in full:—

"1. It admits paragraphs one, two and three of the Statement of Claim. 2. With regard to paragraphs four, five, six and seven, the defendant says it is incorporated as a city under the provisions of Chapter 174 of the Acts of 1903 and amending Acts. 3. The said lot of land described in paragraph one of the Statement of Claim is situated within the limits of the said city and duly assessed on the assessment rolls of the said city and rated for taxes. 4. The said lot of land was duly rated for rates and taxes in the year 1916 for the sum of Eighteen Dollars and Eighty-Eight Cents ($18.88) and the said sum was not paid nor any part thereof. 5. By warrant dated the 12th day of August, 1918, the mayor of the said city authorised and required the City Treasurer of the said city to levy on the said lot of land and sell the same for such arrears and interest thereon

N.S.
S.C.
DOMINISKY
v.
FITZGERALD.
Harris, C.J.

according to the provisions of the said city charter, being Chapter 174, Acts 1903 and amendments. 6. The lot of land was duly and legally sold to the said Frank Fitzgerald, and a deed conveying the said lot of land to him duly and legally executed, which are the matters complained of."

The reply of the plaintiff joins issue on paragraphs three, four and five of the defence of the City of Sydney and attacks the warrant and proceedings leading up to the sale, the sale itself and the deed, alleging certain specific irregularities and defects which it is alleged makes the sale and deed bad and void. This closed the pleadings.

When the case came on for trial the plaintiff very properly moved for judgment on the pleadings and the defendant thereupon called his witnesses and undertook to establish his defence.

It will be noted that as the pleadings stood the defendant City of Sydney set up in paragraph three that plaintiff's property "is situate within the limits of the said City and duly assessed on the Assessment Rolls of the said City and rates for taxes," and in paragraph 4 the City alleged that "the said lot of land was duly rated for rates and taxes in the year 1916 for the sum of Eighteen Dollars and Eighty-Eight Cents ($18.88) and the said sum was not paid nor any part thereof."

Issue having been joined on these by plaintiff the burden was on defendant to establish a valid assessment and rating.

This the city, I think, failed to do. In order to understand the only evidence which it is claimed meets this issue I must refer to sec. 171 of ch. 174 of the Acts of 1903 (which is the Act incorporating the City of Sydney) as amended by ch. 78, secs. 5, 6, of the Acts of 1906.

That section as amended reads as follows:—

"(1) The city treasurer shall, when directed by the city council prepare and post up in a conspicuous place in his office a schedule of all or any of the real property within the city in respect of which any rates or taxes for any preceding year or years are then unpaid. (2) Such schedule shall contain a general description of each lot sufficient to identify and locate the same, together with a statement of the amount of rates payable and in arrear in respect thereto. (3) Such schedule shall be certified and signed by the city treasurer as correct, and shall be entitled 'Lands in the city of Sydney liable to be sold for rates and taxes.' (4) Such schedule shall be filed in the office of the city treasurer and the same or a copy thereof duly certified under his hand, shall in any court of law in this

province be received as conclusive evidence of the facts therein stated in any suit or proceeding in which the legality of any proceeding under this Act is questioned. (5) In the preparation of such schedule the city assessor shall furnish to the city treasurer all the information under his control as to the locality and description of the several lots which it is necessary to include in such schedule."

James J. Curry was the first witness called by the defendant's counsel and I give in full the report of his examination so far as it affects the question under consideration.

"Q. You are the city clerk and treasurer of the City of Sydney? A. Yes. Q. And have been such . . .? A. Clerk since incorporation—treasurer since 1912. Q. With regard to this lot in question here—Dominisky and Fitzgerald—you were asked to bring certain papers. Is there a motion of the city council ordering you to post up certain properties? A. Yes, a motion passed the 21st of March, 1918 (Certified copy of Motion produced and marked H-A.). Q. In obedience to that did you post up the schedule in your office? A. Yes (Schedule produced and marked H-B). The item in question—the party assessed to is R. H. McLeod and the date for which taxes were due the year 1916 $11.88 (Copy of item in question on H-B to be put in). The lot is described as Lot K A 47, Victoria Road.

By the Court: Is that all there was against it? A. $11.88, one year's taxes. Q. Do you remember what the amount was for which it was assessed? A. No, I don't say I do. According to the rate I would judge it would be about $500. Q. Would it be assessed for $500? A. $400 or $500. Q. The rate was 3¼? A. No, 2½ or 2¼ I think. Q. That schedule H-B was duly posted up? A. Yes, and copy sent to Registrar of Deeds.

By the Court: That was 1918? A. Yes, the 9th of April, 1918, this was posted up."

And on cross-examination he is thus reported:—

"Q. The taxes assessed against this property, $11, were for the year $1916? A. Yes. Q. And the sale proceedings were taken in 1918 so that the taxes for 1917 and 1918 were paid? A. No, I don't think 1918 was paid. We started taking proceedings in April, 1918, and no taxes were due then. Q. I think you told my learned friend that the assessed value in 1916 would be approximately $500? A. I judge that from the amount there. I am not just clear whether that $11.88 would be full taxes or only a balance. Q. At least the assessed value would be $500 in 1916? A. $400 or $500 in 1916. Q. And you say

N.S.
S.C.
DOMINISKY
v.
FITZGERALD.
Harris, C.J.

the property sold to the brother of the mayor for $70? A. $75 I think. Q. You don't know whether there was a house built on it between 1916 and the time of sale? A. No."

The charter of the City of Sydney contains elaborate provisions regarding assessments in secs. 92 to 204. The first sections from 92 to 170 deal with the appointment of assessors, the property liable to and exempt from assessment, the preparation of the assessment rolls, and the rules to be followed in making the assessment, the notices to be given in the public press and to be personally served on parties assessed, appeals from assessment, liens for assessment and various other incidental matters, while the sections from 171 to 201 deal with sales of land for taxes.

The sections regarding assessment require the preparation by the assessors of an assessment roll which has to be completed and filed with the city clerk on or before a certain date. Section 110: "The city clerk shall on receipt of the assessment roll from the city assessor give notice of the assessment: (a) By publishing in a newspaper published in the city for two consecutive weeks beginning with the first issue after the receipt of the assessment roll a notice in the form 'D' in the second schedule to this Act; (b) Serving each person . . . liable to be rated with a notice in the form 'E'."

By sec. 138 the assessment roll when finally passed by the Court of Appeal is to be certified by the city clerk and shall then "bind all persons assessed in said roll notwithstanding any defect or error therein or any irregularity on the part of the city assessor or in respect of making up the roll or in the proceedings of the court or any error or irregularity in the notices required to be given or the neglect or omission to give such notices."

Section 141 provides for the preparation of a rate book and 143 for a notice to be given by the city clerk or the collector of taxes to every person rated and this notice has to be served according to the provisions of the Act and to be in the form in the Act.

Section 152 provides:—

"152. In any action brought against a person for the recovery of rates or taxes due the city where there is a defence pleaded, a certificate in writing purporting to be signed by the city clerk and verified by affidavit that the defendant's name appears on the rate book of the city for the sum claimed from him for rates and taxes, that the said sum has been demanded from him and that the same has not been paid, shall without

proof of handwriting be prima facie evidence in any court of such rates or taxes being due and unpaid."

Section 161 provides:—

"161. In any action or other proceeding brought or taken to enforce the payment of any poll tax, or to enforce the payment of any rate, the entry of such person's name on the list of polls shall be conclusive evidence that such person is liable for the payment of such poll tax or rate respectively."

Although our attention was not called to the matter on the argument, the usual Act legalising all assessment rolls for the year was passed by the Legislature. I quote ch. 34 of the Acts of 1916 so far as it affects the question under consideration: "Sec. 2. The Assessment Rolls for the present year . . . are hereby legalised and confirmed."

I have referred to these particular provisions because they shew how important the assessment rolls are and indicate clearly the method of proving an assessment.

Section 167 of the city charter provides that "rates and taxes rated or levied in respect to real property shall constitute a lien on such real property."

The sections following 167 shew that the real property assessed and no other can be sold for non-payment of taxes.

The City of Sydney had in its defence alleged that the lands in question had been "duly assessed on the assessment rolls of the said city and rated for taxes" and both facts were put in issue by the reply. Neither the assessment roll nor the rate book required by sec. 141 of the charter were produced and they were the only legal evidence to prove the issue between the parties. Neither the statement in the direct examination of the city clerk nor that in his cross-examination amount to proof of these issues.

Although the curative sections of the charter of the City of Sydney regarding tax deeds is not pleaded our attention was called to them and I quote them; they are secs. 194, 195, and 196:—

"194. (1) If the land is not redeemed within the period of one year so allowed for its redemption, the treasurer shall on demand of the purchaser, or his assigns, or other legal representatives, at any time afterwards and on payment of two dollars, cause to be prepared a deed to such purchaser of such land, which deed shall be executed by the mayor and city clerk under the seal of the city. (2) Such deed shall be in the form of "O" in the second schedule to this Act, and shall particularly and fully describe the land conveyed.

N.S.

S.C.

DOMINISKY v. FITZGERALD.

HARRIS, C.J.

195. Such deed shall be conclusive evidence that all the provisions of this Act with reference to the sale of land therein described have been fully complied with, and that every act and thing necessary for the legal perfection of such sale have been duly performed, and shall have the effect of vesting the said land in the grantee, his heirs or assigns, in fee simple, free and discharged from all encumbrances.

196. When any lands are sold for non-payment of rates and taxes, and the sale is set aside for any irregularity, the lien for rates and taxes thereon shall not be thereby discharged, but the property may be sold again, unless the rates and taxes and other charges within the meaning of this Act due in respect to the same are paid."

It is to be pointed out that sec. 195 is an exact copy of the clause in the city charter of Halifax at the time when the case of *O'Brien* v. *Cogswell* (1890), 17 Can. S.C.R. 420, was decided. The present city charter of Halifax has been since changed, obviously to get rid of some of the difficulties raised by that decision (See sec. 472).

In *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420, the decision of the Court was that the curative provisions in question could only operate to make the deed available to cure defects in the proceedings connected with the sale and would not cover the failure to give notice of assessment required before the taxes could be imposed.

See also *McKay* v. *Crysler* (1879), 3 Can. S.C.R. 436, and *Whelan v. Ryan* (1891), 20 Can. S.C.R. 65.

The defendants having failed to prove that the property was duly assessed or rated, which was an issue upon them, must fail.

There is also another question argued in the case which I think must be decided against the defendants and that is the description of the property is fatally defective.

The charter of the City of Sydney referring to sales of land upon which the city has a lien for taxes contains various provisions.

Section 171 provides for the city treasurer posting up a schedule of all real property liable for taxes and requires that the schedule "shall contain a general description of each lot sufficient to identify and locate the same. . ."

Section 175 requires the city treasurer to cause to be served upon the owner, tenant or occupier of each lot on the schedule a notice containing a general description of each lot of land, the amount of arrears of rates payable in respect thereto, and

certain other information including a statement that such land is liable to be sold under the Act for such arrears.

Section 176 provides that service of such notice "shall be deemed good and sufficient for the purposes of this Act, if the same is mailed by registered letter to the last known address of such person, or if the address of such person is not known, then by leaving the same with the tenant or occupant of such lands, or if the same are not occupied then by posting up a copy of the notice in some conspicuous place on the premises."

The clerk says he did not know the plaintiff's address but he mailed a notice to him addressed "Whitney Pier" which was not his last known address, and the letter came back next day undelivered. Still the clerk did not leave the notice with the occupant or post it on the premises.

Section 181 provides for the issue of a warrant by the mayor or an affidavit by the treasurer that he has fully complied with all the requirements of the Act with respect to any particular lot or lots of land sought to be sold and "such warrant shall describe as nearly as may be the lands thereby authorised to be sold. . ."

Then it is the "several lots of land mentioned" in the warrant that are to be advertised and sold under sections 182 and 183 and section 187 requires the treasurer on payment of the purchase money to give a certificate to the purchaser "stating distinctly what land has been sold and describing the same."

And then sec. 194 in referring to the deed to be given says that "such deed . . . shall particularly and fully describe the land conveyed."

And 195 says "such deed shall be conclusive evidence . . ."

Section 195 is the curative section which I have quoted in full in discussing the first question raised in the action.

Now the city clerk swears that in the schedule posted up in his office which is the initiation of the proceedings the name of the owner was given as "R. H. McLeod" and the only description of the land was "Lot K A 47 Victoria Road."

That was the only description given in any of the notices, warrant, advertisement of the sale and other documents prior to the deed. No plan was referred to and there was nothing to shew what the mysterious letters K.A. referred to.

When the deed came to be given a new description was inserted reading: "All that certain city lot or parcel of land situate, lying and being in the city of Sydney, in the Island of Cape Breton, and is known and distinguished by Lot K.A. 47 Victoria Road, on the Assessors' plan of the city of Sydney, the same appearing to be the property of Evan Domonisko by deed

N.S.
S.C.
DOMINISKY
v.
FITZGERALD.
Harris, C.J.

dated April 30th, 1918, recorded April 30, 1918, and registered at Sydney in Book....., Page....., referring to last registered instrument."

This is the first reference in any of the documents to the assessors' plan or to the plaintiff as owner and it will be noted that the reference to the owner is "the same appearing to be the property of Evan Domonisko . . ." The book and page are both left in blank.

In the Registrar's certificate under sec. 172 of the Act the owner's name is given as Ewan Domanski." The plaintiff's name apparently is "Ivan Dominiski."

Sheet K of the assessors' plan produced at the trial shews Block A. to refer to one tier of lots only—at least that is I think the only inference, but it is argued that it covers all the lots on the plan between Tupper St. and the Dominion Coal Co.'s land, but admitting this, defendants get no further because there is no Lot 47 anywhere on the plan within those bounds or elsewhere. There are lots numbered to 46 but no lot numbered 47. Then it is argued that there is an unnumbered lot on Victoria Road which must be said to be 47 because it is the only unnumbered lot on that street. If we are to give to the reference to Block A on the plan a different meaning from what it obviously bears, *i.e.*, to one tier of lots only, then I can see no reason why we should not say that Lot A refers to all the lots on that sheet and if it is read in that way there are a number of unnumbered lots on Victoria Road—there are also other unnumbered lots in Block A even interpreted as defendants would ask us to interpret it, and again the street number of the house on the lot in question is 502, not 47. Any one reading the notice of sale would no doubt understand the 47 to be the street number.

Assuming that the curative section covers the irregularities referred to prior to the deed and even assuming that the deed can give an entirely new and different description from that contained in all the documents leading up to the sale the description in deed must "particularly and fully describe the land." It is only such a deed which the statute makes conclusive evidence and there is no such deed in this case.

In Black on Tax Titles, p. 407, I find it stated on the authority of *Curtis* v. *Brown County*, 22 Wis. 167, that "a tax certificate and deed of lots of specified numbers in 'Arndt's Addition,' etc., which do not exist are invalid although the same town has another addition called 'Arndt's Second Addi-

tion' which contains those numbers; and parol evidence is not admissible to shew that the second addition was meant."

The trial Judge found the description insufficient, and I agree with him.

For these reasons I would dismiss the appeal with costs.

RUSSELL, J.:—In this case it appears that a property worth 4 or 5 hundred dollars in the City of Sydney has been sold for a tax bill of 11 or 12 dollars, the owner being at the time of the sale a prisoner in Dorchester penitentiary. The trial Judge deemed it doubtful whether the provisions of the statute as to service upon the defaulting tax-payer had been duly made, but the decision proceeds upon the ground that there was no adequate description of the property in the advertisement pursuant to which the sale was made. The only description given is "Lot K.A. 47 Victoria Road," which is also the description given in the warrant signed by the mayor. It is explained that the letter K. refers to the sheet, and the letter A. to the block, on the assessors' plan of properties assessed in the City of Sydney. On that plan there is no lot numbered 47. But even if there were, the statute would not have been complied with by such an advertisement, following upon the warrant under which the property was advertised to be sold. The person proposing to bid could not determine from this information what property he was going to get for his money, or whether he would get any identifiable property at all.

It is needless to enlarge upon the necessity of some description which will enable purchasers to understand what they are buying. In the absence of such a description the sale can only result, as it has done in this case, in the utter sacrifice of the property of the defaulting tax-payer. I think this objection to the tax-sale proceedings is fatal. The description in the deed might possibly or even probably be made applicable to the property intended to be sold and purchased by admissible evidence to connect its terms with those of the deed under which the plaintiff purchased the property. But that does not cure the fatal defect in the proceedings under which the plaintiff has been deprived of his property.

The curative sections relied upon by the defendant are so fully dealt with in the opinions of their Lordships, the Chief Justice and Mellish, J., that I need not say more than that they do not cure the defects referred to.

CHISHOLM, J., concurred with HARRIS, C.J.

MELLISH, J.:—The plaintiff alleges that he is the owner of certain lands in the city of Sydney conveyed to him by deed

Ont.

App. Div.

dated April 30, 1918, and therein described; that the defendant city by deed dated October 31, 1919, wrongfully purported to convey said lands to the defendant Fitzgerald who wrongfully went into possession under said deed.

Accordingly, plaintiff claims possession and a declaration setting aside said deed to Fitzgerald as illegal and void.

Defendants allege that the deed to Fitzgerald was regularly given on a tax sale duly held to realise the amount of taxes assessed on said property for the year 1916 and amounting to $11.88.

Issue is joined on this defence and on the trial some attempt was made to prove the assessment on this property for the year 1916. I think the attempt failed. The assessment roll was not produced. This roll is "legalised and confirmed" by ch. 34 of the Acts of 1916. But it would not appear that the property in question was assessed on this roll, which was not put in evidence.

It is rather to be inferred from the evidence respecting the contents of the roll which was adduced (and which I think was inadmissible) that there was no property on the roll which could reasonably be identified with that described in the statement of claim.

It follows that under the authority of *O'Brien* v. *Cogswell* (1890), 17 Can. S.C.R. 420, this appeal must be dismissed with costs and the judgment of the trial Judge in favour of the plaintiff affirmed. *Appeal dismissed.*

McIVER v. TAMMI.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford, Middleton, and Lennox, JJ. June 23, 1921.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT (ONT.)—INJURY IN COURSE OF EMPLOYMENT—CLAIM MADE FOR COMPENSATION TO WORKMEN'S BOARD—ACCEPTANCE OF PERIODICAL PAYMENTS—ACTION IN OWN NAME AGAINST TORT-FEASOR—PERMISSION OF BOARD NOT OBTAINED—RIGHTS OF PARTIES.

A workman who is injured in the course of his employment and who makes a claim for compensation to the Workmen's Board under the provisions of the Workmen's Compensation Act, 1914 (Ont.), ch. 25, and receives periodical payments from the Board until the surgeon reports that the wound is healed, is not barred by sec. 9 of the Act from recovering further compensation in an action in his own name against the tort-feasor, although no arrangement is made with the Board allowing him to bring such action. The judgment should declare that the amount recovered shall enure to the benefit of the Workmen's Compensation Board

and be payable to the Board to be applied first in recouping it the money already paid for compensation and secondly in applying the surplus, as the Act directs.

[*Toronto R. Co.* v. *Hutton* (1919), 50 D.L.R. 785, 59 Can. S.C.R. 413, affirming 49 D.L.R. 216, 45 O.L.R. 550, applied.]

ACTION by a carpenter to recover damages for personal injuries sustained by reason, as the plaintiff alleged, of the negligence of the defendant, a labourer.

The judgment appealed from is as follows :—

January 29, 1921. ORDE, J.:—The plaintiff, who is a carpenter, seeks to recover damages from the defendant, a labourer, for injuries sustained through the alleged negligence of the defendant.

The defendant denies that he was negligent, alleges contributory negligence on the part of the plaintiff, and also sets up that the plaintiff filed a claim with the Workmen's Compensation Board, and has recovered full compensation from the Board, and is thereby barred from bringing this action.

The plaintiff was in the employ of the Algoma Construction and Engineering Company Limited, which was erecting buildings at Sault Ste. Marie for the Algoma Steel Corporation. Among these buildings was one with a length of about 150 feet, a width of about 40 feet, and a height of about 40 feet. The building was to be constructed of reinforced concrete, and on the 19th July, 1918, the day when the accident happened, the building was in skeleton form, the upright columns being in place and the cross-beams more or less completed. Otherwise the building was almost wholly open at the sides and ends and to the sky. The defendant, who is a Finlander, was engaged that day, with some other men, upon the upper portion of the structure, in bolting certain portions of the iron-work together. About 1 p.m. the plaintiff was taken off some work elsewhere at the plant and commenced work with some other men at a point along one side of the building in making forms for the cement-work. He had been working about two hours at this and had been moving about with the others, going at times for a few feet inside the frame-work of the building. The defendant had come down from the top at noon for his dinner, and did not return to the top of the building immediately afterwards, being engaged upon some other work for some time. About 3 o'clock the work on that part of the upper portion upon which the defend-

Ont.
App. Div.
McIVER
v.
TAMMI.

ant had been engaged in the morning was finished, and the defendant went up the ladder to throw down his tools. It was the practice, when the work on any portion of the building was completed, to throw the tools down to the ground from above, first calling out, "Watch out below." The defendant says that he saw the carpenters working beside the building when he went up the ladder. He did not tell them he was going up to throw down the tools. When he got to the top he picked up a wrench, and, seeing no one below, after calling out, "Watch out below," threw the wrench down. At that moment the plaintiff stepped out from behind a beam and was struck on the head and badly injured.

The plaintiff says he heard no warning shout, and there is no reason to doubt his word in this respect. He would hardly have walked deliberately into danger. It may be that, having just come on the work two hours before, his mind was not alert, and he may have failed to hear the defendant's warning shout, or, what is more likely, may have failed to understand it. The defendant gave his evidence through an interpreter, and whatever knowledge of English he has is limited. His pronunciation of the words "watch out below" was distinctly foreign, and it is doubtful if the shout, apart from its tone, would have conveyed much meaning to a man below. It seems to be the common practice to throw tools down in this way, but a contractor called for the plaintiff said that they should always be thrown outwards and in such a way as to fall clear of any men below and not be merely dropped. The defendant was apparently doing what was customary with the gang of men with whom he was working and with the approval of his foreman and there may be some excuse for what he did. But what happened is an example of the carelessness which seems to be inevitable in the carrying on of work of this kind, with numerous gangs of men, each engaged upon its own branch of the work, and heedless of what the others are doing. There was evidence that others were injured in the same way both before and after the accident to the plaintiff, and that one man had been killed in this way before this accident.

Whatever excuse there may be for the defendant's following the practice, I cannot see how he can escape the charge of negligence. Whatever the practice or the orders may be, it must be

negligence to throw a heavy tool from a height of 40 feet when there is the slightest risk of hitting some one. Merely shouting "Watch out below" in a perfunctory way, and then throwing down the tool, without first being sure that every man to whom the warning is given has heard the warning and is in a position of safety, cannot be sufficient. Under the circumstances there was a duty cast upon the defendant to take care to avoid the very thing which happened here. The defendant cannot be regarded as a mere machine and not responsible, merely because he obeys certain orders or follows a certain practice. The only answer to the charge of negligence under these circumstances would be either contributory negligence on the part of the injured person, or that the risk of being hit was voluntarily taken by him. In this case there is no evidence to support the defence of contributory negligence, nor is it suggested that the plaintiff knew anything about the risk, so there is no room for the application of the maxim *volenti non fit injuria*.

There remains to be considered the effect upon the plaintiff's position of his having accepted compensation from the Workmen's Compensation Board. The defendant relies upon sec. 9* of the Workmen's Compensation Act, 4 Geo. V. ch. 25, as in effect barring the injured person from setting up any further claim if he elects to claim compensation from the Board or from his employers. So far as the defendant is concerned, I think this question is settled by the judgments of the Appellate Division and of the Supreme Court of Canada in *Hutton* v. *Toronto R.W. Co.* (1919),

*9.—(1) Where an accident happens to a workman in the course of his employment under such circumstances as entitle him or his dependants to an action against some person other than his employer, the workman or his dependants if entitled to compensation under this Part may claim such compensation or bring such action.

(2) If an action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependants are entitled under this Part the difference between the amount recovered and collected and the amount of such compensation shall be payable as compensation to such workman or his dependants.

(3) If the workman or his dependants elect to claim compensation under this Part the employer, if he is individually liable to pay it, and the Board if the compensation is payable out of the accident fund, shall be subrogated to the rights of the workman or his dependants and may maintain an action in his or their names against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund.

(4) The election shall be made and notice of it shall be given within the time and in the manner provided by section 7.

Ont.

App. Div.

McIVER v. TAMMI.

45 O.L.R. 550, 49 D.L.R. 216, and *Toronto R.W. Co.* v. *Hutton* (1919), 59 Can. S.C.R. 413, 50 D.L.R. 785. There are certain things lacking in this case which were present in the *Hutton* case, to which I ought to refer, but which do not, in my opinion, constitute any distinction between the two cases so far as the application of the principle laid down in the *Hutton* case, as it affects the defendant, is concerned.

In the present case the only evidence as to what has taken place between the plaintiff and the Workmen's Compensation Board, is that on the 5th August, 1918, he made a claim for compensation upon the form provided for that purpose, which, with the surgeon's first report, went to the Board. Upon that he received $45.06 compensation to the 9th August, 1918. This was followed by periodical reports from the surgeon, and further periodical payments were made by the Board up to the 28th November, 1918, when, upon the report of the surgeon that the plaintiff's wound was "soundly healed," he received a final payment from the Board, the aggregate amount paid to the plaintiff being $256.47, and in addition the Board paid for medical services $72.50. There is no evidence that the plaintiff, in addition to the claim for compensation, signed any formal notice of election such as was done in the *Hutton* case, but I cannot see that this is essential. The making of a claim for compensation is in itself an election to claim compensation, so far as the Compensation Board is concerned. If the injured person prefers not to claim compensation, then he may proceed with his action against the person (other than his employer) liable for the injuries. And in the present case there has been no arrangement with the Compensation Board allowing the plaintiff to withdraw his election and proceed with this action against the defendant, such as was made in the *Hutton* case. But, as I understand the judgments in the *Hutton* case, these are matters between the Board and the plaintiff, with which the defendant is not concerned. So long as he is not harassed by having to defend two actions, he cannot complain. As stated by Mr. Justice Hodgins in the *Hutton* case, 45 O.L.R. at p. 562: "The situation created by the election spoken of in the statute and its consequences casts no additional burden upon the wrongdoer, nor one which differs in any way

from that which he has brought on himself by his wrongful act. He has no concern with the dealings of the Board and the claimant; and, unless he is prejudiced, he has no right to complain. In this case the respondent's cause of action is not divested; it exists still in him, but, if enforced by him, it must be for the benefit of the Board if he has signed an election." This opinion is expressly adopted by the Supreme Court of Canada. So that, so far as this defendant is concerned, it is immaterial whether the carriage of the action is in the hands of the plaintiff or in those of the Compensation Board.

There is, however, this distinction between this case and the *Hutton* case. There the action was brought by Hutton with the full knowledge and apparent sanction of the Board. While the view held by Anglin, J., that the proceedings should be stayed until some further authorisation was obtained from the Board, was not adopted by the other Judges of the Supreme Court of Canada, that was because the question of the plaintiff's authority to sue was not open to any objection on the part of the defendants. But, if the fact that the plaintiff has elected to claim compensation from the Board is brought to the notice of the Court, is the Court to do nothing to protect the Board? Counsel for the plaintiff here concedes that the Board is entitled to the benefit of any judgment which the plaintiff may recover against the defendant, and that any moneys payable thereunder shall be paid to the Board, in accordance with sec. 9, sub-sec. 3, of the Act. This is of course clear from the section and from the judgment in the *Hutton* case. But is a man whose claim against the wrongdoer has passed to the Board, to be permitted to launch an action and proceed to judgment for the benefit of the Board, but without its sanction or approval, merely because under the law of subrogation the Board's rights against the wrongdoer are enforceable in the claimant's name? If so, then he may consent to a judgment to the prejudice of the Board or to a dismissal of the action. I do not think the *Hutton* case goes quite that far. Under the circumstances, I think that, before the judgment is entered, notice should be given to the Board so that they may either adopt the judgment or take such other course as they may be advised.

As to the damages sustained by the plaintiff, he has undoubted-

Ont.

App. Div.

McIVER v. TAMMI.

ly suffered more than the amount allowed him by the Compensation Board. That allowance in no way compensates him for his pain and suffering. The allowance ceased on the 28th November, 1918, on the surgeon's report that the wound in the head was "soundly healed." The only physician called at the trial—not the physician who reported to the Board—says that the plaintiff's physical condition has been impaired since the accident. He says he could not advise the plaintiff to work at a height, and that the pain in the head which the plaintiff says follows his attempt to lift any heavy weight may be due to the injury. He also suggests the possibility of what he terms "Jacksonian epilepsy." The plaintiff is 50 years of age. He says he has lost weight since the accident, which he has never regained. His memory is not as good and he has lost confidence in himself. The plaintiff was steadily employed after he returned to work in November, 1918, until March, 1919. He then went to Rochester, Minnesota, to consult the Mayo Brothers about his head, and after his return his work was more or less irregular. He says that this was to some extent due to his condition. It was also partly due, I think, to labour conditions. But it is established, I think, that the plaintiff has sustained some permanent damage for which he ought to be compensated. He might, perhaps, have obtained further compensation from the Board, had he seen fit to follow the matter up, but that is, of course, of no consequence here. On the whole, and applying the best judgment that I can to the circumstances, I think the plaintiff's damages may be fixed at $1,000, and I direct judgment to be entered for the plaintiff for that amount and the costs of this action. The judgment will declare that it shall enure to the benefit of the Workmen's Compensation Board and that the moneys shall be payable to the Board, to be dealt with under the provisions of sec. 9 of the Act, that is, first in recouping the Board the $256.47 and the $72.50 already paid for compensation and medical services, and secondly by applying the surplus as the Act directs.

The entry of the judgment will, however, be stayed in order that notice thereof may be given to the Board. If after such notice the Board, within 14 days, either state that they are willing to adopt the judgment, or do not take steps to intervene for the

purpose of asserting their position, then the judgment will be entered as directed above.

Grayson Smith, for appellant.

T. P. Galt, K.C. for respondent.

June 23. The judgment of the Court was read by MIDDLETON, J.:—We are all of the opinion that the appeal should be dismissed. The decision in the *Hutton* case, *supra*, is a conclusive answer to the appellant's contentions.

Appeal dismissed with costs.

POINTER v. ROBINSON & POINTER.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Ives, Hyndman and Clarke, JJ.A. December 24, 1921.

SALE (§ IIA—28)—OF HORSES AT PUBLIC AUCTION—WARRANTY AS TO AGES—BREACH OF WARRANTY—RE-SALE IMMEDIATELY BY PURCHASER AT ADVANCED PRICE—NO DAMAGE FLOWING FROM BREACH—RIGHT TO RECOVER PURCHASE PRICE.

A vendor at a public auction is entitled to recover the purchase price of horses sold although he falsely represents the ages of the horses he sells and breaks a warranty as to their ages which he made when selling, where no damage flows from the breach of warranty, the purchaser having immediately re-sold the horses to a third party at an increased price and without warranty or misrepresentation and being at the time of such sale entirely satisfied.

[See Annotation: Sale of Goods, Representations, Conditions and Warranties, 58 D.L.R. 188.]

APPEAL by defendant from the judgment of a District Court Judge in an action to recover the price of two horses sold to the defendant. Affirmed.

Frank Ford, K.C., for appellant.

W. H. Odell, K.C., for respondent.

STUART, J.A., concurs with CLARKE, J.A.

BECK and HYNDMAN, JJ.A., concur with IVES, J.A.

IVES, J.A.:—This is an appeal from the judgment of Lees, D.C.J. A first examination of the judgment, without reading the evidence, would lead to doubts of its correctness. A plaintiff is found to have been guilty of falsely representing the ages of two horses which he sells and of breaking a warranty as to their ages which he made when selling, yet he succeeds in recovering a judgment for the purchase price.

Robinson bought these horses at an auction sale for $415,

Alta.

App. Div.

POINTER v. ROBINSON.

Clarke, J.A.

giving his promissory note therefor. He bought for the purpose of re-selling, and within an hour or so of the purchase and at the same place he privately sold them to one Lafonde. The evidence of Robinson as to the sale to Lafonde is as follows:—

"Q. You had some negotiations the same day with Albert Lafonde? Tell us about that? A. Albert, well, Mr. Lafonde came along just after the sale (*i.e.*, the auction) was over and I says, 'I have got a good big team, just what you want,' so we went along to the barn and I shewed them to him and asked him what he thought of them. He said they looked to be a good team and he asked me what I wanted for them and I told him $450 and he said he guessed he would take them at that. Q. Yes? A. There was no arrangement made as to how it was to be paid, note, cash or anything, and he took the team home that night."

From this it will be seen that Robinson re-sold at his own price and was entirely satisfied, and upon the evidence the trial Judge has found rightly I think that the sale to Lafonde was without warranty or mis-representation.

What occurs after the sale to Lafonde cannot be construed as repudiation by Robinson of the purchase by him from the plaintiff or by Lafonde of his purchase from Robinson.

In December following the sale in October Lafonde made his promissory note for $450 antedated to the time of purchase and bearing 8% interest. This note was accepted by Robinson and retained for about a month as settlement. At the end of this time Robinson and Lafonde met and after some discussion Robinson released him from the sale but Lafonde kept the horses and continued to use them for some months when one of the horses died.

Undoubtedly Robinson was not damaged by the plaintiff. If he has lost it has been under a contract with Lafonde for which plaintiff's conduct is in no way responsible. No damage flows from the breach of plaintiff's warranty.

I would dismiss the appeal with costs.

CLARKE, J.A.:—Appeal by defendants from District Court of Wetaskiwin in favour of plaintiff upon a promissory note and dismissing defendants' counterclaim.

The defendants in their statement of defence admit the making of the note sued upon and non-payment thereof but ask, by their defence and counterclaim, to be relieved from payment and for rescission of their agreement or for damages by reason of fraudulent misrepresentations or in the alternative for breach of warranty on the part of the plaintiff in connection with the

Alta.

App. Div.

POINTER v. ROBINSON.

Clarke, J.A.

sale of a team of horses by him to the defendant Robinson, for the purchase price of which the note sued upon was given. The defendant Pointer joined in the note as surety for his co-defendant.

By reason of the dealings with the horses by the defendant after learning of the misrepresentations and as the parties cannot be restored to their formed positions, one of the horses having died and the other having been sold, I do not think it a case for rescission.

The trial Judge has found that the plaintiff fraudulently represented the horses to be of the ages of 8 and 12 respectively, whereas in fact they were at least each three years older.

He holds, however, that the defendants are not entitled to damages by reason of having sold the team for $450, a price greater than the purchase price of $415, and he awards the plaintiff the full amount of the purchase price represented by the note sued upon and dismisses the defendants' counterclaim.

On the same day as and shortly after the purchase of the team by Robinson he re-sold them to one Lafonde without any warranty as to age. His own words are:—"I told him I would sell him the team the same way that I bought them from J. R. Pointer, eight and twelve years old. I had never seen the team before and I couldn't say whether they were any older or not. I sold them just the same way I bought them from him."

Both of them believed the ages to be 8 and 12 years. Shortly afterwards, on learning of the greater ages of the horses and failing to get any reduction in price from the plaintiff, Lafonde refused to pay for them, but upon being threatened by a letter from Robinson's lawyer, he gave his note in settlement, payable in three years, but shortly after that he told Robinson he would not pay, and Robinson decided to take the team back and gave Lafonde his note back.

The trial Judge was of opinion that Robinson was not in law bound to receive the horses back, and therefore that he sustained no damages for which he could hold the plaintiff responsible. Thus the guilty party escapes by the circumstance, accidental, so far as he is concerned, that Robinson had this transaction with Lafonde and Robinson is punished for yielding to the dictates of the law of morality and good conscience and cancelling the transaction which, if enforced, would have wronged Lafonde. I am unable to agree with this result or the reasons therefor.

In most cases where there has been a re-sale in an open market

Alta.

App. Div.

POINTER v. ROBINSON.

Clarke, J.A.

the price obtained is pretty good evidence of the value of the article, but it is only because it affords some evidence of value that it has any bearing on the transaction. It is not the measure of the purchaser's damages, and where, as here, the selling price to Lafonde was based upon the belief of the ages being 8 and 12, that price is of little assistance in arriving at the actual value of the horses. That must be ascertained otherwise in order to get the correct measure of damages. In my view of it, it is quite immaterial whether or not Robinson was liable or not to rescission of the transaction with Lafonde or in fact whether or not the transaction was rescinded, so far as the plaintiff's liability for damages is concerned. I do not think the transaction with Lafonde in any event should under the circumstances be treated as a re-sale.

There is some support for the view taken by the trial Judge to be found in Kerr on Fraud and Mistake, 5th ed. At p. 430, it is stated that in actions of deceit the measure of damages is the difference between the actual value of the property and its value if the property had been what it was represented to be, and at pp. 431, 432, this statement appears, "when the purchaser has sold the property at a profit he can recover no damages, although he has failed to realise the profit he could reasonably have expected if the represenations had been true, and the authority cited for this proposition is *Rosen v. Lindsay* (1907), 17 Man. L.R. 251.

But in the light of subsequent decisions of higher authority binding on this Court, the foregoing statement of the law in the Manitoba case cannot be considered to be authoritative as a general rule of law, although on the facts of that case it may have led to the proper conclusion.

In *Bainton* v. *Hellam* (1920), 54 D.L.R. 537, 60 Can. S.C.R. 325, the authorities are reviewed and the result stated to be that in case of breach of warranty the purchaser is entitled to recover as damages the difference between the market value of the goods received and of those which should have been supplied —the price obtained at a re-sale merely affords some evidence of the market value.

In *Slater et al v. Hoyle*, [1920] 2 K.B. 11, the same question is dealt with at length by the Court of Appeal.

Warrington, L.J., says at p. 18:—

"The purchaser here has received inferior goods of smaller value than those he ought to have received. He has lost the difference in the two values, and it seems to me immaterial that

by some good fortune, with which the plaintiffs have nothing to do, he has been able to recoup himself what he paid for the goods. If the goods had been of the quality contracted for he might have sold them at a higher price and made a profit. In truth, as I have already pointed out, in the class of case we are dealing with, the contract price does not directly enter into the calculation at all."

And Scrutton, L.J., says at p. 25:—

For these reasons I think that Greer, J., was right in disregarding the fact that the buyers, for reasons we do not know, were able to deliver inferior goods under their sub-contract without having to pay damages, just as he would have been right in disregarding the fact if they had to pay larger damages than the difference in market value."

I think the principles enunciated in the above cases are applicable to the facts of the present case and that the defendants' damages should be assessed at the difference between $415, the sale price, and the actual value on October 30, 1919, which is difficult upon the evidence to arrive at with any degree of precision. I think $150 a fair sum to allow for the value of the horses and that the defendants are entitled to recover for damages on the counterclaim $265, to be set off against the note sued upon as of October 30, 1919, the net result being that I would set aside the plaintiff's judgment and in lieu thereof would give the plaintiff judgment for $150 with interest at 8% per annum from October 30, 1919, until March 3, 1921, the date of the judgment below. I would allow him the costs of the action up to the statement of defence and the costs of entering the said judgment of March 3, 1921, and allow the defendants their costs of the action subsequent to and including the defence and counterclaim, all to be taxed under column one of the tariff. The balance, if any, in favour of the plaintiff to bear interest at 8% *per annum* until the date of the judgment of this Court. I would give the defendants the costs of the appeal, also to be taxed under column one, to be offset against any balance there may be remaining due to the plaintiff to the extent thereof and the amount remaining unpaid to be recovered from the plaintiff. If the parties cannot agree upon the necessary computations, the same to be settled by the District Court Clerk at Wetaskiwin.

Appeal dismissed.

N.S.

S.C.

COOK v. SHAW.*

Nova Scotia Supreme Court, Harris, C.J., Chisholm and Mellish, JJ. December 23, 1921.

PLEADING (§ IIID—325)—APPLICATION FOR FINAL JUDGMENT UNDER ORDER XIV., RULE I., SUPREME COURT RULES OF NOVA SCOTIA—AFFIDAVIT STATING THAT IN PLAINTIFF'S OPINION THERE IS NO DEFENCE—SUFFICIENCY OF—AFFIDAVIT NOT GOING TO WHOLE CLAIM ENDORSED ON THE WRIT.

An affidavit which states that in plaintiff's *opinion* the defendant has no defence to the action, sufficiently complies with O. XIV., R. I., of the Rules of the Supreme Court of Nova Scotia which requires him to state that in his *belief* there is no defence to the action.

It is not necessary in order to comply with the rule that the plaintiff's affidavit should go to the whole claim indorsed on the writ, and he may later reduce the amount of his claim and accept judgment for a lesser amount.

* Leave to appeal to the Supreme Court of Canada refused, January 28, 1922.

APPEAL from the judgment of Russell, J., in favour of plaintiff in an application on the part of plaintiff for leave to sign final judgment against the defendant Shaw under O. XIV, R. 1 of the Rules of the Supreme Court of Nova Scotia.

Order XIV., R. 1, provides that where the defendant appears to a writ of summons specially indorsed under O. III., R. 5, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a Judge for liberty to enter final judgment for the amount so indorsed . . . and costs.

Appearance was entered for the defendant Shaw and no defence was delivered.

A concurrent writ was issued for service out of the jurisdiction on the defendant La Salle who was a United States citizen and resident in Philadelphia.

The facts are fully stated in the judgments.

J. B. Kenny, K.C., for appellant.

L. A. Forsyth, for respondent.

HARRIS, C.J.:—The plaintiff sued to recover wages due under a contract, and money loaned. Shaw, one of the defendants served with the specially indorsed writ, appeared and there was a motion for judgment under O. XIV. before Russell, J., at Chambers, which was granted, and there is an appeal.

It is clear from the affidavits that there is no defence to the

N.S.

S.C.

COOK v. SHAW.

Mellish, J.

action on the merits and defendant's counsel based his contentions not upon a defence being disclosed but upon the affidavit of the plaintiff which he contended was insufficient.

One ground of insufficiency urged was that it was not sufficient for plaintiff to say that "In my opinion the defendants have no defence to this action, etc., as the rule requires it to be stated "that in his belief there is no defence."

In vol. 1 of Words and Phrases Judicially Defined, at p. 740, "opinion" and "belief" are stated to be synonymous, and it is said that "where the statute requires an affiant to state that in his belief there is reasonable cause for granting a writ, his affidavit that in his opinion there is such ground is sufficient. "The nice philological distinctions between the words 'opinion' and 'belief' are too subtle and refined to form a basis on which to ground substantial justice." *Day* v. *Southwell* (1854), 3 Wis. 657, at p. 661.

In *Manning* v. *Moriarty* (1883), 12 L.R. Ir. 372, the Queen's Bench Division in Ireland had to consider an objection to an affidavit under O. XIV., R. 1, which stated that plaintiff was "advised and believed." The argument was that this might mean that plaintiff only believed because she was advised, but the Court held the affidavit sufficient.

"While "opinion" may not be the exact equivalent of "belief" in all cases I cannot see any distinction here, and I think the affidavit is sufficient compliance with the rule and the objection fails.

Another argument was that the plaintiff's affidavit did not comply with the rule because it did not go to the whole claim indorsed on the writ. I do not think it is open to this objection, and the case is not affected by the fact that the plaintiff, later, reduced the amount of his claim and accepted judgment for a lesser amount.

There is no "triable issue," as it has been expressed in some of the cases, and the defendant's contention are not based on merits or substance.

I would dismiss the appeal with costs.

CHISHOLM, J., concurred.

MELLISH, J.:—This in an action begun by specially endorsed writ.

The statement of claim is as follows:—

"The plaintiff's claim is against the defendants formerly carrying on business in co-partnership under the firm name of LaSalle Stock Co. for salary payable by the defendants to plain-

N.S.

S.C.

COOK v. SHAW.

Mellish, J.

tiff for work done and services rendered by the plaintiff as treasurer or accountant for the defendants at their request. Also for money paid by the plaintiff for the defendants at their request, for expenses of said plaintiff while engaged as such treasurer or accountant. Also for money loaned by the plaintiff to the defendants at their request under a written agreement dated the 20th day of April, A.D. 1921, under and by which the said defendants agreed to pay to said plaintiff said salary and expenses and to repay the said money so loaned in American funds."

Particulars.

Dr.

To 5 weeks salary as above from May 22nd, 1921, to June 25th, 1921	$500.00
To expenses paid	45.00
To money loaned	500.00
	$1,045.00
To exchange on do.	156.75
	$1,201.75

Cr.

1921		
Jly. 12	By cash on account	150.00
		$1,051.75

The plaintiff claims payment of $1,051.75.

The defendant Shaw appeared in the action and the plaintiff moved before Russell, J., under O. XIV. for judgment notwithstanding appearance.

In support of the application the plaintiff made an affidavit shewing that he was engaged by the defendants who were co-partners in a theatrical business as their treasurer and accountant, that he served them as such in the United States, and that there is due him from defendants in respect of such service at the rate of $100 per week and for expenses $362.25. This affidavit also states that he loaned defendants $500, no part of which has been repaid. Deponent further states "In my opinion the defendants have no defence to this action but the appearance has been entered for the purpose of delay only," and that the defendants are justly and truly indebted to him in the sum of $1,019 in respect of the matters alleged in the statement of claim herein."

There are several exhibits to the plaintiff's said affidavit, notably the hiring and loan agreement endorsed with a receipt in the following terms:—

"Received from Lisgar D. Cook (the plaintiff) the said sum of five hundred dollars in American funds. Halifax, N.S. April 30th, 1921. F. A. Shaw."

Also the following the letter:

"June 18, 1921.

To Mr. L. D. Cook:

Under present circumstances and considering our monetary loss I beg leave to give you one week's notice of which this letter will serve.

As you know, we, under our new contract, have no place for you as according to your contract at the present time. I, as manager, however, hand you $32.75 back salary and expenses to Binghamton, leaving a balance of $431.75 due you, plus $45.00 expenses.

The company also agrees to send you in American funds per week until your past salary is paid. The balance of money loaned to the company by you to become due and payable at the termination of your contract with us, namely, the 23rd of August, 1921.

Witness. Richard LaSalle, for LaSalle Players."

Subject to what may be said as to the sufficiency of the plaintiff's affidavit under O. XIV., if the statements contained in it are true, the plaintiff apparently would be entitled to judgment for the amount sworn to, viz., $1,109, which is $32.75 less than the amount claimed on the writ, which does not take into account the payment of $32.75 paid plaintiff on account of salary and expenses and referred to in the above letter, and the Judge seems to have been of that opinion and he expressly finds "that the amount of Canadian money that the plaintiff had to part with on a given day to procure the $500 which he loaned to the defendant on that day is in the nature of a liquidated demand."

In passing it may be noted that there is no specific evidence what that amount was; the receipt shews that it was not Canadian money at all but American funds that was loaned and there is no specific evidence to shew the rate of exchange at the date of the judgment.

Notwithstanding the foregoing, judgment was not given for the amount sworn to, viz., $1,019, but for $862.09 made up as follows:—

N.S.

S.C.

COOK v. SHAW.

Mellish, J.

(1)	Balance due on salary	$431.75
(2)	Expenses	45.00
(3)	Exchange on above at 11%	56.34
(4)	Money loaned	479.00
	Total, less $150 paid on account	$862.09

The terms of this order are to my mind very strong evidence that the appearance was not entered merely for the purpose of delay and that the plaintiff's affidavit is not to be relied on as forming a basis upon which judgment should be entered. Taking items No. (1) and (2): according to plaintiff's affidavit there is $35.50 more due him on account of wages and expenses than admitted in LaSalle's letter, and allowed.

Taking item (3) there is in my opinion no evidence on which it can be said that 11% is the proper rate of exchange and the amount $56.34 is not 11% of the wages and expenses allowed. As to item (4) it is unjustified and contradicted by what appears to be clear evidence of the plaintiff and by the finding of the Judge. This item and the abandonment of exchange can only be justified on the assumption of the facts sworn to by defendant, viz.: that notwithstanding the receipt, American funds were not loaned, if indeed any funds were loaned to the defendant (and which facts would appear to raise proper issues for trial) or by the fact hinted at in LaSalle's letter above referred to, that payments have been made on account of this loan other than the $150 credited in the statement of claim. The defendant (Shaw) is apparently resident in Nova Scotia and the business in respect of which the action is brought seems to have been done largely at least out of the jurisdiction and without this defendant's knowledge.

I do not think it is competent for a plaintiff on an application of this kind to say "the affidavits on which I am moving may not shew the true facts of the case but I will take something less than I have sworn to—although it may be too little." The defendant is entitled to have the action tried on proper evidence when obvious issues are to be raised.

Defendant's solicitor objected that the affidavit of plaintiff was insufficient inasmuch as it did not comply with R. 1 (a) of O. 14 which requires the deponent who must be a "person who can swear positively to the facts" to make an affidavit "verifying the cause of action and the amount claimed (if any) and stating that in his belief there is no defence to the action."

The plaintiff's affidavit states that in his 'opinion' defendants have no defence to the action. I do not think the word "opinion" necessarily has the same meaning as the word "belief." I think the word "opinion" may be used as not implying all that would necessarily be meant if the word "belief" were used in the sense intended in this rule. If this be so we cannot, I think, say that the rule has been complied with. The word "belief" is I think more expressive of "confidence" than the word "opinion"; and when the deponent is required by the rule as a pre-requisite to make a specific declaration under oath "stating that in his belief there is no defence to the action" I think any departure therefrom must be regarded with suspicion.

The defendant should be admitted to defend and the appeal allowed. Costs here and below to be defendant's costs in the cause in any event. *Appeal dismissed with costs.*

DICKIE v. SPARE.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. December 24, 1921.

CONTRACTS (§ IID—185)—TO WORK FARM—SPECIAL CLAUSES—CONSTRUCTION.

An agreement for the lease of a farm on a crop-payment basis contained *inter alia* the following clauses.

11. It is further agreed that Party of the First Part shall deliver to the Party of the Second Part or pay the value of one third of all grain grown and threshed on said land, or one-third of the green feed which may be cut on the said land, except in the event of the Party of the First Part exercising his rights under the next succeeding clause; and the Party of the Second Part will stack all green feed where and as directed by the Party of the First Part.

13. It is also understood and agreed that all crops of the different nature, kind or quality grown on the said land shall be and remain at all times the property of the Party of the First Part until settlement of accounts between the parties on the termination of this contract, and in the absence of express agreement between the parties, the price per bushel to be allowed to the Party of the Second Part for grain grown on the said land shall be the current market price at the nearest shipping point to the said land on the day of threshing, and the Party of the Second Part shall be entitled to no portion of the straw.

Held that under these clauses the plaintiff had the right to choose one of two options, *i.e.*, either deliver the grain or retain it and pay for it. If the latter option was exercised clause 13 settled the method by which the price was determined which was that he should pay the market price at the nearest elevator as of the day upon which the grain was threshed, but held that there was nothing in the document fixing any specific time at which he should exercise this option except upon settlement of accounts at the termination of the agreement.

Alta.

App. Div.

DICKIE v. SPARE.

Hyndman, J.A.

APPEAL by defendant from the judgment of Ives, J., in an action on a contract under which defendant was to farm plaintiff's land. Varied.

H. W. McLean, for appellant; *A. B. Mackay,* for respondent.

The judgment of the Court was delivered by

HYNDMAN, J.A.:—The parties, who are farmers, entered into a written agreement dated April 26, 1920, which it is advisable to set out in full. It reads as follows:—

"Form of Agreement made this 26th day of April, 1920, between:—

W. C. Spare, of the City of Calgary, in the Province of Alberta, hereinafter called the Party of the First Part, and: George Dickie, of the City of Calgary, in the Province of Alberta, hereinafter called the Party of the Second Part:—

Whereas the Party of the First Part is the owner of the West Half Section 16, and North East Quarter 16, and South East Quarter of 21, all in Township 24, Range 28, West 4th Meridian; and the owner of horses, machinery and other necessary equipment for the farming of said land. And the Party of the Second Part has agreed to work the said lands on the terms hereinafter mentioned:

Now therefore this agreement witnesseth:—

1. That the Party of the Second Part agrees to farm the said lands in a good and husbandlike manner for the Party of the First Part, and to care for the said lands and premises until the First day of March, A.D. 1921.

2. The Party of the First Part agrees to allow the Party of the Second Part the use of sufficient horses, harness, tools and equipment to properly farm and work the said land, according to the needs of the various Seasons covered by this contract, and agreed to furnish such machinery, horses and equipment in a good and sufficient condition for the operation or working of same.

3. And the Party of the Second Part covenants and agrees on the termination of this contract to return the same to the Party of the First Part in the same or as good condition as when received by the Party of the Second Part, reasonable wear and tear excepted.

4. The Party of the First Part further agrees to supply all the seed grain of the various kinds to be used on the said farm, and all gopher poison to be used on said premises during the term of this contract.

5. And it is agreed that there is now on the said land: 60 acres summer fallow, more or less, 50 acres summer plowing,

more or less; 30 acres seeded in winter rye, more or less; 80 acres timothy sod, more or less, that can be plowed for 1920 crop, all on West ½ section 16, Tp. 24, Range 28, West 4th Merid. and that Party of the Second Part agrees to plow, disc and harrow any land as directed by Party of the first Part for cropping in 1921; and any lands so prepared in excess of the number of acres received prepared; shall be paid for by Party of the First Part as follows: $1.25 per acre for plowing, 50c. per acre double discing, 15c per acre harrowing or floating, and it is further agreed by and between the parties, that the Party of the Second Part shall seed the said ground according to the directions of the Party of the First Part, and that he shall be the sole judge of what portion shall be seeded to oats, barley, wheat, etc.

6. The Party of the second Part covenants and agrees to remove all loose stone from the cultivated land, or all land that may be sown by him to crop; to haul all manure that may accumulate from the work stock on the said land and properly spread same.

7. The Party of the Second Part agrees to keep all fences in repair around any land seeded to crop, and the Party of the First Part agrees to supply all material for such fences as may be needed, or for the repairing of existing fences under this clause.

8. The Party of the Second Part agrees to pay for all labour used by or in connection with said farm, and the board and keep of such men as he may employ, and to pay for all repairs to machinery, tools, or equipment used on the said land or received by him under this agreement, and it is agreed that all expenses in connection with the farming or operation of the said farm, or the sowing, harvesting, or threshing of the crop or products grown on the said land shall be borne by the Party of the Second Part, except as herein specifically set forth.

9. Party of the First Part agrees to furnish the feed for the work horses, and one cow supplied by him to the Party of the Second Part hereunder, up and until the crop of 1920 is fit to feed; after which same are to be fed from the undivided crop; and it is further agreed that Party of the First Part shall set aside 25 acres of land to be worked and harvested by Party of the Second Part for the feed of work horses used on said farm, and it is expressly understood by and between the parties hereto, that in the event of the Party of the Second Party not continuing the lease for the year 1921; that he will

Alta.

App. Div.

DICKIE v. SPARE.

Hyndman, J.A.

make no claim for any part of this feed grown for feeding the work stock.

And it is agreed that Party of the First Part shall furnish and run engine and separator at his own expense, and the Party of the Second Part shall furnish all help necessary to deliver grain to and from the machine. Party of the First Part agrees to furnish two thirds of the twine and Party of the Second Part one third; and it is further agreed that Party of the First Part shall receive all threshed straw grown on said land.

10. It is further agreed that Party of the First Part shall have the right from time to time to take back any of the horses or equipment furnished hereunder and to supply or substitute others so long as a sufficient supply of same is allowed the Party of the Second Part to carry on the work from time to time and according to the character of work and seasons during this contract.

11. It is further agreed that Party of the First Part shall deliver to the Party of the Second Part or pay the value of one third of all grain grown and threshed on said land, or one-third of the green feed which may be cut on the said land, except in the event of the Party of the First Part exercising his rights under the next succeeding clause; and the Party of the Second Part will stack all green feed where and as directed by the Party of the First Part.

12. The Party of the First Part shall have the right to order any of the grain grown on the said land to be cut by the Party of the Second Part as green feed, so long as not more than two-thirds of the amount of any particular kind of grain is so ordered to be cut.

13. It is also understood and agreed that all crops of the different nature, kind or quality grown on the said land shall be and remain at all time the property of the Party of the First Part until settlement of accounts between the parties on the termination of this contract, and in the absence of express agreement between the parties, the price per bushel to be allowed to the Party of the Second Part for grain grown on the said land shall be the current market price at the nearest shipping point to the said land on the day of threshing, and the Party of the Second Part shall be entitled to no portion of the straw.

14. This contract will not constitute the Party of the Second Part the agent of the Party of the First Part, and he

shall have no authority to pledge the credit of the Party of the First Part or bind him to any contract for the supplying of goods, labour, material or otherwise howsoever, but the Party of the Second Part is an independent contractor operating the farm and equipment of the Party of the First Part.

15. Party of the Second Part agrees to keep the land and premises above described in good repair, and that the Party of the First Part may enter and view the state of repairs.

16. Provided further that if the Party of the Second Part shall fail to observe any or all of the covenants or to work the land in accordance with this contract, the Party of the First Part may re-enter and re-take possession of the said land without hindrance or interruption on the part of the Party of the Second Part, and without any claim from the Party of the Second Part for work or labour performed hereunder, and for such purpose the Party of the Second Part attorns and becomes tenant to the Party of the First Part.

17. Party of the First Part agrees to furnish Party of the Second Part use of one milk cow; and it is further agreed that Party of the First Part furnish Party of the Second Part eggs necessary for his own use up to one-third of the eggs produced from chickens kept on the place.

In witness whereof the parties hereto have hereunto set their hand on the day and year first above mentioned.

Witness: Carrie Spare. Signed: W. C. Spare.
G. M. Dickie."

In consequence of this agreement plaintiff entered upon the land and remained there until November, 1920, leaving his hired man in charge until the first of March, 1921. The lands described comprise a section, 640 acres, but it is admitted that it was the intention that plaintiff would actually work and be entitled to the crop on 220 acres only and as to the remainder would be required to do plowing and cultivating on certain portions of it which was the reason for mentioning in the agreement "lands other than the 220 acres."

About May 5, 1920, a verbal arrangement was made between the parties whereby it was agreed that the plaintiff, in consideration of his plowing a certain 80 acres for the defendant should be allowed one third of the hay on another 80 acres and to stubble in oats on 64 acres of additional land from which he was to have one-third of the resulting crop. In connection with the latter grain and hay nothing was verbally agreed as to the method or time of division although its dis-

Alta.

App. Div.

DICKIE v. SPARE.

Hyndman, J.A.

position was apparently treated as falling within the terms of the written agreement. The trial Judge held that the hay could not be so treated and gave judgment in favour of the defendant's contention that the plaintiff's share is and always was there for him to take when he saw fit, and I am of opinion that the judgment in that respect should not be disturbed.

The operations of the season produced the following yields of threshed grain, viz.:—4308 bus. of oats, 1226½ bus. of barley, 378½ bus. of rye.

For his one-third share of this grain the plaintiff claimed $1808.83 on the basis that it might or should have been sold at the current market price as of the date of threshing as follows:—Oats, at 75cts, $3,231; barley, at 1.25, $1,533.12; rye, at 1.75, $662.38—total, $5,426.50. Plaintiff's share, 1/3, $1,808.83.

The trial Judge after considering the evidence held that plaintiff was entitled to be paid $1,493 in respect thereof.

The serious point arising in this appeal is, what interpretation should be put upon clauses 11 and 13 of the main agreement with respect to the rights of the parties with respect to the division or disposition of the grain product. The conclusion to which I have come makes it unnecessary to differentiate between the grain covered by both written and verbal agreements.

A great deal was said in argument on the nomenclature of the document whether it was a lease or a working agreement. I am quite unable to see what possible difference it can make whether it was one or the other. In fact I think it might readily be regarded as a combination of both.

From one point of view undoubtedly, the plaintiff had a certain interest in, or lease of the land and at least, a right of possession, as well as being under obligation to perform certain acts and things relative to the working of the land and looking after the live stock and implements on behalf of the defendant. But I feel satisfied it cannot be said that he was a "hired man" in the ordinary sense, but rather, was an independent contractor and this notwithstanding the clause in the contract, which says that this is what he was. The provisions of the document must be considered and interpreted in the ordinary way, whatever we may like to call their relationship.

The trial Judge decided that the defendant was liable to the plaintiff for the value or price of the plaintiff's share of the grain as of the date of threshing and was not entitled to satisfy

the plaintiff by delivering to him the one-third share in specie to which he was entitled.

Apart from the terms of the agreement I can find no evidence that defendant at any time agreed to keep the grain and pay for it in cash instead of delivering it in specie and consequently the right of the parties must be deduced from the terms of the instrument itself.

The two clauses 11 and 13 must be read together (see 10 Hals. 438 par. 775). The wording of 13 is clear and unambiguous and it appears to me means that the crops grown on the land in question shall remain the property of the defendant *until settlement of accounts upon the termination of the contract, i.e.*, March 1, 1921. Then reverting to clause 11 we find that the defendant *shall deliver to the plaintiff or pay the value* of one-third of all grain grown and threshed on said land.

This can only mean, in my view of it, that the plaintiff has the right to choose one of two options, *i.e.*, either deliver the grain or retain it and pay for it. If the latter option is exercised then para. 13 settles the method by which the price is determined which is that he shall pay the market price at the local elevator as of the day upon which the grain is threshed; but I can find nothing in the document fixing any specific time at which he shall exercise this option, except upon settlement of accounts at the termination of the agreement, viz.: the first of March. There does not seem to me to be anything irreconcilable or repugnant in the two paragraphs.

"If there are two clauses or parts of a deed repugnant to each other the first will be received and the latter rejected, unless there is some special reason to the contrary. But this is an expedient to which the court very reluctantly has recourse and never until it has exhausted every other means in its power to reconcile apparent inconsistencies." 10 Hals. p. 456, par. 799.

The term of the arrangement last referred to seems entirely consistent, reasonable and businesslike for it must be appreciated that many things had to be done besides and after harvesting the crop before their relationship could be dissolved. It is easily conceivable that on the winding up of their affairs it might be found that the defendant owed more than his share of the crop amounted to—or at least have nothing coming to him. Of course it was most unfortunate that the price of grain fell between the date of threshing and the following

Alta.

App. Div.

DICKIE v. SPARE.

Hyndman, J.A.

March, but I venture to say that so great a spread was not anticipated by the parties. In any event it was an advantage which the defendant secured for himself when making the agreement to which exception cannot properly be taken. That was a matter of arrangement at the time. Parties are expected to look to their own interests in advance, and, whereas in this case future conditions over which neither party had any control, worked to the disadvantage of the plaintiff, I cannot see upon what grounds he can be heard to effectively complain. The defendant, as I understand it, says he still has the plaintiff's third share for delivery to him. No demand for it of course has been made as such would be inconsistent with plaintiff's present claim. He is entitled to delivery at any time on demand after first paying the amount of his indebtedness.

The defendant also appeals against the award of $50 damages to the plaintiff in respect of plaintiff's negligence in not having the threshing machine in proper condition when the plaintiff had completed his preparations for the work. The language of the trial Judge on this part is as follows:—

"For damages resulting from the condition of the threshing outfit $50.00, not because there was any liability to warrant the condition of the outfit on the part of the defendant but because he notified Dickie to prepare for threshing with a certain crew and then his machine was not in a condition for at least a day, to take care of the labour of that crew and that was wasted through no fault of the plaintiff, but because of the condition of the defendant's machine, although that condition may be usual to threshing machines and quite reasonable I fix that at $50.00."

The evidence on this point is not very clear or satisfactory, but the trial Judge having seen and heard the witnesses I do not think his finding should be disturbed.

As to the hay, the Judgment should stand, the trial Judge having found that the plaintiff is entitled to one-third thereof and at liberty to take it when it pleases him to do so.

In my opinion, the appeal should be allowed insofar as the judgment places upon the defendant the obligation to keep and pay for the grain crops instead of allowing the option of either purchasing or delivering in specie.

The judgment should, therefore, be that the plaintiff on payment or tender of the amount due by him, less the damages allowed him shall, on demand, been entitled to delivery to him of one-third share of the different kinds of grain in question.

It is possible that owing to the changed conditions as to value of the produce the plaintiff might not consider it in his interest to make payment to the defendant. I think it advisable, therefore, that if, at the expiration of 30 days from the entry of judgment, he fails to satisfy the defendant's counterclaim the defendant should be at liberty to apply to a Judge in Chambers for directions as to the disposition of the grain or if ordered, sold, then the proceeds thereof, and if necessary or advisable to appoint a receiver of the property in question.

I agree with the trial Judge that this is one of those cases which should never have come into Court but have been settled by mutual arrangement. It seems too bad that when all legal expenses have been paid there will be very little, if anything, left for either party.

The defendant having won on the principal item in dispute would in the ordinary case be entitled to costs. I would, therefore, in the action, apply rules 27 and 33, as to costs, and on the appeal, allow costs on the first column only.

There should be judgment accordingly.

DENTON v. GOODMAN.

Alberta Supreme Court, Simmons, J. December 23, 1921.

PRINCIPAL AND AGENT (§ IIC—20)—OWNER OF LAND LISTING IT FOR SALE WITH AGENT—AUTHORITY OF AGENT TO BRING IN SIGNED AGREEMENTS—FRAUD OF AGENT—LIABILITY OF OWNER—PURCHASER ASSUMING AGENT'S AUTHORITY TO RECEIVE DEFERRED PAYMENTS—THEFT BY AGENT—LIABILITY OF PURCHASER TO OWNER.

An owner of land who places an agent, with whom he has listed land for sale, in a position to commit a fraud, is the one who must suffer where both he and the innocent purchaser have been defrauded by the agent, but a purchaser is not entitled to assume that because the agent has apparent authority to make a binding contract for the sale of land that he has authority to receive the deferred payments on the purchase, and where the agent has received these moneys without authority and fraudulently converted them to his own use the purchaser must reimburse the owner.

ACTION for specific performance of an agreement for the sale and purchase of land, or in default thereof for foreclosure of the purchaser's interest and for a vendor's lien for the balance of the purchase price.

J. E. A. Macleod, K.C., for plaintiff.

S. B. Hillocks, for defendants.

SIMMONS, J.:—The plaintiffs were the owners of a subdivision in East Calgary, known as Bow Park. The plaintiffs resided in England and were represented in Calgary, by their

Alta.

S.C.

DENTON v. GOODMAN.

Simmons, J.

son, Frank G. Denton, and in his absence by Francis Pritchard. One, Lowndes, a real estate broker in Calgary, obtained from the plaintiffs' agent a listing of parcels of lots in this subdivision and authority to obtain purchasers, the plaintiffs paying him a commission of 2½% on the purchase price and he made a number of sales for the plaintiffs. Lowndes was in the habit of bringing in agreements already signed by the prospective purchasers and paying the plaintiffs' agent a deposit on same covering the period in which the agreements were transmitted to England by the owners. The sales, which are the subject matter of this action, were conducted this way and consist of Lots 7 and 8 and 9 and 10, sold by A. M. Denton and William Denton respectively under two agreements of November 24, 1911. These agreements purport to be made with one, J. M. Goodman, as purchaser, of the city of Calgary, in the Province of Alberta, gentleman, and the purchase price is $750 per lot, with a cash payment of $500 on each agreement, totalling $1,000 on the 4 lots. The evidence discloses that the real estate agent, Lowndes, committed a fraud on both the vendors and the purchaser and that John M. Goodman was, in reality, a fictitious person. The real purchaser of the lots was one, Conrad Spielman, a German, resident in East Calgary, who is somewhat illiterate and who spoke very indifferent English. Lowndes delivered to Spielman an agreement purporting to be made by John H. Goodman, for the 4 lots at the purchase price of $3,400 payable $1,500 in cash and the balance in deferred payments. Lowndes informed Goodman that the owners resided in England and that he had authority to act for them. He did not, however, pay over to the agent of the vendors the whole sum of $1,500 cash but paid only the sum of $1,000, which represented the cash price provided for in the alleged agreement with John M. Goodman. From this it will be seen that the agent by putting over this scheme concealed the real purchase price and obtained $400 more than the purchase price of the lots. But the fraud of the agent, Lowndes, did not end here. He collected the deferred payments from Spielman but he never paid these over to the vendors or their agents, in other words, he stole the same or fraudulently converted them to his own use. The vendors had no knowledge of the fraud until after all the moneys had been paid over to Lowndes.

In 1913 Spielman caused a caveat to be filed on the land. The plaintiffs now bring action against John M. Goodman for specific performance of his agreement to pay the balance of the purchase price of $2,000 and interest and in default thereof, foreclosure of the interest of the said Goodman. The plain-

tiffs also claim a vendors' lien for the balance of the purchase price.

The defendant, Spielman, has erected on the said 4 lots 4 cottages of the present value of about $1,000 each. The defendant, Spielman, alleges that Lowndes was the agent of the plaintiffs with authority to make a binding contract and that the defendant was illiterate and unable to read and that he signed the said agreement relying upon the representation of the said agent. The defendant alleges that the payments made by him to Lowndes were made to Lowndes as agent for the plaintiffs.

I am inclined to think there never was any real agreement to purchase these lands by any person. It is quite obvious that John M. Goodman and John H. Goodman were fictitious persons created by Lowndes for the purpose of deceiving both the plaintiffs and the defendant, Spielman. The plaintiffs, however, allege an agreement with Goodman and set up that the defendant, Spielman, has a caveat on the land and the defendant does not, in fact, deny that there was an agreement but he alleges that the real agreement was with the plaintiffs, owners, and that Lowndes was their agent. In view of this, I do not think I would be justified in finding against the pleadings of both parties that there was no agreement to purchase the said land. In the result then I have to determine which of the two innocent parties shall suffer the loss on account of the dishonesty of the agent, Lowndes.

There is a sum of $400 increase in the purchase price, the sum of $2,000 paid to Lowndes by Spielman and the value of the 4 houses placed upon the lots by Spielman at stake and at issue. In my view the plaintiffs are liable for the additional $500 for the purchase price fraudulently contracted for and received by Lowndes. The authorities indicate that the party who places another in a position to commit a fraud is the one primarily to suffer where two innocent parties have been defrauded. While Lowndes had no authority to make a binding contract, he did have authority to solicit purchasers and to receive the initial cash payment. He also had authority to bring in agreements already signed and it was through this later fact, chiefly, that he was enabled to put over the fraud on both parties. In regard to the deferred payments which unfortunately Spielman made to Lowndes, I do not think the same principle should apply. The sale was concluded when the agreements were signed and the cash payment made and I have held the plaintiffs liable for the fraud of their agent in regard to that transaction. The deferred payments, however, were transactions concerned with the carrying out of the agreement at a subsequent date and I do not

Imp. P.C.

think the defendant was entitled to assume that the agent, Lowndes had authority to receive these moneys on account of any vendors and in the result he must be held responsible for his own loss in that regard. The plaintiffs' purchase price is reduced by the sum of $500 and judgment is for the plaintiff for the sum of $1,500, the balance of the purchase price and interest at the rate of 8% per annum and costs.

CANADA CEMENT Co. Ltd. v. LA VILLE DE MONTREAL EST.

Judicial Committee of the Privy Council, Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury and Lord Carson. December 20, 1921.

COURTS (§ IIA—160)—JURISDICTION—CIRCUIT COURT (QUE.)—MUNICIPAL TAXES—FINALITY OF DECISION.

The Circuit Court of Quebec has jurisdiction in proceedings taken under sec. 5755 of the Cities' and Towns' Act for the recovery of municipal taxes within the district regardless of the amount involved, and its judgment is final and conclusive there being no right of appeal given either by sec. 52 of the Code of Civil Procedure or by Quebec Statutes 1920, ch. 79.

[*Canada Cement Co.* v. *Montreal East* (1921), 31 Que. K.B. 236, affirmed.]

The judgment of the Board was delivered by

LORD BUCKMASTER:—By sec. 5755 of the Cities' and Towns' Act of Quebec, 1909, it is provided that:—

"The payment of municipal taxes may be also claimed by an action brought in the name of the corporation, before the Magistrate's Court, or the Circuit Court for the county or district, or before the Mayor, or two or more councillors, acting *ex officio* as justices of the peace, or before the Recorder's Court if there be one."

Their Lordships are unaware of any statutory definition of a Circuit Court for the county or district and none has been called to their attention; but they have been definitely informed that a Circuit Court for the district—or, as it is generally known, a District Court—is the Court sitting at the chief place in the county, and the other Courts are called the County Courts.

The respondents, who are the Corporation for the town of Montreal East, availed themselves of the provision of the section above quoted and took proceedings against the appellants, the Canada Cement Co., in the Circuit Court, for the recovery of taxes which had been imposed upon them to the extent of $60,253. On January 5, 1921, Archambault, J. sitting in the Circuit Court, gave judgment for the respondents as against

Imp.

P.C.

CANADA CEMENT CO. v. LA VILLE DE MONTREAL EST.

Lord Buckmaster.

the appellants for the amount claimed. From this judgment the appellants appealed to the Court of King's Bench for the Province of Quebec (1921), 31 Que. K.B. 236, but on a motion made to dismiss the appeal for incompetency the Court held, by a majority of three Judges to two, that the judgment of the Circuit Court was final and was not susceptible of appeal. From that judgment the present appeal has been brought.

The whole question that is raised is covered by determining whether or no the judgment of the Circuit Court at the chief place of its district was final. The respondents contend that it is, on three distinct grounds, the first being that, as the jurisdiction of the Circuit Court owed its origin to the Cities' and Towns' Act, 1909, all rights of appeal must be found in that statute, and none are thereby conferred. Their Lordships do not think that this contention is sound. The power that was given to take proceedings before the different Courts mentioned in sec. 5755 enabled those proceedings to be taken as part of the ordinary business of the Courts mentioned, and the rights of appeal that exist from judgments given by those Courts are applicable to such proceedings. The case of the *Postmaster-General* v. *National Telephone Company*, [1913] A.C. 546, is an illustration of this principle. The statement of Dorion, J., in *Grand Mère* v. *Balcer* (1913), 45 Que. S.C. 109, at 121, where he points out that there is a right of appeal under sec. 5533 where penalties can be recovered in the Civil Courts, is doubtless based upon this view, and their Lordships think it correct. The judgment of Lemieux, C.J. in the same case, where he says that no appeal lies under sec. 5755, does not appear necessarily to depend upon the absence of appeal provisions in the statute, but may be due to other considerations.

The second and by far the most important argument urged by the respondents is that the Circuit Court is created and governed by the provisions of the Code of Civil Procedure, and that in order to ascertain if any appeal exists in such case as the present, it is essential to ascertain what are the powers conferred by the Code, and, according to their contention, by these no right of appeal exists. Section 54 of the Code establishes the Circuit Court and defines and limits its jurisdiction. It is in the following terms:—

"54. The Circuit Court has ultimate jurisdiction to the exclusion of the Superior Court:—

"(1) In all suits wherein the sum claimed or the value of the thing demanded is less than one hundred dollars, saving the exceptions contained in the following Article and such cases as fall exclusively within the jurisdiction of the Exchequer Court

Imp.
P.C.
CANADA CEMENT CO. v. LA VILLE DE MONTREAL EST.
Lord Buckmaster.

of Canada, and suits in matters of petition of right; (2) In all suits for school-taxes or school-fees, and all suits concerning assessments for the building and repairing of churches, parsonages, and churchyards, whatever may be the amount of such suits."

From this it will be seen that, so far as this section is concerned the District Court as part of the Circuit Court has no jurisdiction in cases of $100 and upwards excepting in cases relating to school-taxes, school-fees, and other matters specifically mentioned in sub-sec. (2). With regard to both branches of the section, its jurisdiction is ultimate and complete. The County Court—that is, a Court sitting elsewhere than at the chief place of the district—has, however, in addition to the jurisdiction conferred upon it by sec. 54, a further jurisdiction between $100 and $200, conferred upon it by sec. 55, but this is subject to appeal. It also has jurisdiction with regard to matters specified in sub-sec. (2) of sec. 55. There is, therefore, so far as these sections are concerned, no power whatever to appeal from any judgment of the District Court.

Section 52 provides for the Court to which the appeals lie. The first three sub-clauses, which are all that are material, are as follows:—

"52. An appeal lies to the Court of Review:— (1) From every final judgment of the Superior Court or of the Circuit Court, susceptible of appeal to the Court of King's Bench; (2) From any final judgment of the Superior Court in suits in which the sum claimed or the value of the thing demanded is less than five hundred dollars; (3) From any final judgment of the Circuit Court in which the sum claimed or the value of the thing demanded amounts to or exceeds one hundred dollars except in suits for the recovery of assessments for schools or school-houses, or for monthly contributions to schools, and in suits for the building and repairing of churches, parsonages, or churchyards."

Sub-section (1) relates to the appeal given in certain named cases by sec. 44. Sub-section (2) has nothing to do with the present dispute. The right to appeal, if it exists, must be found in sub-sec. (3). The appellants contend that the power there conferred is adequate, as it includes any final judgment of the Circuit Court exceeding $100. But it must be remembered that under this Code no judgment of the District Court could be given in any matter exceeding $100 excepting the matters specified in sub-sec. (2) of sec. 54, and they are expressly excluded. Any final judgment of the Circuit Court referred to in sec. 52 is, in their Lordships' opinion, a judgment contemplated by

Imp.

P.C.

CANADA CEMENT CO. v. LA VILLE DE MONTREAL EST.

Lord Buckmaster.

the Code of Civil Procedure itself, for their attention has not been directed to any statute under which further and more extended jurisdiction was conferred upon the Court at the time of the passing of the Code. The consequence is that the right to recover the taxes has been conferred upon the municipality with regard to a Court from whose judgment no right of appeal exists, and it cannot, in their opinion be introduced by giving the words in sub-sec. (3) of sec. 52, a meaning which would only be apt if they were considered in relation to an extended jurisdiction not provided for by the Code in which the section finds its place.

There is a further point also raised by the respondents to which, in their Lordships' opinion, no sufficient answer has been found. By the Statutes of Quebec, 1920, ch. 79, the whole of the sections of the Code of Civil Procedure in which the provisions relating to the Circuit Court and the rights of appeal find place are declared to be replaced by other provisions, and so far as the Circuit Court is concerned the provisions as to appeal drop out. Section 42, however, provides that the Court of King's Bench shall have jurisdiction in all matters from all Courts wherefrom an appeal by law lies, and sec. 64 provides:—

"Unless otherwise provided by this Act, all cases, matters or things which, at the time of its coming into force, were within the competence of the Court of Review, shall be within the competence of the Court of King's Bench, sitting in appeal."

Now this appeal had not been brought when the statute was passed, although the proceedings before the Circuit Court had been instituted. Consequently the statutes giving whatever right of appeal may have existed were replaced by sections which gave none, and sec. 64 of the Act, which provided that matters within the competence of the Court of Review should be subject to the Court of King's Bench, must be regarded as qualified by the provision that the powers of the Court of Review with regard to the Circuit Court had been taken away, and consequentlly to that extent the statute "had otherwise provided."

For these reasons their Lordships think that the appeal fails and must be dismissed with costs. The petition to quash the appeal as incompetent lodged by the respondents, which was before the Board on July 27, 1921, and was ordered to stand over until the hearing of the appeal, will be formally dismissed, and the appellants will be entitled to set off their costs in relation to it against the costs which they are now ordered to pay Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Can.

S.C.

KINNEY v. FISHER.

Supreme Court of Canada, Idington, Duff, Anglin, Mignault, JJ., and Cassels, J., ad hoc. November 21, 1921.

LIBEL AND SLANDER (§ IIE—50)—LETTER CLAIMING WAGES—LETTER IN RETURN CONTAINING ALLEGED LIBEL—PRIVILEGE—MALICE—NEW TRIAL—RES JUDICATA.

The plaintiff who had been casually employed by the defendant on his ranch, sent in his account for wages and in reply the defendant wrote him the following letter:—

"Dear Sir:—Replying to your request to pay your balance of wages I would say outside of errors in your account which you have failed to credit me with meals furnished you and have charged for more time than you worked particularly on the last day, I have a counter-claim against you for $25 due me from you on your wife's account being the amount of Mrs. McDonald's lost cheque, in the felonious conversion of which and the cashing of same by falsely impersonating Mrs. McDonald at the Bank I have reason to believe and do believe your wife took part.

This of course would leave you in debt to me which balance I hereby demand you pay forthwith to me.

Yours, truly, W. A. Kinney.

P.S.—Mrs. McDonald has transferred all her rights to me in the cheque in question.

The plaintiff brought action claiming damages for libel; on the trial defendant failed to prove the criminal charge and also his rights in the cheque, but relied upon his plea that the letter was privileged. There had been a former trial of the action in which a judgment for the plaintiff had been set aside by the full Court, which held that the whole letter of defendant was privileged and ordered a new trial to have the question of malice submitted to the jury. On the second trial the plaintiff's action was dismissed the case being withdrawn from the jury and the full Court again ordered a new trial. The Court held that whatever privilege might have attached to the defendant's letter in so far as it was a reply to plaintff's demand for payment of his wages, did not extend to the charge of felonious misappropriation of a cheque by the plaintiff which it contained, there being no evidence in the record to establish any interest in the defendant in making such a charge.

Held also that as the judgment appealed from ordered a new trial without restriction, and as the evidence taken on the former trial was not before the Court the question of privilege was not *res judicata* by the decision of the former Court. Held also that on the evidence there was sufficient evidence of express malice to entitle the plaintiff to have it passed on by a jury.

APPEAL by defendant from the judgment of the Supreme Court of Nova Scotia (1920), 51 D.L.R. 396, 53 N.S.R. 406, setting aside a judgment for the defendant and ordering a new trial. Affirmed.

The facts and circumstances are fully set out in the judgments given and in the headnote. The questions to be determined were: First, was the decision of the Court, below (1920), 51 D.L.R. 396, 53 N.S.R. 406, after the first trial conclusive as against the parties as to the question of privilege? Secondly,

Can.

S.C.

KINNEY v. FISHER.

Idington, J.

if that question is not *res judicata* was the whole letter really privileged? Thirdly, if it was privileged was there evidence of malice to be submitted to the jury?

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

L. A. Lovett, K.C., for respondent.

IDINGTON, J.:—This is an appeal from a judgment of the Supreme Court of Nova Scotia (1920), 51 D.L.R. 396, 53 N.S.R. 406, directing a new trial in an action for libel founded on the following letter written by appellant to the respondent's husband:—

"Mr. Vince Fisher:

Dear Sir:—Replying to your request to pay your balance of wages I would say outside of errors in your acct. which you have failed to credit to me with meals furnished you and have charged for more time than you worked particularly on the last day, I have a counter claim against you for $25 due me from you on your wife's account being the amount of Mrs. McDonald's lost cheque, in the felonious conversion of which and the cashing of same by falsely impersonating Mrs. McDonald at the bank I have reason to believe and do believe your wife took part.

This of course would leave you in debt to me which balance I hereby demand you pay forthwith to me.

Yours truly, W. A. Kinney.

P.S.—Mrs. McDonald has transferred all her rights to me in the cheque in question."

This was in reply to the following letter of respondent's husband:—

"Mr. Kinney:

Dear Sir:—Please find enclosed my bill and also time of labour. Please settle at $2.00 a day for 10 days. Vincent Fisher."

The ground upon which the Court below proceeded was that there was evidence before the trial Judge of malice on the part of appellant sufficient to entitle the respondent to have her case submitted to the jury instead of being dismissed as it was at the close of the respondent's case.

I agree with the Appellate Court below (1920), 51 D.L.R. 396, 53 N.S.R. 406, in the result reached, but cannot agree with all the reasons assigned.

There is another ground on which I hold the trial Judge erred, and which the reasons of the Appellate Court seem to countenance, and that was in holding the publication of such a libel was privileged by reason of the occasion therefor being so.

This probably arose from the fact that there had been a prior

Can.

S.C.

KINNEY v. FISHER.

Idington, J.

trial of same cause of action in which a verdict had been rendered in favour of the plaintiff (now respondent) and judgment therein had been set aside on the ground that the publication was privileged by reason of the occasion giving rise thereto.

The new trial granted therein was unrestricted and in no *res judicata* sense was plaintiff, or the trial Judge, bound by such ruling of the Court.

In the sense that such a ruling as matter of precedent in the Court above bound the Judge if the facts presented were exactly the same as on the first trial he may have been bound by such ruling and to leave the plaintiff if she so desired to appeal therefrom.

In like manner the Appellate Court may have felt bound.

If that Court of Appeal from the first trial holding as it did in fact, had desired to render its judgment conclusive, it might have so directed, and restricted the second trial to a single issue and thus forced appellant to come here for relief.

In the absence of such direction the whole case is open to us now and, assuming the evidence on the first trial exactly the same as on the trial now in question there was such obvious error that it is I conceive our duty in the interest of the administration of justice to make clear that such a holding not only is no bar to the respondent now, but also that she is entitled to our ruling upon the point in dismissing this appeal.

And all the more so by reason of the Appellate Court, 51 D.L.R. 396, 53 N.S.R. 406, holding that the statements of alleged fact which appear in the alleged libel must be taken as evidence of the occasion being privileged.

I, with respect, cannot assent to such a proposition of law.

To maintain that because a plaintiff in a libel suit driven by necessity of law to put in evidence the whole document is bound by all the alleged facts therein is, I submit, quite untenable.

If that were the case there would be no necessity for a libeller to prove the truth of his accusation.

As a means of interpreting the alleged libel they may be valuable, but not as proof of existence of a privileged occasion.

To bring any defendant within a privilege claimed by him under the law he must prove the facts upon and by virtue of which he is entitled to make such claim unless they have already been proven in the case.

It is not what such a defendant says or believes that constitutes the privilege, but the proven facts and circumstances which if sufficient constitute in law the privilege.

It sometimes happens as, for example, in the common case of

a man asking another as to the integrity or fidelity of a former servant and his answer is given fairly that no further evidence is needed inasmuch as the circumstances involved in the proven facts constitute the privilege.

In this case there was nothing resembling that condition of things.

And the excuse that the appellant might believe what he related does not alone constitute the privilege.

See the judgments of the several able Judges in the case of *Hebditch* v. *MacIlwaine*, [1894] 2 Q.B. 54, dealing with the case of belief as an element which proved nothing as part of what could constitute the occasion a privileged one.

And in another aspect of this phase of the question as to proof needed, see the case of *London Association for the Protection of Trade* v. *Greenlands*, [1916] 2 A.C. 15, 85 L.J. (K.B.) 698, and especially the following sentence on p. 26:

"I do not think that *Macintosh* v. *Dun*, ([1908] A.C. 390), affects the consideration of this case, beyond showing that in determining what is a privileged occasion all the circumstances under which the publication is made need to be considered for the purpose of determining whether privilege attaches or no."

That sentence expresses what I think must be observed in this case, and the said case of *Macintosh* v. *Dun*, [1908] A.C. 390, 77 L.J. (P.C.) 113, is worth considering in the same connection.

When we try to find out those circumstances we cannot accept as proven all the appellant imagines and utters unless and until he has proven same or what he alleges is admitted as fact which is not the case by filing as of necessity the libel as a whole.

That is, however, evidence against him and somewhat cogent that there never was a basis for supposing that the man addressed was at all concerned in the story put forward as a means of answering an honest debt by way of counterclaim, which is the only matter in which they had a common interest.

According to what he relates the cheque belonged first to Mrs. McDonald and then possibly to the bank.

It was no concern of his unless and until he had proven the postscript allegation of his that he had acquired her rights. No evidence being given on that point and his allegation being unproven, there remains no possibility of his claiming the occasion as privileged until he does, and proof thereof would possibly destroy his pretensions.

And when he has proven, if ever, that fact, I fail to see how he could, without a good deal more, come near establishing a

Can.

S.C.

KINNEY v. FISHER.

Duff, J.

counterclaim resting thereon as against the husband of respondent.

Assuming the law of Nova Scotia as stated by counsel for respondent and not denied by appellant's counsel as to the liability of the husband for a wife's torts, the foundation for the privilege claimed is far from being established.

And the fact of his pleading justification is one open to very serious and grave remarks even if withdrawn, which is stated by Court and counsel for appellant.

So far as appears in the case before us it stands there yet.

In this connection a perusal of the opinion of Odgers on Libel and Slander, at p. 538, is worth while for those concerned.

There is abundant evidence, in the case as it stands, of malice which entitled the respondent to the opinion of the jury even if there had been proven a case of privilege which I hold there was not.

The appeal should be dismissed with costs.

DUFF, J.:—Two questions arise. And first was the occasion privileged? This question was passed upon by the full Court when ordering a new trial. It was then held, and this was the basis of the Court's judgment, that the occasion was privileged. It is not suggested that the pertinent evidence presented at the second trial differs in any relevant way from the evidence presented at the first trial. The full Court proceeded upon the assumption that it did not and that may fairly be presumed to know the grounds of its own previous decision. The former decision was therefore binding upon the full Court and in my judgment it is conclusive as between the parties in this Court also. I had occasion to discuss the effect of the decisions of a Court of Appeal in making an order directing a new trial based upon definite conclusions of law and fact in *Western Canada Power Co.* v. *Bergklint* (1916), 34 D.L.R. 467, at p. 477, 54 Can. S.C.R. 285 reversing 24 D.L.R. 565, 22 B.C.R. 241. I cite the passage:—

"There is some authority indicating that where a Court of appeal in granting a new trial decides a substantive question in the litigation, that question, for the purposes of that litigation, is to be taken to have been conclusively determined as between the parties. I refer without further discussion to the observations of Lord Macnaghten in *Badar Bee* v. *Habib Merican Noordin*, [1909] A.C. 615 at p. 623, and to their Lordships' decision in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*, 11 Ind. App. 37 (see especially p. 41 as to the effect of determinations in interlocutory judgments upon the rights of parties in the suits in which the judgments are given). It seems quite

clear that for this purpose we are not confined to the formal judgment; *Kali Krishna Tagore* v. *Secretary of State for India*, 15 Ind. App. 186 at 192, and *Petherpermal Chetty* v. *Mumandi Servai*, 35 Ind. App. 102, at 108."

I think the view here tentatively put forward is the sound view of the effect of a decision of the character under discussion.

There remains the question whether there was sufficient evidence of express malice to support the verdict of the jury. The case, on this branch of it, is very close to the line. On the whole I prefer the view of Harris, C.J., and Mellish, J., 51 D.L.R. 396, 53 N.S.R. 406, and in consequence my conclusion is that the action should be dismissed.

ANGLIN, J.:—The law governing occasions of qualified privilege in actions for libel, as to the respective functions of the Judge and the jury in dealing with the issue raised by such a defence and as to the nature and degree of evidence of express malice relied on to destroy the privilege which may properly be submitted to the jury, has been so fully reviewed by the House of Lords and the authorities so exhaustively discussed in the recent case of *Adam* v. *Ward*, [1917] A.C. 309, 86 L.J. (K.B.) 849, that it is no longer necessary to look to earlier reported decisions and a re-statement of the principles established by them is uncalled for.

In my opinion whatever privilege may have attached to the defendant's letter in so far as it was a reply to the plaintiff's reiterated demand for payment of his wages did not extend to the charge of felonious misappropriation of a cheque by the plaintiff which it contained. There is an utter absence of evidence in the record before us to establish any interest of the defendant in making such a charge. If an assignment of Mrs. McDonald's rights in regard to the cheque would have given him such an interest, the fact of such assignment is not proved. With respect, I cannot accept the view of Ritchie, E.J., that the libellous letter, because put in evidence on behalf of the plaintiff to prove the libel and its publication, affords evidence against him of all the facts which it states. The plaintiff was obliged to put in the whole document. That was the defendant's right.

We do not know on what evidence the Supreme Court of Nova Scotia *en banc*, 51 D.L.R. 396, 53 N.S.R. 406, when dealing with the record of a former trial held that the privilege of the occasion on which the letter complained of was written extended to the libellous portion of it. It may be that if the same evidence was again before him the Chief Justice, who presided at the second trial would properly have held himself bound by

B.C.
C.A.
GREENIZEN v. TWIGG.

the ruling of the full Court. Indeed the full Court itself might have been so bound. But the evidence given at the former trial is not before us. We have no means of knowing whether it was the same as that given at the second trial. The order of the full Court on the appeal from the judgment at the first trial directed a new trial of the whole case. It was not limited to the question of malice but left open the entire issue raised by the defence of privilege. We therefore must deal with the evidence now before us and determine whether it discloses such an interest in the defendant as would entitle him to claim qualified privilege for the libellous statement complained of made when he was replying to the demand of the plaintiff's husband for payment of his wages. That it does not do so I am quite satisfied.

But if the privilege of the occasion on which the defendant's letter was written extended to the libellous matter complained of I should be disposed to agree with the view which prevailed in the Court *en banc* that the language in which it was couched and the subsequent incident indicative of persistence by the defendant in the accusation against the plaintiff afforded some evidence of actual malice which should have been left to the jury.

MIGNAULT, J.:—I would dismiss this appeal for the reasons stated by Ritchie, E.J., in the Appellate Courts.

CASSELS, J.:—I concur with Anglin, J.

Appeal dismissed.

GREENIZEN v. TWIGG.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. October 14, 1921.

CONTRACTS (§ VC—402)—SALE OF LAND—SECRET PROFIT ON SALE—RESCISSION ON ACCOUNT OF FRAUD—PROPERTY SUB-DIVIDED AND SUBSTANTIAL INTEREST GIVEN TO GOVERNMENT—MORTGAGE FOR PURCHASE PRICE — FORECLOSURE — RIGHTS AND LIABILITIES OF PARTIES.

In an action for foreclosure of a mortgage given for the balance of the purchase price of land, purchased by a syndicate and afterwards turned over to a joint stock company which subsequently divided the lands into townsite blocks, the Court held that the fact that the plaintiff had colluded with one of the members of the syndicate whereby such member was enabled to obtain a secret profit of $25 per acre was not sufficient ground on which to grant rescission of the contract because the vendor had parted with the land, and the vendee had changed its character by sub-dividing it into townsite lots, and as a consequence had given the government a substantial interest in it. Judgment for foreclosure should be directed, but the sum of $25 per acre as damages for deceit should be set off against the mortgage moneys.

[See Annotation, Rescission of contract for fraud and damages for deceit, 32 D.L.R. 216.]

B.C.

C.A.

GREENIZEN v. TWIGG.

Macdonald, C.J.A.

APPEAL by the plaintiff from the judgment of Clement, J., May 17, 1921. Allowed in part.

W. J. Taylor, K.C., and *J. R. Green*, for appellant.

H. A. Maclean, K.C., and *J. B. Clearihue* for McGregor Estate.

E. C. Mayers and *H. G. S. Heisterman*, for respondents, Twigg et al.

MACDONALD, C.J.A.:—The action is for foreclosure of a mortgage and upon a guarantee of payment thereof.

The plaintiffs in the year 1912 sold a tract of land containing upwards of 500 acres, situate on the line of the Grand Trunk Pacific Railway at the price of $75 an acre to a syndicate of which the defendant Twigg was trustee for the purpose of taking the conveyance and granting a mortgage back for the balance of the purchase money. After the execution of the conveyance and mortgage and a guarantee by members of the syndicate, the syndicate caused a joint stock company to be registered under the name of Nechaco River Estates Ltd., to which company the trustee conveyed the land subject to the mortgage. The company then subdivided the land into townsite blocks of lots and registered a plan or map thereof in the Land Registry Office of the district in which the lands are. The Land Act, ch. 129 of R.S.B.C. contains a provision entitling the Crown in right of the Province to a conveyance of one-quarter of the blocks of the lots of such a subdivision, and enacts that the lots selected by the Crown shall be conveyed to it before the plan or map shall be filed in the Land Registry Office. Whether or not the lots were so conveyed does not appear in evidence.

The mortgage moneys falling into arrears, this action was brought and the substantial defence to it is that the plaintiff colluded with one of the members of the syndicate, now deceased, whereby such member was enabled to obtain a secret profit of $25 an acre.

In the conveyance from the plaintiff to the said trustee, the price at which the land was sold was intentionally misstated by the plaintiff to be $75 an acre, whereas the amount actually to be received by the plaintiff was $50 an acre. The balance, unknown to the other members of the syndicate, was to be received by the said deceased.

I agree with the trial Judge that the plaintiff's conduct in this respect was wrongful and would found an action by the defendants, other than the defendant executrix, for damages for deceit.

The defendants have counterclaimed for rescission and for an account, but as rescission cannot be decreed unless the de-

B.C.

C.A.

GREENIZEN v. TWIGG.

Macdonald, C.J.A.

fendants are able to re-convey the land it becomes necessary to inquire whether the defendants have shewn their ability to restore the property to the plaintiff should rescission be decreed.

The judgment dismisses the action unconditionally; it orders cancellation of the mortgage and guarantee; subject to plaintiff's right to a re-conveyance as after-mentioned, it rescinds the sale and conveyance; it declares that upon re-conveyance the plaintiff is to repay the purchase money received by him, but that if re-conveyance be not made the counterclaim is to stand dismissed; and that restitution shall be sufficiently made by deposit with the Registrar of the Court of a duly executed deed of the land as subdivided, together with written consents on defendants' parts to the cancellation of the plan or map.

The Nechaco River Estates Ltd. is not a party to the action, but it is suggested that its assistance and concurrence can be obtained by the defendants in furtherance of the re-conveyance. It is also suggested that the consent of the Crown may be obtained to the cancellation of the plan or map and to the giving up of its interest in the lots to which it is entitled. The effect of the judgment, as I read it, is to declare that restitution shall be deemed to be sufficiently made when the defendants have deposited with the Registrar, a deed of all the interest of themselves and the said company in the land, together with their own written consents to the cancellation of the plan, leaving the plaintiff to do the best he can to recover the interest of the Crown. We have not been told by what authority the representatives of the Crown can give up the lots which the statute has declared shall be Crown property. Unless there be clear statutory authority for the gift back to the company or to the plaintiff of these lots, the plaintiff will get by way of restitution the privilege of first, with the assistance of the defendants, persuading the Crown to make the gift and if made, of taking the risk of its validity. I may say that I do not think the land granted to the railway company for right-of-way and station grounds, are lands with respect to which restitution must be made. That was an independent transaction between the defendants and the railway company.

In support of the judgment we were referred to *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221. That case fully sustains the finding of the trial Judge on the first branch of the case. Their Lordships decreed rescission upon condition that the land there in question should be re-conveyed to the vendor. The only obstacle in the way of an absolute order was a suggestion that the company had ceased to exist and could not

B.C.

C.A.

GREENIZEN v. TWIGG.

Macdonald, C.J.A.

therefore re-convey. It was a mere suggestion not raised in the Courts below, and one which their Lordships said in the circumtsances, should not have been made before them, and which in all likelihood could be easily removed. They, however, thought it their duty to take notice of it in giving directions for judgment. I cannot think that that case can be relied upon in support of a case like the present one where the vendor has parted with the land and where his vendee has changed its character from that of wild or farm land to townsite lots, and as a consequence has given another a substantial interest in them. What was ordered by the judgment was not restitution at all, it was at most the return to the vendor of part of the land, together with consents that might facilitate him in an endeavour to recover the balance.

The defendants by their pleadings have not specifically asked for damages for the deceit practised upon them by the plaintiff. Mr. Mayers referred us on this point to the prayer in the counterclaims for an account, no doubt having in mind a similar prayer in *Lindsay Petroleum Co.* v. *Hurd*, under which Hurd was, in the event of the company's want of power to reconvey, ordered to refund to the company his secret profits. No such order was made against the other defendant, for the manifest reason that while Hurd was adjudged to have stood in a fiduciary relationship to the company, the other defendant had not. The like situation exists here. Mr. McGregor was so related to the syndicate of which he was the promoter, but no relief such as was given against Hurd is claimed against the defendant executrix. The case of *Lindsay Petroleum Co.* v. *Hurd*, was tried in the Ontario Court of Chancery (1870), 17 Gr. 115, before the passing of the Judicature Act, a Court which had no jurisdiction to award damages for deceit. Here the Court below had jurisdiction to award such damages, and while there is no prayer for such relief beyond the omnibus one, yet the evidence is all before us and if it be necessary to amend the prayer, which I doubt, I would amend it to include a claim for damages against the plaintiff. The damages which ought to be awarded is the difference between the real and the fictitious price, namely, $25 per acre. In my opinion, the judgment should be set aside and the usual judgment for foreclosure should be directed with a reference to take the accounts on which reference the sum awarded for damages should be set off against the mortgage moneys with all due adjustments of interest.

Costs of the appeal should follow the event. The plaintiff is entitled in the Court below to the costs of the action and the

B.C.

C.A.

GREENIZEN v. TWIGG.

McPHILLIPS, J.A.

defendants, other than the said executrix, to the costs of their counterclaims.

GALLIHER, J.A.:—I am in accord with the views expressed by the Chief Justice.

McPHILLIPS, J.A.:—In my opinion, the appeal should succeed with a reduction in the amount claimed which I will later explain.

The action is upon a mortgage made by Twigg, one of the respondents and one of a syndicate of speculators in land in Northern British Columbia acquired for townsite purposes—it being arranged amongst the syndicate that the conveyance of the property should be to Twigg and the mortgage, being for consideration money in respect of the conveyance, should be given by Twigg. The appellant was the vendor—he had given an option upon the property to the late J. Henrick McGregor. (*Kelly* v. *Enderton*, 9 D.L.R. 472, [1913] A.C. 191) and the executrix of the estate of McGregor is one of the respondents. The defence of the respondents is that of fraud and rescission is claimed by way of counterclaim—but there is no alternative claim for damages as and for deceit, but it was argued at this Bar that nevertheless that the respondents were entitled to that alternative remedy. The gravamen of the charge of fraud is that the appellant was an active party in collusion with the late McGregor to misrepresent the facts, notably that the appellant was willing to sell for $50 an acre—whereas the appellant sold ostensibly, as the consideration in the conveyance shews, at and for the price of $75 an acre and that the appellant was cognisant of this misrepresentation to the respondents and that a part of this collusive arrangement was the agreement between the appellant and the late McGregor that the late McGregor was to receive $25 per acre out of the purchase price. The terms of the sale were that the syndicate or partnership—as it is alleged the joint adventures were—were to pay the sum of $11,062.50 in cash and a mortgage be given upon the property for the remainder of the purchase price, viz., $33,187.50, and this was carried out and a conveyance, as previously stated, made to the respondent Twigg on December 19, 1912, and a mortgage of even date. It would appear that the appellant made a payment to the late McGregor of $3,687.50 in February, 1913—and two assignments for $4,425—and $6,637.50 in November, 1912, of the moneys to be paid by the syndicate or partnership, in all the sum of $14,750, being moneys the late McGregor was entitled to. The syndicate or partnership then, in order to exploit the property, it being a highly speculative proposition, out of which they expected to get from the public $500,000, in-

corporated a company and conveyed the lands to it—the company (Nechaco River Estates Ltd.) undertook to pay the mortgage and agreed to indemnify the respondent Twigg therefrom. Later there were alterations of terms of payment, the appellant being lenient in regard thereto. The defence is that the fraud, as laid, was not discovered until after the commencement of the action. Now it is trite law that he who alleges fraud must clearly and distinctly *prove the fraud as laid*—every material step must be proved by sufficient evidence: *Angus* v. *Clifford*, [1891] 2 Ch. 449 at p. 479. After the most careful reading of the evidence and analysing the same throughout, I unhesitatingly say that the respondents have failed to fix upon the appellant the fraud as laid *that he colluded with* the late McGregor in the perpetration of a fraud upon the syndicate or partnership. In my opinion, no evidence was adduced sufficient in its nature to fix fraud upon either the appellant or the late McGregor—in truth—I am not satisfied that any fraud of any nature or kind was perpetrated—certainly no collusion was established between the late McGregor and the appellant and everything points to the appellant not being aware of any failure upon the part of the late McGregor to acquaint his associates with the true position and that he was making a profit or participating in the purchase price—in fact the letter and agreement (see A.B. Ex. 28 and 121, pp. 390, 351-3) came to the knowledge of Twigg in McGregor's lifetime, i.e., long before 1915—the year in which McGregor gave up his life in the great war, and no repudiation was claimed or election to rescind but an election to affirm the contract must be assumed upon the facts and the agreement. There was the clearest documentary evidence that the appellant was open and frank in the matter and the appellant had every reason to believe that the facts were known to the associates of the late McGregor—he had taken pains to make it known what a terrible thing to charge fraud in such a case. The late McGregor was a gentleman of high professional and social standing in the city of Victoria—what would entitle the appellant to question his integrity? The joint adventures never apparently went into the question of the value of the land—in truth were only too anxious to profit by McGregor's great knowledge and experience and heavy outlay of money and expense of surveys to be borne by McGregor, and now do not hesitate to defame the fair name and character of a valorous soldier—as the late (Major) J. Henrick McGregor died for his King and country leading on Canada's valiant soldiers in the forefront of battle. That I am entitled to refer to a matter of common knowledge which is—I would refer to what Anglin, J.,

B.C.

C.A.

GREENIZEN v. TWIGG.

McPhillips, J.A.

said in *In re Price Bros., etc.* (1920) 54 D.L.R. 286 at p. 295, 60 Can. S.C.R. 265: "The common knowledge possessed by every man on the street of which Courts of justice cannot divest themselves," and in the present case the unfortunate situation was that 5 years after the death of McGregor, never mooted in his lifetime with knowledge in his lifetime of the facts known to Twigg, this terrible accusation of fraud is made—it revolts one and it should be received with judicial abhorrence.

A still more painful thing has taken place in this action—the widow of the late McGregor, one of the respondents, as executrix of the estate of the late McGregor, has spread upon the pleadings in her defence an allegation of the same fraud, as is alleged by the other respondents, and that her husband, the late McGregor, was guilty of fraud—a more scandalous pleading, I venture to say, was never known in the annals of the law—and whoever is really responsible for instructing or advising such a pleading is entitled to be visited with the severest judicial animadversion. Further, at this Bar, counsel appearing for the executrix, stated, no doubt instructed to do so—that the fraud of the late McGregor was not contested or denied, in fact admitted—I was appalled by this and there came to my memory what Lord Macnaghten—the greatest jurist of our day—said in the celebrated case of *Neale* v. *Gordon-Lennox*, [1902] A.C. 465 at p. 472, 71 L.J. (K.B.) 939:

"I do not think that the Court is entirely in the hands of counsel and bound to give the seal of its authority to any arrangement the counsel may make when the arrangement itself is not in its opinion a proper one."

Can it be said to be proper or seemly that the executrix, the widow of the late McGregor, should admit that her husband committed a fraud, something inscrutable and something she knew nothing of and impossible of being spoken to by her husband cut off by death. It could only have been advanced with a sordid interest, a self interest for monetary gain or to relieve the estate from liability. The pleading should have been struck out—as in effect—being a pleading by the representative of the estate of the late McGregor—it was the pleading of a party's own fraud by way of defence which is not admissible or permissible. Further, it is the pleading of that which, as I have said, is inscrutable—not proved in the action or capable of proof and, if the late McGregor had not been cut off by death it might well have been that such facts would have been shewn that would have displaced wholly and totally this allegation of fraud—as it is, there is evidence that it came to the knowledge of the respondent Twigg long before, years before, the commencement

of this action, that the appellant was not in fact receiving the total purchase price and notice to Twigg was notice to all of the respondents. Further, if it could be said—that the appellant was not perfectly clear in his dealings—there is no proof whatever of the fraud as laid—and relief cannot be had—(*Mowatt* v. *Blake* (1858), 31 L.T. (Jo.) 387; *Luff* v. *Lord* (1865), 11 Jur. N.S. 50 at p. 52, per Lord Westbury). What is alleged here is—the fraud and collusion of the appellant and the late McGregor, with not a tittle of proof of it—and fraud will not be carried by way of relief beyond that which is proved to the satisfaction of the Court—(*Mowatt* v. *Blake, supra;* and 11 Jur. N.S. at p. 52, per Lord Westbury). Further, again, where actual fraud is alleged—relief cannot be obtained by proving only a case of constructive fraud—and here actual fraud is set up, (*Wilde* v. *Gibson* (1848), 1 H.L. Cas. 605, 9 E.R. 897). The majority of the Court has come to the conclusion that rescission cannot be decreed but that relief should be granted by way of damages for deceit. Were I of the opinion that fraud was established, I would also have been of the opinion that rescission could not be granted. I cannot come to the conclusion that a case of deceit was made out—quite apart from the fact that there is no alternative claim which, to my mind, is an insuperable obstacle. Clearly *Derry* v. *Peek* (1889), 14 App. Cas. 337 lays it down that without proof of actual *fraud* no action for deceit is maintainable—at p. 362 Lord Herschell said:—

"I shall have by-and-by to consider the discussions which have arisen as to the difference between the popular understanding of the word 'fraud' and the interpretation given to it by lawyers, which have led to the use of such expressions as 'legal fraud,' or 'fraud in law,' but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavour to shew that there is abundant authority to warrant this proposition."

See also Lord Herschell, at pp. 373, 374, 375, 376.

Nothing less than a fraudulent intention will suffice for an action of deceit—and where has it been established that the appellant had any fraudulent intention? What reason had he to believe that McGregor did not disclose all the facts to his associates. The appellant, upon his part, placed in McGregor's hands that which gave complete disclosure and what reason had the appellant to believe that the information would be withheld, if it were withheld, and there is no evidence that it was withheld, in any case there is express evidence that years before the action was commenced, notice was brought to the respondent

B.C.

C.A.

GREENIZEN v. TWIGG.

McPhillips, J.A.

Twigg that McGregor was getting a portion of the purchase price and if he did not appreciate the facts that came to his knowledge he should have, and must be held to have become apprised of the fact that all the purchase price of the property was not going to the appellant.

Now, as to fraudulent intention—we have Viscount Haldane, L.C., in *Nocton* v. *Ashburton*, [1914] A.C. 932 at pp. 953, 954, saying:—"It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit," and it was held in *Derry* v. *Peek*, 14 App. Cas. 337—that in an action for deceit the plaintiff must prove actual fraud. In *Angus* v. *Clifford*, [1891] 2 Ch. 449, Lindley, L.J. at p. 469 said:—"But as I say I base my judgment purposely on the broader ground that after *Peek* v. *Derry*, (14 App. Cas. 337) an action of this kind [for deceit] cannot be supported without proof of fraud, an intention to deceive and that it is not sufficient that there is blundering carelessness however gross unless there is wilful recklessness, by which I mean wilfully shutting one's eyes, which is of course fraud." Nothing of this nature can be attributed to the plaintiff. Then, even if there were actual fraud and an action for deceit established—no damages have been established and fraud without damage is not sufficient—the property may well be worth a great deal more than what has been paid for it. *Ajello* v. *Worsley*, [1898] 1 Ch. 274, 67 L.J. (Ch.) 172; *Derry* v. *Peek*, (1889) 14 App. Cas. 337 at p. 374; Lord Blackburn, *Smith* v. *Chadwick* (1884), 9 App. Cas. 187 at p. 196.

The only relief that I think the respondents can be said to be entitled to is the reduction of the principal sum due upon the mortgage by the amount which the late J. Henrick McGregor was to be paid, viz., the $25 per acre, in all the sum of $14,750—this sum the appellant is not entitled to recover as it would go to the executrix of the estate if it were paid, and, as I understand at this Bar, counsel for the estate expressly abandoned any claim in respect to these moneys.

The respondents could have accomplished this relief by proper pleading and not embarked upon the untenable contention that there was fraud—in which they have, in my opinion, woefully failed. The authorities which support this view are the following: *Fawcett* v. *Whitehouse* (1829), 1 Russ & M. 132 at p. 133, 39 E.R. 51; *Bentley* v. *Craven* (1853), 18 Beav. 75 at p. 78, 52 E.R. 29; *Grant* v. *The Gold Exploration and Development Syndicate Ltd.*, [1900] 1 Q.B. 233; *Cameron* v. *Cuddy*, 13 D.L.R. 757, [1914] A.C. 651—Lord Shaw of Dunfermline at p. 759.

I would, therefore, allow the appeal in part, the appellant be-

ing entitled to payment less the amount payable to the late McGregor in respect to the sale of the property—in the result, according to my view, the respondents would fail in the defence of fraud.

Appeal allowed in part.

Sask.

C.A.

LICHSTEIN v. LICHSTEIN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. January 16, 1922.

EVIDENCE (§ XIIF—952)—ACTION FOR DIVORCE—TESTIMONY OF WITNESS RELIED ON BY TRIAL JUDGE NOT SUPPORTING FINDING—APPEAL—REVERSAL.

In an action for dissolution of marriage on the ground of the wife's adultery, and for damages against the co-respondent, the trial Judge granted an order *nisi* for the dissolution of the marriage and awarded damages against the co-respondent, and in reaching his conclusion disregarded entirely the evidence of the plaintiff and based his decision entirely on the evidence of one witness, Haultain, C.J.S., and McKay, J.A., held that the trial Judge was right in rejecting the evidence of the plaintiff, but that the evidence on which his decision was based did not support a finding of adultery and allowed the appeal and dismissed the action. Turgeon, J.A., held that in view of certain material evidence concerning plaintiff's conduct which had come into possession of the defendants since the trial which would probably change the result of the case, a new trial should be granted.

[*Fitz Randolph* v. *Fitz Randolph* (1918), 41 D.L.R. 739; *Kestering* v. *Kestering* (1921), 61 D.L.R. 44, 14 S.L.R. 367, referred to. See Annotations, Divorce Law in Canada, 62 D.L.R. 1, 48 D.L.R., 7.]

APPEAL by defendant from the judgment at the trial of an action for dissolution of marriage on the ground of adultery. Reversed.

G. A. Cruise, for appellants.

C. H. J. Burrows, for respondent.

HAULTAIN, C.J.S.:—On the hearing of this appeal I was much impressed with the argument for a new trial. After a careful consideration of the evidence, however, I have come to the conclusion that there is no necessity for a new trial, but that the action should be dismissed.

The evidence of the plaintiff was, in my opinion, very properly disregarded by the trial Judge, who bases his decision entirely on the evidence of Mrs. Martin. That evidence, in my opinion, does not support a finding of adultery.

I would therefore allow the appeal with costs. The judgment below should be set aside, and judgment entered for the defendants dismissing the action with costs.

TURGEON, J.A.:—I think that under all the circumstances of

Sask.

C.A.

LICHSTEIN v. LICHSTEIN.

Turgeon, J.A.

this case a new trial should be ordered. The plaintiff sues his wife for a dissolution of marriage and claims damages against the co-respondent. The evidence from which adultery on the wife's part might be inferred was not direct, but circumstantial, as is usual in divorce cases. The plaintiff himself gave evidence of the strained nature of the relations which existed between himself and his wife for several years prior to their separation in January, 1920, and he attributes the troubles between them to her too great intimacy with the co-respondent. In this particular he cites various incidents in support of the allegations contained in para. 6 of the statement of claim, which charge the wife with having committed adultery with the co-respondent at the times and places therein specified. From these incidents adultery between the defendants might reasonably be inferred if the plaintiff's evidence was to be believed upon all conflicting points, and if his own cross-examination did not place him, as it does, in a decidedly unfavourable light. Both the defendants deny all the allegations of improper intimacy alleged against them in the plaintiff's evidence, and explain each one of the incidents relied upon by him in a manner that appears reasonable; and in some cases the plaintiff's own admissions serve to corroborate them. Unfortunately the trial Judge has made no express finding upon any of these allegations, and it is impossible to gather from his judgment whether he believes the plaintiff or not. The only finding of fact which his judgment contains relates to a separate allegation of adultery set up in paragraph 7 of the statement of claim, and is as follows:—"In this case I accept the evidence of Mrs. Martin as to what took place down at Estuary. That evidence satisfied me that there were relations between the two defendants. There will therefore be an order (etc.)." He thereupon grants an order *nisi* for the dissolution of the marriage and awards damages in the sum of $1,500 against the co-respondent. He gives the custody of the 4 oldest children to the plaintiff, and states that he makes no order as to the custody of the youngest child.

Since, therefore, the evidence of Mrs. Martin is relied upon in the judgment as establishing the wife's adultery, it should, I think, be examined with some care. In the first place, I may say, this evidence is uncorroborated; it is denied explicitly by the defendants, and is inconsistent with the evidence given by the two sons of the husband and wife, Joseph, aged 15, and Paul, aged 14 years. But leaving all contradictory evidence aside, and taking Mrs. Martin's testimony at its face value, what does it shew? She is the wife of the proprietor of the Palace Hotel at Estuary. On January 14 or 15, 1920, the defendant, Mrs. L.,

came to the hotel with her 4 children and her luggage. The co-respondent accompanied them. In the evening he helped the wife and the boys to carry the baby and the baggage to the room which Mrs. L. had engaged in the hotel. The next morning about 9 o'clock he called upon her there and then left and drove away to his own home, 24 miles distant. During the time the co-respondent was in Estuary, Mrs. Martin says she saw him in Mrs. L.'s room twice,—once in the morning, and once in the evening. She was in an adjoining room from which, she says, she could see into Mrs. L.'s room through a small window in the wall between the two rooms. She says that on these two occasions she saw the co-respondent come into the room and she then saw the two defendants lying together across the bed, fully dressed, and arm-in-arm. On one of these occasions, she says, the co-respondent first locked the door. On each occasion, Mrs. Martin says, she was called away, and upon returning saw Mrs. L. up and straightening out her clothing. She does not give further particulars, except that on her cross-examination she says, "There was nothing wrong that I saw." She also says that she thought at the time that the defendants were man and wife.

The necessary inferences to be drawn from the trial Judge's judgment is that he believes either that adultery was committed by the parties upon one or both of these occasions, or that the occurrence of these intimacies shewed that the pre-existing relations between the defendants had been adulterous.

The nature of the evidence which is usually adduced to establish the fact of adultery, and the manner in which such evidence should be considered, is discussed as follows by Lopes, J., in his judgment in *Allen* v. *Allen*, [1894] P.D. 248 at pp. 251, 252: "It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place, because, to use the words of Sir William Scott in *Loveden* v. *Loveden*, 2 Hagg. Cons. 1, at p. 2—'if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct act of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights.' To lay down any general rule, to attempt to define what circumstances would be sufficient, and what insufficient, upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of cir-

Sask.

C.A.

LICHSTEIN v. LICHSTEIN.

Turgeon, J.A.

cumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury, in a case like the present, ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the parties sought to be implicated."

It is to be observed, therefore, that in order to determine whether a finding of adultery in an action for the dissolution of a marriage is supported by the facts, the appellate tribunal must inquire whether the evidence reveals circumstances which lead to it by "fair inference as a necessary conclusion," in the language of Sir William Scott; or, to use the words of Lopes, L.J., "whether these circumstances are capable of any other reasonable solution than that of the guilt of the parties sought to be implicated." And when one considers that the result of the verdict is to fasten the guilt of adultery upon a wife and mother, to dishonor her womanhood, and to deprive her of her home and possibly of her children (as is the case in the matter now under review), it would appear that the rule to be deduced from the above citation is a reasonable one and closely akin to the rule followed in those criminal cases where the prosecution relies upon circumstantial evidence to prove guilt, and where it is laid down that in order to find the accused guilty the jury must be satisfied not only that the circumstances are consistent with his having committed the act but that they are such as to be inconsistent with any other rational conclusion. (Per Alderson, B., in *R.* v. *Hodge* (1838), 1 Lew C.C. 228).

If the only ground relied upon by the appellants in this appeal were the insufficiency of Mrs. Martin's evidence, I should be strongly inclined to decide in their favour, because I doubt very much whether that evidence could reasonably justify any more serious finding against Mrs. L. than one of impropriety, lack of modesty, and indiscretion,—conduct of a reprehensible character, certainly, but not bad enough in the eyes of the law to bring upon her the punishment of divorce with all its harsh consequences. It appears to me that there is still a great gulf between what Mrs. Martin says she saw and sufficient evidence of actual adultery. But there are other elements in this case which must also be taken into consideration, and which concur with all I have just said to lead me to the conclusion that the judgment of the trial Judge should be set aside and a new trial ordered.

The first of these matters is that of the plaintiff's own con-

Sask.

C.A.

LICHSTEIN v. LICHSTEIN.

Turgeon, J.A.

duct, as disclosed at the trial. Even when adultery is proved beyond a doubt, the position of the husband may be such that the Court will refuse him the relief of dissolution of the marriage. If he has wilfully neglected or ill-treated his wife and refused to act towards her as a husband should, he will forfeit his right to a divorce on the ground of her subsequent adultery. (*Keslering* v. *Keslering* (1921), 61 D.L.R. 44, 14 S.L.R. 367). Now the evidence taken at the trial shews that the plaintiff was convicted several times of assaulting his wife and once of assaulting one of the children. Her trip to Estuary in January, 1920, with all the children, when she was accompanied by the co-respondent and when Mrs. Martin says she saw the incidents she describes, was rendered necessary by her determination to leave the plaintiff immediately after the last of these trials at which he was convicted. On that occasion the plaintiff stood aside, according to his own evidence, and allowed her and the children to go. She says that he had made things so miserable for her that she could not stay with him any longer. She has lived separate from him ever since. Unfortunately it is not clear from the evidence as we have it before us whether he began to ill-treat his wife before or after the occurrence of the incidents which he says he witnessed and which caused him, according to his story, to believe her guilty of infidelity. It is regrettable that the evidence surrounding these and other important circumstances of the case should be as indefinite as it is.

Since the trial new evidence concerning the plaintiff's conduct as a husband has come into the possession of the defendants; and the discovery of this new evidence is one of the grounds alleged by the defendants in their prayer for a new trial. Several affidavits have been filed. It is apparent from all of them that the evidence which they disclose was not available to the defendants at the time of the trial, and neither of the defendants can be taxed with lack of diligence in this respect. And in my opinion the nature of the evidence is such that if it can be substantiated in Court it will in all probability change the result of the case. The gist of these several affidavits is as follows:—

(1) Ellis Dwyer swears that in the summer of 1917 the plaintiff told him that his trouble with his wife was due to the fact that she was too religious and had too many children, and refused on religious grounds to take means to stop having children. He said he would like to find a way to get rid of her by a divorce. (2) Isaac Finkelstein swears that about four months previous to November 22nd, 1920, he overheard the plaintiff tell one C. Coleburg how anxious he was to get rid of his wife, and that he had a witness who would swear anything he wanted her

Sask.

C.A.

LICHSTEIN v. LICHSTEIN.

Turgeon, J.A.

to swear if he would pay her to do so. (3) Ben Zuckerman swears that in December, 1919, he heard the plaintiff say to a third party in reference to his wife: "I will get her now. I have a good witness, but it has cost me enough money to get the witness." (4) Rebecca Feinberg swears that in the fall of 1920 the plaintiff approached her and asked her to give evidence against his wife in the suit for divorce which was coming on. He told her he would pay her well if she would testify that she had seen men at the wife's house and that the co-respondent lived with her. The deponent answered that these things were not true and that she would not say them. Later, she swears, the plaintiff approached her again and told her that since she would not testify for him he had found another woman who would do so and who would say what he wanted her to say, and that he was paying her well for it.

All this evidence is certainly of a material character, and, when considered in conjunction with the general aspect of the case as it was left at the trial, it tends, in my opinion, to confirm the conclusion at which I have arrived, that this appeal should be allowed in favour of both defendants, the judgment in the Court below set aside, and a new trial ordered.

I may say that it is only after some hesitation that I have reached the conclusion that this Court should order a new trial instead of dismissing the plaintiff's action. There is doubtless much to be said in favour of the latter course being adopted. In view, however, of the brevity of the judgment delivered by the trial Judge and of the indefinite language used by him I am unable to determine to my own satisfaction whether he intended to find against the plaintiff on the allegations of adultery relating to para. 6 of the statement of claim and to find that the evidence of Mrs. Martin is capable in itself of establishing adultery at Estuary, or whether he merely accepts the evidence of the events at Estuary as corroborating the plaintiff's evidence in regard to the adulterous relations which the plaintiff testifies existed between the defendants for years and which come within the allegations in para. 6. In my opinion, if Mrs. Martin's evidence is left entirely aside, there is still ample evidence given by the plaintiff himself to establish adultery provided the Judge hearing the evidence and observing the witnesses were to find in his favour in all particulars. It is much to be regretted therefore that the judgment appealed from is of so little assistance to us in the matter. We ought, in my opinion, to have had the benefit of the views of the trial Judge upon the evidence pertaining to adultery by the defendants during the years the wife lived with her husband and before she left him

Alta.

S.C.

ST. PAUL LUMBER CO. v. BRITISH CROWN ASS'CE CO.

to go to Estuary. Again, it should be observed that the defendants do not ask for a dismissal of the plaintiff's action, but merely for a new trial. Of course we are not bound by this, but may ourselves draw any inferences of fact which we may deem proper and make any order which in our opinion ought to have been made by the Court below. In view, however, of the very conflicting nature of the evidence upon which we have no finding and which relates to incidents spreading over a period of some years, I think this is a case where justice cannot be done unless the parties and the witnesses are heard again, and the Appellate Court in case of an appeal, has the benefit of express findings by the Court below. If we dismiss the action outright the plaintiff will be precluded for all time from seeking a divorce upon the grounds alleged by him in this action. I am not convinced that such a course would do him justice. (*Fitz Randolph* v. *Fitz Randolph* (1918), 41 D.L.R. 739, at p. 743, 45 N.B.R. 505).

The appellants should have their costs of appeal.

McKAY, J.A., concurs with HAULTAIN, C.J.S.

Appeal allowed.

ST. PAUL LUMBER Co. Ltd. v. BRITISH CROWN ASSURANCE CORP'N.

Alberta Supreme Court, Walsh, J. November 30, 1921.

INSURANCE (§ IIIE—75)—WARRANTIES AND REPRESENTATIONS—CONSTRUCTION OF PARTICULAR CLAUSE—MISREPRESENTATION—FULL DISCLOSURE TO AGENT—LIABILITY OF INSURANCE COMPANY.

A fire insurance policy contained the following type-written clause, "It is understood and agreed that this insurance also covers loss or damage arising from or traceable to Prairie Fires. It being warranted by the assured that the several locations named herein on which lumber are piled shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard." The Court held that the warranty related only to loss or damage arising from or traceable to prairie fires, and that the defendant was freed from liability as the loss sued for did not arise from and was not traceable to a prairie fire.

When an insured makes an explicit communication to the agent of an insurance company that the lumber to be insured is on a clearing in a bush and the insurance company refuses the risk on the ground that it is exposed by heavy under brush, but on the demand of the agent places the insurance with another company the insuring company cannot escape liability on the ground that the insured omitted to communicate such material fact to it, within the meaning of a statutory clause in the policy.

ACTION to recover on a policy insuring the plaintiff against loss by fire on *inter alia* 150,000 feet of sawn lumber. Judgment for plaintiff.

Alta.

S.C.

ST. PAUL LUMBER CO. v. BRITISH CROWN ASS'CE CO.

Walsh, J.

S. W. Field, K.C., for plaintiff.

H. P. O. Savary, K.C., for defendant.

WALSH, J.:—The defendant by its policy of insurance insured the plaintiff against loss by fire on, *inter alia*, 150,000 ft. of sawn lumber piled on the bank of a certain river. This lumber was during the currency of the policy wholly destroyed by fire.

On the face of the policy the following type-written clause appears:—

"It is understood and agreed that this insurance also covers loss or damage arising from or traceable to Prairie fires. It being warranted by the assured that the several locations named herein on which lumber are piled shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard."

The evidence does not disclose the cause of the fire or, except inferentially, where it originated. It did not spread to the lumber from a prairie fire or a bush fire, but seems to have originated from some unknown cause in the lumber itself. The land on which it was piled was not "entirely surrounded by ploughed ground." It is in fact admitted that there was no ploughing whatever around it. Because of this and upon the further contention that this lumber was exposed to bush hazard it is submitted by the defendant that no liability for this loss attaches to it, the argument being that the words of the foregoing clause from "It being warranted" to the end constitute a warranty which applies to the entire risk, the fulfillment of which is a condition precedent to any liability of the defendant under the policy.

I am of the opinion that this warranty relates only to "loss or damage arising from or traceable to prairie fires." The words relied upon as creating it do not of themselves make a sentence for they are not grammatically complete. The comma which immediately precedes them indicates that what goes before it does not constitute a sentence otherwise, of course, a period would be the proper punctuation mark. The only thing that gives the defendant any ground for its contention is the spelling of the word "it," the first word of the warranty, with a capital "I," thus denoting the beginning of a sentence. There is an obvious typographical error either in the case of this comma or in this spelling of this word. The grammatical construction of the entire clause in my opinion justifies no other conclusion than that the capital "I" was used in error. That being so, I think that both physically and as a matter of grammatical construction the entire clause consists of but one sentence. Its real meaning may be seen without changing a word of its phraseology by simply transposing the order of the two clauses of

which it consists and putting the subsidiary clause first, making it read as follows:

"It being warranted by the assured that the several locations named herein on which lumber are piled shall be entirely surrounded by ploughed ground and in no way exposed to bush-hazard, it is understood and agreed that this insurance also covers loss or damage arising from or traceable to prairie fire."

I can see no ambiguity in the clause as it stands except such as is created by the erroneous use of the capital letter "I" and that presents no difficulty. If, however, the clause as it reads is ambiguous it must be construed most strongly against the defendant for it is responsible for its wording.

Holding the opinion of this clause which I do, it follows that I cannot, because of it, free the defendant from liability as the loss sued for did not arise from nor was it traceable to a prairie fire.

Statutory Condition No. 1, to which this policy is subject, provides that "if any person insures property and . . . . omits to communicate any circumstance which is material to be made known to the company in order to enable it to judge of the risk it undertakes such insurance shall be of no force in respect to the property in regard to which the . . . . . omission is made." The defendant says that the plaintiff omitted to communicate to it a material fact within this condition, namely that the lumber described in the policy was entirely surrounded by bush and under-brush and was exposed to the risk of bush fire, and by reason of this omission it is under no liability to the plaintiff in respect of this loss.

Meunier, the president of the plaintiff, gave Lebel, the agent to whom he applied for this insurance, all of the information that was conveyed to him as to the surroundings of this lumber. He told him that it was on a flat coming down from the hill and 50 ft. from the river, on a half-acre of clearing, that there was hemlock and jack-pine beyond the clearing and that the company had had two men clearing away the brush before the lumber was put there. This strikes me as being a fairly explicit communication to Lebel of the fact that this lumber was on a clearing in a bush. Lebel endeavoured to place the risk with the London & Lancashire Fire Ins. Co., whose agent he was. He described this particular pile of lumber as being "piled on the bank of a river on the timber limit of the owner . . . . . at present 150 feet from the sawmill, but I am informed that the mill will be removed inside of ten days to another setting a few miles out." This letter must have conveyed to that company knowledge of the fact that this lumber was in or in the neighbourhood

Alta.

S.C.

ST. PAUL LUMBER CO. v. BRITISH CROWN ASS'CE CO.

Walsh, J.

of a bush for it had obviously been cut by a portable mill on a timber limit. That company's reply was by wire which after referring to the other piles says of this one, "Location number three, when sawmill is removed rate will be the same unless exposed by heavy underbrush in which case would prefer not to have the risk." This wire was confirmed in a letter from that company the following day, the only material part of which is the following, "We should be glad to write the sawn lumber when in no way exposed by bush, slashings or heady underbrush; our experience in the latter case has been so costly that even with the additional charge we would not care to have the risk on our books and indeed I do not think you will find any reputable company that would take it." Lebel's only reply to either telegram or letter was a request by telegram to the London & Lancashire to issue the policy. Here the correspondence between Lebel and that company ended except for a wire from it some days later that it was prohibited from writing that class of insurance, and so it had been brokered and the policies would go forward the next day.

What happened, in fact, was that the London & Lancashire decided not to take the risk and so offered it to the defendant, which accepted it. Correspondence by wire and letter passed between these two companies, and the defendant seems to have obtained all of its information about the risk in that way. I do not think the plaintiff can be in any way bound by the statements made by the London & Lancashire in the course of that correspondence to which it was in no sense a party, and of which it was ignorant until long after. The defendant enclosed the policy to Lebel with a covering letter which contains nothing material to this issue except the statement that the policy was written at the rate for unexposed lumber in the open. That is the only letter between the defendant and Lebel that is in evidence, and there is none between the plaintiff and the defendant.

I understood Mr. Savary to rest his argument under this plea largely upon the fact that there was no communication made by the plaintiff of the existence of a willow bush on the flat below the lumber between it and the river. An insurance adjuster visited the spot on January 20, 1921, the fire having occurred towards the end of December, and he says that he found a willow bush from 10 to 15 ft. high covering an area of about half-an-acre on a flat about 8 ft. below the lumber. Meunier does not seem to have mentioned this bush to Lebel when he was describing the location to him. Hivon, the defendant's secretary, says that this bush was 7 or 8 feet high,

Alta.

S.C.

ST. PAUL LUMBER CO. v. BRITISH CROWN ASS'CE CO.

Walsh, J.

and that in the spring the ground on which it stood was covered by the waters of the river.

I think that the defendant has failed to establish this defence. The plaintiff conveyed to Lebel knowledge of the fact that the lumber was piled in a clearing in the bush. The London & Lancashire certainly must have gathered from Lebel's letter that this was the case. No questions were asked by it as to the character of the surroundings or the distances from the lumber to the bush. It contented itself by expressing its willingness to assume the risk "when in no way exposed by bush, slashings or heavy underbrush." There was no exposure to danger from either slashings or heavy underbrush for the land had been cleared of them. It certainly was told that there was bush around the lumber. With the exception of the half-acre of willows along the river, Meunier gave Lebel a sufficient description of the bush. If he thought of this willow bush at all, he might very well have regarded it as of absolutely no importance from the point of view of a fire risk. It then stood in water to a height barely reaching the bottom of the lumber pile and separated from it by a few feet. When the adjuster saw it, nearly 9 months later, it had of course grown and the subsidence and the freezing over of the waters of the river no doubt made it look more formidable as a possible source of fire than it was when the application was made. I am quite unable to find that Meunier's silence about this bush constituted an omission on his part to communicate a circumstance material to be made known to the defendant, and that being in my understanding of the evidence the only omission that he was guilty of, I must hold that this defence fails.

The plaintiff is entitled to judgment. It was agreed that if I reached this conclusion the amount of the judgment should be determined by a reference, subject to the plaintiff's right to contend that the amount has already been determined by an award of arbitrators. This question may be spoken to again if necessary.

Judgment accordingly.

[This decision was reversed by the Appellate Division, March 16, 1922.]

Sask.

K.B.

LONDON & BRITISH NORTH AMERICA Co. Ltd. v. HAIGH.

Saskatchewan King's Bench, MacDonald, J. December 12, 1921.

COSTS (§ I—7)—ACTION FOR FORECLOSURE OR SALE—PLAINTIFF ASKING FOR PERSONAL JUDGMENT — COSTS NOT LIMITED TO SUCH AS WOULD HAVE BEEN INCURRED IN ACTION ON THE COVENANT.

In an action for foreclosure or sale where the plaintiff asks for personal judgment and establishes his right thereto, the order made should follow Form 121 in the appendix to the Saskatchewan Rules of Court, and the plaintiff is not limited to such costs only as would have been incurred in an action on the covenant.

[*Orser* v. *Colonial Investment & Loan Co.* (1917), 37 D.L.R. 47; 10 S.L.R. 349, followed.]

MORTGAGE (§ VG—105)—SALE UNDER POWER OF SALE IN—RIGHT OF MORTGAGEE TO BID—RESTRICTIONS.

In an action for foreclosure or sale, a mortgagee for his own protection where he has not the conduct of the sale and is not a trustee, should be given leave to bid and this right should not be restricted.

APPEAL by plaintiff from that portion of an order made in a mortgage action, which limited his costs to such as are applicable to an action on the covenant, and which restricted his right to bid at the sale. Reversed.

J. M. Stevenson, for the plaintiff.

No one for defendant.

MACDONALD, J.:—This is a mortgage action in which the Local Master made the following order:—

"It must be referred to the Local Registrar to ascertain the amount due under the mortgage in question for principal, interest, insurance premium and taxes, and the plaintiff is at liberty to sign judgment against the defendant Haigh for the amount so found due, together with such costs as are applicable to an action on the covenant. And it is further ordered that the defendant Haigh do specifically perform the covenant contained in the mortgage sued on as to payment of taxes by paying all taxes and arrears on the premises within sixty days of the date of such reference.

And it is further ordered that the defendants pay into Court within the same period to the credit of this action the amount found due on the aforesaid reference together with interest thereon and costs to be taxed.

And that in default of either of the terms above ordered, and without further order, the mortgaged property to be sold under the direction of the sheriff of this judicial district on the usual terms.

Two months' notice of such sale to be given by insertion in .....of eight successive weekly insertions, and by posters of such sale to be posted not less than six weeks

Sask.

K.B.

LONDON & BRITISH N. AMERICA CO. v. HAIGH.

MacDonald, J.

and not more than two months prior to the sale in twelve conspicuous places in the city. The plaintiffs have leave to bid by delivery to the sheriff of a sealed tender prior to sale. Terms 25 per cent. cash at the time of the sale, and the balance within two months on the transfer being duly confirmed. Other terms as usual.

And it is further ordered that the plaintiff be at liberty to enter into immediate possession of the mortgaged premises, namely, Lot 28 in Block 23, according to the Plan F.K., subject, however, to accounting for the rents and profits thereof, when applying further.

Costs of this application costs in the cause. Leave to the plaintiff to apply further."

The plaintiff appeals from that portion of the order which limits the costs for which personal judgment may be entered to such costs only as are applicable to an action on the covenant, and from that portion whereby the leave to bid is limited to delivery to the sheriff of a sealed tender prior to sale.

From the material before me it does not appear that there were any special circumstances in question in the action.

No counsel appeared on behalf of the defendants herein, but counsel for the plaintiff very properly called attention to the case of *Farrer* v. *Lacy, Hartland & Co.* (1885), 31 Ch. D., 42, 54 L.J. (Ch.) 808, 33 W.R. 265, in which there was approved by the Court a form of order to the same effect as to the disposition of the costs as the order in question herein.

From a perusal of the reasons for judgment in said case, it appears to me, however, that the Lords Justices were approving a form of order to be followed in practice rather than deciding any question of substantive law.

Baggallay, L.J., says at p. 47:—

"The remaining objection which was not taken at the hearing, and was now raised for the first time, nearly two years after date of the original judgment, is that the form of order for payment by the mortgagor personally of principal, interest and costs of the action is too wide. I am not sure as a matter of practice how far the Taxing Master would deal with the costs of an action which like this combines the double form of an action on the covenant and an action for foreclosure, whether he would limit them to such as were incurred as costs of the action on the covenant, or whether he would tax the whole costs of the action. I think that the proper course to be pursued in future will be that the costs should be limited to those which would have been properly incurred had the action been one on the covenant only."

Sask.

K.B.

LONDON & BRITISH N. AMERICA CO. v. HAIGH.

MacDonald, J.

Bowen, L. J., says at p. 49: "It will be convenient for us to express our view as to the form of order which it will be convenient to adopt, and Lord Justice Fry has sketched out a form of such order."

It is true, however, that Fry, L.J., says as follows at p. 50: "The strict right of the Plaintiff is to require the Defendant personally to pay the costs so far as they would have been incurred in an action on the covenant, leaving the costs of the foreclosure action to go into the account."

If this is intended to mean that the plaintiff cannot recover against the mortgagor personally the costs of an action for foreclosure of sale in excess of the costs that would be incurred in an action on the covenant, I cannot find authority for the proposition. A mortgagee, it is clear, has the right to pursue all his remedies concurrently. 21 Hals. 244; *Orser* v. *Colonial Investment & Loan Co.* (1917), 37 D.L.R. 47, 10 S.L.R. 349.

Where the plaintiff pursues a remedy which he has a right to pursue and is not guilty of misconduct, it seems to me that he should be entitled to all the costs incurred.

Our present rule 663 provides that the forms contained in the appendix to the rules shall be used with such variations as circumstances may require. Form 121 contains the following: "And it is further ordered that the plaintiff have judgment against the defendant for the sum of $,together with costs to be taxed."

It seems to me, therefore, that the Judges of the Court, in promulgating said rules, intended to settle said form as the one to be generally followed, subject, of course, to variations by reason of any special circumstances.

Moreover, a perusal of the judgment in *Orser* v. *Colonial Investment & Loan Co., supra*, shews that the costs for which the plaintiff was given personal judgment there were not limited to such costs only as would have been incurred on an action on the covenant.

The point in question in this appeal was not, it is true, raised there. Reference is made to the form of order that was made in that action merely to shew what the practice has been in this jurisdiction for some time.

Before the Judicature Act, a mortgagee had two rights which were enforced in different tribunals; an action at law against the mortgagor personally, and a suit in equity against the mortgaged property.

But since the Judicature Act, as already pointed out, he can now pursue all his rights concurrently and he does so in the

same tribunal. I cannot therefore see any good reason for differentiating as to the costs to be recovered.

I am therefore of opinion that in the absence of any special circumstances in an action for foreclosure or sale where the plaintiff asks for personal judgment and establishes his right thereto, the order made should follow Form 121 in the Appendix to the Rules of Court.

The second objection taken herein is that the order in question should not have limited the right of the plaintiff to bid to the delivery of a sealed tender to the sheriff before sale.

In Fisher's Law on Mortgages, Canadian ed., pp. 1006-1007, para. 2020, it is stated as follows:—

"Both in the Admiralty and Chancery Divisions leave will be given to the mortgagee to bid at the sale; but it will be refused until the other ways of selling have failed, if the mortgagee is also a trustee, and objection is made by *cestuis que trust*. And also if the applicant have the conduct of the sale; in which if he desire to bid, the usual course is to appoint some other person to conduct the sale."

In this case the mortgagee was not a trustee, nor did he have the conduct of the sale.

In *Dakota Lumber Co.* v. *Rinderknecht* (1905), 1 W.L.R. 481, at pp. 485, 486, Wetmore, J., said as follows:—

"The evidence establishes that it is the practice in the Courts of South Dakota for the plaintiff in a foreclosure suit to purchase the property in. Now, I can discover nothing in this which is contrary to natural justice. I know that in Canada it is not allowable without the leave of the Court, but on application and leave of the Court obtained it is allowable. So much is that so that the application for leave appears to me to take upon it rather the character of a farce. I have known in my experience both as Judge and while practising at the Bar, a number of cases where mortgaged property was sold on foreclosure proceedings, and in every instance it was usual to apply for leave for the plaintiff to bid, and I never knew it to be refused."

Again, it may be pointed out that Form 121 already referred to contains this provision:—"The plaintiff is hereby given leave to bid."

It appears to me that for his own protection a mortgagee should, where he has not the conduct of the sale and is not a trustee, be given leave to bid, and I cannot see that it is of any advantage to the mortgagor to have the mortgagee restricted in his rights to bid.

In fact it may be to the mortgagor's disadvantage. Should anything occur in connection with the conduct of the sale which

Can.
S.C.

gives the mortgagor reason to complain, he can raise his objections on the motion to confirm the sale. *Canada Permanent Mortgage Co.* v. *Jesse*, (1909), 2 S.L.R. 251.

I am therefore of opinion that, excepting where he is a trustee and *cestuis que trust* object, or where he has the conduct of the sale, a plaintiff, if he so desires, should be given unrestricted leave to bid. The appeal is therefore allowed with costs.

As this appeal raised two important questions of practice, and the order complained of was, though not according to the prevailing practice in the Province, supported by *Farrer* v. *Lacy*, *supra*, I considered it proper in order to have uniformity of practice, to consult such other members of this Court as I could reach before deciding these questions. Unfortunately I was not able to consult all of them, but I have the benefit of the opinion of the majority of the Judges of this Court, which is unanimously to the effect above stated.

BRITISH EMPIRE UNDERWRITERS v. WAMPLER.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. December 9, 1921.

INSURANCE (§ IIID—60)—INSURANCE OF MOTOR CAR—CONSTRUCTION OF POLICY—CAUSE OF DAMAGE NOT COVERED BY.

A policy insuring a motor car contained an endorsement as follows:—"In consideration of $28.05 premium . . . it is hereby understood and agreed that this policy is extended to cover the insured to an amount not exceeding $1,700 on the body, machinery and equipment while within the limits of the Dominion of Canada and the United States, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits subjects to the conditions before mentioned and as follows: (A) Fire, arising from any cause whatsoever, and lightning. (B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the insured is legally liable." Held, reversing the judgment of the Ontario Supreme Court, Appellate Division (1920), 57 D.L.R. 88, and restoring that of the trial Judge, 54 D.L.R. 657, that damage to the plaintiff's motor-car while being unloaded from a ferry-boat, caused by the boat backing away and allowing the car to drop into the water, was not covered by the policy, the loss not having been caused by the stranding, sinking or collision or burning of the ferry-boat.

APPEAL by defendant from the judgment of the Supreme Court of Ontario (1920), 57 D.L.R. 88, 48 O.L.R. 428, reversing the judgment of Orde J. at the trial (1920), 54 D.L.R. 657, 48 O.L.R. 13, of an action upon an automobile insurance policy. Reversed and judgment of Orde J. dismissing the action, restored.

Can.

S.C.

BRITISH EMPIRE UNDERWRITERS v. WAMPLER.

DAVIES, C.J.

A. C. Heighington, K.C., for appellant.

DAVIES, C.J. (dissenting):—This is an appeal from the Second Appellate Division of the Supreme Court of Ontario (1920), 57 D.L.R. 88, 48 O.L.R. 428, reversing a judgment of the trial judge (1920), 54 D.L.R. 657, 48 O.L.R. 13 (who had dismissed the action) and holding that the plaintiff respondent was entitled to recover from the appellant herein $1,781.47 on his policy of insurance covering his automobile.

The judgment of the Appellate Division was delivered by Masten J., speaking for the whole court.

The circumstances under which the loss was sustained are fully set out in the judgment of Orde J., the trial Judge, and need not here be repeated.

The question to be determined in this appeal is whether the loss is or is not covered by the terms of the policy of insurance.

I may say that I agree generally with the reasons stated by Masten J., for holding that this question should be answered in the affirmative.

This question must be determined under the opening words of the policy, which are as follows:—
any of these facts?

"Automobile."

"In consideration of twenty-eight &..... five cents dollars ($28.25) Premium and the Declarations of the Insured, it is hereby understood and agreed that this policy is extended to cover the Insured to an amount not exceeding Seventeen Hundred Dollars (1,700) on the Body, Machinery & Equipment, while within the limits of the Dominion of Canada and the United States (exclusive of Alaska, the Hawaiian Islands and Porto Rico), including while in building, on road, or railroad car, or other conveyance, ferry or inland steamer, or coast-wise steamer between ports within the said limits, subject to the conditions before mentioned and as follows:—

"(A) Fire, arising from any cause whatsoever and lightning. (B) While being transported in any conveyance by land or water———stranding, sinking, collision, burning or derailment of such conveyance, including the general average and salvage charges for which the insured is legally liable."

It appears to me that the answer to the question of defendant appellant's liability turns upon the proper construction of condition "(B)." Does this condition mean that defendant's liability, by the insertion after the dash —— of the words "stranding, sinking, collision, burning or derailment of such conveyance," is strictly limited to damages caused by one or more of these specified facts of "stranding, etc." or are they stated

Can.

S.C.

BRITISH EMPIRE UNDERWRITERS v. WAMPLER.

Idington, J.

merely as examples of that liability? In other language, do these words following the dash (———) mean including damages caused by "stranding, etc.," or must they be read as defining and limiting the company's liability to accidents arising from any of these facts.

I think these causes of possible damage explicitly enumerated are only given as examples of the company's liability, but do not exclude other causes, and that the fair and reasonable way of construing the clause is to read in after the dash (———) the word "including" or the words "such as," but not the words "but only in case of" or "or only if caused by" as contended by the company.

At the very worst these words seem to be ambiguous and should therefore, in case of doubt as to their meaning, be construed against the company, if capable of such construction.

For the reasons, therefore, stated by Masten J., in delivering the unanimous judgment of the Appellate Division, 57 D.L.R. 88, 48 O.L.R. 428, and the additional reason above stated by me, I would dismiss the appeal with costs.

IDINGTON, J. (dissenting):—This is an appeal from the unanimous judgment of the Second Appellate Division of the Supreme Court of Ontario, 57 D.L.R. 88, 48 O.L.R. 428, reversing the judgment of Orde J., 54 D.L.R. 657, 48 O.L.R. 13, and turns only upon the construction of an insurance policy issued by appellant to respondent covering risks of loss by the latter arising from his ownership of an automobile.

I agree with the reasoning of the said Court of Appeal unless in the minor suggestion therein that the contract prepared by the appellant is not ambiguous. I find it so ambiguous that we are entitled to construe it most strongly against appellant.

And if we do so there is ample ground for holding that if the company ever intended to limit its liability in the way contended for on its behalf its limitation thereof should have been so expressed as to take it clearly out of the risk its general terms had clearly expressed.

This it clearly did not do, and therefore is bound by the general terms used.

It rather clearly intended to extend its liability to contribute to general average marine terms used.

The appellants' factum appeals to our general knowledge of such a subject. My limited share of such general knowledge clearly shews that such an ambiguously worded contract is not universal and that some other companies do not use such ambiguous language.

Indeed it looks rather like a trap for the unwary compared with what I know.

I conclude that the general comprehensive terms of the contract cover just such a loss as in question and that the pretended limitation does not effectively except the loss in question therefrom.

There is another ground of appeal claimed, and that is from the exercise of discretion on the part of the Courts below which clearly falls within those questions of practice and procedure with which this Court has uniformly refused to interfere.

A point was taken by counsel for the respondent that the acts of the adjuster for appellant were such, and so reasonably relied upon by respondent that appellant cannot now be heard to set up its present pretensions.

I am unable to take that view, but the extent to which the adjuster, presumably well acquainted with his business and the facts he had to deal with, and those directing him certainly never imagined the policy was so limited and restricted as now contended for and acted upon the construction which has been upheld by the Appellate Division.

It is illuminating to find that the appellant never considered its contract otherwise than as the Appellate Division finds it.

It certainly is the view which anyone presented with such a contract would take of his rights if acting thereon.

Beyond that I do not think the contention of respondent arising out of that incident is of any value.

I would dismiss the appeal with costs.

DUFF J.—I find myself unable to accept the view of the Court below as to the construction of this policy. I concur in the view of the trial Judge and mainly for his reasons. There is not, I think, any satisfactory evidence of authority reposed in the adjuster to enter into a contract to pay, and it appears to me to be more than doubtful whether the facts relied upon establish a contract even assuming such authority. As to the construction of the policy, with great respect to the Court below, I confess I am unable to read sub-para. (B) otherwise than as describing the conditions out of which liability is to arise when the automobile is in the course of transport "in any conveyance by land or water." These conditions include and are limited to "stranding, sinking, collision, burning or derailment," and it is undeniable that on this construction the respondent must fail. The word "extended" which was the subject of some discussion during the course of the argument, is no doubt used in a not uncommon sense of the word "extend"—to "write out (a legal instrument) in proper form." Oxford Dict.

ANGLIN J.:—For the reasons stated by Orde J., 54 D.L.R. 657, 48 O.L.R. 13, in giving judgment dismissing this action

Can.

S.C.

BRITISH EMPIRE UNDERWRITERS v. WAMPLER.

Anglin, J.

after the trial, I am of the opinion that the cause of loss sustained by the plaintiff was not within the risk covered by the insurance policy which he held with the defendant company. While the restriction upon the risk assumed during transit certainly might have been better expressed, it is stated in terms which I think admit of no doubt and seem sufficiently clear to preclude misunderstanding of its scope by an ordinary person taking insurance.

The form of policy is one intended for general use to cover risks of many different kinds. The nature and the extent of the risk under each individual policy is intended to be defined by an endorsement or endorsements attached to it. The policy on its face says so. The insurance is expressed to be "as respects loss . . . covered by endorsement or endorsements attached hereto"; through "fire, theft and transit" . . . while in building, on road, or railroad car, or other conveyance, ferry or inland steamer, subject . . . as follows:

. . . . . .

(B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the insured is legally liable."

If every case of loss during transit was meant to be covered, the first phrase of (B), just quoted, would have been left unqualified. The only possible office of the words following the dash is to restrict this otherwise general risk by particularising and defining what the insurer means shall be the limitation of its responsibility. I am, with great respect, unable to accept the construction put upon this clause in the Appellate Divisional Court, 57 D.L.R. 88, 48 O.L.R. 428.

In the absence of any proof that the insured was misled, or that he did not get precisely the insurance for which he bargained and paid, I can see no ground for extending the company's responsibility beyond the limits which the policy, in my opinion, evidences its intention to set.

Nor do I find anything in what the adjuster Marsh did that should estop the defendant from raising the defence that the plaintiff's loss was not covered by his policy. In the absence of express authority enabling an employee such as Marsh was to commit the company to a liability not covered by its policy, I cannot conceive that it is within the scope of his powers to do so. *Atlas Ass'ce Co.* v. *Brownell* (1899), 29 Can. S.C.R. 537; *Commercial Union Ass'ce* v. *Margeson* (1899), 29 Can. S.C.R. 601. There is nothing to shew that any such authority was in fact given to Marsh. Nor does it appear that any action was

taken by the company's directors or executive officers or by any general agent representing them after the circumstances of the loss were known at all inconsistent with their present defence. The policy expressly provides that no acts or proceedings of the company relating to appraisal or any examination shall operate as a waiver of any provision or condition of the policy. Marsh's duties, as I view them, were confined to investigating and appraising the amount of the plaintiff's loss. The company when apprised of all the material circumstances appears promptly to have repudiated liability, and advised the insured that it would be useless for him to put in proofs of loss.

Sask.

C.A.

I would allow the appeal with costs here and in the Appellate Division, and would restore the judgment of the trial Judge.

MIGNAULT, J., concurs. *Appeal allowed.*

KNIGHT-WATSON RANCHING Co. Ltd. v. CANADIAN PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. November 28, 1921.

CARRIERS (§ IIIF—433)—LIVE STOCK—CARE DURING TRANSIT—CONTRACT WHEREBY SHIPPER IS TO "FEED" AND "WATER"—DEPRECIATION OF STOCK THROUGH INSUFFICIENT WATER—FAILURE OF SHIPPER TO GIVE NOTICE IN ACCORDANCE WITH CONTRACT—LIABILITY OF CARRIER TO SUPPLY WATER—ADMISSION OF ORAL EVIDENCE TO VARY WRITTEN CONTRACT.

Certain cattle belonging to the plaintiff were shipped under contract with the defendant company to be carried from points in Alberta to Chicago. The written contract between the parties was in the form authorised by the Board of Railway Commissioners under sec. 348 of the Railway Act, 1919 (Can.), ch. 68, and provided among other things that "the company shall not be liable for any loss or damage which shall happen to the said stock even while on the railway operated by the company unless a written notice with full particulars of such loss or damage and of the claim to be made in respect thereof is delivered to the station agent at the said point of delivery, within twenty-four hours after the said property or some part of it has been delivered." No notice of any kind of loss or damage was delivered to the station agent at Chicago, the point of delivery, after delivery of the cattle. Held by Haultain, C.J.S., and Turgeon, J.A., that the failure to deliver this notice in accordance with the provisions of the contract afforded a complete answer to the plaintiff's claim, that the giving of the notice was a condition precedent to the plaintiff's right of action, and that the letter written by a solicitor in the employ of the defendant company then two weeks after the failure of the plaintiff to comply with the condition could not be construed as a waiver of the notice.

The contract also contained the following provision: "Said stock is to be loaded, unloaded, fed, watered, and while in the cars cared for in all respects by the shipper or owner, and at his expense

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

Haultain, C.J.S.

and risk. In case any of the company's employees load, unload, feed, water, or otherwise care for said stock, or assist in doing so, they shall be treated as the agents of the shipper or owner for that purpose and not as agents of the company." Held by Lamont, J.A.: That the obligation assumed by the shipper to "feed" and "water" included the obligation of supplying the feed and water, and that as the plaintiffs by their written contract had expressly agreed to furnish the water necessary for the needs of the cattle while being transported, they could not succeed in an action founded on the failure of the company to supply water which they themselves by their contract had undertaken to supply, and that oral evidence was not admissible to vary or contradict the terms of the written contract.

In the absence of any duty imposed by law upon the company to furnish a supply of water for cattle which are being shipped over its railway, the written contract signed by the shipper obligating them to furnish the water themselves prevented them from recovering for loss due to depreciation of the cattle by reason of an insufficient supply of water.

Unless and until an order is made by the Board under the power given to it by sec. 312 of the Railway Act of Canada, 1919, ch. 68, there is no duty cast upon the railway to supply water or feed to cattle being shipped over its road.

APPEAL by defendant from the trial judgment in an action for damages for depreciation of stock owing to being insufficiently supplied with water while being shipped over the defendant's railway. Reversed.

L. J. Reycraft, K.C., for appellant.

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

HAULTAIN, C.J.S.:—Several very important questions have been raised on this appeal, involving the consideration of a large volume of evidence.

There is one point, however, which, in my opinion, is decisive, and I shall confine my attention to that.

Certain cattle belonging to the respondent were shipped under contract with the appellant company, to be carried from points in the Province of Alberta to Chicago. The written contract between the parties was in the form authorised by the Board of Railway Commissioners under sec. 348 of the Railway Act, 1919, (Can.) ch. 68. Among other things, the contract provided that

"the Company shall not be liable for any loss or damage which may happen to the said stock, even while on the railway operated by the Company, unless a written notice with the full particulars of such loss or damage, and of the claim to be made in respect thereof, is delivered to the station agent at the said point of delivery, within twenty-fours after the said property or some part of it has been delivered."

No notice was given by the respondent to the station agent at

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

Haultain, C.J.S.

Chicago, the point of delivery, but on September 18, 1919, while the cattle were still at Moose Jaw en route to Chicago, a letter was written to the claims agent of the appellant at Moose Jaw on behalf of the respondent by Messrs. Willoughby, Craig & Co., which, after complaining that the appellant had neglected to provide a sufficient amount of water at Moose Jaw for watering the cattle, went on to say as follows:—

"Mr. Watson has found it necessary to load these cattle out, as he cannot leave them here owing to your neglect to supply water, and the cattle are being loaded out at the time of writing, and this will be completed at about 6.30 this afternoon, and they are being loaded without having received any proper supply of water, and it is now practically 48 hours since the cattle were first loaded. Mr. Watson states that by the neglect of your obligations in this regard that each head of cattle has suffered a shrinkage of at least fifty pounds, and this shrinkage causes a loss not only in the price per pound, but knocks down the general price paid for the cattle and decreases the price per pound offered by the buyer, and Mr. Watson estimates that his loss on these cattle for the reasons given will be a shrinkage of fifty pounds at approximately 8c. per pound, and a depreciation in general value of 75c. per hundredweight on cattle that will run about eight hundred pounds, making a further loss of $6, or a total loss of $10 per animal.

Mr. Watson will be able to furnish you with the exact figures of his claim when he markets these cattle, but the above are approximately correct. Mr. Watson, therefore, claims against your Company $14,740 loss. . . . .

This will serve as notice of Mr. Watson's claim against you, and we would be obliged if you would let us know what your attitude is in the matter, as our instructions are to take proceedings on this claim unless you are disposed to settle without us doing so."

No reply to this letter was received until October 8, 1919. In the meantime the cattle were taken on to Chicago and delivered there on or about September 19.

No notice of any kind of loss or damage was delivered to the station agent at Chicago, the point of delivery, after delivery of the cattle. The failure to deliver this notice in accordance with the provisions of the contract affords the appellants a complete answer, in my opinion, to the respondent's action. The giving of notice in strict accordance with the contract is a condition precedent to the respondent's right of action, and, to adopt the language of Strong, J., in *G.T.R. Co.* v. *McMillan* (1889), 16 Can. S.C.R. 543, at p. 560:—

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

Haultain, C.J.S.

"The plaintiff has failed to prove that he gave the notice . . . required, so that the defence is completely sustained both in law and in fact. . . . . Unless we are to make a new contract for the parties, I am at a loss to conceive any answer to the defence founded on this condition."

There are a number of decisions to the same effect, of which I will refer to:— *Northern Pacific Express Co.* v. *Martin* (1896), 26 Can. S.C.R. 135; *Mercer* v. *C.P.R. Co.* (1908), 8 C. R.C. 372, 17 O.L.R. 585; *G.T.R. Co.* v. *Robinson* (1915), 22 D.L.R. 1, 19 C.R.C. 37, [1915] A.C. 740, 84 L.J. (P.C.) 194; *C.P.R. Co.* v. *Parent*, 33 D.L.R. 12, 20 C.R.C. 141, [1917] A.C. 195, 23 Rev. Leg. 292, 86 L.J. (P.C.) 123.

It was urged on behalf of the respondent that a letter dated October 7, 1919, from the law department of the appellant at Winnipeg to Messrs. Willoughby, Craig & Co., in answer to their letter of September 18, referred to above, constitutes a "waiver" of the notice of loss required by the contract. This letter, it will be noticed, was written more than 2 weeks after the respondent had failed to comply with the requirements of the contract respecting notice of loss. The letter, so far as it can possibly relate to this question, is as follows:—

"While the cattle were in the yards, they received water. It may be that they did not receive all the water that they could drink, but they received all the water which the City could or would supply to this Company. The City was under contract to furnish water to the Company, but it is a known fact that at certain times and under certain conditions, the City has been unable to supply the people of the City with sufficient water. Owing to the abnormal shipment, however, there was not a full supply of water available. This Company did the best it could under the circumstances, and I think you must agree with me that this does not furnish Mr. Watson with any reasonable or legitimate grounds of complaint.

Mr. Watson loaded his cattle out, and they left about 8 o'clock in the evening by special train. They made an unusually good run to Portal, where Mr. Watson could have unloaded them, and could have had them watered and fed, but he chose to have them run through to Enderlin. The distance from Moose Jaw to Portal is about 167 miles, but the distance from Portal to Enderlin is approximately 294 miles. So Mr. Watson chose to go by Portal, and to have his cattle taken to Enderlin, an additional distance of 294 miles without feed or water. The Railway Company is not under obligation to do more than what is reasonable. Under the circumstances, it did all that was reasonable or could fairly be expected of it.

Mr. Watson's cattle were of an inferior class, and if they suffered any shrinkage, it is on account of his own neglect, and not on account of any neglect of the Railway's obligations. I cannot advise the Company to accept any responsibility."

It will be observed that the letter of Messrs. Willoughby, Craig & Co., while it states that it will "serve as a notice of claim," expressly states that the claim is only an estimate and that Mr. Watson "will furnish the exact figures of his claim when he markets the cattle." Watson, in his evidence, stated that he had intended to serve notice of loss after the cattle arrived in Chicago, but did not do so.

Up to the receipt of Mr. Reycraft's letter of October 7, at least, the provisions of the contract were in full force. On and after the determination of the time within which notice had to be given, the respondent appellant, by the express terms of the contract, was not liable for any loss or damage. Up to that time the appellant had not done anything or said anything which could justify the respondent in assuming that the contract would not be relied on. Even if Mr. Reycraft's letter had been received before the time for giving notice had elapsed, it would not, in my opinion, have relieved the respondent of the obligation to give notice in proper form and at the proper time. That letter, however, as we have seen, was not received by the respondent until after October 7. It can only be taken as saying that the company has not been guilty of any negligence resulting in damage to the respondent, that the alleged loss or damage resulted solely from the negligence of the respondent and that, therefore, the railway company would not accept any responsibility therefor.

The denial of liability on other grounds surely can not have the effect, *ex post facto*, of altering the original contract. The appellants had a complete defence on the ground that no notice had been given and, according to the letter, considered that it had a good defence on the grounds stated therein. If the letter only denies liability on some grounds, can the Company be held to be estopped from setting up any other grounds upon which it may choose to reply? The special provision in the present contract is a condition precedent to liability and not to the bringing of an action. In the latter case there might be waiver of notice, and then an action would lie. In this case the liability of the company had actually gone, and could only be re-established by the agreement of the company. *Earl of Darnley* v. *London C. & D. R. Co.* (1867), L.R. 2 H.L. 43, 36 L.J. (Ch.) 404.

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

Lamont, J.A.

I cannot find any evidence from which it may be presumed that the respondent consented or intended to waive notice and revive a liability which had been completely extinguished.

I would, therefore, allow the appeal.

LAMONT, J.A.:—In my opinion this appeal should be allowed. The plaintiffs base their claim for damages upon (1) a contract partly verbal and partly written, which they allege was entered into between themselves and the defendant company for the transportation of 1,490 head of cattle to Chicago; (2) in the alternative, upon alleged false and fraudulent representation made to them by the defendants' superintendent McIntosh. The facts briefly are: The plaintiffs are ranchers living near Cardston in Alberta. They had a large number of cattle for shipment to Chicago. They had the option of shipping by either of two routes, the Great Northern Railway or the defendants' railway. Prior to the time they desired to ship, they saw the defendants' superintendent, McIntosh, who talked to them about shipping over the defendants' line. The plaintiffs told him that unless there were ample facilities in the stockyards at Moose Jaw for feeding and watering the cattle, and a sufficient supply of water there, they would have to ship *via* the Great Northern line. McIntosh, according to their evidence, replied that there was plenty of water at Moose Jaw and ample facilities there for taking care of the shipment. The jury accepted the plaintiffs' evidence in this respect, and found that McIntosh "did represent to the plaintiffs that there were ample facilities in Moose Jaw stockyards for handling the shipment." They found also that this representation was false, but that McIntosh did not know that it was false. In answer to a question of the representation was made recklessly, not caring whether it was true or false, the jury answered that "there was no proper justification for making such representation." About 10 days after the above representation was made, J. D. Watson, general manager of the plaintiff company, loaded 1,490 head of cattle upon the defendants' cars for shipment to Chicago *via* Moose Jaw. At the same time he entered into a specific contract with the defendants, by which the defendants undertook the transportation of the cattle at a special rate on condition that their liability should be restricted as set out in the contract. The form of this contract had been approved by the Board of Railway Commissioners. One of the provisions of the contract contained the following: "Said stock to be loaded, unloaded, fed, watered, and while in the cars cared for in all respects by the shipper, or owner, and at his expense and risk."

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

Lamont, J.A.

When the cattle reached Moose Jaw there was not sufficient water there for their needs. The plaintiffs claim that by reason of not getting a sufficient supply of water at Moose Jaw the cattle depreciated greatly in value. The loss arising from this depreciation they now seek to recover from the defendants.

The first question requiring consideration to my mind is, To what did the contract signed by Watson obligate the plaintiffs?

That contract provided that the stock was to be fed and watered by the shipper and at his expense and risk. The obligation to "feed" and "water," in my opinion, includes the obligation of supplying the feed and water. When a shipper contracts to feed and water cattle while being transported and the contract is silent as to who is to furnish the feed and water, the obligation is upon the shipper. If this conclusion is correct, the plaintiffs, by their written contract, expressly agreed to furnish the water necessary for the needs of the cattle while being transported. Their claim in this action is founded upon a scarcity of water which they themselves by their contract had undertaken to supply. In other words, they claim damages for the consequences resulting from their own default.

Although the loss in question resulted from the plaintiffs' failure to furnish the necessary water, the plaintiffs seek to fix the responsibility therefor upon the defendants in two ways. First they say that the written contract was only part of the contract, that there was a verbal contract by which the defendants, through McIntosh, undertook to provide the water required by the stock. This is entirely inconsistent with the written contract as I construe it, and oral evidence is not admissible to vary or contradict the terms of a written contract. But apart from that, I am unable to find any evidence from which a jury could properly find that what took place between the plaintiffs and McIntosh amounted to an undertaking by him, or to a collateral contract, that the defendants would furnish the water. The plaintiffs in their testimony do not say that McIntosh undertook to supply the water. What they say is, that he represented that there was a sufficient supply of water at Moose Jaw. But even if McIntosh, during his interview with the plaintiffs, had undertaken on behalf of the defendants to supply the water, the plaintiffs 10 days later, when they loaded their cattle, expressly contracted that they would supply it themselves. In view of that express contract, I cannot see how any prior undertaking by McIntosh could be the foundation of an action for loss suffered by the plaintiffs by reason of their own failure to perform their written contract.

SASK.
C.A.
KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.
TURGEON, J.A.

The other ground upon which the plaintiffs sought to fix the defendants with liability was, that the representation made by McIntosh was fraudulently made. As the jury did not say that the representation was made recklessly, without caring whether it was true or false, and as their answer may, in my opinion, be reasonably interpreted as merely affirming that the facts were not such as to justify the making of the representation, I do not think it can be said that the jury found the representation to have been fraudulently made. If it is to be interpreted as a finding of fraud, then I am of opinion there was no evidence upon which fraud could properly be found. If there was no fraud, all that McIntosh was guilty of was innocent misrepresentation. Innocent misrepresentation, while sufficient to enable the party to whom it is made to have a contract induced thereby avoided and set aside while it is still executory, is not sufficient to support an action for damages.

In the absence of any duty imposed by law upon the defendant company to furnish a supply of water for cattle which are being shipped over their railway, I am of opinion that the written contract signed by the plaintiffs obligating them, as I think it did, to furnish the water themselves, prevents them from recovering for loss due to depreciation of the cattle by reason of an insufficient supply of water.

The appeal should be allowed with costs and the action dismissed with costs.

TURGEON, J.A.:—On September 16, 1919, the respondents delivered to the appellants 1,490 head of cattle to be carried by the appellants from Cardston and Raymond in the Province of Alberta over the appellants' railway and connecting lines to Chicago. The cattle were destined for sale at Chicago. The train-load of cattle arrived at Moose Jaw, on the appellants' line of railway, about 11.45 p.m. on September 17. Moose Jaw is a point at which the appellants keep facilities for the unloading and feeding and watering of cattle. The jury who tried the facts of this case found that the cattle, or at least some of them, did not receive sufficient water at Moose Jaw, as a result of which the respondents suffered damage through a depreciation in the value of the cattle when sold at Chicago. The jury also found that the respondents might have reduced the amount of their total loss by unloading and watering the cattle at Portal, which is 167 miles from Moose Jaw, instead of waiting to water them, as they did, after leaving Moose Jaw, until the train reached Enderlin, 300 miles beyond Portal. In the result, they estimated the loss occasioned by the insufficiency of the

water supply at Moose Jaw at $10,000, for which they held the appellants responsible. Pursuant to an agreement arrived at between counsel at the trial, the trial Judge in giving his written reasons for judgment, on November 29, 1920, fixed the damages, under the limitations imposed by the contract, at $5,921.69, and gave judgment in favour of the respondents for that amount with costs.

The written contract under which the cattle were carried was in the form authorised by the Board of Railway Commissioners for Canada, under the provisions of sec. 348 of the Railway Act.

The respondents' claim is not based upon the neglect or the failure of the appellants to perform any of the undertakings specifically set out in the said contract. Their claim arises out of a representation made to them by the divisional superintendent of the appellants' railway at Lethbridge. The jury's description of this representation is to be found in their answers to questions 1 and 2 and 8 and 9 submitted to them at the trial. In all, sixteen questions were put to the jury, which they answered as follows:—

"(1) Q. Did the defendant by its superintendent McIntosh make any representations to the plaintiff? A. Yes. (2) Q. If so, what representations were made? A. That the defendant did represent to the plaintiff that there is ample facilities in the Moose Jaw stockyards at Moose Jaw for handling the shipment in question. (3) Q. Were any of said representations false? A. Yes. (4) Q. Were any of the said representations false to the knowledge of the superintendent, McIntosh? A. No. (5) Q. Were the said representations made recklessly, not caring whether they were true or false? A. That in our opinion there was no proper justification for making such representations. (6) Q. If any representations were made, did the plaintiff act upon the same, and if so, in what way? A. Yes, by deciding to ship *via* the C.P.R. instead of the Great Northern. (7) Q. Were the said representations made with the intention that they should be acted upon? A. Yes. (8) Q. Did the defendants undertake by their superintendent McIntosh to supply the plaintiffs' cattle with sufficient water at Moose Jaw? A. Yes. (9) Q. If so, was this undertaking fulfilled? A. No. (10) Q. Did the plaintiff suffer damage by reason of such representation? A. Yes. (11) Q. If so, in what amount. A. $15,368.52. (12) Q. Was the defendant guilty of negligence? A. Yes. (13) Q. If so, in what did such negligence consist? A. That the defendant in accepting for shipment these cattle without making proper provision for their care, especially in not having a

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

TURGEON, J.A.

sufficient supply of water at Moose Jaw stockyards. (14) Q. Did the plaintiff suffer damage by reason of such negligence? A. Yes. (15) Q. If so, in what amount? A. $10,000. (16) Q. Could the plaintiff by the exercise of reasonable care have avoided the damage? A. Yes, as to the difference between the sum of $15,368.52 and the amount of the jury's award of $10,000."

In my opinion, if the respondents cannot rely on McIntosh's representation, the appellants are not liable to them for any loss they may have suffered through the shortage of water at Moose Jaw.

Whatever duties may have fallen upon railways as common carriers under general rules of law, their liability in the handling of traffic must be ascertained, in the first place, at least, by a reference to the Railway Act of Canada, 1919 (Can.) ch. 68, and particularly to secs. 312 and 348. Sec. 312 sets out the accommodation which is to be supplied by the railway, and gives a right of action (sub-sec. 7) to those who may be aggrieved by any neglect or refusal of the company to comply with its requirements. But this right of action is specifically stated to be "subject to this Act," and sec. 348 provides that the company may limit its liability in any manner which may be approved by the Board of Railway Commissioners, and, moreover, gives the Board power to prescribe the terms and conditions under which any traffic may be carried by the railway company. See *G.T.R.* v. *Robinson*, 22 D.L.R. 1, [1915] A.C. 740, 84 L.J. (P.C.) 194.

Looking then at the Act and at the contract, I find no duty cast upon the appellants to supply water at all. Section 312 does not either expressly or impliedly mention it, and we were not informed of any order of the Board requiring it having been made under the provisions of clause (e) of sub-sec. (1) of the said section. The only reference to water contained in the written contract is the following provision:—

"Said stock is to be loaded, unloaded, fed, watered, and while in the cars cared for in all respects by the shipper or owner, and at his expense and risk. In case any of the company's employees load, unload, feed, water, or otherwise care for said stock, or assist in doing so, they shall be treated as the agents of the shipper or owner for that purpose, and not as the agents of the company."

Unless and until an order is made by the Board under the power given to it by the aforesaid section 312, sub-sec. (1), clause (e), or a specific provision be inserted in the form of the contract used under the Act, I know of no duty cast upon the

railway to supply water or feed to cattle, any more, may I say, than there is any duty upon them, in the absence of an order of the Board, to supply dining cars for the use of passengers, or restaurants (as they do) at certain stations.

Having regard, then, to the findings of the jury, the evidence shews that Knight and Watson, of the respondent company, interviewed McIntosh, the appellants' divisional superintendent at Lethbridge, some days before the cattle were shipped, and made inquiries of him regarding conditions pertaining to the care and watering of stock at Moose Jaw. The jury have found that McIntosh made certain representations to the respondents with the intention that they should act upon them, and that the respondents did so act upon them by deciding to ship their cattle over the appellants' railway, instead of over the Great Northern Railway.

I am of the opinion that, in order to succeed in this action for damages, the respondents must shew either (1) that the said representations were made fraudulently, or (2) that they were incorporated into and became a part of the contract between the parties. If they stand outside of the contract as a mere innocent misrepresentation, then, I think, no right of action for damages can be based upon them, however the respondents may have suffered through relying upon them. This, I think, is the rule as firmly established by the House of Lords in the well-known cases of *Peek* v. *Derry* (1889), 37 Ch. D. 541, 58 L.J. (Ch.) 864, and *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30, 82 L.J. (K.B.) 245.

The finding of the jury must be taken, in my opinion, to reject the theory of fraud. Their answer to question 5 is, no doubt, given in an indefinite form of language, but it can, and I think should, be interpreted in a manner which negatives fraud, and, having regard to the evidence of Knight and Watson themselves, I do not see how any other interpretation can be placed upon it.

If, in the absence of fraud, McIntosh's representations can be held to be part of the real contract between the parties, as is contended by the respondents, we are at once confronted with the necessity of considering the objection raised by the appellants to the respondents' claim on the ground of their non-compliance with the notice of damage required by the terms of the contract. The requirement in question is in the following language:—

"And the company shall not be liable for any loss or damage which may happen to the said stock, even while on the railway operated by the company, unless a written notice with the full

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

TURGEON, J.A.

particulars of such loss or damage, and of the claim to be made in respect thereof, is delivered to the station agent at the said point of delivery within twenty-four hours after the said property or some part of it has been delivered."

The only notice given by the respondents to the appellants was the letter written by Messrs. Willoughby, Craig & Co., on behalf of the respondents, to the appellants' claims agent at Moose Jaw, on September 18, while the cattle were still at Moose Jaw. No notice was delivered to the station agent at Chicago (the point of delivery).

With great regret I find myself inclined to the view that this objection, however harshly technical it may appear, would prevail against the respondents' claim, even if such claim were established by the facts. This provision as to notice forms part of the contract approved of by the Board of Railway Commissioners under sec. 348 of the Act. In my opinion it constitutes a very severe limitation upon the appellants' liability. The language, it will be noted, is: "the company shall not be liable for any loss or damage unless a written notice," . . . . "is delivered."

In the case of *G.T.R. Co.* v. *Robinson*, 22 D.L.R. 1, their Lordships of the Judicial Committee of the Privy Council, in discussing another provision, and on the face of it a very harsh provision, of this same form of contract, said, after referring to the statutory authority on which it is based (at p. 5): "If the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of justice."

I think also that the judgments of the Supreme Court of Canada in *G.T.R. Co.* v. *McMillan*, 16 Can. S.C.R. 543, and *Northern Pacific Express Co.* v. *Martin*, 26 Can. S.C.R. 135, will support the conclusion that the respondents are unable to assert their claim because of their failure to comply strictly with the terms of the contract regarding notice of loss. The decisions in *Mason* v. *G.T.R.* (1875), 37 U.C.R. 163; *Hayward* v. *C.N.R.* (1906), 6 C. R.C. 411, 16 Man. L.R. 158, and *Mercer* v. *C.P.R.*, 8 C.R.C. 372, 17 O.L.R. 585, are all based upon a similar interpretation of the law. On behalf of the respondents it is contended that the answer to Willoughby, Craig & Co.'s letter sent by Mr. Reyeraft on October 7, 1919, constitutes a waiver on the part of the company of the provision of the contract respecting notice. This letter, by the way, was written more than 24 hours after the cattle had reached Chicago. If any letter written by the appellants after the time had gone by within which the respondents were required to give notice can be construed as a waiver, then it must be remembered that Mr.

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

TURGEON, J.A.

Reycraft is a permanent solicitor of the appellant company who devotes his whole time to their service for a remuneration. He is therefore, in my opinion, in the position of an officer or an employee of the company, and cannot be likened to a solicitor or to counsel acting for a party in regard to specific litigation. (Re *Liberator Permanent Benefit Building Society* (1894), 71 L.T. 406, 15 R. 149, 2 Manson 100, and *Duncan* v. *City of Vancouver* (1917), 36 D.L.R. 218. But then we find another stipulation in the contract to the effect that no officer, agent or employee of the company may waive, verbally or otherwise, any of its provisions.

For the foregoing reasons I am of opinion that the respondents' action must fail, even if they succeeded in establishing a contractual right against the appellants upon the representations made by Superintendent McIntosh to Knight and Watson. I think it is my duty to add, however, that the appellants are not entitled to succeed upon such narrow grounds alone. I think that a full consideration of the case will shew that no such contractual right was created by what occurred in the conversation between the parties. It is true that the jury were asked to find, in question 8, whether the appellants did "undertake" by their superintendent to supply the respondents' cattle with water at Moose Jaw, and that they answered this question in the affirmative. With all respect I must say that I think this question is not one for a jury to answer, as it seems to involve a matter of law. In any event, if the intention of that question is to ascertain whether the conversation between the superintendent and the respondents must be construed as a contract binding upon the appellants, it ought to have been decided as a question of law by the Judge, and not found as a question of fact by the jury. The jury did find in their previous answers that the superintendent made certain representations to the respondents with the intention that they should be acted upon, and that they were acted upon. I do not think any further statement by the jury can stand in the way of the Court deciding whether, as a matter of law, any contract was thereby entered into. The jury must find what was actually said by the parties, but the Court must determine the legal effect of the words which the jury find to have been spoken.

Now, in point of fact, although the appellants, according to my view, are not bound either by the Railway Act or by their form of contract to keep water for cattle at Moose Jaw, it is nevertheless the case that they do keep stockyards at that point with the special facilities necessary for the unloading and reloading of cattle in transit, hay-racks and water troughs, and

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

TURGEON, J.A.

also men in their employ to help feed and water the cattle. They, no doubt, provide this special accommodation in order to secure the traffic. Shippers of cattle know these facilities exist. If they did not exist at Moose Jaw, or at some other convenient point upon the appellants' railway, it would be impracticable for shippers to use the railway for long-distance hauls. Therefore the appellants allow it to be known that there is certain accommodation at Moose Jaw for the use of shippers of live stock; but it should be recalled here, I think, that they take care to say, in effect, to the shippers in their contract: "You can use these facilities, but at your own risk and expense: you must see that the animals are fed and watered; if any of our employees assist you, they shall be deemed to be your agents and not ours." In so far as water is concerned, the appellants have a tank in their stockyards with a capacity of 8,690.85 gallons. At the time in question in this case, the appellants received the water for this tank from the authorities of the city of Moose Jaw and from the city's source of supply. The evidence shews that from time to time the city's water supply ran very low, and upon such occasions the amount furnished by the city to the appellants was inadequate. The respondents knew all these facts. They knew that the accommodation existed, but they knew, or at least believed that it was not at all perfect. They knew that the water supply was not always sufficient, and that the arrangements for feeding the cattle were defective. Their knowledge on all these points was derived from their own experience and was the very thing which caused them to doubt, and the reason why they consulted Superintendent McIntosh before deciding to deliver this particular shipment to the appellants. They were certainly not led astray by any general "holding out" on the part of the appellants, even if any such holding-out could be taken to create a liability against the appellants in favour of a shipper ignorant of the true facts.

It becomes of the greatest importance then to consider what took place between the respondents and Superintendent McIntosh, because, in my opinion, any liability to be cast upon the appellants must be founded upon the conversation which took place between these men.

McIntosh is superintendent of the Lethbridge division. He has nothing to do with Moose Jaw, which is in another division in another Province. He had lived in Moose Jaw at one time, however, for a period of 5 years, from 1910 to 1915, as district engineer of the appellants' line, and was familiar with water conditions at that point. He had never known of any deficiency of water as early in the year as mid-September. Acute short-

ages occurred, he says, just before the break-up in the spring and there were periodical shortages during the winter. He had no reason whatever to suspect that there would not be sufficient water for the respondents' purposes in September. The information which he had at the time of the conversation in question was also to this effect. He was not asked to state the source of his information. The trial Judge was apparently much impressed with the honesty of McIntosh's evidence, as he referred to him in his charge to the jury in strongly favourable language. Mr. Halkett is the appellants' divisional superintendent at Moose Jaw, with a full knowledge of water conditions at that point at the time of the shipment and immediately prior thereto. He is very positive that there was sufficient water at Moose Jaw up to the time that the respondents' shipment arrived, and, while he had no recollection of having communicated any information to McIntosh regarding water, he says that he certainly would have told him, if asked, that the supply was adequate. I may say here that, notwithstanding the evidence of Mr. Green, the assistant engineer of the city of Moose Jaw, I do not see how any fraud can be attributed to Mr. Halkett, or to any other of the appellants' officials, in regard to the matters in controversy. It may be necessary for me to state this here, as the jury were asked only to find whether or not McIntosh was guilty of fraud. If it had been suggested that they be asked further whether any other official of the appellants had fraudulently supplied McIntosh with wrong information regarding the water supply, I think the suggestion should have been rejected.

Now, under these circumstances, the conversation took place about 10 days or two weeks before the shipment. Naturally the three participants in the conversation do not give exactly the same version of what was said, but there is little difference between them. Watson says in his evidence, as it appears on p. 38 of the appeal book:—

"A. Well, we just told him if there wasn't water there we could not go there, that is all.

His Lordship: If there wasn't water you couldn't go that way? A. No, we would have to go by the other road. Q. What do you mean by the other road? A. Ship over the Great Northern.

By Mr. Knowles:Q. What did he say to you? A. He said there was water there and that the yards were fixed.

His Lordship: What did he mean by that? A. Well, that there was racks in the yards and water. That is what we had had been discussing all the time, that water condition and feed

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

Turgeon, J.A.

racks. We had to feed on the ground with all our shipments up to this time."

And in his cross-examination on p. 52 he is questioned regarding statements made by him upon his examination for discovery, and he has this to say:—

"Q. Well, you said 'We met Mr. McIntosh on the platform and he asked us when our next shipment was going to be and we told him in about ten days.' Is that correct? A. Certainly. Q. 'If the stockyards and everything was all ready in Moose Jaw.' A. Yes. Q. 'And he told us that they were.' A. Yes. Q. Now that is a correct answer—that is what took place between you and Mr. McIntosh? A. Yes, sir."

Mr. Knight, in his evidence says, at p. 60:—

"A. And the conversation arose—I don't know which asked the question—whether it was Mr. McIntosh or whether it was Mr. Watson—about the next shipment of cattle that we were about to make, and we told him we had come over to see; we hadn't fully decided which way we would go, whether by the Great Northern or the C.P.R. We said we hadn't been satisfied with the kind of treatment we had with the C.P.R. with regard to water at this end, and the way they had been treated in the Moose Jaw yard, and unless we were sure we would get good treatment, that these cattle were looked after, with fair feed and water, we would go the other way. And Mr. McIntosh assured us that there was plenty of water here and that they would be looked after at Moose Jaw if we would send the cattle this way."

McIntosh appears to believe that the conversation had not so much to do with water as with certain other matters that the respondents had to complain about. However, he states that he told them that all these matters, including the water supply, were then in satisfactory condition.

I can find no evidence that anything more than a representation of the existence of certain things was made by McIntosh, and I gather this from a perusal of the whole evidence of these three men. The words used by Knight in the last sentence in the paragraph of his evidence which I have quoted above: "and that they would be looked after at Moose Jaw," is the only hint I can find of a collateral undertaking to run with the contract made on behalf of the appellants and binding upon them, and I think that no theory of such an undertaking having been created can be supported by the evidence. Nor do I think the respondents, who are old cattle men, used to dealing with railway companies in these matters, believed that they were getting from McIntosh anything else than the assurance that conditions at

Sask.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

Turgeon, J.A.

Moose Jaw were such that they could send their cattle to that point in safety. It turned out that when the cattle arrived there, some 10 days or 2 weeks later, the water supply was found to be inadequate. The very most that can be made out of McIntosh's statements, in my opinion, is that they amount to an innocent misrepresentation, not constituting fraud either in himself or in anybody else whose fraud might be attributed to the appellants, and that the findings of the jury on the questions properly left to them amount to nothing more than that. This being the case, no action in damages will lie.

In stating this conclusion, I am making no extended reference to the great number of cases cited in support of the proposition that, even under the circumstances of this case, as I have related them, an innocent misrepresentation of the kind we are dealing with here will entail legal liability. Some of these cases have been expressly over-ruled, as was pointed out by Lindley, L.J., in *Low* v. *Bouverie*, [1891] 3 Ch. 82, 60 L.J. (Ch.) 594, 40 W.R. 50. Others have to do with the doctrine of estoppel. Some deal with the equitable relief against a suit for specific performance which may be granted on account of such a representation. In others, fraud was found. In another, the statement relied upon was in itself the full consideration of the contract, and, in making the statement he did, the defendant acted negligently in the performance of his contract. (*Pritty* v. *Child* (1902), 71 L.J. (K.B.) 512). In short, I may say that I find they are all distinguishable from the present case for one reason or another. In my humble opinion the attempt made in this case to hold the appellants liable, in the absence of fraud, for the statement made by McIntosh to the respondents is of the class referred to by Lord Moulton in *Heilbut* v. *Buckleton*, [1913] A.C. 30, where he uses the following language, at pp. 48, 49:—

"In the history of English law we find many attempts to make persons responsible in damages by reason of innocent misrepresentations, and at times it has seemed as though the attempts would succeed . . . .

On the Common Law side of the Court the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits, and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation. The present case is, in my opinion, an instance of this."

And later on, at p. 51, he says:

"It is, my Lords, of the greatest importance, in my opinion,

SASK.

C.A.

KNIGHT-WATSON RANCHING CO. v. C.P.R. CO.

Turgeon, J.A.

that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made."

We next have to consider questions 12, 13 and 14, and the answers of the jury thereto. The result of these 3 answers is that the appellants are found guilty of negligence because they accepted the respondents' cattle for shipment without having a sufficient supply of water at Moose Jaw to enable the respondents to water them properly at that place. Having disposed, according to my views, of the questions of misrepresentation and of fraud, and the written contract speaking for itself, it remains only for me to determine whether the mere acceptance of the cattle by the appellants cast upon them the duty to have a sufficient supply of water at Moose Jaw, the point where their facilities for the use of cattle shippers were known to exist, and, if so, whether they committed a breach of that duty. I am aware that the form in which I have put the question in this last sentence is not the form in which the jury accepted it, but is rather a reversal of that form. I think, however, that the negligence, if there was any, must have consisted, not in accepting the shipment, but in failing to provide for it after having accepted it.

Now, in my opinion, if there was any duty cast upon the appellants at all regarding the water supply at Moose Jaw, it was only the duty to exercise all reasonable care and not a duty of absolute insurance. But I cannot find any evidence of negligence on that point. Their tank was filled to its full capacity of 8,690 gallons. All this water was placed at the disposal of the train upon which the respondents' cattle were carried. This train was made up of 65 cars of cattle, 53 belonging to the respondents and 12 to another shipper. After all this water had been consumed by the cattle, it turned out that the tank was replenished very slowly, owing to the inadequacy of the supply coming from the city waterworks to the appellants' tank. The appellants could do nothing to hasten the inflow of the water. Their witnesses state that they had no knowledge and no grounds for believing that the city supply would run short on that occasion. In all, about 15,200 gallons of water were given to about 2,500 head of cattle, including the respondents' 1,490 head, which on an average would mean 6 gallons to each animal. There is some evidence to the effect that if some of the respondents' cattle received no water or less than they needed, it was due to the manner the watering took place, the stronger animals forcing their way ahead and

Ont.

S.C.

drinking more than sufficient and thus depriving the weaker ones of their share. If such was the case, it would be a matter pertaining to the "watering of and caring for" the animals, and entirely of the respondents' responsibility, and, if it could have been prevented, it ought to have been prevented by them under the written contract. The only ground upon which negligence is alleged against the appellants, so far as I can see, is that they should not have dealt with the city but should have had a different system of water supply installed, in which case there might have been more water for the respondents' cattle. I do not think that their conduct in this regard can be construed into negligence in this particular case. In my opinion there was no evidence of negligence upon which the jury might have found as they did.

I am therefore of opinion that this appeal should be allowed with costs and judgment entered for the appellants in the Court below with costs, notwithstanding the verdict of the jury.

Appeal allowed.

Re McINTYRE PORCUPINE MINES Ltd. and MORGAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A. January 31, 1921.

TAXES (§ IIIB—122)—MINES AND MINERALS—ON WHAT VALUATION OF MINERALS BASED—ASSESSMENT ACT, R.S.O. 1914, CH. 195, SEC. 40, SUB-SECS. 6 AND 7—OPERATION—LIABILITY OF MINING BUSINESS FOR BUSINESS TAX.

The operation of sub-secs. 6 and 7 of sec. 40 of the Assessment Act, R.S.O. 1914, ch. 195, is not confined to income derived from the mineral according to its value when brought to the surface, they extend to the income derived from the mining operations including the crushing, reducing, smelting, refining and treating of the ore, and this being so the mining business is not subject to a business tax.

[See Annotation following.]

TAXES (§ IIIB—116)—ASSESSMENT ACT, R.S.O. 1914, CH. 195, SEC. 40, SUB-SEC. 4—DESCRIPTION OF PROPERTY—"CONCENTRATORS"—MEANING OF.

The word "concentrators" as used in sub-sec. 4 sec. 40 of the Assessment Act, R.S.O. 1914, ch. 195, has no scientific or technical meaning, but is a colloquial expression signifying a process for separating metal from the rock or dross in which it is found, and any process the purpose of which is the separation of the valuable mineral from the dross is a concentrating process and the building and plant used for that purpose is a concentrator.

APPEALS by Charles B. Morgan and Charles V. Gallagher from orders of the Ontario Railway and Municipal Board of the 28th May, 1920, allowing appeals from orders of the Junior Judge of

Ont.

App. Div.

McINTYRE PORCUPINE MINES LIMITED AND MORGAN.

Meredith, C.J.O.

the District Court of the District of Temiskaming, which allowed appeals from the Court of Revision of the Township of Tisdale, in the matter of the assessments of the McIntyre Porcupine Mines Limited and five other mining companies made by the said township corporation. The Board found that the buildings, machinery, and appliances, which had been assessed under the designation of "concentrators," were not subject to taxation, and also that the mining companies were not subject to a "business tax."

McGregor Young, K.C., for appellants.

R. S. Robertson and *J. Y. Murdoch*, for respondents.

MEREDITH, C.J.O.:—The main question for decision is as to the meaning of sub-sec. 4 of sec. 40 of the Assessment Act, R.S.O. 1914, ch. 195, and there is a subsidiary question as to the liability of the respondents to business assessment in respect of part of their operations. Sub-section 4 provides that:—

"(4) The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to sub-section 8, the minerals in, on or under such land, shall not be assessable."

Sub-section 8 does not affect the question: it relates only to cases in which petroleum mineral rights have been reserved.

The policy of the Legislature, as indicated by its enactments, is to impose a provincial tax on the profits of mines in excess of a stated sum: The Mining Tax Act, R.S.O. 1914, ch. 26, sec. 5. These profits are ascertained and fixed in the following manner, "that is to say: The gross receipts from the year's output of the mine, or in case the ore, mineral or mineral-bearing substance or any part thereof is not sold, but is treated by or for the owner, tenant, holder, lessee, occupier, or operator of the mine upon the premises or elsewhere, then the actual market value of the output, at the pit's mouth, or if there is no means of ascertaining the market value, or if there is no established market price or value, the value of the same as appraised by the Mine Assessor, shall be ascertained . . . " (sub-sec. 3).

From the value thus ascertained, certain deductions, which it is not necessary to mention, are to be made.

Section 14 provides that where the mine-owner has to pay a

municipal tax on income derived from the mine it is to be deducted from the amount of the provincial tax payable by him.

By the provisions of the Assessment Act, sec. 40 (6), "the income from a mine or mineral work shall be assessed by, and the tax leviable thereon shall be paid to the municipality in which such mine or mineral work is situate;" but "no income tax shall be payable to any municipality upon a mine or mineral work liable to taxation under section 5 of the Mining Tax Act, in excess of . . . one-third . . . of the tax payable in respect of annual profits from such mine or mineral work under the provisions of the said section and amendments thereto" (sec. 40 (9)).

I see no reason for confining the operation of these sub-sections to income derived from the mineral according to its value when brought to the surface. In my opinion, they extend to the income derived from the mining operations, including the crushing, reducing, smelting, refining, and treating of the ore. See the Mining Tax Act, sec. 5 (3), and the Mining Act of Ontario, R.S.O. 1914, ch. 32, sec. 2 (*k*).

If I am right in this view, the mining business is not subject to a business tax. The business tax was substituted for a tax on income, as to the businesses in respect of which that tax is imposed, but in the case of mines the Legislature had left them to be taxed on the income from them. This is clear, I think—otherwise a person engaged in the mining business would be doubly taxed for the same thing.

It is true that the annual profits of a mine for the purposes of sec. 5 of the Mining Tax Act are the value of the output at the pit's mouth, subject to certain deductions for the expenses incurred in winning the ore; but there is no such provision in the Assessment Act, and what is taxable under it is "the income from" the "mine."

This has no bearing on the main question for decision; it applies only to the contention that the respondents are liable for business tax in respect of a part of their operations. The solution of the main question depends upon the meaning to be attached to the word "concentrators" as used in sub-sec. 4.

The proper conclusion upon the evidence is, I think, that the

Ont.
App. Div.
RE McINTYRE PORCUPINE MINES LIMITED AND MORGAN.
Meredith, C.J.O.

word has no scientific or technical meaning, but is a colloquial expression signifying a process for separating metal from the rock or dross in which it is found. I see no reason for confining it to a mechanical process. All the processes in use by the respondents are designed to produce the same result—the separation of the valuable mineral from the dross—and the concentration that takes place is the concentration of this valuable mineral by the separation of it from the dross. It is rather a process of separation than of concentration, though the latter is the name that has been given to it.

To give effect to the contention of the appellants would mean the penalising of the operators of mines producing low grade ore. With that class of ore, as I understood the evidence, it is necessary for commercial success to combine chemical with mechanical means for the separation of the valuable mineral from the dross, and the result would be that the buildings and plant used for that purpose would be liable to municipal taxation, from which, in the case of richer ore where the mechanical process sufficed, the buildings and plant would be exempt.

I rest my judgment upon this branch of the case on the ground that any process the purpose of which is the separation of the valuable mineral from the dross is a concentrating process, and that the building and plant used for that purpose is, within the meaning of sub-sec. 4, a concentrator.

I would dismiss the appeals with costs.

MAGEE and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—The Ontario Railway and Municipal Board have reached a conclusion in this case that should not be disturbed. Their finding that the buildings, machinery, and appliances which had been assessed both by the local assessor and by the District Court Judge, under the designation of "concentrators," are not subject to taxation, is the view taken by the Court of Revision, and is in accord with what I take to be the true meaning of the statute.

The sole point of difference seems to be that the Board gave a wider meaning to the descriptive term "Concentrators" than does the District Court Judge, who limits its scope to mechanical

means of concentration. Undoubtedly the word in question was originally sometimes confined, as evidenced by what I mention below, to the meaning adopted by the learned Judge. But it does not in itself involve any such limited idea, and must therefore be construed so as to include that which, in the march of progress, falls properly within its ordinary meaning. In Murray's New English Dictionary, vol. 2, published in 1893, "Concentrator" is defined as "an apparatus for concentrating solutions or other products of manufacture . . . An apparatus by which mechanical concentration of ores is performed." In the Encyclopædia Britannica, 11th ed., 1910-1911, vol. 20, at p. 238, "Ore-dressing" is defined thus: "The province of the ore-dresser is to separate the 'values' from the waste—for example, quartz, felspar, calcite—by mechanical means, obtaining thereby 'concentrates' and 'tailings.' The province of the metallurgist is to extract the pure metal from the concentrates by chemical means, with or without the aid of heat." But in similar and later works and in some of the earlier publications a more extended meaning is found. Thus in "The Americana" (a Universal Reference Library), last edition, 1911, "Concentration," in chemistry, is defined as "the act of increasing the strength of solutions. This is effected in different ways: by evaporating off the solvent, as is done in the separation of salt from sea-water; by distilling off the more volatile liquid, as in the rectification of spirit of wine; by the use of low temperatures, as in the purification of benzol; by difference of fusibility, as in Pattinson's process for desilverizing lead." In a "Thesaurus Dictionary of the English Language," by Francis A. March, published about 1902, under the head of "Chemistry," "Concentration forces" is defined as "Chemical forces or actions which reduce to one bulk or mass."

In Funk & Wagnall's New Standard Dictionary, 1913, "Concentrator" is said to mean, in mining, "a machine or device used to concentrate or separate ore;" while in the Century Dictionary, last edition (1913), "Concentrator" is thus spoken of: "In mining, the name frequently given, especially in the United States, to any complicated form of machine used in ore-dressing, or in separating the particles of ore or metal from the gangue or rock with which they are associated."

The rule laid down in the Interpretation Act, R.S.O. 1914,

Ont.

App. Div.

RE McINTYRE PORCUPINE MINES LIMITED AND MORGAN.

Hodgins, J.A.

ch. 1, sec. 10, is that statutes shall "receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof." It is therefore open to the Court to adopt the larger or later meaning of the word in question, if it be true, as I think it is, that the Assessment Act in this particular aims at exempting such means as may be adopted at the mining location to aid in the concentration of the ore-mass, even if that progresses to the point of using chemical means as well as those mechanical, and in so doing draws within its scope some part of what may be alternatively described as amalgamation or reduction: see *Attorney-General* v. *Salt Union Limited*, [1917] 2 K.B. 488, *per* Lush, J. In this connection I refer to the language of Cozens-Hardy, M.R., in *Camden (Marquis)* v. *Inland Revenue Commissioners*, [1914] 1 K.B. 641, at pp. 647 and 648: "The duty of this Court is to interpret and give full effect to the words used by the Legislature, and it seems to me really not revelant to consider what a particular branch of the public may or may not understand to be the meaning of those words. It is for the Court to interpret the statute as best they can. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help which they can find, including of course the consultation of standard authors and reference to well-known and authoritative dictionaries, which refer to the sources in which the interpretation which they give to the words of the English language is to be found. But to say we ought to allow evidence to be given as to whether there is any such technical meaning, to be followed up, of course, by evidence as to what that special meaning is, would I think be going entirely contrary to that which seems to be the settled rule of interpretation."

There is one point, however, in the judgment of the Board to which attention should be drawn so as to avoid misconception in the future. It is that which treats the whole question as one of fact and as not embracing any question of law. It is only upon questions of law that an appeal lies to this Court; and, while care should be taken not to trench upon the final authority of the Board upon questions of fact, it is equally important that the limited right of review should not be ignored or diminished.

The construction of the words of any statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its terms is a question of fact: *Elliott* v. *South Devon R.W. Co.* (1848), 2 Ex. 725; *Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.*, [1919] A.C. 999, 48 D.L.R. 147. This distinction clearly runs through the decision of this Court in *Re Hiram Walker & Sons Limited and Town of Walkerville* (1917), 40 O.L.R. 154 where it is said (p. 156): "The case was argued by Mr. Anglin as if the legislation imposed taxation in respect of a 'distillery.' The question in such a case would be a very different one from that which arises when the taxation is in respect of 'the business of a distiller.' The Court cannot, I think, know judicially what such a business is, and the question of what it is must therefore be a question of fact."

The case just quoted is in line with the decision, upon somewhat similar words, in *Re S. H. Knox & Co. Assessment* (1909), 18 O.L.R 645. It is no doubt difficult to separate questions of law and fact in a case of this kind, where evidence which enables the Court to put itself in a position to construe the words of the Act is very often the same or practically the same as that which determines whether the statute covers the particular thing in question. But that is no reason for confusing two separate matters, in one of which an appeal lies and in the other the decision of the Board is final. See *Re Bruce Mines Limited and Town of Bruce Mines*, 20 O.L.R. 315, and the dissenting judgment of Meredith, J.A., in *Re S. H. Knox & Co. Assessment, supra.*

I would dismiss the appeals.

Appeals dismissed with costs.

ANNOTATION.

TAXATION OF MINERALS AND MINERAL LANDS IN ORGANIZED MUNICIPALITIES OF ONTARIO.

By J. E. IRVING.

By sub.sec. 1 of sec. 40 of the Assessment Act, R.S.O. 1914, ch. 195, it is provided that "subject to the provisions of this section, land shall be assessed at its actual value." The interpretation clause of the Act provides that the word "land"

ANNOTATION shall include all mines and minerals in and under land. Consequently, if sec. 40 did not otherwise provide, minerals in and under land would be assessable at their actual value. But the section does provide otherwise. Sub-sec. 4 provides that "the buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to sub-sec. 8, the minerals in, on or under such land, shall not be assessable." Sub-sec. 5 provides that "in no case shall mineral land be assessed at less than the value of other land in the neighbourhood used exclusively for agricultural purposes." Sub-sec. 6 provides that "the income from a mine or mineral work shall be assessed by, and the tax leviable thereon shall be paid to the municipality in which such mine or mineral work is situate."

The main difficulty in the practical application of the section arises from the fact that the word "minerals" is not defined specifically by the Act, and that the word in question is one which has given rise to a great diversity of judicial opinion as to its meaning, in relation to its context and other circumstances.

Perhaps the only point which can be regarded as settled in respect of the word "minerals" is that whether or not any particular substance is a mineral within the meaning of a statute in which the word is used, is a question of fact.

The object of a statute always has a controlling influence on the interpretation of words used therein, and so in interpreting the sub-sections in question it is necessary to know their object. The provisions of sub-secs. 4. 5 and 6 indicate that the object of the Legislature in enacting them was to provide a plan of taxation which would be equitable and just as between the owners of agricultural lands and the owners of mineral lands. The plan provided is plain. It is not mineral lands which are made non-assessable, but the minerals in, on or under such lands. Both farming lands and mineral lands are assessable respectively at their actual value, subject, in the case of mineral lands, that their assessed value must not include anything savouring of the value of buildings, etc., of the kind, and used for the purposes, mentioned in sub-sec. 4, nor of the value of minerals in, on or under such lands, and subject also that they must be assessed at not less than the value of farming lands in use in the neighbourhood. In lieu of the assessment of such buildings, etc., and of such minerals, at their actual value, it is provided by sub-sec. 6 that the income of a mine or mineral work shall be assessed. Mineral lands, whether worked or unworked, are to be assessed without reference to the minerals in, on or under

ANNOTATION

them, but when worked, the minerals as such are taxable indirectly on the basis of the income derived from the mine or mineral work.

Keeping in mind that object and the plan provided for attaining the same, recourse to the time-honoured canons of construction of statutes will lead to the proper interpretation of the word "mineral." These canons were stated as long ago as the year 1584 by Sir E. Coke in *Heydon's* case (1584), 3 Co. Rep. 7a, 76 E.R. 637, and often since approved. Modifying these canons somewhat to fit the statute under consideration they may be stated thus:—1st. What is the basis of assessment of minerals provided by sub-sec. 1? 2nd. What is the mischief and effect for which sub-sec. 1 does not provide? 3rd. What remedy has the Legislature resolved and appointed to cure the disease of sub-sec. 1? 4th. What is the true reason of the remedy? And then to make such construction as shall suppress the mischief and advance the remedy. The answer to the first question is plain that the basis of assessment provided by sub-sec. 1 is the actual value of the minerals. The answer to the second question may be indicated by a few illustrations:—Assume a 40-acre farm lying adjacent to 40 acres of bare rock shewing outcroppings of an ore deposit, and that the owner of the farm could, at any time, sell it for $4,000, and that the owner of the adjacent 40 acres could, at any time, sell it for $50,000. If these parcels of land were assessed at their actual values, their respective assessments would be $4,000 and $50,000. Assume the case of the owner of a 40-acre tract, containing an ore vein, having, by diamond drilling, proved up 1,000,000 tons of ore. The approximate value of the ore per ton in the ground could be ascertained by calculating back from the market price per ton of similar ore, and assume it to be so ascertained at 20c. per ton. The assessment of the ore deposit at its actual value would be $200,000. It is well known that mine operators always keep development work in the mine well in advance of actual mining, and so always there is a large tonnage or other measure of reserve ore proved up, the approximate value of which in place could be ascertained by the method above mentioned, and if this reserve were assessed at its actual value, the assessment would be a very large sum. The above suppositious cases have their counterparts in actual assessments in some jurisdictions. From these illustrations it appears that the mischief and effect for which sub-sec. 1 does not provide, as applied to minerals, and in contrast to farming lands, is that, because, in the ordinary course of operations, the entire surface of farming lands is capable of continuous production from year to year,

ANNOTATION whereas minerals are not productive in place, but only on removal spread over a period of years, the owner of minerals, unlike the owner of farming lands, would be called upon to pay yearly taxes on property incapable of being made productive in years for which taxes would be payable. The answer to the third question is obvious, namely:—that the Ontario Legislature considered that effect of sub-sec. 1 a "disease" for which the remedy was resolved and appointed of making the minerals, and the buildings, etc., used in getting them, non-assessable, and by providing for an income assessment of a mine or mineral work. The answer to the fourth question is already suggested, and is that the true reason of the remedy, or, in other words, for the difference in the methods of assessment, is to be found in the difference between the methods whereby farming lands and mineral lands can respectively be put to commercial uses. Then what construction of the word "minerals" will suppress the mischief and advance the remedy? In its primary meaning the word includes "all substances other than the vegetable matters forming the ordinary surface of the ground (*Lord Provost and Magistrates of Glasgow* v. *Farie* (1888), 13 App. Cas. 657, per Lord Herschell at p. 683). The object of the enactment and the plan provided for attaining the same call for this primary meaning to be understood in a business sense, and so restrict the meaning to include only such of said substances as have an economic use or value when "removed by man for the substance itself" (Am. & Eng. Ency. of Law, vol. 20, p. 683). The object of the income assessment being to impose the tax as and when the minerals are put to a commercial use, the reasons for that method of assessment are equally applicable to all classes of mineral irrespective of the kind of use to which the substance is subsequently put, whether for making coins or roads, or any other use. The reasons which prevail against the taxation of a deposit of auriferous quartz on the basis of its actual value in the ground before removal apply with equal force against the taxation on the same basis of a deposit of sand or gravel destined for removal for an economic use. Consequently the word "minerals" as used in the Act under consideration should be given its primary meaning unless the context restricts that meaning, which, it is submitted, it does not, the case of *Foster* v. *Tp. of St. Joseph* (1917), 39 O.L.R. 114 affirmed 37 D.L.R. 283, 39 O.L.R. 525, to the contrary notwithstanding.

In that case a substance, commonly known as trap-rock, was held not to be a mineral within the meaning of the Act. The trial Judge—Latchford, J.—in his judgment (39 O.L.R. 117)

says that "the words 'and concentrators and sampling plant' occurring in the same sub-section, obviously refer to means of treating ores, and not rocks," and Meredith, C.J.C.P., in delivering the judgment of the Appellate Division (37 D.L.R. 285), says "it is quite plain from the words of the Act that it is the more valuable minerals which are exempt; not, as in this case, the mere rock, but minerals in and to be won out of the rock, if any there were in it. It will be observed that buildings and machinery used mainly for obtaining or storing minerals, and concentrators and sampling plant, are, with the minerals in, on or under the land, not assessable—words inapplicable to the rock in question, used in road-making and road-repair only, as gravel and sand may be." The statements quoted are inexplicable in view of the fact that the assessment attacked in that case included, as disclosed in the evidence, crushers, screens and storage bins, and that a person having only a casual knowledge of a rock-crushing plant would know that the function of the screens is to collect, or concentrate, into separate bins, different sizes of the crushed rock. The words referred to are much more inapplicable to a deposit of iron ore—such as is common on the Mesabi range—in which the ore is of such quality as not to need concentration, and so near the surface as to permit of open-pit mining, and loading directly from the pit into railway cars, and surely such an iron ore is a mineral within the Act. The Act makes minerals non-assessable, and, if there be, in the getting of any particular mineral, buildings, plant, etc., of the kind, and used for the purposes, mentioned in sub-sec. 4, it makes them non-assessable also; but if buildings, plant, etc., except the most simple kind, are not necessary for the winning of any particular substance, placer gold, for instance, their absence cannot preclude such substances from the category of minerals within the meaning of the word as used in the Act. The words referred to, it is submitted with respect, have no bearing whatever on the meaning of the word "minerals" as used in the Act. ANNOTATION

As the decision in the case under consideration, in respect of trap-rock being a mineral, was on a question of fact, and especially as the point was not essential to the decision in the case, the action having been dismissed on another ground also, the interpretation given in that case to the word "minerals" is not binding on the same Court or on any other Court, in another case, and as the reasons given are unconvincing, and indeed inconsistent with the express words of the sub-sections, the way is still clear for a proper definition of the word "minerals" as used in the Act. Probably no better definition,

ANNOTATION

for all practical purposes, can be given than that said to be what the word means primarily by Kay, J. in *Midland R. Co.* v. *Haunchwood Brock and Tile Co.* (1882), L.R. 20 Ch. D. 552 at p. 555 (51 L.J. (Ch.) 778, 30 W.R. 640), namely:—"all substances (other than the agricultural surface of the ground) which may be got for manufacturing or mercantile purposes, whether from a mine, as the word would seem to signify, or such as stone or clay, which are got by open working." This definition would include a "mineral work" as mentioned in sub-sec. 6, which would be excluded by the dictum of Latchford J. in the *Foster* case at p. 117 (39 O.L.R.), that "nothing but what in the usual acceptation of the word is regarded as a mine can give to land the character of 'mineral land' within the meaning of sub-sec. (4)." It would also include unworked minerals, which the said dictum would exclude; moreover the dictum is inconsistent with the words of sub-sec. 7, which provides for a business assessment on a person occupying "mineral land" for the purpose of any business other than "mining." The definition could not be taken to be limited to mines and open workings, and thus to exclude oil and gas, which are clearly minerals under the Act, as sub-sec. 6 provides a minimum income assessment for "each oil or gas well." Of course, where land is in use, the nature of the use will determine, in equivocal cases, whether or not the substance is to be classed as a mineral; for instance, a body of clay used to grow crops would be classed as farming lands, but the same clay, if used to make bricks, would be classed as mineral. An area of bare rock could not be classed as farming land, but very properly might be classed as mineral land, and, as such, assessable under the provisions of sub-sec. 5, and the presence of veins of metallic ore in the rock would not make the rock itself any less a mineral.

Under this interpretation of the Act the question of the Appellate Division in the *Foster* case to the effect:—What would there be of land that could be taxed if the broadest meaning is given to the word "minerals"? does not appear the argument *reductio ad absurdum*, which, no doubt, it was intended to be. The answer to that question is simple, that the mineral land itself is taxable, and, if the minerals are worked, the income therefrom is taxable also.

There remains to be noted only the exception provided by sub-sec. 8, namely, that petroleum mineral rights are to be assessed at their actual value where in any deed or conveyance of lands they have been or shall be reserved to the grantor of such lands.

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.

Re PROGRESSIVE FARMERS; Re HOLDEN NATIONAL Co.'s CLAIM.

Alberta Supreme Court in Bankruptcy, Hyndman, J. December 21, 1921.

BANKRUPTCY (§ IV—36)—*Voluntary intermingling of goods with those of bankrupt—Impossibility of selecting goods from the bankrupt stock—Rights of claimant.*]—Application to disallow a claim to a preference in regard to certain goods of the claimant which he alleged he brought into the business of the bankrupt during his occupancy of it. Application allowed. [See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

G. H. Van Allen, for applicant.

Cormack, for claimant.

HYNDMAN, J.:—At the conclusion of the evidence I was of opinion that the claimant cannot succeed, because he failed to shew that it was possible to select from amongst the bankrupt stock the goods which he alleges he brought into the business during his occupancy of it. It seems that the goods were so intermingled that it became practically impossible to select one set or part thereof from the other.

No authorities were cited to me and I adjourned the matter to give the parties an opportunity to refer me to any they might find.

Since then Mr. Cormack for the claimant has informed me he has been unable to find any cases on the point. Mr. Van Allen has referred me to the following decisions, *viz.*:—2 Blackstones Commentaries 405. *Lupton* v. *White* (1808), 15 Ves. 432, 33 E.R. 817, at pp. 819, 820. *Panton* v. *Panton*, referred to in *Lupton* v. *White*. *Re Oatway*, [1903] 2 Ch. 356, 72 L.J. (Ch.) 575. *Cook* v. *Addison* (1869), L.R. 7 Eq. 466, 470, 38 L.J. Ch. 322, 17 W.R. 480.

The principle laid down in these cases is in effect that "if one wilfully" (meaning, I take it, voluntarily), "intermingles his property with that of another man without his knowledge or approbation, our law to guard against fraud gives the entire property, without any account, to him whose original dominion is invaded and endeavoured to be rendered uncertain without his consent."

This situation here seems to me to exactly fit the law as above stated. Therefore I feel unable to accede to the claimant's con-

Alta.
S.C.

tention that he is entitled to any preference over the other creditors, but must claim, if at all, as an ordinary creditor of the estate.

I might remark here that had the claimant immediately upon the trustee taking possession, pointed out his goods, he might have been able to succeed to some extent at least, but having allowed that opportunity to pass has lost any chance he might have had to successfully maintain his present claim.

The application to disallow the claim is therefore allowed with costs. *Application allowed.*

McFADYEN v. CANADIAN NORTHERN R. Co.

Alberta Supreme Court, Walsh, J. December 6, 1921.

MASTER AND SERVANT (§ V—340)—*Action for damages for death of husband—Workmens' Compensation Act*, 1918 (Alta.), *ch. 5—Decision by Workmens' Compensation Board that employment was within the scope of the Act—Right to recover in action—Application made to Board without notice to plaintiff—Conclusiveness of finding of Board—Finding of Court that deceased not within the scope of the Act*]—Action by wife as administratrix of husband's estate to recover damages for the death of her husband as the result of the negligence of the defendant, of whom he was an employee.

D. Campbell, K.C., and *H. A. Friedman*, for plaintiff.

N. D. Maclean, K.C., for defendant.

WALSH, J.:—The jury on the trial of this action answered the questions which I submitted to it so as to entitle the plaintiff to a judgment for $15,000 if her right of action has not been taken away by the Workmens' Compensation Act, 1918 (Alta.), ch. 5. She sues as the administratrix of her husband's estate to recover damages for the death of her husband, which she attributes to the negligence of the defendant, of whom he was an employee. The Workmens' Compensation Board has determined that in such employment he was within the scope of the Act. The defendant submits that because of this finding the plaintiff cannot maintain this action. It says further that, if this finding is not conclusive of the question I should hold that the Act does apply to this man, and so the plaintiff's remedy is under it and not by action for under sec. 38, sub-sec. 2 "the provisions of this Act shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependants are or may be entitled against the employer of such workman for or by reason of any accident happening to him while in the employment of such employer and no action in respect thereof shall lie."

Alta.

S.C.

The Board has exceedingly wide jurisdiction in this respect under sec. 13, ch. 5, 1918, as amended by sec. 2 of ch. 36 of the statutes of 1919.

"13. The board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Act and the action or decision of the board thereon shall be final and conclusive and shall not be open to question or review in any court and no proceedings by or before the board shall be restrained by injunction, prohibition or other process or proceedings in any court or be removable by *certiorari* or otherwise into any court. . . . . (4) Without thereby limiting the generality of the provisions of sub-section 1 it is declared that the exclusive jurisdiction of the board shall extend to determining— . . . . (i) whether or not any workman in any industry within the scope of this Act as defined in the schedules hereto is within the scope of this Act and entitled to compensation thereunder."

The finding of the Board upon which the defendant relies was made upon the application of the defendant and without notice to the plaintiff or to any one else representing the estate or the family of the deceased. It was *ex parte* in every sense of the term. Now, however conclusive such a finding might be after an opportunity had been given the other side to be heard, I do not think that one arrived at, as this one was, can conclude the matter. This identical question arising under a very similar provision of the Manitoba Workmens' Compensation Act, 1916, ch. 125, was considered by the Court of Appeal of that Province in *Canadian Northern R. Co.* v. *Wilson* (1918), 43 D.L.R. 412, 29 Man. L.R. 193, which held that where the provisions of a statute do not expressly require notice to a party and do not dispense with the giving of notice it is a fundamental principle that the party must receive notice and that otherwise the proceedings do not bind him. I think upon this ground (for our Act is silent on the question of notice) and for the reasons given in that case that this finding of the Board is not conclusive of the matter and it is, therefore, my duty to determine the question which it attempted to dispose of.

Section 69 of the Act, as amended 1919, ch. 36, sec. 15, and 1920, ch. 39, sec. 16, provides that it shall not apply to certain classes of persons employed by certain named railway companies, one of which is the Canadian National Railway. The defendant here is the Canadian Northern Railway Co., which is not named in this section. The argument before me proceeded apparently on the assumption by both counsel that the defendant company is included in the words "The Canadian National Railway," as no reference whatever was made to the omission of the defendant

Alta.

S.C.

from the section and it is a matter of common knowledge that it now goes by that name. Some seventy classes of employees are named in the list of persons employed by these companies who are excluded from the Act by this section. Amongst them are "maintenance of way employees," which is a large term, including many classes. The deceased was an assistant road master, and as such was a maintenance of way employee. The portion of the section with which I am concerned reads as follows:—

"Subject to the provisions of Sec. 16 this Act shall not apply the ..... persons employed by ..... the Canadian National Railway as ..... maintenance of way employees, section men, section foremen, bridge and building foremen and men, towermen, signal maintainers and repairmen, pump repairmen, pumpmen, extra gang foremen, snow-plow and flanger foremen, pile drivers, ditchers and hoisting engineers, track and bridge watchmen, signalmen or watchmen on highway or railway crossings, nor to pipe fitters, blacksmiths, plumbers, painters, tinsmiths, masons, concrete foremen and men, bricklayers and plasterers employed in connection with maintenance of way of the said railways."

It is admitted that ten or eleven of the classes which immediately follow the words "maintenance of way employees" are maintenance of way employees and it will be observed that the section concludes with a reference to certain well-known trades but limiting them to their employment in connection with the maintenance of way. Neither a roadmaster nor an assistant roadmaster is named, and it is admitted that there are about a dozen other classes who come within the definition of maintenance of way employees who are not mentioned. The argument for the defendant is that the term "maintenance of way employees" is cut down to those classes of that kind of employees which are specifically mentioned in the section, and as the deceased was not one of those classes he is not excluded from the Act, and so he was subject to it and this action does not lie.

It is difficult to understand but idle to speculate why when the broad general term maintenance of way employees was used it was thought necessary to mention by name so many of the classes of which this large class is composed. It certainly lends colour to the defendant's contention that the intention was to make the section apply only to those classes thus named. There is nothing, however, beyond that bare fact, to support this contention. Neither the phraseology nor the punctuation of the section helps it. There is no break in the section. There is no change from the method of punctuation which prevails

Alta.

App. Div.

throughout it, namely the placing of a comma after each class. There are no words which limit the larger term to the subordinate classes which follow. There is nothing ambiguous on the face of the words for the doubt only appeared from the statements in evidence and by way of admission of the facts upon which the defendant's argument rests. To give effect to this argument I must either read out of the section the words "maintenance of way employees" or read into it words of limitation such as "the following classes of" preceding those words. I would have just as much right to read out of it the descriptions of the 10 or 11 different classes, because they are surplusage.

I must hold that the deceased was not within the scope of the Act, because being a maintenance of way employee, the Act did not in my opinion apply to him.

Judgment will be entered for the plaintiff on the answers of the jury for $15,000 with costs.

JOHNSON v. GIFFEN.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Ives, Clarke and McCarthy, JJ.A. November 19, 1921.

NEGLIGENCE (§ II C—95)—*Automobile on highway—Injury to cow being driven along highway—Rules of the road—Degree of care required—Rights and liabilities of parties.*]—Appeal from the judgment of the trial Judge dismissing plaintiff's action and directing judgment to be entered for the defendant on his counterclaim, in an action brought to recover damages for the loss of a cow which was struck by the defendant's automobile and had to be killed. Reversed.

P. H. Russell, for appellant; *R. E. McLaughlin*, for respondent.

The judgment of the Court was delivered by

MCCARTHY, J.A.:—This is an appeal from the judgment of the trial Judge dismissing the plaintiff's action and directing judgment to be entered for the defendant on his counterclaim in the sum of $293.70. The action was brought by the plaintiff to recover damages for the loss of one cow. On October 17, 1920, shortly after 6 o'clock p.m., it being dusk, the defendant while driving his automobile in a northerly direction upon what is known as the Edmonton Trail at a speed of 25 miles an hour, ran into plaintiff's cow which eventually had to be killed by reason of the damage it sustained in the collision. The defendant's version of what took place may perhaps be briefly stated from the evidence contained in the appeal book at p. 50, as follows:—

"Q. Tell the Court what happened. A. We were coming along

Alta.

App. Div.

nicely, everything was all right, I took a look at the lights of the car, we had good lights, the lights were fixed in the proper way, the headlights would show the width of the grade of the road almost, but of course in driving a car as you know there would be more or less darkness on the sides. We were proceeding carefully, and had no idea of anything being on the road when all at once there was a cow or a calf about 6 or 8 feet ahead of me. Q. You were going north and on the right side of the road? A. Yes. Q. And which direction did the cow come from. A. West. Q. And did it cross in front of you? A. Yes, immediately in front. Q. What did you do? A. Your mind kind of works automatically in cases of that kind. I put on the brakes instantly and tried my utmost to avoid hitting the cow. I swerved the car right to the side of the road and into the bank, it pretty nearly straightened the car right round and it turned over."

With the conclusions of the law arrived at by the trial Judge I am unable to agree. The mutual rights and duties on highways with regard to automobiles may be broadly stated as follows:—"The general principles applicable to the use of all vehicles upon public highways apply to automobiles and may be summarised in the statement that a driver must use that degree of care and caution which an ordinarily careful and prudent person would exercise under the same circumstances. The rights of the driver of a motor vehicle and that of others to use the highway are equal, and each is equally restricted in the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury or inflicting injury upon the other. The degree of care required in the use and operations of an automobile upon the highway depends not only upon their condition but also upon the dangerous character of the machine or vehicle and its liability to do injury to others lawfully upon the highway. The more dangerous its character the greater is the degree of care and caution required in its use and operation. The degree of care which the operator of an automobile is bound to exercise is commensurate with the risk of injury to others on the road. In the application of these principles conditions frequently arise under which conduct amounting to reasonable care in the exercise of a light and slow-moving vehicle does not amount to proper and necessary care in the operation of a heavy and rapidly moving automobile. All operators of motor vehicles, in addition to exercising reasonable care and caution for the safety of others who have the right to use the highways, must anticipate the presence of others. They

have no right to assume that the road is clear, but under all circumstances and at all times they must be vigilant and must anticipate and expect the presence of others. Accordingly the fact that he did not know that anyone was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that someone else was approaching. Drivers of motors must be specially watchful and in anticipation of the presence of others, and where individuals or cattle are liable to be crossing or are on the highways and a failure to see them may amount to negligence.

The result of the authorities is stated in the case of *Bombard* v. *Newton* (1920), 111 Atl. 510, 11 A.L.R. 1402 (annotated). In that case the Court held that the right to drive an automobile along the public highway is not superior to that to drive cows along the highway. The parties have equal and reciprocal rights to the use of the road, and each owes to the other the duty of so exercising his own right as not to interfere with that of another.....the fact that the defendant was operating an automobile, an instrument whose capacity for harm is well exemplified by the results in this case, and the fact that the plaintiff was driving cows, animals whose viatic vagaries have come to be known of all automobile drivers were conditions affecting merely the degree of care required from the parties respectively..... One driving a cow along the right side of the road with nothing to indicate a necessity to take particular care of it is not bound to take extra steps to keep it out of the way of an automobile approaching from the opposite direction, which has ample room to pass if it keeps on its side of the road. Nor is it necessary as a matter of law in the absence of a statutory requirement for one driving cows along a public highway at night to carry a light. The fact that it was in the night time affected the rights of the parties only as it bore upon the amount of vigilance each was bound to exercise. It was held in *Fitzsimmons* v. *Snyder* (1913), 181 Ill. App. 70, not to be negligence *per se* for the owner of a domestic animal to drive it unhaltered upon the public highway. (See also notes to *Bombard* v. *Newton*, 11 A.L.R. 1402, at p. 1405.)

The trial Judge seemed to be of the opinion that it was negligence on the part of the plaintiff or his agent not to take the necessary precautions to prevent the cows from turning the wrong way upon the highway. The evidence is that the person in charge of the 6 head of cattle was taking them to a creek to water coming down the lane from the west which met the Edmonton Trail, and the cattle, instead of turning north turned south and met the automobile when the collision occurred. I

Alta.

App. Div.

am unable to agree with the trial Judge that that would constitute negligence on the part of the owner of the cattle. The damages claimed for the injuries done to the cow seem to me to be excessive, and in the result I would allow the plaintiff damages to the extent of $107, which I think would meet the ends of justice, and an order will go setting aside the judgment of the trial Judge, and judgment will be entered for the plaintiff for the sum of $107 with costs here and below, and the counterclaim will be dismissed with costs.

Appeal allowed.

BRAY v. FRYKLUND.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Ives, Hyndman and Clarke, JJ.A. December 17, 1921.

GIFT (§I—1)—*Made during an engagement of marriage—Conditional—Rescission of promise—Gift made absolute on termination of engagement—Conflicting evidence—Findings of trial Judge—Interference with finding by Appellate Court.*]—Appeal by plaintiff from the judgment at the trial of an action to recover certain furniture, given to the defendant during her engagement to marry the plaintiff. Affirmed. [See Annotation, 1 D.L.R. 306.]

Alex. Stuart, K.C., for appellant.

G. R. Porte, for respondent.

STUART, J.A. (dissenting):—I would allow this appeal and give the plaintiff judgment for a return of the goods or their value. The law is clear that a gift made during an engagement and in view of the engagement is conditional only. Here the only point upon which the defendant can rest a final claim to the goods is on the ground of what was said at the moment of the breaking of the engagement. There is contradictory evidence as to this, and I do not find in the trial Judge's reasons any specific finding as to which told the truth. He merely says "I think the subsequent conduct (not saying what conduct) of the defendant confirms this view," *i.e.* the view that there had originally been a gift. Indeed, one interpretation of what the trial Judge thus said might reasonably be that even if he accepted the defendant's story he thought that the plaintiff was just stating what he thought had been the situation all along—not that he was then making a real gift. And it does look strange when a gift conditional on the fulfilling of a promise of marriage has been made, that at the very moment of the rescission of that promise the grantor should make the gift absolute. There is not enough in the evidence to convince me that the plaintiff really intended to make a gift of the goods at the

moment of the breach of the engagement. Even adopting the defendant's account of what occurred, I do not believe that he really so intended. There was no accompanying delivery to furnish tangible evidence of intention, and although the law seems to be that an antecedent delivery is sufficient, I do not think that the bare remark made by the plaintiff under such circumstances should be treated as sufficient. The burden was, I think, in the circumstances, on the defendant to shew that the plaintiff really seriously intended then to make a gift. In my opinion she did not meet this burden, and I find nothing to shew that she met it in the opinion of the trial Judge. I do not think his mind was ever really directed to the exact point upon which it now appears that the case must turn.

I would allow the appeal with costs.

BECK, J.A., concurs with IVES, J.A.

IVES, J.A.:—Appeal from judgment of Morrison, Co.Ct.J., sitting as a Judge of the Edmonton District Court, dismissing the plaintiff's action.

The plaintiff and defendant were engaged to be married, and during the engagement the plaintiff fitted up a room for the defendant with a divanette, bedding, &c., suitable for her lodging, at a cost of $216.

The engagement was broken by the defendant in June, 1920, the defendant says that when she left him she asked him if he wanted those things back, he said "No, they were yours." The goods being then in her possession these words would, I think, constitute a complete gift. She says she considered it was a present, when he would not have them back when she offered them to him. The plaintiff says he did not tell her the furniture was hers.

The plaintiff made no request for the furniture till May, 1921. She refused to give it up, saying it was hers, and he shortly after brought action to recover it. He says that after the engagement was broken she asked if she could have the use of it, and he agreed, that he spent the last year in the Military Hospital and had no use for it. He also says, that on the three occasions when she changed her lodging apartments after the engagement was broken, she obtained his consent to the removal of the furniture except on the last occasion. The defendant denies this.

Upon this conflicting evidence, the trial Judge, who had the advantage of observing the demeanor of the witnesses found for the defendant. I cannot say he was wrong and would, therefore, dismiss the appeal with costs.

HYNDMAN and CLARKE, JJ.A., concur with IVES, J.A.

Appeal dismissed.

Alta.

App. Div.

McKAY v. BIXBY.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. December 9, 1921.

CONTRACTS (§ II D—52)—*As evidenced by certain letters and documents—Lease of land—Formal agreement prepared and signed by one party only—Evidence of agreement—Parties not ad idem.*]—Appeal from the judgment at the trial of an action for specific performance of an alleged agreement of sale. Affirmed.

A. McL. Sinclair, K.C., for appellant.

H. C. B. Forsythe, for respondent.

The judgment of the Court was delivered by

HYNDMAN, J.A.:—This is an action for specific performance of an alleged agreement of sale arising out of certain documents—letters and telegrams, passing between the parties, and in the alternative for damages.

It appears to me that a close examination of the correspondence makes it evident that no final agreement as to terms was ever arrived at. If the plaintiff ever thought that he would acquire the land free of any claim on the part of Wilcox, the tenant, certainly it was not the intention of the defendant that he should.

The negotiations commenced about March 6, 1921, and continued intermittently up to August 12, when plaintiff wrote the following letter to defendant:—

"In replying to your letter of recent date in regard to your land—If you will come up and get possession of this land we will then pay you $1,000 as per contract with you. Mr. Wilcox will not get off the land until he has a settlement with you. He is starting to cut the hay. *It is the hay we want this land for, and if we do not get possession at once will have to call the deal off.* We also understand the C.P.R. is taking legal action in regard to their equity. We have had this from no authority and may be wrong, but we would like to get this deal closed up satisfactorily to all concerned. Your early action in this regard will greatly oblige."

This was the last written communication between them.

The formal agreement prepared and executed by plaintiff alone and referred to in the defendant's letter cannot be regarded as the agreement itself, although it may be evidence of an agreement to satisfy the Statute of Frauds and the action is not founded upon it. But reading the whole of the documentary evidence, the conclusion cannot be avoided that immediate possession was insisted on by the plaintiff and never agreed to absolutely by the defendant, as same was contingent

on a satisfactory settlement with Wilcox, which never came about. The plaintiff never bound himself to purchase without immediate possession, and the defendant never bound himself otherwise than subject to the rights of Wilcox. In other words, the parties were never *ad idem* on this point, and it would be idle to waste time in citing authorities for so elementary a proposition—as that in such a case no action can arise.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

MACDONALD v. ONYSCHUK.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. November 25, 1921.

FIRES (§ I—1)—*Roots piled on breaking—Set fire to by child—Negligence of owner—Prairie Fires Ordinance C.O.N.W.T., 1898, ch. 87—Application—Liability.*]—Appeal by defendant from the judgment at the trial in an action to recover damages for injuries caused by a fire which escaped from defendant's land. Reversed.

G. H. Steer, for appellant; *A. H. Gibson*, for respondent.

STUART, J.A. (dissenting):—After some hesitation I agree that the work being done by the defendant was not "clearing land" within the meaning of the statute.

This leaves the liability to rest upon negligence only. I agree that after the fire once started the defendant did everything reasonably possible to prevent it spreading. But I am by no means satisfied that the defendant was not negligent in allowing his daughter, 13 years old, to set fire to the pile of roots and in not going near the place himself until too late. There is some doubt upon the evidence as to how near to the sod the nearest pile of roots was. But it was at any rate near enough for the sparks in fact to escape to the sod and set fire to it. And taking even the defendant's own account of the distance, I am strongly inclined to think that it was negligence to leave a fire burning even at that distance from the sod, and leave no one there to watch the sod to see that it did not become ignited by a floating spark of fire.

My inclination, therefore, is to dismiss the appeal, and I would so order.

BECK, J.A.:—This is an appeal by the defendant from the judgment of Scott, J., at the trial.

The action was one to recover damages on a claim that the defendant negligently and unlawfully permitted a fire to escape from his lands whereby a dwelling house of the plaintiff on

Alta.

App. Div.

land in the vicinity was burned. The Judge gave judgment for the plaintiff with $700 damages.

A determination of the case depends very largely upon the construction of some of the provisions of the Prairie Fires Ordinance, C.O.N.W.T., 1898, ch. 87.

In *Clark* v. *Ward* (1909), 2 Alta. L.R. 101, I discussed at length the law relating to fires used for the purpose of husbandry. That case was affirmed on appeal on a different view of the facts without much consideration of the law as I had expressed it. It was approved by Scott, J., in *Whitehead* v. *McClaive* (1911), 19 W.L.R., 216.

The starting point for our Canadian law upon the subject is *Dean* v. *McCarty* (1846), 2 U.C.R. 448. After an examination of such decisions as seemed to me of value, I came to this conclusion.

In cases other than those dealt with by sec. 4 of the Ordinance, liability is negatived if the person kindling the fire has not been guilty of negligence; in cases coming under sec. 4, the person kindling the fire would be liable if he neglected to take the precautions prescribed by that section.

That section applies—and those precautions are obligatory—only in three specified cases, that is, where the fire is kindled for the purpose of (1) guarding property, (2) burning stubble, or (3) clearing land.

To come to the facts of the present case. The plaintiff's house was burned on May 1; the fire which burned it began on April 30 on the defendant's farm.

On the defendant's farm he had two pieces of breaking, one of them containing about 3 acres. The defendant's daughter, a young girl, had made 3 or 4 small piles of roots upon this piece of breaking. The girl set fire to the roots about 9.30 or 10 in the morning of April 30. It is unquestionable that the fire which burned the plaintiff's house originated on the defendant's land, though in reaching the plaintiff's land it necessarily passed over 2 or 3 intervening farms. The defendant says that the several piles of roots, when burning, were more than 21 yards from the adjacent sod.

Gardner, a witness for the plaintiff says that several days before the fire he noticed one pile of roots on the breaking, and says: "From the sod I would say the main part of the root pile would probably be—Q. 25 feet? A. No. Q. 30 feet? A. It wouldn't be quite that far." The same witness says that about a week after the fire he and MacDonald (the plaintiff) and Lewis went and examined the breaking where the fire started

and found the roots "tumbled about" and some of them lying on the edge of the sod.

MacDonald says, referring to this visit, that they found charred roots "scattered around"; some within 5 feet of the sod; though he insisted that they apparently had just fallen away from a fire which had been burning just a little further from the sod.

Lewis says that before the fire he saw piles of roots on the breaking "scattered over that breaking, a pile here and there." As to the burned roots found when visiting the breaking with Gardner and MacDonald, he was indefinite, but said there were burnt roots along the edge of the breaking.

The defendant's wife says that she and her husband put water on the roots and put the fire out entirely. It seems most reasonable to believe that the root piles were built at reasonable distances from the sod surrounding the breaking, and that if they were after several days found close to the sod they had been scattered there after the fire.

All the witnesses agree that the part of the defendant's land on which the fire was set out, that is, on which the root piles were built and set fire to, was "breaking." The plaintiff says: "There were piles of roots that he took out of his breaking." "That is his piece of breaking where the fire started." "I should say maybe it (the breaking) was three acres, maybe three and a half; I didn't measure it."

I think it unnecessary to detail the efforts made by the defendant to prevent the fire spreading. It seems clear that when it was found to be spreading every one concerned did everything reasonably possible to prevent it spreading further.

The trial Judge seems not to have had any question raised in his mind against the view that what the defendant was engaged in was "clearing land." If that were the correct view his application of law, in which he expresses agreement with myself, would, I think, be correct; but for myself I am clearly of the opinion that "clearing land" was not what the defendant was doing. The land on which the fire was started was "breaking." This implies that the land had (first) been cleared and (then) been ploughed. It is scarcely necessary to fortify this by reference to a dictionary, but I have referred to Webster's New International Dictionary. I find: "Clear, v.t. 5. xx to open for passage, action, use, etc., as to clear land. Clearing, n.2. a tract of land cleared of wood, as for cultivation. Break, v.t. 2.d. to rupture the surface of; specif. to plow (land) preparatory to sowing."

So that if in *Clark* v. *Ward* I correctly set forth the law,

Alta.

App. Div.

the defendant was not bound by the requirements of sec. 4, and is liable only if negligence has been established against him. I find no evidence of negligence. To quote, as I did in the former case, the words of Taylor, C.J. (Manitoba), at p. 108:—

"Having come to the conclusion that the defendants set out the fire in the first instance for a legitimate purpose, and that they used reasonable efforts to prevent it from spreading beyond his farm," the defendant is not liable; and the appeal should be allowed with costs and the action dismissed with costs.

HYNDMAN, J.A., concurs with BECK, J.A.

Appeal allowed.

LOGAN v. BRENNAND.

Alberta Supreme Court, Appellate Division, Scott, C.J., Beck and Clarke, JJ.A. December 17, 1921.

VOLUNTEERS and RESERVISTS (§ I—1)—*Soldier's Relief Act 1916 (Alta.) ch. 6—Construction—"Possession" meaning of—Actual occupation.*]—Appeal by defendant from the judgment at the trial of an action for the recovery of possession of lands. Affirmed.

Frank Ford, K.C., for appellant.

Alex. Stuart, K.C., for respondent.

The judgment of the Court was delivered by

BECK, J.A.:—This is an appeal by the defendant from the judgment of Hyndman, J., at the trial.

The facts which are set out in great detail in the appellant's factum are very complicated and unusual, and no good purpose would be accomplished by setting them out here.

The substantial ground of appeal is that the trial Judge was wrong in holding as he did that "possession" of land in sub-sec. 1 of sec. 3 of the Soldiers' Relief Act, 1916 (Alta.) ch. 6, means actual occupation.

That sub-section prohibits any proceeding against a soldier .....for the recovery of possession of any lands in the *possession* of such soldier until, &c.

The defendant, Businens, claimed as tenant under the defendant, Brennand. Businens took his lease with knowledge of the plaintiff's title. He does not appeal. We are agreed that the decision at the trial was right—that Brennand was not in possession of the land within the meaning of the statutory provision in question.

The appellant also contends that the evidence shews plaintiff is not the absolute owner of the land, though he has an unregistered transfer, but is at best in the position of a mortgagee. The plaintiff, however, is at all events in the position of an

Alta.

App. Div.

unpaid vendor seeking possession against a purchaser in default and such a title entitles him to possession.

The appeal should, therefore be dismissed with costs.

If the plaintiff has any taxable costs by reason of the discontinuance of the appeal of the defendant Business, there is ample remedy for their recovery under R. 361. The appeal case contains no reference to any such appeal.

Appeal dismissed.

COZANT v. DURFEE.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. November 16, 1921.

WRIT and PROCESS (§ I—2)—*Commencement of action—Statement of claim issued by process issuer—Regularity—Rules—Construction.*]—Appeal from an order of Ives, J., dismissing an application of the defendant for an order setting aside and vacating the judgment obtained by the plaintiff and all subsequent proceedings and for a direction that no action was ever commenced against either of the defendants. Affirmed.

M. M. Porter, for appellant.

J. K. Paul, for respondent.

The judgment of the Court was delivered by

SCOTT, C.J.:—This is an appeal from an order of Ives, J., dismissing the application of the defendant for an order setting aside and vacating the judgment obtained by the plaintiff and all subsequent proceedings and for a direction that no action was ever commenced against either of the defendants.

The statement of claim in the action was issued by the process issuer at Empress, in the Judicial District of Acadia, who signed it and affixed his seal of office thereto and stated thereon that it was issued by him at Empress, in the Province of Alberta.

The following rules bear upon the question involved in this appeal:—

120. The clerk, upon a copy thereof being filed with him, shall issue the statement of claim by signing the same and sealing it with the seal of office. 121. It shall bear the date of the day on which it was issued. 122. The clerk shall make a note upon it of the office and Judicial District from which it is issued, and shall subscribe his name thereto. 128. All copies thereof which are served shall have at the foot or end thereof or endorsed thereon or attached thereto a notice to the effect *inter alia* that the plaintiff may enter judgment in accordance with the statement of claim or such judgment as, according to the practice of the Court he is entitled to without any further notices unless within the time prescribed by the rules of the defendant's cause

Alta.

App. Div.

to be filed in the office of the clerk of the Court from which the statement of claim issued either a statement of defence or a demand that notice of any applications to be made in the action be given to him and unless within the same time a copy of the statements of defence or demand be served upon the plaintiff or his solicitor. 517. The office in which the first document in a cause or matter is required to be filed shall be deemed to be the office in which the cause or matter is commenced. (2) Proceedings commenced in the office of a process issuer shall, for the purposes of this rule be deemed to have been commenced in the office of the clerk of the Court of the Judicial District in which the process issuer resides. 520. Each clerk of the Court, deputy clerk and process issuer shall have a seal and he shall seal therewith and sign all writs, statements of claim and process issued by him. 522. A process issuer shall be supplied by the clerk of the Court or deputy clerk with blank forms, original and *mesne* process signed by the said clerk or deputy clerk and shall issue same and countersign each one before issuing it. 5. (b) The word "clerk" shall, where the context requires it, mean and include a process issuer.

Rule 522 is taken from sec. 13 of the Act respecting Clerks and Deputy Clerks (ch. 18 of 1906, Alta.) That Act provides for the appointment of process issuers "where the convenience of the public requires." At the time that Act was passed actions were commenced by a writ of summons. The framers of this rule appear to have overlooked the change in procedure by the new rules which substituted the issue of a statement of claim for that of a writ of summons. It is now impossible for a clerk to supply a process issuer with original process signed by the former. A statement of claim issued by a clerk or process issuer has the force and effect of the former writ of summons, and I see no reason why it should not be classed as a process. The convenience of the public would not be well or even reasonably served if a process issuer had no authority to issue a statement of claim. That it was the intention that he should have that authority appears by R. 520. That it could be issued by him without the signature of the clerk appearing thereon is a reasonable deduction from R. 6(b) as, in issuing it, he was acting as the clerk, and exercising his authority.

In the present case the defendants could not have been misled by the manner in which the statement of claim was issued. It stated upon its face that it was issued from the Supreme Court in the Judicial District of Acadia. The notice issued with it required them to file their statement of defence on demand of notice in the office of the clerk of the Court from which the

Alta.

App. Div.

statement of claim issued, and R. 517 provides that the action should be deemed to have been commenced in the office of the clerk of the Court of the Judicial District in which the process issuer resides.

In my opinion the issue of the statement of claim was not a nullity. For the reason I have stated it is open to question whether it was even an irregularity. If it was the defendants have clearly waived it by their conduct. The statement of claim was served upon them before October 13, 1920. They consulted a solicitor who applied for an extension of time to file a defence. Time was given until November 19 following when judgment was entered by default of filing defence and executions issued. It was not until after the sheriff seized under execution on August 20, 1921, that the application was made to set aside the proceedings.

I would dismiss the appeal without costs.

I suggest that in order to establish uniformity of practice throughout the Province, process issuers when issuing a statement of claim should state thereon that it is issued from the office of the clerk of the Court of the Judicial District in which it is issued, instead of stating that it was issued from the office of the process issuer. This practice appears to me to be clearly authorised by the rules I have quoted.

VIENNE v. FRASLIN.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Ives, Hyndman and Clarke, JJ.A. November 25, 1921.

JUDGMENT (§ IIB—72)—*By default—Small sum paid into Court as result of garnishee proceedings—Land advertised for sale under execution—Mortgage given to secure debt—Clause in mortgage that on default being made in payments, judgment creditor could sell under execution—Default made in payments—Application to confirm sale failing because execution issued more than six years after entry of judgment—Statute of Limitations—Acknowledgment.*]—Appeal from an order of McCarthy, J., setting aside a default judgment. Reversed.

H. P. O. Savary, K.C., for appellant.

G. B. O'Connor, K.C., for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—The action was commenced under the former practice by writ and statement of claim personally served upon the defendant at Calgary where he then resided on July 26, 1907. He entered an appearance by a firm of reputable solicitors on August 15, 1907. No statement of defence was delivered

Alta.

App. Div.

and judgment was entered in default thereof on October 28, 1907.

In 1916, as a result of garnishee proceedings, a small sum ($9) was paid into Court by the garnishee and paid out to the plaintiff. After the defendant's land was advertised for sale by the sheriff under an execution issued to enforce payment of the judgment, and before the sale the defendant gave a mortgage to the plaintiff to secure the judgment debt and costs which mortgage contained this clause:—

"It is understood and agreed by and between the parties hereto that this mortgage is given as collateral security for the amount of a certain judgment debt of record in the office of Clerk of the Supreme Court at the Court House in the City of Calgary, and that the judgment is not to be considered as being merged in this mortgage and that the mortgagee shall be at liberty notwithstanding the giving of this mortgage to proceed to sell the said land under the execution upon default being made in the payment as herein provided without the necessity of proceedings to foreclose this mortgage or otherwise to realise on his said judgment."

The defendant was not residing in Calgary at the time of the garnishee proceedings, but his family were residing there and the necessary process was served substitutionally upon his wife. In the mortgage transaction the defendant, who was still absent, was represented by a solicitor. The defendant executed the mortgage and paid the sheriff's fees. Upon default being made under the mortgage defendant's land was offered for sale, under the execution on July 23, 1921, after an unsuccessful application by defendant for a stay.

An application to confirm the sale failed by reason of the execution having been issued more than 6 years after entry of judgment, without an order of the Court. Subsequently an order was obtained and a new execution issued.

Defendant now applies to set aside the default judgment and the writ of execution as well as all proceedings under the execution, and shows a *prima facie* defence to a portion of the plaintiff's claim sufficient ordinarily to entitle him to be let in to defend and in addition I incline to think the judgment was improperly entered by reason of the insufficiency of the statement of claim in regard to interest, but I do not think the judgment was a nullity and the irregularity has been waived by subsequent events. The plaintiff says he cannot now remember the facts regarding the matters set up by the defendant, but is satisfied that at the time the action was brought he was entitled to the full amount claimed. I do not accept the defendant's

statement that on giving the mortgage he reserved the right to make an application to open up the judgment. His uncorroborated statement is contradicted by the plaintiff and his solicitor, and by the written correspondence leading up to the mortgage.

Under all the circumstances, I do not think a case has been made out for setting aside the judgment. Upon the appeal to this Court, Mr. O'Connor for the defendant contends that by the operation of sec. 8 of the Real Property Limitation Act, 1833 (Imp.), ch. 27, as amended by 1874, (Imp.), ch. 57, the plaintiff's right to proceed upon his judgment is barred. If his point is well taken the judgment would still stand but the execution and all proceedings under it would fall, for the execution now current was issued more than 12 years after the entry of judgment. Section 8 reads as follows:—

"8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

This section has been held to apply to a judgment for payment of money; *Jay* v. *Johnstone*, [1893] 1 Q.B. 189, 62 L.J. (Q.B.) 128.

I do not think the small amount realised upon the garnishee proceedings can be relied upon as a payment of either principal or interest. The costs of the proceedings were greater than the amount realised, leaving nothing to apply on the judgment, and even if it were otherwise, I am not yet satisfied that a payment not voluntarily made by the debtor is sufficient to prevent the running of the statute. In my view of the matter it is unnecessary to decide this unsettled question, by reason of the acknowledgment and promise to pay contained in the mortgage, though given after the expiration of 12 years from date of the judgment. The law seems quite settled that in cases of simple contract debts an acknowledgment given after the expiration

B.C.
S.C.

of the period of limitations prescribed by the Statute of James I. —if given within 6 years before action is brought is sufficient.

Darby & Bosanquet's Statutes of Limitations, 1893, 2nd ed., p. 91. And in principle there seems no reason why the same rule should not apply in case of a judgment debt. Section 34, 1833 (Imp.), ch. 27, which provides that certain rights shall be extinguished at the end of the period of limitation, does not extend to judgments for payment of money, only the remedy is barred, so that as in the case of simple contract debts the judgment debt remains as a sufficient consideration for the new promise created by the acknowledgment which becomes a new starting point for the statute.

The effect of the words "in the meantime," in sec. 8, has been considered in *Harty* v. *Davis* (1850), 13 I.L.R. 23, approved in *Re Lord Clifden, Annaly* v. *Agar-Ellis*, [1900] 1 Ch. 774, 69 L.J. (Ch.) 478, the short point there decided being as applied to the present case that it is competent for the holder of a judgment, by an acknowledgment given, no matter how long after the rendition of the judgment, provided it be within 12 years before the commencement of the action or suit, to keep the claim alive in favour of the person entitled to it. See also *Beamish* v. *Whitney*, (No. 1003), [1908] 1 I.R. 38; *Beamish* v. *Whitney* (No. 1271), [1909] 1 I.R. 360; *Waters* v. *Lloyd*, [1911] 1 I.R. 153; *National Bank of Tasmania* v. *McKenzie*, [1920] Vic. L.R. 411, which recognise the law to be as stated in *Harty* v. *Davis*.

I think the cases mentioned afford a safe guide to be followed in the present appeal. I would therefore dismiss [allow] the appeal with costs and set aside the order appealed from, with costs.

STANDARD TRUSTS Co. v. DAVID STEELE Ltd.

British Columbia Supreme Court, Murphy, J. November 24, 1921.

LANDLORD AND TENANT (§ IID—33)—*"Leased premises"—Meaning of—Bankruptcy Act, 1921 ch. 17, sec. 41—Construction of—Landlord and Tenant Act, R.S.B.C. 1911, ch. 126—Construction—Writ of possession—Termination of tenancy before trustee entered into possession—Rights and liabilities.*]—Action to recover possession of certain premises under the Landlord and Tenant Act R.S.B.C. 1911, ch. 126.

E. P. Davis and *J. L. G. Abbott*, for plaintiff.

E. C. Mayers and *F. R. Anderson*, for defendant.

MURPHY, J.:—As to the first contention that the writ herein is not equivalent in law to re-entry because it claims for double the yearly value of the land and premises until possession shall

N.S.
S.C.

be given, I think the same invalid. *Moore* v. *Ullcoats Mining Co.*, [1908] 1 Ch. 575, 77 L.J. (Ch.) 282, is authority for the proposition that a writ claiming possession *simpliciter* and any further relief which is incidental to a claim for possession is equivalent to re-entry. The claim for double yearly value can only be valid if the lease is at an end. The language of sec. 14 of the Landlord and Tenant Act R.S.B.C. 1911, ch. 126, is explicit on this point in my opinion. If so, the claim is one incident to a claim for possession. The main argument for defendant, however, is based on sec. 41 of ch. 17 of the Bankruptcy Amendment Act, 1921. It turns on the meaning of the phrase "leased premises" in that section. The section repeals sub-sec. 5 of sec. 52 of the Bankruptcy Act, ch. 36, 1919, and enacts a subsection in substitution. The language of the original sub-section is similar, so far as the question at Bar is concerned, to the language of sub-sec. 2 of sec. 34 of R.S.O. 1897, ch. 170. The Ontario sub-section was referred to in *Soper* v. *Fane* (1901), 31 Can. S.C.R. 572, at p. 579, in a way that inferentially supports defendant's argument. But the language of the new sub-sec. 5 is markedly different from the old. The privilege given to the trustee thereby of election is only exercisable whilst he is in occupation of "leased premised for the purposes of the trust estate." Under the repealed section the trustee had this privilege of election during a limited time in reference to "the premises occupied by the bankrupt or assignor at the time of receiving order or assignment." In the absence of authority, I feel bound to hold that the phrase "leased premises" means premises covered by a subsisting lease. In consequence, if the views hereinbefore expressed are correct the lease was at an end before the trustee entered into occupation, for the facts in the case stated shew that the landlord had, previous to such entry, himself re-entered in law and thereby brought the proviso in the lease as to forfeiture of the term into operation. As to relieving against forfeiture, I adhere to the opinion expressed by me in *Hamilton* v. *Ferne* (1920), 61 D.L.R. 213.

To question 1, I would answer—The lease and the term thereby created became forfeited and void as against both parties. To question 2—The trustee is not entitled to retain the premises either for the whole or any portion of the unexpired term. To question 3—The Court should not relieve against the forfeiture.

ALLAN v. WAMBOLT.

Nova Scotia Supreme Court, Harris, C.J., and Chisholm and Mellish, JJ. December 10, 1921.

PLEADING (§ I S—145)—*Defence and counterclaim—Reply—*

N.S.
S.C.

Issue joined—Counterclaim disclosing no cause of action—Notice of trial—Application to set aside—Dismissal of application—Appeal—Nova Scotia Rules.]—Special case on appeal from the judgment of Russell, J., at chambers refusing to set aside on defendant's application the notice of trial given by the plaintiff for trial of the action. Affirmed. [See also 57 D.L.R. 594.]

J. J. Power, K.C., for appellants; *R. McCleave*, for respondent.

HARRIS, C.J.:—In this case there was a defence and counterclaim and the reply joined issue on the defence and set up that the counterclaim disclosed no cause of action against the plaintiff. With the reply the plaintiff gave notice of trial of the action and there was a motion to the Chambers Judge to set it aside. The Chambers Judge dismissed the motion and there is an appeal.

The argument in support of the appeal is that O. 34 r. 10 does not apply to the case where a counterclaim has been pleaded and it is pointed out that when there is a reply or defence to a counterclaim that there may be a reply filed by the defendant.

Throughout the rules the defence to a counterclaim is referred to not as a defence but as a reply. For instance, in O. 19 r. 2 the language is "the plaintiff shall.....deliver his reply if any to such defence, set off or counterclaim."

See also O. 21, rr. 14, 15; O. 23, r. 4; O. 27, r. 12.

In *Rumley* v. *Winn*, (1889), 22 Q.B.D. 265, 58 L.J. (Q.B.) 128, 37 W.R. 285, the matter is referred to in the same language.

The case of *Brookfield* v. *Sutcliffe*, (1896), 40 N.S.R. 628, has no application to this case. It was a motion to set down a trial at Chambers under O. 34, r. 1 A (2), and the language of that rule differs from O. 34, r. 10.

Under Rule 1 A (2) the motion cannot succeed until the pleadings are closed and O. 23, r. 5, and O. 27, r. 12, shew when pleadings are deemed to be closed.

Order 34, r. 10, gives the right to the plaintiff to give notice of trial "with the reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial."

Asquith v. *Molineaux* (1880), 49 L.J. (Q.B.) 800, shews that the words "or any time after the issues of fact are ready for trial" apply to different circumstances and have no application to such a case as the present.

A defence to a counterclaim being referred to in the rules as a reply, the language of O. 34, r. 10, expressly covers the present case and an examination of the various rules to which

N.S.

S.C.

our attention was called on the argument discloses no reason for placing any different construction on the word reply.

The fact that in the definition of the word "pleading" in the interpretation clause of the Judicature Act, the reply to the reply to the counterclaim is referred to does not affect the case. Those words are no doubt added *ex abundanti cautela* to make certain that the reply to a reply is to be embraced in the word pleadings. It is significant that in that definition a defence to a counterclaim is referred to as a reply.

I would dismiss the appeal with costs.

CHISHOLM and MELLISH, JJ., concurred with HARRIS, C.J.

Appeal dismissed.

MAGONET v. INDUSTRIAL CO-OPERATIVE SOCIETY.

Nova Scotia Supreme Court, Harris, C.J., Russell, Chisholm and Mellish, JJ. December 10, 1921.

FIXTURES (§ IV—20)—*Counters—Leases of property without mentioning fixtures—Subsequent conveyance without any reservation as to—Removal of by vendor—Right of purchaser to recover.*]—Appeal from the judgment of Finlayson, Co.Ct.J., in favour of the defendant in an action to recover possession of goods consisting of counters, shelves and other articles, to the value of $3,000, removed by defendant from premises occupied as tenant of plaintiff and damages for their detention. Reversed.

T. R. Robertson, K.C., and *Finlay McDonald*, K.C., for appellant.

John MacNeil, for respondent.

The judgment of the Court was delivered by

CHISHOLM, J.:—The action was brought for the return of "counters, shelves and other articles" claimed by the plaintiff and converted by the defendant society to its own use, and for damages for their detention; and the plaintiff's ownership of said articles is put in issue in the defence of the defendant society. The action was tried by the County Court Judge for District No. 7, who dismissed the action on the ground that, as to some of the articles that they were not affixed to the freehold at all, and as to others that though so affixed the defendant society had the right to sever them and did sever them. There is now no contest respecting the right of the defendant society to the articles which were not affixed to the freehold. The Judge held as to the articles affixed that the question must be decided as between landlord and tenant and not as between grantor and grantee.

The defendant society, was formerly the owner in fee and was

N.S.
S.C.

in occupation of the freehold. On March 31, 1920, it gave a written option to the Sydney Investments, Ltd., a body corporate, to purchase the property. In this option it was provided that the society should, in the event of a sale, have a 3 years' lease of the ground floor. Later, on April 5, 1920, an agreement of sale was made by the same parties, and in this agreement it was stipulated that the society should have a lease for 3 years from May 1, 1920, of the ground floor and the basement of the building. On the same day, an agreement was entered into between the Sydney Investments, Ltd., and the plaintiff for the sale of the property. This agreement also had a provision for a lease for 3 years to the defendant society of the ground floor and the basement. In these agreements there is no mention of fixtures. Later, a conveyance was made by the defendant society to the plaintiff of the property without any reservation of the fixtures. The fixtures, it may be added, were installed by the defendant society while it owned and occupied the property. I think the trial Judge was in error in holding that the fixtures which were affixed to the freehold could be severed by defendant society after the conveyance to plaintiff of its property. The conveyance of the realty to the plaintiff vested in him the title to the fixtures. They were not attached by the defendant society as tenant, but as and while it was the owner.

The law on the subject is thus laid down in the Encyclopedia of the Laws of England, vol. 6, p. 118:—

"Upon the sale of land or a house, there can be no doubt that at common law in the absence of some expression in the contract .....to the contrary, all fixtures annexed or attached thereto will pass to the purchaser (*Colegrave* v. *Dias Santos* (1823), 2 Barn. & Cress. 76; *Goff* v. *Harris* (1843), 5 Man. & G., 473.")

This is a statement of the general rule, and as between vendor and purchaser slight annexation will suffice to make the articles realty. *Bain* v. *Brand* (1876), 1 App.Cas. 762; *Argles* v. *McMath* (1894), 26 O.R. 224; *Haggert* v. *Town of Brampton* (1897), 28 Can. S.C.R. 174; *Hobson* v. *Gorringe*, [1897] 1 Ch.D. 182, 66 L.J. (Ch.) 114; *Monti* v. *Barnes*, [1901] 1 Q.B. 205, 70 L.J. (Q.B.) 225, 49 W.R. 147; *Stack* v. *Eaton* (1902), 4 O.L.R. 335.

The fixtures must of necessity have become the property of the plaintiff before the relation of landlord and tenant between the plaintiff and the defendant society was created, and the stipulation that the defendant society should have a lease does not take the case out of the general rule which has been mentioned.

I think, therefore, that the appeal should be allowed with

N.S.
S.C.

costs. The plaintiff is entitled to recover with respect to the office, and to such portions of the counters and shelves as were physically affixed to the freehold and removed by the defendant society. The case will be remitted to the trial Judge to settle in accordance with this opinion the terms of the judgment in his Court, both as to damages and costs.

Appeal allowed.

HARDING v. LEBLANC.

Nova Scotia Supreme Court, Harris, C.J., Russell, Chisholm and Mellish, JJ. December 10, 1921.

ARREST (§ II—10)—*Violation of sec. 206 of the Customs Act R.S.C. 1906, ch. 48—Action claiming forfeitures under the Act—Arrest of defendant under sec. 270 until security given as provided by section—Application of section—Temporary absence in exercise of calling.*]—Motion to rescind an order of Harris, C.J., made under the Customs Act R.S.C. 1906, ch. 48, for the arrest of the defendant before final trial in an action for forfeitures incurred for violation of sec. 206 of the Act. Motion granted.

R. W. E. Landry, K.C., for defendant.

W. A. Henry, K.C., for the prosecution.

The judgment of the Court was delivered by

MELLISH, J.:—This action was commenced by a general form of writ on November 8, 1921, indorsed as follows:—

"The plaintiff is Collector of Customs and Excise in and for the Port of Yarmouth, Nova Scotia, with jurisdiction over the County of Yarmouth, Nova Scotia.

The plaintiff claims judgment against the defendant for forfeitures incurred for violation of sec. 206 of the Customs Act, ch. 48, of R.S.C. as amended, the same amounting to $11,200, and having been incurred in the County of Yarmouth on or about the first day of October, A.D. 1921 and for costs."

On reading this writ and the affidavit of the plaintiff, sworn on said date, the Chief Justice ordered under sec. 270 of said chapter that defendant be arrested and detained in custody until the security be given as provided in said section, which also provides that "any judge of the Court.....may, upon being satisfied by affidavit that there is reason to believe that the defendant will leave the province without satisfying such penalty or forfeiture, issue a warrant....."

The defendant moved the Chief Justice to set aside this order and he has referred the motion to the Court for determination.

The grounds urged before us on behalf of the defendant are (1) that the order for arrest should not have been granted on

Sask.

K.B.

the material before the Chief Justice, and (2) that the defendant as shewn by affidavits read in his behalf, will not leave the Province.

Dealing with the last ground only, I have come to the conclusion that the application should be allowed. Under sec. 268 I think the procedure in this Court as to setting aside an order for arrest made before final judgment is applicable.

It was argued before us that, as special grounds for obtaining the order are apparently required under sec. 270, the decisions of this Court under the provisions of the Judicature Act, which do not require such grounds to be stated are inapplicable in a case of this kind: and the language of Graham, J., in the case of *McLaughlin Carriage Co.* v. *Fader* (1901), 34 N.S.R. 534, at pp. 536, 537, was cited in support of this contention as follows:—

"The practice of this Court has been that inasmuch as the plaintiff in obtaining an order for arrest, need not state facts or grounds, but is merely required to state his belief that the defendant is about to leave the province, the defendant if he negatives that intention is entitled to be discharged unless the plaintiff can shew facts from which it can be clearly inferred that it was his intention to leave."

Notwithstanding this language, with great respect I do not think that defendant's right to be discharged if he negatives an intention to leave the province is based on the reason here indicated.

Under the English Act, 1838, ch. 110, sec. 3, grounds for granting an order for arrest were required to be shewn by affidavit,—*inter alia* that the defendant was about to quit England, but there are nevertheless numerous cases in which a defendant was discharged on his shewing that he was not "about to quit England." Temporary absence such as that indicated in the exercise of defendant's calling as master of a fishing vessel is not, I think, what is contemplated by sec. 270.

Larchin v. *Willan* (1838), 7 Dowl. 11, 4 M. & W. 351, 150 E.R. 1463, 8 L.J. (Ex.) 19, 2 Jur. 970.

We were requested by plaintiff's counsel to order that defendant be cross-examined on his affidavit. This request, I think, should not be granted.

The order for arrest should be set aside with costs and the defendant discharged.

HOLZ v. BRUNO CLAY WORKS

Saskatchewan King's Bench, Embury, J. December 23, 1921.

CONTRACTS (§ IIC—140)—*Construction—Period of sixty days*

Sask.

K.B.

or more—Meaning of.]—Action by administratrix, for wrongful dismissal of deceased, under a contract of employment.

E. S. Wilson, for plaintiff. *E. Gardner*, for defendant.

EMBURY, J.:—The plaintiff sues as the administratrix of Henry Holz, deceased. The deceased and the defendant entered into a contract in writing on January 28, 1919, for the employment of deceased by defendant for the period from April, 1919, to March 31, 1921. The agreement contained the following clause:—

"It is hereby understood that if Mr. Holz should be disabled through sickness or accident for a period of sixty days or more then this contract will become null and void and be cancelled. Minor ailments or sickness of short duration is not to in any way affect the condition and true meaning of this contract and otherwise to remain as binding to the company."

The evidence shews that the plaintiff was ill and away from work for 25 days between July 30 and August 24, 1920; that he returned to work on August 25 and continued to work continuously until November 20; that then he went away and had an operation on November 22; that he returned to his home on December 3, and went back to work on December 30, having been absent a period of 41 days,—when he was dismissed. The evidence is to the effect that when he went back to work in December he was fit to carry on. This action is brought for wrongful dismissal.

The point to be determined is whether or no the plaintiff had been absent for such a period of time as made his dismissal by the defendant perfectly in accord with the terms of the contract. It will be noted that he was absent a period of 25 days and another period of 41 days, and that between those two periods he worked for 87 days. Clearly, if the dismissal was proper, then the two periods of absence would have to be counted together as one period in order to make up the 60 days of disability provided for in the agreement. I think the word "period" in this contract—even in spite of the last sentence, referring to minor ailments—must be held to mean a continuous period of time. This is what the word "period" when applied to "time" actually means. A somewhat similar point was before the Court in the case of *Tyler* v. *London & India Docks Joint Committee* (1892), 9 Times L.R. 11. The words to be construed in that case were "for a period not less than ten years"; and the Master of the Rolls delivered the judgment of the Court in which he said, "such a period must mean ten continuous years."

I am therefore of opinion that the deceased was wrongly dismissed from the employment of the defendants. The plaintiff

Sask.
C.A.

should have judgment for $900 and interest at 9% per annum from the times when the payments were due.

JONES & COLQUHOUN v. FINCH.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 14, 1921.

APPEAL (§ XI—720)—*Notice of—Application to Court reporter for notes of evidence—Impossibility of completing evidence in time for next sittings of Court—No praecipe for transcript of notes filed—Rule 664 (Sask.), Application of.*]—Application on the part of the defendant (appellant) for leave to perfect his appeal for the next sittings of the Saskatchewan Court of Appeal. Application granted.

A. L. McLean, for appellant.

H. E. Sampson, K.C., for respondents.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—This is an application on the part of the appellant for leave to perfect his appeal for the next sittings of this Court.

Notice of appeal was served on August 30, last. On September 1 application was made to the Court reporter for the notes of evidence, and on September 6 the reporter informed appellant's solicitors that it would be impossible for him to complete the evidence in time for the next Court. It further appears from the material filed that the reporter was not able to complete the evidence until a few days' later than September 20. The regular sittings of the Court began on September 26. No praecipe for a transcript of the notes was filed and no fees were paid. In view of the facts of the case, the failure of the appellant to comply with the rule in that regard has not in any way delayed the proceedings in appeal.

The application was also opposed on the ground that it should have been made in the first instance to a King's Bench Judge in accordance with R.S.C. 664, and the case of *Shaw* v. *Masson* (1920), 56 D.L.R. 598, 14 S.L.R. 88, was cited by Mr. Sampson as establishing the practice in this regard.

Shaw v. *Masson* deals with an entirely different matter, namely, an application to extend the time for giving notice of appeal, which is obviously an application which, in the first instance at least, should be made to a Judge of the Court below. Rule 664 does not apply to such an application as the present one, which can only be made to this Court or to a Judge of this Court in Chambers.

The application should be granted, but without costs.

TWEET v. SMITH.

Sask.

C.A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 14, 1921.

MASTER AND SERVANT (§ IC—10)—*Hire of skilled workman to put separator in order—Compensation—Counterclaim for damages—Negligence and lack of skill in putting in order—Negligence and lack of skill in operation.*]—Appeal by plaintiff from the trial judgment in an action for wages, and counterclaim for damages. Judgment varied. [See Annotation 31 D.L.R. 233.]

N. R. Craig, for appellant; *L. Johnson*, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—The appellant worked for the respondent during the threshing season of 1920 as a separator man. His claim for wages was allowed by the trial Judge, who found that he had been employed as a skilled workman to put the separator in good working condition before the threshing began and to operate it during threshing, and fixed the rate of his wages accordingly, as claimed by the appellant. From this finding there is no appeal.

The respondent counterclaimed against the appellant for damages on two counts: (1) for negligence and lack of skill in putting the separator in running condition, whereby a defect was caused in the machine which resulted in a fire that damaged the respondent's separator and his granary; and (2) for negligence in the operation of the separator whereby certain bearings were burnt out and the separator caused to remain idle during a period of 7 hours. The appellant appeals from this judgment of the trial Judge upon the counterclaim.

As to both these grounds of complaint alleged by the respondent, I am of opinion that there was some evidence upon which the trial Judge could find in favour of the respondent, as he did, and I do not think I would be justified in reversing his finding in either case. In considering the amount of the damages allowed, however, I have come to the conclusion that certain reductions must be made and the judgment varied accordingly.

The only evidence of appreciable damage caused by the fire was the damage done to the granary. As to this item several witnesses described the damage done, but two of them, only, placed a money estimate upon it. The respondent said, referring to the sum of money involved: "I would consider anywhere between $30 to $50"; and David McKillop, one of the respondent's witnesses, said: "It might run up to $30 or $35, may be more, I wouldn't say for certain." As to the separator, the

Sask.

C.A.

only evidence is that of the respondent himself, who says: "The machine caught fire I think in two different places, but the amount of damage wasn't of any account." Upon this evidence I do not think the trial Judge could award damages on account of the fire for more than $50 at the utmost, instead of $100, as allowed by him, and I would reduce the award by $50 accordingly.

On the second count, for damage caused by reason of the separator being idle and the threshing operations stopped for 7 hours when the bearings burned out, I think a further reduction must be made in the amount allowed by the trial Judge. The respondent claimed $126. The only damages which I can find as reasonably resulting from the stoppage of the machine are the wages of the workmen who were paid, as they were entitled to be paid, by the respondent during the 7 hours in question. This amount of these wages, computed according to the figures of their daily pay, is $56.70, and the damages on this head should be reduced to this sum.

The total damages allowed by the trial Judge to the respondent upon his counterclaim amount to $226. This sum should be reduced to $106.70 in accordance with the above, and the judgment below varied accordingly.

The appellant should have his costs of this appeal.

Judgment varied.

THOMPSON v. PIERCE.
PRINCE v. PIERCE.
J. I. CASE THRESHING MACHINE Co. v. PIERCE.
PIERCE v. THOMPSON, et al.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 14, 1921.

INTERPLEADER (§ IB—10)—*Automobile seized by sheriff for husband's debt—Wife claiming—Evidence—Prima facie case that purchased with wife's money—Shifting onus—Failure to attack successfully.*]—Appeal from the judgment of the trial Judge in an interpleader issue to determine the ownership of an automobile seized by the sheriff on executions issued against the goods of appellant's husband. Reversed.

P. H. Gordon, for appellant.

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

The judgment of the Court was delivered by

TURGEON, J.A.:—The appellant claimed the automobile as hers, and was made the plaintiff in the interpleader action. The only evidence given at the trial was that of the appellant herself. The trial Judge delivered judgment against her in the following terms:—

"The plaintiff's husband absolutely carries on farming operations on the plaintiff's as well as his own land.

The car in question was bought with money realised from the proceeds of the crops grown on their lands.

The plaintiff has not satisfied me that that farming business is really hers and that her husband is her servant, and as the onus of shewing this was on her, her claim herein must fail.

Plaintiff's claim barred with costs."

With deference, I must state that, in my opinion, this finding is erroneous and cannot be supported by the evidence.

The appellant's evidence directly relative to the automobile shews that it was bought by her with money realised from the sale of wheat grown upon a quarter section of land owned by her and acquired by her with her own money. In establishing this, she established, I think, a *prima facie* case in favour of her ownership of the automobile, and the onus was thereupon shifted to the respondents to meet this case by adducing evidence against it or by attacking it successfully in their cross-examination of the appellant. They did neither.

The status of a married woman in this province in respect to her property under the statutes in force in the North-West Territories and in the province was considered and explained at length by Newlands, J., in *Harvey* v. *Silzer* (1905), 1 W.L.R. 360, and Lamont, J., in *Moose Mountain Lumber and Hardware Co.* v. *Hunter* (1910), 3 S.L.R. 89, and by Wetmore, C.J., in *Karst* v. *Cook* (1910), 3 S.L.R. 406. In *Moose Mountain Lumber and Hardware Co.* v. *Hunter*, Lamont, J., lays down the following rule at p. 91:—

"Where the crop is grown on land owned by a married woman, and both herself and her husband reside upon that land, the crop, being the product of her land, prima facie belongs to her, and it can only be held to be the husband's when it is shewn that he carried on the farming operations as the head of the family or as tenant of the land."

In *Karst* v. *Cook*, Wetmore, C.J., after quoting the above language, says as follows, at p. 684:—

"Now I agree with that; but I do not wish to be understood as holding that, if the husband carried on farming operations upon such land merely as his wife's manager, it would deprive her of the right to her property or to the proceeds of that property."

In the case at Bar the appellant and her husband do not reside upon the land in question, but upon an adjoining quarter section owned by the husband. Taking the evidence given by the appellant at the trial, both upon her examination and her

Sask.

K.B.

cross-examination (and no other evidence was given), and examining it, as I have endeavoured to do, with the closest scrutiny, I can see nothing to support a finding that the husband farmed this land as the head of the family or as a tenant. Consequently, I am satisfied that the trial Judge is wrong, and that his judgment should be reversed, and that it should be declared that the automobile in question belongs to the appellant and is not liable to seizure at the suit of the respondents.

I would allow the appeal with costs.

Appeal allowed.

HOWELL v. WARNER.

Saskatchewan King's Bench, McKay, J. October 28, 1921.

COURTS (§ IIA—151)—*Jurisdiction of District—Action commenced in one district—Whole cause of action not arising in that district—Defendant residing in another—Sec. 29 of the District Courts Act, R.S.S. 1920, ch. 40—Sec. 35 of the King's Bench Act, R.S.S. 1920, ch. 39—Construction.*]—Appeal by defendant from an order of a District Court Judge dismissing his application for the transfer of an action from one judicial district to another. Reversed.

E. S. Williams, for defendant; *P. H. Gordon*, for plaintiff.

MCKAY, J.:—This is an appeal by defendant, from an order of the District Court Judge of the judicial district of Cannington, dismissing the defendant's application for the transfer of this action from the judicial district of Cannington to the judicial district of Regina, on the ground that the defendant resides in the judicial district of Regina, and that the whole cause of action did not arise in one judicial district.

It appears from the statement of claim filed that the plaintiff has three separate causes of action against defendant, namely:—(1) On a simple contract for the pasturing of the defendant's horses on the ranch of the plaintiff. (2) For money (the sum of $8) paid by the plaintiff for the defendant at his request and for his benefit. (3) For the price of meals, $3.60, served by the plaintiff to the defendant at his request.

The material filed shews that the contract for pasturing said horses was made at defendant's home within the judicial district of Regina, and the horses were pastured within the judicial district of Cannington, and that plaintiff lives in the latter judicial district. That the meals were supplied at plaintiff's home within the judicial district of Cannington. The defendant resides within the judicial district of Regina and was residing there when the writ herein was issued, and for 9 years previously.

Sask.

K.B.

Section 29 of the District Courts Act, R.S.S. 1920, ch. 40, applicable to this appeal, reads as follows:—

"(1) Subject to Rules of Court, all actions shall be commenced and unless otherwise ordered tried in the judicial district in which the cause of action arose or the defendant or one of several defendants resides or carries on business at the time the action is commenced.....

(3) Where an action has been entered in the wrong judicial district, the Judge may at any stage of the proceedings order the record to be transferred to the District Court of the district in which the action should have been entered."

The contention of the defendant is that the words, "the cause of action," in the above section mean "the whole cause of action." That is, they do not mean merely the particular act or omission of the defendant which gives the plaintiff his cause of complaint, but mean and include every material fact which plaintiff must allege and prove to give him a right to judgment.

If the defendant's contention is right, then this action should not have been entered and should not be tried in the District Court for judicial district of Cannington, as the whole cause of action herein did not arise therein. The contract for pasturing was made in the judicial district of Regina, and, in order to be entitled to judgment, plaintiff would have to prove his contract made in the judicial district of Regina, the breach of which he complains. Were I dealing with the District Courts Act alone, I would have no hesitation in agreeing with the defendant's counsel, as the authorities are in his favour. But sec. 2, sub-section 2 (2) of the District Courts Act states that in this Act, unless there is something in the subject or context repugnant thereto, the expressions "cause" and "action" shall respectively have the same meaning as the same expressions have in the King's Bench Act, R.S.S. 1920, ch. 39. The section in the King's Bench Act corresponding to that which I am now considering is sec. 35, the material part of which is as follows:—

"35. (1) Actions shall be entered and unless otherwise ordered tried in the judicial district where the cause of action arose or in which the defendant or one of several defendants resides or carries on business at the time the action is brought.

(3) Where an action has been entered in the wrong judicial district the court or a judge may at any stage of the proceedings order the record to be transferred to the proper office of the district in which the action should have been entered."

It is, therefore, necessary to give some consideration to this section first, although I do not think it necessary to come to a

Sask.

K.B.

definite conclusion as to the meaning of these words in this section.

The meaning of the words "the cause of action" in the foregoing section has been discussed in the Court of King's Bench on several occasions, and there are conflicting decisions on the point.

The cases in favour of defendant's contention follow a long line of English and Ontario cases dealing with the jurisdiction of Inferior Courts, under sections worded very much like our sec. 35. In these cases it was held that "cause of action" meant the whole cause of action. The principle on which these English and Ontario cases were decided being that in dealing with the question of jurisdiction in inferior Courts, jurisdiction could not be assumed, and they could only have that jurisdiction which the statute clearly conferred on them,—hence "the cause of action" was given the extended meaning of "the whole cause of action." That is before an inferior Court, such as the Lord Mayor's Court, or a County Court could have jurisdiction the whole cause of action as above defined must arise within its territorial limits. The contract must be made and the breach thereof committed within the territorial limits of the inferior Court, except in cases in the Lord Mayor's Court under £50, where the Mayor's Court of London Procedure Act, 1857, ch. 157, specially gave it jurisdiction of the cause of action either wholly or in part arose therein. (*Read* v. *Brown* (1888), 58 L.J. (Q.B.D.) 120, 22 Q.B.D. 128, 37 W.R. 131. A different principle, however, is followed, when dealing with a Superior Court, as the Court of King's Bench is. "And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so; on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged. *Peacock* v. *Bell* (1668), 1 Wms. Saunders 73 at p. 74, 85 E.R. 84.

This distinction was pointed out in *Jackson* v. *Spittall* (1870), 39 L.J. (C.P.) 321, L.R. 5 C.P. 542, 18 W.R. 1162. This was a case under sec. 18, ch. 76 of the Common Law Procedure Act, 1852, the material portion of which is as follows:—

"It shall be lawful for the Court or Judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction.....to direct from time to time that the plaintiff shall be at liberty to proceed in the action," etc.

The plaintiff sued in England the defendant, a British subject,

living in the Isle of Man, where the contract was made, upon an alleged breach of said contract not to indorse a bill of exchange delivered to him as security. The breach of indorsing over took place in Manchester, England. Objection was taken that the Court of Common Pleas in England had no jurisdiction because "cause of action" meant the whole cause of action, and, as the contract was made in the Isle of Man, the whole cause of action did not arise within the jurisdiction of the Court. The English County Court cases were cited as authority. The Court held these cases did not apply as they were decisions on questions of jurisdiction in inferior Courts, and it was held "cause of action" did not mean the whole cause of action. This case was followed in *Vaughan* v. *Weldon* (1874), 44 L.J. (N.S.) C.P. 64, L.R. 10 C.P. 47, 23 W.R. 138, where it was held the words "cause of action" mean the act on the part of the defendant which gives the plaintiff his cause of complaint.

In *Olmstead* v. *Scott*, [1921] 1 W.W.R. 1033, Brown, C.J.K.B., held that cause of action in this sec. 35 had the meaning given to it in the *Jackson* and *Vaughan* cases above referred to. He did not expressly say so, but this can be gathered from the report of his oral judgment.

In *St. Louis* v. *Markham*, [1921] 1 W.W.R. 950, Doak, L.M., also so held, following the *Jackson* and *Weldon* cases (*supra*).

In the *Jackson* case, Brett, J., in the course of his judgment at p. 550, (L.R. 5 C.P.) said (referring to the Act):—

"It does not therefore affect to give or to take away jurisdiction, but only to regulate process, practice and pleading *in cases already within the jurisdiction.*"

These words are very applicable to our sec. 35, as it does not affect to give jurisdiction. Section 11 of the Act does this. This sec. 35 simply deals with practice and procedure. The Court having jurisdiction to issue the writ, this section says in what particular district the writ may be issued and the action tried.

Then at p. 552, Brett, J., dealing with the meaning of the words "cause of action" in above quoted sec. 18, says:—

"It is that which, in popular meaning,—and for many purposes, in legal meaning,—is 'the cause of action,' namely, the act on the part of the defendant which gives the plaintiff his cause of complaint."

In view of the foregoing eminent authority one might be justified in saying that the words "the cause of action" in this sec. 35 mean the act or breach on the part of the defendant which gives the plaintiff his cause of complaint, and that they do not mean the whole cause of action.

If the meaning contended for by the defendant were given

Sask.

K.B.

to these words, in the sec. 35 in what judicial district should a writ be issued where the defendant resides out of the province, where the whole cause of action does not arise in one judicial district? There is no other section in the Act providing the entry of actions in judicial districts except this sec. 35, and yet the Court clearly has jurisdiction to issue a writ and try the action in such a case. But I purposely refrain from deciding what these words mean in sec. 35 as it is not necessary for me to do so. I deal with the question as above to show that a different principle must be borne in mind when construing the same words in the two Acts.

While sec. 35 of the King's Bench Act does not deal with jurisdiction, sec. 29 of the District Courts Act does. There is no other section that confers jurisdiction.

There is a separate District Court for each judicial district in the province (sec. 5) but only one King's Bench Court. Section 29 being the section conferring jurisdiction it must be strictly construed and, in my opinion, the decisions above referred to with regard to jurisdiction in inferior Courts apply. And, I think, the words "the cause of action" in sec. 29 of the District Courts Act should not be construed in the same way as in sec. 35 of The King's Bench Act, because in sec. 29 there is something in the subject or context repugnant thereto, being a question of jurisdiction in sec. 29 and not in sec. 35, and different rules of construction apply.

In my opinion, then, the words "the cause of action" mean the whole cause of action, and as the whole cause of action herein did not arise within the judicial district of Cannington, the action should have been entered in the judicial district of Regina where defendant lives, and should be tried there.

The result is that the appeal is allowed, and the order of the District Court Judge will be reversed, and an order granted, ordering the record to be transferred to the District Court of the judicial district of Regina.

The defendant will be entitled to his costs of this appeal, and of the motion below.

Appeal allowed.

MARSHALL v. GRAND TRUNK PACIFIC R. Co.

Saskatchewan King's Bench, Bigelow, J. November 2, 1921.

MASTER AND SERVANT (§ IIB—152)—*Boiler foreman—Leaky plug in engine—Request to investigate—Blowing out of plug—Injuries—Evidence—Contributory negligence—Questions for jury—Liability of company.*]—Action for damages suffered by plaintiff while in the employ of the defendant, on account of

Sask.

K.B.

the alleged negligence of the defendant. [See Annotation 31 D.L.R. 233.]

P. M. Anderson, K.C., for plaintiff.

J. F. Frame, K.C., for defendant.

BIGELOW, J.:—This is an action for damages suffered by the plaintiff while in the employ of the defendant, and alleged to be on account of the defendant's negligence.

The facts are briefly as follows:—On October 12, 1920, plaintiff was employed by defendant at Melville as foreman boilermaker. A certain locomotive had steam up with a pressure of about 150 lbs. and was ready to take out a train, when it was discovered that a plug in the cab was leaking. One Steeves was locomotive foreman over the plaintiff, and asked plaintiff to go over and see the engine. It was plaintiff's duty to go with Steeves when requested. Plaintiff and Steeves went to the engine with a wrench and applied the wrench to the plug, when the plug blew out and the scalding steam escaped, causing serious injuries to the plaintiff and the death of Steeves.

That morning the engine in question had been in the boiler shop for the purpose of being washed out. That is an operation that requires removing of the plugs of the boiler, over forty in number, washing out the boiler, and replacing the plugs. The plaintiff was the foreman of this department, and it was his duty to see that the men under him in the department did their work properly. The plaintiff examined the engine about 8 a.m., when the plugs were out of the boiler, for the purpose of washing out the boiler, that inspection being to examine the threads in the boiler into which the threads of the plug would be screwed, and plaintiff says on this examination the threads of the boiler were all right. It was the duty of one Peat, in this particular case, to put the plugs in, Peat being one of the men in the plaintiff's department. After Peat had put the plugs in, and the boiler filled with water, plaintiff examined the boiler again, and as far as he could tell the plugs were all right. As far as the evidence is concerned, there was no further duty on the plaintiff to examine the boiler or the plugs.

The negligence alleged in the statement of claim is:— (a) that the defendant's servants failed to properly screw the plug into its socket; (b) in providing a defective plug that would not properly screw into its socket.

There was no evidence of a defective plug given at the trial, and plaintiff's evidence was that the plug must have been put in cross-threaded by Peat, or it would not have blown out.

The defence set up is a denial of any breach of duty to the plaintiff, and contributory negligence.

Sask.

K.B.

At the conclusion of the evidence, counsel for the defendant moved that the case be withdrawn from the jury. I reserved judgment on that motion, and put certain questions to the jury. The following are the questions and answers:—"(1) Q. Was the injury to the plaintiff caused by the negligence of the defendant? A. Yes. (2) Q. If so, in what did such negligence consist? A. Putting in plug cross-threaded or improper. (3) Q. Was the plaintiff guilty of any contributory negligence. A. No. (4) Q. If so, what? A. ——. (5) Q. To whose negligence do you attribute the injury? A. Defendant company. (6) Q. Could the plaintiff, by the exercise of reasonable care and diligence, have avoided the accident? A. No. (7) Q. Did the plaintiff with a full knowledge and appreciation of the danger from moving the plug with a wrench voluntarily accept the risk attendant on the plug being so moved? A. No. (8) Q. At what sum do you assess the damages? A. (a) General damages, $10,000; (b) Special damages, $5,529.80."

The plaintiff moves for judgment in accordance with the findings of the jury, and the defendant renews the motion made at the conclusion of the evidence, and also moves that judgment should be entered for the defendant notwithstanding the findings of the jury.

Defendant's first contention is that defendant could not be guilty of negligence as against the plaintiff, as there was no breach of duty as far as the plaintiff is concerned. This is based on the fact that the negligence of Peat was negligence in the department of the plaintiff, and that it was plaintiff's duty to see that the men in his department did their work properly. The cases most in point cited by defendant are: *Davidson* v. *Stuart*, (1903), 34 Can. S.C.R. 215; *Sharp Traction Co.* v. *Begin* (1918), 52 D.L.R. 686, 59 Can. S.C.R. 680.

In *Davidson* v. *Stuart* the head-note is as follows:—

"An electrician engaged with defendants as manager of their electric lighting plant, and undertook to put it in proper working order, the defendants placing him in a position to obtain all necessary materials for that purpose. About three months after he had been placed in charge of the works, he was killed by coming in contact with an incandescent lamp socket in the power house which had been there during the whole of the time he was in charge, but at the time of the accident was apparently insufficiently insulated. Held, that there was no breach of duty on the part of the defendants towards deceased, who had undertaken to remedy the very defects that had caused his death, and the failure to discover them must be attributed to him."

Nesbitt, J., at p. 223, says:—

"I think the case may be disposed of on the short ground that no evidence was adduced of any breach of duty owing by the defendants to the deceased. The charge and control of the plant was with the deceased, and any of the defects complained of were the very matters which the deceased undertook to remedy if discovered, and the failure to discover such defects must be attributed to him. There was no evidence of negligence in the defendants, having in mind the duties of the deceased."

In *Sharp Traction Co.* v. *Begin*, the plaintiff was in the employ of the company as engineer. The engine was operating a certain number of cog-wheels. These cog-wheels were not covered. It was proved that the plaintiff was a skilled engineer who was looked to to have the machine in proper order. The accident occurred when the plaintiff tried to clean a friction pulley near the cog-wheels while in motion by holding a rag against it. The trial Judge dismissed the action with costs. The Court of King's Bench (1917), 26 Que. K.B. 345, reversed this judgment, Cross, J., dissenting, holding that there was contributory negligence, and condemning the company to pay $2,400. On appeal to the Supreme Court of Canada, the Court allowed the appeal, 52 D.L.R. 686.

It is not clear from the report whether judgment on the appeal to the Supreme Court of Canada was given on account of contributory negligence or because plaintiff was a skilled engineer, who was looked to to have the machine in proper use.

I was at first impressed with this argument, but after consideration I do not see how the company can escape liability for Peat's negligence. To hold this would put the plaintiff in the position of taking a risk of the negligence of all the men under him. The plaintiff did all that he reasonably could in his duties to the defendant. He hired competent men, and as far as the evidence goes he had every reason to think that Peat was a competent man up to this time. When plaintiff inspected the boiler at 11 o'clock and the plugs and the water were in the boiler, everything was all right as far as he could tell. In my opinion I would not be justified in holding that there were no facts from which negligence might reasonably be inferred. Therefore, it was a question for the jury as to whether there was negligence, and their finding must prevail.

Defendant contends that the cross-threaded plug was not the proximate cause of the accident,—meaning, I suppose, that plaintiff's own negligence in applying the wrench while steam was on was the proximate cause. The cases cited by defendant do not seem to me to assist, and I think this was a question for the jury.

Sask.

K.B.

Then defendant alleges that plaintiff was clearly guilty of contributory negligence: (a) in not inspecting the engine boiler after steam was up and before it was due to go on the road: (b) when plaintiff found the leaking plug and could not tell the exact cause of the leaking, in not "killing the engine" before he touched the plug, and in assisting to move the plug when the engine was under heavy steam pressure.

There was contradictory evidence about this, and I think this was also a question for the jury.

Plaintiff will have judgment for $15,529.80 and costs.

Judgment for plaintiff.

STEEVES v. GRAND TRUNK PACIFIC R. Co.

Saskatchewan King's Bench, Bigelow, J. November 2, 1921.

NEW TRIAL (§ IIIA—10)—*Conflicting and ambiguous answers given by jury—Question left in doubt.*]—Action under Act respecting Compensation to the Families of Persons Killed by Accident. New trial ordered.

P. M. Anderson, K.C., for plaintiff.

J. F. Frame, K.C., for defendant.

BIGELOW, J.:—This is an action brought by the administratrix of W. B. Steeves under the Act respecting Compensation to the Families of Persons Killed by Accident, 1920, (Sask.) ch. 29. Steeves died in a few days as the result of the same accident referred to in *Marshall* v. *The Grand Trunk Pacific R. Co.*, ante p. 666, judgment in which I have filed to-day. Steeves was locomotive foreman over Marshall.

In this case the questions and answers of the jury are as follows:—

"(1) Q. Was the injury to Steeves and his death caused by the negligence of the defendant? A. Yes. (2) Q. If so, in what did the negligence consist? A. Having an improperly placed or defective plug in arch tube of boiler. (3) Q. Was Steeves guilty of any contributory negligence? A. No. (4) Q. If so, what? A. ——. (5) Q. Did Steeves with a full knowledge and appreciation of danger from moving the plug with a wrench voluntarily accept the risk attendant on the plug being so moved? A. No. (6) Q. At what sum do you assess the damages? A. (a) For the widow, Hattie Amelia Steeves, $6,500; (b) For the child, Eric W. Steeves, aged 13 years, $2,500; (c) For the child, Jack Edward Steeves, aged 18 years, $1,000."

As regards the defendant's contentions, (a) that the cross-threaded plug was not the proximate cause of the accident; (b) contributory negligence,—my remarks in the *Marshall* case apply to this case, and I think these questions were for the jury.

Sask.

K.B.

This case is different in this respect, however. In answering the question, "If so, in what did the negligence consist?" the jury said, "Having an improperly placed or defective plug in arch tube of boiler."

The plaintiff alleged in the statement of claim that the defendant's negligence consisted in (a) its servants failing to properly screw the plug into its socket; and (b) in providing a defective plug that would not properly screw into its socket. The only evidence given in support of the plaintiff's claim was as to (a). There was no suggestion in the evidence that the plug was defective. See *Lilja* v. *The Granby Consolidated Mining, etc., Co., Ltd.* (1915), 21 B.C.R. 384. That was an action for damages for injuries sustained by a blaster from an explosion of dynamite while in the act of inserting it into a hole in a mine for blasting. Two defective systems were alleged,—one, as to the storage and thawing of the powder, and the other, as to the manner of cleaning out the drilled holes before the insertion of the dynamite. The jury found a defective system without specifying which it was. It was held on appeal that there was no evidence to support the jury's finding of a defective system in connection with the cleaning of the holes, but there was evidence upon which a defective system might be found as to storing and thawing the powder. The jury not having specified which of the two systems was defective, a new trial was ordered.

This judgment was sustained in the Supreme Court of Canada. See (1915), 9 W.W.R. 662.

See also *Leblanc v. Moncton Tramway, Electricity & Gas Co., Ltd.* (1920), 53 D.L.R. 68, 47 N.B.R. 291. Hazen, C.J., giving the judgment of the Appellate Division of the Supreme Court of New Brunswick, said, at p. 74:—

"Answers by a jury to questions should be given the fullest possible effect, and if it is possible to support the same by any reasonable construction they should be so supported. But when the questions answered and unanswered leave the original question in controversy in doubt and ambiguity, the cause of justice is best promoted by a new trial."

Applying these principles here, if the jury based their finding of negligence on a defective plug, there is no evidence whatever of that, and in my opinion defendant would be entitled to have such a verdict set aside. If, on the other hand, the negligence consisted of the plug being placed improperly or cross-threaded, then plaintiff would be entitled to judgment. This finding to my mind leaves the question in doubt and ambiguity, and there should be a new trial. I think the costs of this trial should be paid by the plaintiff. *New trial ordered.*

Sask.

K.B.

MORTIMER v. SHAW and DREDGE.

Saskatchewan King's Bench, Bigelow, J. November 16, 1921.

VENDOR AND PURCHASER (§ IE—27)—*Agreement for the sale and purchase of farm property on crop payments—Purchaser financed by vendor for first year—Refusal to finance for second year—Agreement giving purchaser right to sell—Fraud on part of owner and real estate agents in procuring signature to sale of property—Rescission of contract on account of fraud—Damages—Amount.*]—Action for possession of certain property purchased under an agreement of sale and for damages for being wrongfully deprived of such possession.

S. R. Curtin, for plaintiffs.

Avery Casey, K.C., and *L. L. Dawson*, for defendants.

BIGELOW, J.:—By an agreement in writing dated March 24, 1920, the defendant Shaw agreed to sell to the plaintiffs a certain farm and personal property for $57,600, payable by half crop payments. The plaintiffs entered into possession about April 1, 1920, farmed the land during the season of 1920, and delivered to the defendant Shaw his half-share of the crop. The defendant Shaw remained on the premises with the consent of the plaintiffs during all the farming season of 1920, and, after the farming season was over, stayed on without any arrangement with the plaintiffs. The plaintiffs apparently had no money to finance operations in 1920, and defendant Shaw advanced them money and other things for that purpose to the extent of $3,777.77, the amount due on November 1, 1920. Most of this amount was paid to the defendant Shaw that fell out of plaintiffs' share of the crop and the cattle, but defendant Shaw was not satisfied to finance the plaintiffs another season, and told plaintiffs so in November 1920.

An agreement was drawn up on November 10, 1920, giving the plaintiffs the right to sell the said property, or, if they could not sell, the plaintiffs were to vacate by March 15, 1921. The plaintiff, John Mortimer (the father of the other two plaintiffs), refused to sign this agreement, and it was not acted on.

On December 16, 1920, at Shaw's request, John and Joseph Mortimer went with Shaw to the office of a real estate firm in the city of Regina, called The Real Estate Brokers. Here, they met the defendant Dredge, and one Ullerich. Shaw was anxious to get another purchaser of the land in question. Dredge was a prospective purchaser who was willing to consider taking Shaw's land if it suited him after inspection, and if Shaw would take as part payment 25 lots in a subdivision in the town of Macleod. Ullerich had an equity in a half section near Cedoux, which half section he had listed for sale at $35 an acre. The Real Estate

Sask.

K.B.

Brokers endeavoured to complete a three-cornered transaction whereby:—

(1) Shaw would sell to Dredge the farm in question, and take in part payment the 25 Macleod lots. (2) Shaw would give the plaintiffs the Macleod lots and certain chattels to quit claim their interest in the farm in question. (3) Ullerich would sell the plaintiffs the half section near Cedoux at $50 an acre, and take in part payment the lots in Macleod.

The following document was drawn up and signed that day by John and Joseph Mortimer and Ezra Shaw:—

Agreement
made in triplicate.

Between

John Mortimer, Joseph Mortimer, and Stanley L. Mortimer, of the town of Davin, in the Province of Saskatchewan, in the Dominion of Canada, Farmers,

Parties of the 1st part.

and

Ezra Shaw, of the town of Davin, in the Province of Saskatchewan, in the Dominion of Canada, Retired Farmer,

Party of the second part.

Witnesseth:

In consideration of One Dollar, in hand paid, receipt of which is hereby acknowledged, and other valuable consideration, consisting of the chattels enumerated herein, below, Parties of the First Part hereby agree to sell by way of quit claim deed to the Party of the Second Part, who agrees to buy, all of Section 22, and the South Half of Section 14-16-16, West of 2nd Meridian, in the Province of Saskatchewan in the Dominion of Canada, including all chattels purchased from the Party of the Second Part under the terms of a certain Bill of Sale, dated the 28th day of March, 1920.

[The agreement here set out the chattels, above mentioned.]

Also the surrender of all notes now held by the Party of the Second Part against the Parties of the 1st Part, and 25 lots in Mayfair, a sub-division to the town of McLeod, in the Province of Alberta, subject to only arrears of some taxes.

We, the undersigned, having read this agreement and received a copy of the same, do hereby agree to carry out and fulfil the same in detail.

Signed, sealed and delivered this 16th day of December, A.D. 1920, in the presence of,
Witness, O. D. McIntyre.

John Mortimer.
Joseph H. Mortimer.
Stanley L. Mortimer.
Ezra Shaw.

Sask.

K.B.

None of the plaintiffs had seen the Cedoux property. John Mortimer did not want to sign that document, or commit himself about the Cedoux property, before inspecting it, but the Real Estate Brokers and Ullerich induced him to sign that night, urging the fact that Ullerich was leaving for Saskatoon that night. There was some conflict of testimony, and I find that it was distinctly agreed that McIntyre of the Real Estate Brokers was to hold the document until John Mortimer inspected the Cedoux property, and, if the Cedoux property did not suit John Mortimer, McIntyre was to return the document to John Mortimer. This was agreed to by McIntyre, who was Shaw's agent, and also by Shaw, as well as Ullerich. The effect of this was, that the document was not to take effect until the performance of the condition above referred to, and, in my opinion, the document was delivered to McIntyre in escrow. John Mortimer went the next day to inspect the Cedoux property. The same day, but before John Mortimer had a chance to return, McIntyre and Ullerich, in their great anxiety to complete the transaction, drove down to the farm in question, and procured Stanley's signature to the document above quoted. Stanley Mortimer at first would not sign without seeing his father, but was told by McIntyre that it would save him a trip to Regina, and that the document was not to take effect until John Mortimer had inspected the Cedoux property and if John Mortimer was not satisfied with the Cedoux property the deal would not go through.

I was not favourably impressed with the evidence of McIntyre or Hilson (two partners of the Real Estate Brokers), or of Ullerich. McIntyre and Hilson contradicted each other as to whether the question of inspection of the Cedoux property was mentioned at all. Ullerich had been a partner in the same firm, and the whole transaction seemed to me a piece of sharp practice on the part of the three of them to close a transaction, and obtain a large commission, and get rid of the Cedoux farm.

John Mortimer inspected the Cedoux property, and found it vastly different from what it was represented to be, and entirely unsatisfactory, and immediately came back to Regina and notified McIntyre, and demanded his papers back from both McIntyre and Ullerich. They refused to give them up. The plaintiffs then consulted their solicitor, and notices were given to both Shaw and Dredge. Shaw entered into an agreement of January 15, 1921, to sell him the land in question, and Dredge entered into possession with Shaw's assistance and forced the plaintiffs off the place. Dredge has farmed the property for the season of 1921. This action is for possession of the property,

Sask.

K.B.

and for damages, and, in my opinion, the plaintiffs are entitled to recover.

The defendant Dredge contends that he was an innocent purchaser, and therefore the action should fail against him, but I find that Dredge had full knowledge and notice of the dispute between the plaintiffs and Shaw, and that he entered into the agreement of January 15, 1921, and went into possession with such full knowledge and notice, and that he is liable as well as Shaw.

As to damages: The plaintiff claims in his statement of claim "damages against each of the said defendants in the sum of $5,000.00 for entering the said premises and disturbing the plaintiffs in their use and enjoyment of same, and for obstructing the plaintiffs in their farming operations on the said premises, and for the loss and expenses occasioned to the plaintiffs by the defendants wrongfully occupying a portion of the said premises."

First, as to the principles on which damages should be assessed. The plaintiffs claim that this is a case for exemplary damages. I cannot agree with this contention.

When the trespass takes place under a colour of right, I do not think it is a case for exemplary damages. Here, the defendants had the plaintiffs' signed agreement, and there was a dispute as to whether it was delivered absolutely or conditionally. The plaintiffs could easily have avoided the dispute by insisting on having the condition written in the agreement, or by calling in a solicitor and protecting themselves. Although they wanted to do this, they gave in to the suggestions of the real estate agents, and thus they were to a certain extent responsible for what has taken place.

See also *Bell* v. *Foley Bros.* (1917), 34 D.L.R. 391, 51 N.S.R. 1. This was an appeal from the trial Judge who allowed exemplary damages. The appeal was allowed and exemplary damages disallowed. Graham, C.J., refers to a number of cases on the subject. I quote from his judgment at p. 393:—

"Indeed, in an action at law, as this is, for trespass to land, either here or in England, exemplary damages are rather unusual. I cannot think of one in our own Courts. Of course there are old cases in England, but one has only to read the judgments to observe that there was more involved than the mere trespass to land. There were personal things coupled with it—some matter of aggravation, and Heath, J., in *Merest* v. *Harvey*, 5 Taunt, 442 (128 E.R. 761), cited in the judgment, said:—'It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages.' This case

Sask.

K.B.

and a number of cases of exemplary damages were cited in the case of *McArthur & Co.* v. *Cornwall*, [1892] A.C. 75. They are called penal damages in that case. The Judicial Committee said, (p. 88):—'These consequences are inflicted upon the defendants, because, it is said, they have defied British law, and committed a trespass unauthorised and wilful in its inception, and persistent and definite in its continuance. Assuming in Cornwall's favour that such conduct would authorize what is in its nature a fine or penalty, and is not damages to the plaintiff by reason either of pecuniary loss or of such loss combined with injury to the feelings (a proposition which appears to their Lordships open to grave question), their Lordships cannot take so severe a view of the conduct of the defendants.' I think the whole amount (whatever it was) allowed for exemplary damages should be disallowed."

Then the defendant contends that special damages must be alleged as well as proved before they can be recovered. The plaintiffs submit that their claim is for special damages. The action was begun on February 21, 1921. I think it is desirable that all questions in dispute between these parties should be settled in this one action, and, if the plaintiffs' claim is not one for special damages, I allow an amendment to conform to the evidence.

I realise that it is not an easy matter to assess as damages the actual pecuniary loss sustained, but I must do the best I can. The evidence shews that the two cars of wheat raised on the place in 1920 at $1.85 per bushel, the market price at the time of threshing, were worth $5,154. The cattle sold off the place in 1920 realised, according to defendant Shaw's evidence, $690, making a total of $5,844. There was also some money made out of pasturing cattle in 1920. Two of the Mortimer families made a living there in 1920, but it must also be considered that all their work went into the crop for that year, and I think the work might reasonably be offset against their living. Dredge farmed the land in 1921, and put in 170 acres of wheat, 130 acres of oats, and 30 acres of barley. At the time of the trial—September 28, 1921—this crop was not threshed, so no one could tell what it would produce in bushels or price. Dredge admitted on cross-examination that if this farm was in proper shape it was worth five to six thousand dollars a year. I think the farm was in proper shape. The annual interest plaintiffs pay Shaw on the place amounts to $3,456, payable in half crop payments. Taking everything into consideration, I think $6,000 a year would be a fair rental valuation of the property. If plaintiffs were landlords, and renting it they would only get 2/3rds of the

annual value which would amount to $4,000, at which amount I assess the damages.

As under the agreement between the plaintiffs and Shaw, Shaw should get half of the profits made out of the place to apply on the agreement, and Mr. Curtin for the plaintiffs has consented to this, I direct that one-half of the damages allowed be so applied.

The plaintiffs will have judgment against both defendants for possession, and the injunction as asked for in the statement of claim, and $4,000 damages, and costs, one-half of the damages to be applied on Shaw's agreement, and the plaintiffs will be entitled to issue execution for the $2,000 and costs.

Counterclaim: The defendant Shaw counterclaims for $748.80 on an open account. This account, although disputed in the pleadings, was admitted at the trial, but plaintiffs claim in the pleadings an offset of an open account amounting to $2,500.70. There are no particulars in the pleadings shewing how this amount is made up, but a statement was furnished at the trial claiming a larger amount, although the claim for wheat and cattle was abandoned as that was to be credited on the agreement for sale. On the defendant Shaw's own evidence, I allow the following items as offset against Shaw's claim:—

Item	1.	Drawing straw, 2 men and 2 teams	$45.00
"	2.	Spreading out wheat, stocking it again, 1 man	16.00
"	3.	Threshing wheat, 3 men & 3 teams	31.50
"	4.	Raking stubble, 1 man and team	10.00
"	5.	Taking cattle to pasture, 2 men and 2 teams	7.00
"	7.	Hauling wheat rakings, 1 man and team	7.00
"	8.	Hauling in stubble rakings, 1 man and team	3.50
"	10.	Trying to drive cattle, 2 men and 2 teams	7.00
"	11.	Bring home cattle, 2 men and 2 teams	7.00
"	12.	Hauling wheat to Davin, 2 men and 2 teams	21.00
"	13.	Shoveling wheat in bin, 1 man	4.00
"	14.	Business trip to Regina, 3 men	15.00
"	15.	Business trip to Glenavon, 1 man	5.00
"	18.	Hauling wheat to Davin, 2 men and 2 teams	14.00
"	19.	Loading cattle, 3 men and 3 teams	7.00
"	22.	Pasturing 38 head of cattle, 4 months and 5 days	182.40
"	23.	8 trips to north place with team looking after cattle	8.00
"	26.	Drawing water for Mr. and Mrs. Shaw	15.00
"	33.	40 bushels potatoes	53.00
			$358.40

Sask.

K.B.

On disputed evidence, I allow the following items of the plaintiffs' claim as an offset against Shaw's counterclaim:—

Item 6.	Hauling in barley rakings, 2 men and 2 teams	$5.00
" 16.	1 man to Regina	8.00
" 17.	Cleaning wheat, 1 man, 41 days	80.00
" 20.	60 bushels barley, $1.50 bus., fed to Shaw's hogs	90.00
" 21.	Feeding and fattening, care of hogs	32.00
" 24.	4 trips to Vibank with team	5.00
" 27.	5½ tons coal burnt by Shaw	41.25
" 28.	10 months' rent for house	100.00
" 29.	10 months' storage for automobile	20.00
" 34.	5 tons of coal at $7.50	37.50
	Potatoes	40.00
	Sheaves	50.00
" 25.	1 trip to Kroneau	2.00
		$510.75

making a total of the items allowed plaintiff of $969.15.

The defendant Shaw says in answer to this claim that he did work for the plaintiffs which should be set off against that. In describing the work he did for the plaintiffs, he said he helped to clean their wheat and ran the engine during threshing. The wheat that he helped to clean I find was seed that the defendant Shaw supplied plaintiff, and for this he should not be paid. I think he should be allowed for running the engine, 15 days at $10—$150. Deducting $150 from the $969.15, leaves $819.15 to offset against defendant's counterclaim of $748.80.

The counterclaim of the defendant Shaw is dismissed with costs.

CANADIAN BANK OF COMMERCE v. CUDWORTH RURAL TELEPHONE Co. Ltd.

Saskatchewan King's Bench, Bigelow, J. December 7, 1921.

COMPANIES (§ IVD—60)—*Company incorporated under the Companies Act and in accordance with the Rural Telephone Act now ch. 96 R.S.S. 1920—Contract for construction—Note given for part of amount due—Power of company to give note.*]—Action on a promissory note, payable on demand, and endorsed to the plaintiff for value and before maturity, and of which the plaintiff is the holder in due course.

F. F. MacDermid, for plaintiff.

H. E. Sampson, K.C., and *F. A. Sheppard*, for defendant.

BIGELOW, J.:—The defendant is a company incorporated under the Companies Act on May 8, 1918, and, in accordance

Sask.

K.B.

with the Rural Telephone Act, now ch. 96, R.S.S. 1920. The only provision as to its powers or objects expressed in its Memorandum of Association is:—"The object for which the company is established is the construction, maintenance and operation of a telephone system."

On August 19, 1918, one George Foley entered into a contract with the defendant for the construction of a telephone system to cost $49,500. After that, the defendant company decided to have certain extension work done in addition to the main contract, and that contract was awarded to Foley. On June 12, 1920, Foley's work had been completed for sometime and he demanded a settlement. A meeting of the directors was called, and 4 out of the 5 directors attended. Several hours were occupied in figuring up the balance due Foley when the defendant company gave a cheque for $1,000 and a note for $5,407.50 payable on demand. The note was sealed with the seal of the company and signed "John Wild, President; Archie Langridge, Sec. Treas. Cudworth Rural Telephone Co. Ltd." This note was endorsed to the plaintiff on June 15, 1920, and is the subject matter of this action.

The first defence raised is that on subsequently checking up the amount, the defendant found that it only owed Foley $1,785.27. A complete answer to this contention is that the note was endorsed to the plaintiff for value and before maturity and that the plaintiff is a holder in due course.

The second defence is that the company had no power to make the note. It is a common impression that a non-trading corporation, such as this was, has not the power to make notes, and this proposition is established by abundance of authorities. Brice on Ultra Vires, 3rd ed., pp. 246, 263; 2 Hals., p. 491; 5 Hals., p. 304; 8 Hals., p. 361; Palmer Company Law, 11th ed., p. 273; *Stephens* v. *North Battleford School District* (1908), 1 S.L.R. 506; *Piggott* v. *The Town of Battleford* (1913), 6 S.L.R. 235. But it is contended that that proposition would only apply to a company incorporated under a general or special Act, and that, since 1917, when our Legislature amended the Companies Act (1915, ch. 14) so as to give every company the same powers as a company which had been incorporated by Letters Patent under the Great Seal, such a company now has power to make notes. After the case of the *Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566, 25 Que. K.B. 170, 85 L.J. (P.C.) 114, our Legislature amended the Companies Act (1917) (ch. 34, sec. 42 (3), which is now the Revised Statutes of Saskatchewan (1920), ch. 76, sec. 14, the material part of which reads as follows:—

Sask.

K.B.

"Unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the great seal."

This question came before the Appellate Division of the Supreme Court of Ontario in *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280, 42 O.L.R. 105. The provision in the Ontario Companies Act, 1916, ch. 35, sec. 6, is:—

"Every corporation or company.....heretofore or hereafter created, by or under any general or special Act of this Legislature, shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter."

I take it that the meaning of that provision in the Ontario Act is practically the same as the provision in our Act quoted above.

In *Edwards* v. *Blackmore*, *supra*, the defendant company was incorporated by Letters Patent signed by the Provincial Secretary and sealed with his official seal under the authority of the Ontario Companies Act. The objects of incorporation set forth in the letters were briefly as follows:—

"To acquire lands and buildings, improve and alter them, sell, lease, exchange or mortgage them; to erect buildings and to deal in lands and building material, and generally to do all such things as were incidental or conducive to the attainment of these objects; to carry on business as brokers and agents, and to acquire, purchase, and take over a real estate, insurance agency, and building business carried on by B. & Co."

The action was brought on a promissory note which was given on account of the purchase price of machinery and patent rights for the manufacture of machines for pressing clothes. The company set up the defence that it had no authority or power to make the note under its charter and it was held that this defence could not prevail. See Ferguson, J.A., 42 D.L.R. 280, at p. 285:—

"As I read the *Bonanza Creek* case, it is there decided that a company incorporated by letters patent, under the Great Seal of the Province of Ontario, derives its being, vitality, and capacity not only from or under the Ontario Companies Act, but from and by reason of the exercise, by the Lieutenant-Governor of the Province, of the prerogative right of the Crown to grant a charter of incorporation; and that, by virtue of the

exercise of such prerogative, the company so incorporated is thereby created with all the capacity of a common law corporation, save only in so far as the conferring of such capacity on companies by the exercise of that prerogative right by the Lieutenant-Governor of a Province is limited by the provisions of the British North American Act, or by other express statutory provision assented to by the Crown. The subject is dealt with at p. 285 of the report of the *Bonanza Creek* case, as follows:—

'The words 'legislation in relation to the incorporation of companies with provincial objects' (British North American Act, sec. 92) do not preclude the Province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person.' ''

Ferguson, J.A., continues at p. 286:—

''The construction adopted by Blackburn, J., . . . expressed by him in *Riche* v. *Ashbury Railway Carriage and Iron Co.* (1874), L.R. 9 Ex. 224, 264, is as follows:—

'I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, Does the statute creating the corporation by express provision, or by necessary implication, shew an intention in the Legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, Does the statute creating the corporation by express provision, or necessary implication, shew an intention in the Legislature to prohibit, and so avoid the making of, a contract of this particular kind?' The question raised by Blackburn, J., as to the intention of the Legislature to confer a general capacity to contract, is in this case answered by the Act of 1916, ch. 35, sec. 6, whereby the Legislature of the Province of Ontario has expressly enacted and declared that'': (See quotation above).

Ferguson, J.A., continues at p. 288:—''The same question is dealt with in Palmer's Company Law, 10th ed., at p. 3, as follows'':—'There still, however, subsists a difference of a fundamental character between a chartered company and a company formed under a special Act or registered under the Companies Acts, and it is this: at common law a corporation created by the King's charter has power, as was determined in

Sask.
K.B.

the *Sutton's Hospital* Case (10 Rep. 13), to deal with its property, to bind itself by contracts, and to do all such acts as *an ordinary person* can do, and so complete is this corporate autonomy that it is unaffected even by a direction contained in the creating charter in limitation of the corporate powers. For the common law has always held that such a direction of the Crown—though it may give the Crown a right to annul the charter if the direction is disregarded—cannot derogate from that plenary capacity with which the common law endows the company, even though the limitation is an essential part of the so-called bargain between the Crown and the corporation. See judgment of Bowen, L.J., in *Baroness Wenlock* v. *River Dee Co.* (1883-1887), 36 Ch. D., 674, 685, and of Blackburn, J., in *Riche* v. *Ashbury Railway Carriage and Iron Co.*, L.R. 9 Ex. 224. This feature—the unrestricted corporate capacity of the chartered company—is in marked contrast to the strict delimitation by the Legislature and the Courts of the statutory or registered company to its defined objects.' ''

The decision of *Edwards* v. *Blackmore, supra,* was a decision of the Appellate Division of the Supreme Court of Ontario, in which the judgment of the trial Judge, Masten, J., was affirmed by Lennox, J., Ferguson, J.A., and Rose, J., although Meredith, C.J.C.P., dissented. The importance of this case would seem to have warranted an appeal to the Supreme Court of Canada, but I have searched the reports, and cannot find that an appeal was ever taken.

I think I should follow this decision, and for these reasons I am of opinion that this defence cannot prevail. The plaintiff will have judgment for the amount claimed, including interest and costs.

CENTRAL CANADIAN SECURITIES Ltd. v. BROWN & WANNER.

Saskatchewan King's Bench, Bigelow, J. December 24, 1921.

VENDOR AND PURCHASER (§ III—39)—*Agreement for sale of land—Assignment—Alteration of terms of payment—Alleged default in payments—Construction of contracts—Amendment of statement of claim—Acceleration clause.*]—Action to recover the whole amount due under an agreement for the sale and purchase of land under the acceleration clause in the agreement.

L. L. Dawson, for plaintiff; *A. E. Vrooman,* for defendants.

BIGELOW, J.:—On April 30, 1919, one Daniel Coleman agreed to sell to the defendants, who agreed to buy certain farm land. On June 20, 1919, Coleman assigned this agreement to plaintiff, and the assignment, which altered the terms of payment in a

Sask.

K.B.

way which will be referred to later, was signed by the defendant. Plaintiff alleges default and claims that the acceleration clause applies, and asks for judgment for the full amount.

The material provisions in the agreement for sale are:—The purchase price is $11,520, payable $2,868 cash, and the balance $8,552, by crop payments, in annual instalments as hereinafter provided, together with interest at the rate of 6% per annum, such interest to be payable on December 1; the first payment of interest to be payable on November 1, 1919.

The purchasers also covenant to pay taxes after December 31, 1919, and 7/12ths of the taxes for the year 1919. The purchasers agreed to deliver to vendor one-half share or portion of all crops. The share of the crop so delivered was to be applied at the then market price, first, in payment of the interest payable thereunder in that year; next, in payment of the arrears of any kind payable under the agreement, and the balance on account of the purchase money.

It was also agreed, in the event of default being made in payment of any sums payable thereunder, including taxes and insurance premiums or any part thereof, that the whole purchase money was to forthwith become due and payable.

The agreement also contains this clause, "Notwithstanding anything herein contained, it is agreed that the said purchase price of the said land is to be paid in full on or before December 31, 1926, and if the crop payments herein provided to be made shall not by that time have paid all sums payable hereunder, the balance unpaid shall on that date become due and payable by the purchaser to the vendor in lawful money of Canada."

The assignment contains the following covenant by defendants:—

"The purchaser of the third part assumes the mortgage indebtedness now registered against the within mentioned lands and covenants to hold harmless from this mortgage indebtedness the parties of the first and second part herein and hereby relieves the parties of the first and second part herein from any indebtedness now registered against the lands both as to principal and interest."

There is no allegation or proof that the defendants have failed to deliver their half share of the crop as agreed, but it is proved that defendants have made default in payment of taxes for 1919. The defendants were to pay 7/12ths of the 1919 taxes and plaintiff has been obliged to pay this. This default is not alleged in the statement of claim, but on attention being called to this the plaintiff's counsel asks for an amendment. If this were the only default proved, I would not allow the amendment

Sask.
K.B.

at such a late stage without making the plaintiff pay all costs to date, but as this is not the only default proved I will allow the amendment to cover this default.

The defendants have also made default in payments due to the mortgage companies which plaintiff has paid to the amount of $300.

The only question to decide is whether the acceleration clause is operative, or whether defendants were only bound to deliver one-half of the crop and to make all payments out of the crop.

The plaintiff contends that no matter what construction can be put on the original agreement, the clause quoted from the assignment alters the terms of payment. It does, but only to the extent that the purchasers there covenant to pay monies due to the mortgagees. Such a payment would, in my opinion, not be in any different position than the payment of taxes which the defendants had agreed to pay in the original agreement, and default in payment of taxes or mortgage monies would not accelerate all the payments if the defendants were only obligated to pay the share of the crop raised each year. This question came before the Court of Appeal in *Wellington* v. *Selig* (1919), 50 D.L.R. 253, 13 S.L.R. 12, in which, unfortunately, for litigants there was an equal division of the Court. Practically the same question came before Macdonald, J., in *Pattison* v. *Behr* (1920), 13 S.L.R. 137, although the wording of the contract in the last case was somewhat different.

In *Wellington* v. *Selig*, (supra), at p. 262, Elwood, J.A. states:—

"In the agreement for sale in the case at bar it is quite true that the principal is payable by crop payments, but I am of the opinion that the interest is payable quite apart from the crop. It is payable on a time certain, which distinguishes it from *Sherrin v. Wiggins* (1917), 27 Man. L.R. 572. There are provisions in the agreement with respect to applying the crop on interest and principal, but I am of the opinion that that is merely a method of providing for what is to be done with the crop and how it is to be applied. If there is no crop, or if there is an insufficient crop, the interest is nevertheless payable in cash. Apart from that, however, the taxes are clearly payable in cash, and in the event of default being made in payment of either interest or taxes, the whole purchase-money became due and payable."

Haultain, C.J.S., concurred with Elwood, J.A. Newlands, and Lamont, JJ.A., held that the purchaser was only obligated to pay

Sask.

C.A.

the vendor's share of the crop raised each year until after 1926, and that it was impossible to accelerate such payments.

In *Pattison* v. *Behr*, (supra), at p. 141, MacDonald, J., says:—

"As I construe the particular provisions in question, which it is true differ somewhat from those in *Sherrin* v. *Wiggins*, *supra*, the effect of them is that the purchaser covenants to pay the purchase price by delivering to the vendor a share of the crop in each year, and then agrees that if he makes default in making payment in that manner, then the whole purchase-price and interest becomes due and payable. It seems to me clear that the meaning of the acceleration clause is that on default the whole purchase-price and interest must be payable *in money*, though the word 'money' is not used in the clause in question in this action. In *Sherrin* v. *Wiggins*, *supra*, the provision was that the whole purchase *money* should become due and payable one month after default. In other words, when the purchaser herein agrees to pay $6,000, with interest, for the land in question, it is provided that said sum and interest may be paid by crop payments, but, if the purchaser does not deliver the share of the crop provided for in the agreement, then the whole purchase-money and interest becomes payable in money."

I adopt the reasons of Elwood, J.A., insofar as they apply to the payment of taxes, and the same remarks in this case would apply to monies due the mortgagees in this case. Such items in my opinion are payable in cash, and, in the event of default being made in payment of any sums payable under the agreement, the whole of the purchase money is to become due and payable.

I am, therefore, of the opinion that the acceleration clause applies.

There will be a reference to the Local Registrar to ascertain the arrears due under the contract and the total amount due. Plaintiff will have judgment for the total amount so found due and costs to be taxed, with liberty to the plaintiff to apply for such further order as he may be advised. The defendants to be relieved from the consequences of their default on payment of the arrears so found due, and costs. Plaintiff will have the costs of this action.

LIEPHAN v. BECK.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. December 14, 1921.

LANDLORD AND TENANT (§ II B—10)—*Lease of farm—Covenant as to ploughing—Verbal agreement to disc instead of ploughing—Term as to termination of lease—Lease terminated*

Sask.
C.A.

by landlord—Recovery by landlord of value of ploughing—Construction of lease—Evidence.]—Action and counterclaim between a tenant and his landlord to enforce their respective accounts.

C. R. Morse, for appellant; no one *contra*.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an action and a counterclaim between a tenant and his landlord to enforce their respective accounts.

The trial Judge allowed the plaintiff a number of items claimed against the defendant, and he allowed the defendant on his counterclaim certain items against the plaintiff. Only one item is questioned in this appeal, namely, the allowance to the defendant of $300 for the failure of the plaintiff in the spring of 1919 to plough one hundred acres as required by the lease.

The evidence, which was mostly taken through an interpreter, shews that the plaintiff commenced ploughing in the spring of 1919, but that shortly afterwards it was agreed between himself and the defendant that, instead of ploughing the 100 acres for the crop that spring, the plaintiff should double disc it. This the plaintiff did. The defendant testified that the plaintiff asked him to allow him to double disc instead of ploughing, and that he "allow him to double disc instead of ploughing; double disc and drill it in, but he would expect him to plough this amount of land back any time he wanted him to do so." The crop was put in, and the evidence shews that in that neighbourhood the crop on land which had been disced in the spring was better that year than the crop on land which had been ploughed. The defendant got his share of this crop. The trial Judge found that, owing to weather conditions, the plaintiff was unable to plough in the fall after he got the crop off. The lease contained a provision by which the defendant could at any time between December 1 and April 1 following, put an end to the lease by giving one week's notice. On February 4, 1920, the defendant terminated the lease, and he now claims that, as the plaintiff agreed to plough the hundred acres whenever he called upon him to do so, he was entitled to recover the value of the ploughing, notwithstanding the fact that he himself had terminated the lease.

It is necessary to understand just what was the agreement between the plaintiff and defendant in respect of the substitution of double discing for ploughing in the spring of 1919.

Taking the statement of the defendant that the plaintiff was later on to plough the 100 acres, and the evidence of practically all the witnesses that where the land for a crop in one season was prepared by discing, good farming required that it should be prepared for the next season's crop by ploughing, it seems to me clear that the agreement was, that if the plaintiff disced for

the crop of 1919 he should plough for the crop of 1920. This however presupposed that the plaintiff would still be lessee in 1920. There was no agreement, nor is there any evidence that it was ever contemplated that the plaintiff should pay to the defendant any money whatever in respect of the substitution of discing for ploughing in the spring of 1919 in case the defendant exercised his right to terminate the lease. The plaintiff could have performed his agreement by ploughing in the spring of 1920 but for the fact of the defendant in terminating the lease in February. The defendant, having deprived the plaintiff of a right to crop the land in 1920, in my opinion lost his right to ask the plaintiff to prepare the land for that crop by ploughing.

The appeal should, therefore, be allowed with costs, and the amount awarded to the defendant by the judgment appealed from reduced to $88.33.

Appeal allowed.

Re SPELTZ ESTATE.

Saskatchewan King's Bench, MacDonald, J. November 11, 1921.

EXECUTORS AND ADMINISTRATORS (§ I—12)—*Letters of administration issued in United States—Application to Surrogate Court to reseal—Refusal—Insufficiency of bond—Surrogate Courts Act R.S.S. 1920, ch. 41—Construction.*]—Appeal from the decision of a Judge of the Surrogate Court in Saskatchewan refusing to re-seal letters of administration granted by the Court of Probate in the State of Massachusetts on the ground *inter alia* that the sureties reside outside the Province of Saskatchewan.

E. Sneath, for appellant.

MACDONALD, J.:—Section 71 of the Surrogate Courts Act, R.S.S. 1920, ch. 41, provides:—

"The letters of administration shall not, except in the case of letters of administration granted to the public trustee appointed under the provisions of The Public Trustee Act, 1906, being chapter 55 of the Acts of the Parliament of the United Kingdom of Great Britain and Ireland, passed in the sixth year of His late Majesty King Edward VII., be sealed with the seal of the said Surrogate Court until a certificate has been filed under the hand of the clerk of the Court which issued the letters that security has been given in such Court in a sum of sufficient amount to cover as well the assets within the jurisdiction of such Court as the assets within Saskatchewan, or in the absence of such certificate until like security is given to the judge of the Surrogate Court covering the assets in Saskatchewan as in the

Sask.
C.A.

case of granting original letters of administration. R.S.S. 1909, c. 54, s. 71; 1913, c. 67, s. 11."

In this case no certificate from the clerk of the Probate Court for the County of Winona was filed, but there was filed a bond with two sureties who reside in the State of Minnesota.

I am of opinion that the decision of the Surrogate Court Judge was correct that this bond is not sufficient, that the sureties should reside in the Province of Saskatchewan as indicated by Form 14 in the appendix to the Surrogate Court Rules, as it was also indicated by the former corresponding Form which was No. 19 as referred to in the judgment appealed from.

In England, in May, 1893, the President of the Probate Court directed with regard to sureties that:—

"(1) The administrator of a foreign subject resident abroad may, if it be proved by affidavit that the deceased left no debts in England, or by leave of a judge at chambers, be allowed to give bond with foreign sureties."

But in all other cases sureties residing in the United Kingdom, the Channel Islands, or the Isle of Man, are to be required, except by leave of a judge at chambers. See Tristram & Coote's Probate Practice, 15th ed., pp. 125, 126.

Accordingly in England foreign sureties would not be accepted in a case such as this, as it is not shewn that the deceased left no debts in Saskatchewan.

Moreover, there is no corresponding rule in Saskatchewan, and, accordingly, the sureties must reside within the jurisdiction. See *Hall* v. *Mackenzie*, (1895), 31 C.L.J. 700; Widdifield Surrogate Court Practice & Procedure (1917), p. 156.

The appeal must be dismissed.

PERRY v. CANADIAN PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. December 14, 1921.

MASTER AND SERVANT (§ II D—206)—*Injury to railway employee—Negligence of company—Evidence as to—Failure to place flag, on car being oiled—Duty of workman to place—Liability.*]—Appeal by defendant from the judgment of the trial Judge in an action for damages for personal injuries caused by the plaintiff being knocked down by a car which he was oiling, and which the defendant in coupling an engine to, caused to be moved a few feet, striking the plaintiff. Reversed.

L. J. Reycraft, K.C., for appellant.

D. Buckles, K.C., for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—The plaintiff in this action claims damages

Sask.

C.A.

for personal injuries. He was an employee of the defendant company, and on September 22, 1920, was engaged in oiling the wheels of two certain cars in the company's yards at Swift Current. Having finished oiling the wheels on the south side of the cars, he was passing around the end of the most easterly of these cars to oil the wheels on the north side, when a train came down from the west to take away the cars in question. The train, in coupling, hit the cars as the plaintiff was passing over the track behind them and moved them a few feet. The plaintiff says that when the cars moved he was struck and knocked off his balance, and falling to the ground the wheel ran over his left foot, crushing it, and he has brought this action, alleging that his injuries were caused by the negligence of the defendant company.

The only act of negligence alleged in the statement of claim is the following:—

"The said accident was caused by the defendant in neglect of its duty in that behalf failing to have on said car the usual signals to prevent other employees of the defendant moving the said car to the injury of the parties employed thereat."

The jury found that the plaintiff was injured by the negligence of the defendants. In answer to the question, "In what did such negligence consist?" they said:—"By the plaintiff not receiving form 48." As no negligence of this kind had been alleged in the statement of claim, the trial Judge sent the jurors back for further consideration, and they returned with the question answered as follows:—

"By the negligence of the car foreman in not notifying the plaintiff that he had removed the blue flag, when he had been working under the protection of the blue flag previous to that time."

The jury awarded the plaintiff damages, and judgment was entered for him for the amount awarded.

The defendants now appeal; contending that there is absolutely no evidence from which it could reasonably be inferred that the defendants were guilty of negligence, either as alleged in the statement of claim or as found by the jury.

In so far as the negligence alleged is concerned, there was no evidence whatever that it was usual to have any signal on a car which was being oiled to prevent employees from moving the car. It was suggested that a blue flag should have been displayed. A rule of the company reads as follows:—

"The following and all similar acts of recklessness are specifically forbidden. . . . . (h) Working on repairs to cars, except under protection of blue flag, which blue flag must in all cases

Sask.
C.A.

be respected as absolute protection by yardmen and others in charge of switching operations."

Under this rule the duty is upon the workman himself to put up a blue flag. In his evidence the plaintiff admitted that at the time of the accident he was aware that it was not customary to put up a blue flag when oiling cars. The reason for not putting one up, as stated by the foreman, is, that an employee while oiling a car is not underneath it but alongside of it, and is therefore not in a position of danger. The plaintiff admitted in his evidence that in oiling a car an employee was in a position to look after himself. No suggestion was made that any signal other than the blue flag should have been displayed.

In reference to the negligence found by the jury, namely, that the car foreman failed to notify the plaintiff that he had removed the blue flag "when he had been working under the protection of it previous to that time," I might point out that, in so far as this is an allegation that the plaintiff had previous to the accident been working under the protection of the blue flag, it is contrary to the fact as admitted by the plaintiff himself. The foreman and certain employees had been repairing a car which was coupled to the two cars which the plaintiff oiled, and while the repairs were being made they put out a blue flag for their protection. They had finished the repairing when the plaintiff came up. They took down their flag and went away, and the foreman directed the plaintiff to oil the two cars. The plaintiff was not under any misconception as to his being protected by the blue flag of the repair men. He does not even suggest that he believed that he had the protection of that flag. What he does say is, "At the time of the accident the blue flag did not cross my mind at all, and the question of the blue flag did not enter my mind in any shape or form." And at another place he says: "If I thought it necessary I would have put a blue flag on, but I did not think it necessary." This testimony makes it clear that the plaintiff was not relying upon the protection of the blue flag put up by the repair men. Further, it shews that he knew that if he required the protection of the blue flag he was the one to put it up. There was, therefore, in my opinion, no duty cast upon the foreman to notify the plaintiff of the removal of the flag which had protected the repair men while they were making repairs. There being no duty to notify him, the failure to give such notice on the part of the foreman was not negligence.

I am, therefore, of opinion that the jury's finding that it was the negligence of the defendants that caused the plaintiff's injuries cannot be supported by the evidence.

Sask.

C.A.

The appeal should be allowed with costs, the judgment below set aside and judgment entered for the defendants with costs.

Appeal allowed.

GATHERCOLE v. EMERY et al.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay, J.A., and Embury, J. (ad hoc). November 28, 1921.

FORGERY (§ I—1)—*Sale of land—Forgery of transfer—Mortgage of land purchased—Foreclosure proceedings—Mortgagee becoming registered owner—Evidence—Delay in bringing action.*]—Appeal by plaintiff from the trial judgment in an action for damages for being deprived of the ownership of certain land. Affirmed. [See Annotation, 32 D.L.R. 512.]

John Feinstein, for appellant.

T. A. Lynd, for respondent Emery.

A. L. McLean, for respondent Registrar of Land Titles.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The grounds upon which this action was brought, as set out in the statement of claim, may be summarised as follows:—The plaintiff was the registered owner of the N.W. ¼ of sect. 19, tp. 38, range 1, west of the 3rd meridian. On July 22, 1913, the defendant Emery became the registered owner of the land in question by means of a transfer purporting to be executed by the plaintiff. That transfer is alleged to be a forgery. Later on Emery mortgaged the land to one Hanson, who subsequently became the registered owner of the land under foreclosure proceedings. The land was afterwards transferred to A. H. Hanson & Co., Ltd., and that company is now the registered owner.

On these facts the plaintiff claimed $4,000, the value of the land, as damages for being deprived of the ownership of the land.

The statement of defence admits everything above stated except that the transfer to Emery was forged, denies damages, and claims that the statement of claim discloses no cause of action.

On the trial of the action the trial Judge held that the plaintiff had failed to prove that the transfer in question was forged, and dismissed the action with costs. The present appeal turns entirely on the question of forgery or no forgery. A very careful consideration of the evidence has led me to the conclusion that the plaintiff failed to prove that the transfer in question was not signed by him. He was bound by his agreement to give a transfer, and he admits that he was not only willing to give one, but thought that he had done everything necessary to convey

Sask.

K.B.

the land to the defendant. Another significant fact which should weigh against the plaintiff is, that he allowed several years to elapse before attacking the transfer, although, according to his evidence, he knew that such a document was actually on record. The evidence of the plaintiff with regard to the mortgage to the Massey-Harris Co. furnishes sufficient ground, in my opinion, for the finding of the trial Judge. In the case of that mortgage, as in the case of the transfer in question, the plaintiff had no recollection of ever signing such a document and for that reason was prepared to say that it was a forgery.

I do not attach any importance to plaintiff's statement that he remembers that he did not give a transfer. His memory with regard to the whole transaction and the Massey-Harris mortgage seems to have been a perfect blank, and the above statement is not entitled to any more credence than his statement that he did not give a mortgage to the Massey-Harris Co., and did not remember anything about it.

I entirely concur in the result arrived at by the trial Judge, and would dismiss the appeal with costs.

Appeal dismissed.

MILALEY v. McNALLY.

Saskatchewan King's Bench, Taylor, J. December 1, 1921.

VENDOR AND PURCHASER (§ IE—28)—*Agreement for purchase of land—Failure to make payments—Notice of cancellation of agreement—Acceptance of by purchaser—Violation of 1917 Sask. Stats., 1st Sess., ch. 31—Lease of land to third party—Cancellation of agreement by Court—Damages—Costs.*]—Action to have it declared that a contract for the sale and purchase of land is at an end or in the alternative for rescission and for an injunction restraining the defendant from taking possession, and counterclaim by defendant for damages for being wrongfully deprived of the land, and breach of contract.

P. H. Gordon, for plaintiff.

W. M. Blain and *S. Adrain*, for defendant.

TAYLOR, J.:—Under the provisions of the Saskatchewan enactment 1917, 1st Sess., ch. 31, any proceeding by the plaintiff to determine or put an end to, or rescind or cancel the agreement of November 1, 1919, between the plaintiff and the defendant should be had and taken by proceedings in a Court of competent jurisdiction. In April, 1921, however, at a time when, owing to the defendant's continued default (not, as I find, waived as alleged), it was open to the plaintiff to take such proceedings, he served on the defendant a notice which he intended should cancel the contract, and which the defendant then accepted with

Sask.

K.B.

full knowledge of all the facts as sufficient for that purpose, and the defendant then abandoned any intention to further proceed to fulfil the terms of his contract. As he expressed it, he was 'through with the land.' The plaintiff leased it to one Troddon, who cropped the land in 1921.

During the summer the defendant changed his mind, threatened to take the 1921 crop, and would have gone on to summerfallow but for the dry weather, and, possibly, an interim injunction restraining him. The plaintiff's action is to have it declared that the contract is at an end, or in the alternative, for rescission, and for an injunction restraining the defendant from taking possession. The defendant counterclaims for damages for being wrongfully deprived of the land, and breach of contract.

As counsel for the defendant now states that his client does not in any event desire to redeem, being unable to do so, the 1921 crop having proved unprofitable, whether the contract should be deemed to have been effectually cancelled by the defendant's acquiescence—and I incline to the view that it was—or be cancelled by order of the Court, is of little moment except as to costs; and as the plaintiff avers the defendant to be a man of no substance, a judgment for costs can be of little value. There will be a declaration that the plaintiff was entitled to possession on the date when the action was commenced, and that the contract is no longer a subsisting contract.

The plaintiff is entitled to costs of the action if asked for.

As to the counterclaim: the plaintiff having determined the contract in an illegal manner, that is tantamount to a breach for which the defendant would be entitled to damages had he shewn any. But whether we assess the damages on the basis contended for by the defendant, that is repayment for his expenditures less the value of the occupation, or by the plaintiff, that is the difference in the value of the land at the time of breach and the balance of the purchase-money, the defendant has established none. He purchased on November 1, 1919, for $4,800, and paid only a dollar down, and has paid nothing since, even defaulting as to taxes in 1920 amounting to $71.20, and this year over $70; and the value of his improvements, on the defendant's own estimate, would be less than the interest and taxes accrued to the alleged date of wrongful determination. He got the whole of the 1920 crop, worth $576. I am quite convinced that in April, 1921, it was apparent to the defendant that he was in pocket in accepting the cancellation; and whilst for a time in the summer of 1921 it may have looked as though he had used bad judgment, more recent events, and the actual

Sask.

K.B.

results, now shew that it was even more in his interest to drop the contract than he could then see, for the returns in 1921 are again insufficient to pay interest, taxes and costs of production in 1921, leaving aside making up the deficiency of 1920.

The counterclaim should be dismissed, but I think under the circumstances, without costs.

WILLOMMETT v. PILANTZ.

Saskatchewan King's Bench, McKay, J. September 21, 1921.

SALE (§ IIA—26)—*Of separator and tractor—Warranty—Breach—Return of tractor—Damages—Amount.*]—Action to recover an amount alleged to be due on an agreement in writing given for the balance of the purchase price of one Case separator and one Ford tractor; counterclaim by defendant for damages for breach of warranty. [See Annotation, Sale of Goods, 58 D.L.R. 188.]

W. W. Lynd, for plaintiff.

W. J. Perkins, for defendant.

MCKAY, J.:—The plaintiff sues to recover from the defendant $800 and interest alleged to be due on an agreement in writing dated August 21, 1919, given for the balance of the purchase money for one Case separator, size 18-inch cylinder, 36-inch body, and one Ford tractor 18—16 horse power.

The defendant claims that at the time he purchased said separator and engine, plaintiff warranted, amongst other things, "That the separator and engine were each in good running order and that the said engine would satisfactorily run the said separator."

I find from the evidence that the plaintiff did so warrant said separator and engine, and that the engine was not in good running order, and in fact could not furnish sufficient power to thresh with said separator. The engine was of no value to defendant. The defendant offered to return the engine but not the separator, as he was willing to keep the latter for the $300 paid. The defendant, owing to the worthless engine, counterclaims damages for an amount equal to the plaintiff's claim.

The defendant, in my opinion, is entitled to damages for the value of the engine if it had been as warranted. No value was put on each machine when purchased by defendant. Thomas, a witness for plaintiff, says in 1919 this separator would be worth from $800 to $900, and he saw the engine in 1918, and it was then in good shape and would then be worth $500 or $600. Hutton, another of plaintiff's witnesses, says in the fall of 1918 at threshing time, the separator was worth $900 to $1,000, and the engine a good buy at $500.

Sask.

K.B.

The plaintiff says the engine cost him, new, $651.80 in 1916, and the separator, second-hand, $300.

When defendant offered to return the engine and keep the separator he offered to pay $400 altogether, that is $100 more than he had already paid. The evidence also shews that machinery has gone up in price since above dates.

I will allow defendant $600 damages, which will be applied on plaintiff's claim.

Plaintiff's counsel contends, on the authority of *New Hamburg Mfg. Co.* v. *Webb* (1911), 23 O.L.R. 44, that as the ownership of the machinery herein was not to pass to defendant until paid for, the defendant cannot succeed in his claim for general damages. I cannot agree with this. As I read the *New Hamburg* case, it is an authority to support the defendant's claim in the case at Bar. In the *New Hamburg* case the plaintiff sued for $260, and the defendant claimed $600 special damages; that is, defendant was claiming more than the plaintiff's claim.

At pp. 49, 50, Riddell, J., says:—

"In Ontario the law, as laid down in these cases, seems to be that, in the case of a sale of this character, the purchaser cannot, before paying the full price, sue for general damage, but may set up a breach of warranty in reduction of the price, if that be sued for

If in the present case the damages claimed were general damage, which, to repeat the definition, is 'the difference between the value of the article contracted for and that supplied,' the present pleading by way of counterclaim could be amended, and the amount made effective as a set-off to an amount at all events sufficient to meet the plaintiff's claim."

That is what defendant is counterclaiming in the case at Bar, damages by way of set-off to the amount of plaintiff's claim, but I am allowing only $600 by way of set-off, in reduction of plaintiff's claim.

That the contract of sale between plaintiff and defendant does not comply with the Farm Implement Act, R.S.S. 1920, ch. 128, (*Aitken* v. *Currie* (1921), 61 D.L.R. 120, 14 S.L.R. 377), was not raised by the defence, hence, I do not deal with it.

The plaintiff will have judgment for the amount of his claim, less the sum of $600 to be credited on said claim as of August 21, 1919, with costs of the action. The defendant will be entitled to judgment of $600 damages, which will be set off on plaintiff's claim as above stated, with costs of the counterclaim. There will be a right of set-off as to costs. Both plaintiff and defendant will be taxed on the King's Bench Court scale, low column, Rule 721 not to apply.

Sask.

K.B.

MOCK v. REGINA TRADING Co. Ltd. and McGREGOR.

Saskatchewan King's Bench, Embury, J. December 21, 1921.

DAMAGES (§III I—196)—*Erection of building—Angle iron of great weight falling and striking child—Death of child—Negligence of contractor—Liability of contractor and owner—Evidence—"Res ipsa loquitur"—Measure of Compensation.*]—Action under the Fatal Accidents Act (Sask.), by a widow, the mother of the deceased, to recover damages for his death, by being struck by a heavy angle iron which fell from a building in the course of construction. [See Annotation, Parent's claim under fatal accidents law, 15 D.L.R. 689.]

J. E. Doerr, for plaintiff.

J. A. Cross, K.C., for The Regina Trading Co., Ltd.

G. H. Barr, K.C., for A. W. McGregor.

EMBURY, J.:—The plaintiff is a widow and the mother of Joseph Mock, deceased.

On September 15, 1920, while the defendants, the Regina Trading Co., Ltd., by their contractor or employee, the defendant A. W. McGregor, were engaged in the erection of the building now occupying the site of the present Regina Trading Co. building in the city of Regina, an angle iron of great weight fell from the third storey of said building into the lane, striking the deceased, who was killed instantly. The plaintiff, as administratrix of deceased, claims damages, and has joined both defendants with the intention of obtaining judgment against such one of them as may be liable, or against both if they are both liable.

This is a case where the principle *res ipsa loquitur* applies. See *Byrne* v. *Boadle* (1863), 33 L.J. (Ex.) 13, at p. 16, 12 W.R. 279:—

"So, in the construction or repairing of a house or building, or in putting chimney-pots on the roof of it, if a passenger passing along the road is damaged by something coming down which, according to the ordinary course of doing such work ought not to come down, into the street, I think the accident alone would be sufficient evidence of negligence."

Accordingly, on proof of the accident, the onus is shifted to those responsible for the building operations to shew there was no negligence.

This angle iron had been set in the proper place in the wall at about 10 o'clock in the forenoon, and certain brick and mortar work done about it, which was left to set until about 5.30 o'clock p.m., the intention being to give time for the angle iron to become fixed in position with sufficient firmness to permit of a cement lintel being poured in behind it without forcing

Sask.

K.B.

the angle iron out of position. It was while this cement lintel was being poured that the angle iron fell.

It is contended by one set of experts that all proper care was taken, and the accident should not have happened. Other experts testify that the angle iron should have been braced before the pouring of the lintel. Analysing the evidence in the light of the fact that the angle iron did fall, one of two conclusions is inevitable, either that:—(1) The method of construction was faulty, or that (2) While the method of construction followed was proper, there was negligence in performing the work.

Whichever of these conclusions is taken to be the correct one, the right of the plaintiff to recover against one or both defendants necessarily follows.

It is next to be considered if liability attaches to both of the defendants, or to one only.

I am of opinion that both defendants are liable. On the contract between the parties, I think the defendant McGregor was in the position of an independent contractor doing the work under the supervision of the architect. The evidence of the architect, coupled with that of the witness Fifczak, leads to the conclusion that the weight of the cement lintel, while being poured in behind the angle iron, forced the angle iron out, so that it fell. This could have resulted from one of two causes, either:—

(a) The angle iron should have been braced so as to hold it in position while the cement lintel was being poured in behind it, or (b) The brick and mortar work had not been allowed to stand sufficiently long to allow the mortar to set before the pouring in of the cement lintel.

I incline to the former opinion, for all the evidence on the latter point is to the effect that ample time had been allowed for the mortar to set sufficiently to permit of the pouring of the lintel, assuming that the mode of construction was the proper one. If, as I think, the failure to brace the angle iron was the cause of its falling, then, in the circumstances, both the contractor and the owner would be liable. The work to be done, in the place it was to be done, involved danger and risk to the public passing along this lane, unless precautions were taken. The wall from which the angle iron fell was being constructed on the edge of a public lane—a public thoroughfare—along which anyone was free to pass, and there was no protection provided for persons using this lane against objects falling from the building while it was in course of construction. While the contractor could not escape liability by shewing that he did the

Sask.

K.B.

work in the manner agreed upon with the owner, neither yet can the owner evade his responsibility to provide protection to the public by engaging a contractor to do the work. See *Dalton* v. *Angus and Co.* (1881), 6 App. Cas. 740, at p. 829, 50 L.J. (Q.B.) 689, 30 W.R. 191, Blackburn, L.J.:—

"So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor."

In this case, both the contractor and the owner were held liable. See also *Penny* v. *Wimbledon Urban District Council*, [1898] 2 Q.B. 212, at p. 217, 68 L.J. (Q.B.) 704, 47 W.R. 565, Bruce, J.:—

"When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and .....he cannot escape liability by seeking to throw the blame on the contractor."

See also a case in our own Courts, *Belway & Parnett* v. *Serota* (1919), 47 D.L.R. 621, 12 S.L.R. 349.

Accordingly, I am of opinion that liability attaches to both of the defendants.

It has been urged that the deceased was a trespasser at the time of the accident, but I do not think there is sufficient evidence to establish the correctness of this contention.

It remains to be considered what damages should be awarded, and how any sum awarded shall be divided. The plaintiff sues under the Fatal Accidents Act as the administratrix of the deceased. The action is on her own behalf as well as on behalf of her children, the brothers and sisters of the deceased. These brothers and sisters are as follows:—Elizabeth, aged 19; Magdalene, aged 18; Martha, aged 16; Mary, aged 9; Theresia, aged 6, and Nicholas, aged 5.

The mother is a healthy and strong woman, 40 years of age. In addition to doing work at home, she works out, and derives a certain amount of income from this.

Of the children, Elizabeth is working, and earns $17 per week. Magdalene is also working, and earns $15 per week. The deceased lived at home and earned about $6.50 a week as a newsboy. The earnings of these three went to the mother for the common support of all. The child Martha is subject occa-

sionally to fits, and so remains at home.

The Saskatchewan Fatal Accidents Act, 1920, ch. 29, at the time this cause of action arose, gave the remedy provided by Lord Campbell's Act in England, and gave an additional remedy in favour of the brothers and sisters. This legislation has since been amended to correspond with Lord Campbell's Act.

It is impossible to accurately calculate what damages should be allowed. In regard to the boy, one has to consider his age, his grade of intelligence, his earning capacity, the possibility of his getting married or remaining single, the possibility of accidents, his probable length of life. Similar matters enter into the consideration of the case of each of the children, and, indeed, with regard to the mother similar considerations arise. It has also to be considered that the children Elizabeth and Magdalene are earning money and that their earnings all go to the expenses of the household. It has also to be considered that at a later stage it is probable that the three youngest children will also contribute to the expenses of the household; also the cost of maintenance of deceased must be considered.

I have given the matter my very best consideration, and I am of the opinion that the sum of $3,500 would be a proper sum to award by way of damages. I am of the opinion, also, that of this sum the benefit should go as follows:—

To the widow, $1,600; for the benefit of the 2 eldest children, nothing; for the benefit of the child Martha, $800; for the benefit of the other three children, as follows:—Mary, $250; Nicholas, $425; Theresia, $425. Total, $3,500.

There will be judgment accordingly, with costs.

ANWEILER v. BESLER.

RUSNIAK (Garnishee); AULTMAN & TAYLOR MACHINERY Co. (Claimant).

Saskatchewan King's Bench, Bigelow, J. January 19, 1922.

MONEY IN COURT (§ I—1)—*Garnishment—Payment into Court by garnishee—Assignment of debt due by garnishee—Consent of solicitor to payment out—Setting aside of garnishee summons—Order for payment to claimants.*]—Appeal by claimants from an order of a District Court Judge dismissing claimants' application to set aside a garnishee summons and to have the money paid into Court by the garnishee paid out to the claimants. Reversed.

A. Allan Fisher, for appellants.

No one *contra*.

BIGELOW, J.:—I think the garnishee acted properly in paying

Sask.

K.B.

the money into Court when he was notified of the claim of the claimants.

The garnishee summons was served on the garnishee on November 4, 1921. It is alleged by the claimants that the defendant has assigned the debt due by the garnishee to the claimants on November 3, 1921. A letter from defendant to the claimants of November 3, 1921, was put in evidence, and reads as follows:—

"Melville, November 3, 1921.

Messrs Aultman Taylor Threshing Company, Regina, Sask.

Dear Sirs:—

Enclosed please find a thresher's lien for threshing done by me for John Rusniak, Melville. Kindly collect same and credit on my past due note given for tractor. Send me a credit as soon as I collect it I will forward the balance of a note as soon as I get some more threshing done.

Yours very truly,

(Sgd.) Fred L. Besler."

Attached to this letter is a statement of the grain threshed, signed by the defendant as correct.

In my opinion this letter is not an assignment. It is only an authority to collect.

William J. Graves, Collection Agent for the claimants, swears in para. 2 of his affidavit:—

"That on or about the 12th day of September, 1921, the claimant company sold and delivered to Fred Besler, the above-named defendant, a certain threshing engine for the sum of $2,000.00, and other valuable consideration, due in different payments, and as part of the security for the purchase price obtained from the said defendant an assignment of 25% of the gross earnings of the said engine. Said assignment was in writing."

The writing referred to was not put in evidence, and without such evidence before the District Court Judge, it seems to me that it was impossible for him to say that said account had been assigned to the claimants. That being so, it seems to me that the proper order would have been to direct an issue to determine whether the claimant was entitled to that money, except for this fact that on the hearing before the District Court Judge the solicitor for the plaintiff consented to payment out to the claimants. Possibly the solicitor for the plaintiff had seen the document above referred to—and not put in evidence—and satisfied himself that the assignment was good. At any rate this consent was given, and probably for the purpose of saving further costs of an issue. The defendant supports the claim of

Sask.

K.B.

the claimants, so the plaintiff is the only party interested other than the applicant.

The plaintiff having consented, I think the motion should have succeeded, and with costs. The appeal is allowed; the garnishee summons set aside, and the money paid into Court by the garnishee will be paid out to the claimants or its solicitors, with costs of the original motion and of this appeal.

Appeal allowed.

CARYK v. KIEFER, HOFFMAN and KURTENBACH.

Saskatchewan King's Bench, Embury, J. December 21, 1921.

MORTGAGE (§ ID—15)—*Of hotel property—Property also within class contemplated by sec. 2 (3) of the Homesteads Act, R.S.S. 1920, ch. 69—Failure to comply with Act in not being signed by wife—No affidavit or evidence that no wife—Validity of mortgage—Foreclosure personal judgment against mortgagor.*]—Action under an unregistered mortgage made by defendant Hoffman under which a caveat has been registered in the Land Titles Office, asking for a continuation of the caveat, foreclosure, certain declarations as to title, and personal judgment against the defendant. Personal judgment against defendant Hoffman only allowed. [See Annotation, 17 D.L.R. 89.]

F. H. Bence, for plaintiff.

B. M. Wakeling, for defendants.

EMBURY, J.:—The plaintiff sues under an unregistered mortgage made in her favour by the defendant Hoffman under which a caveat has been filed in the Land Titles Office against the land covered thereby. The plaintiff asks for a continuation of the caveat, foreclosure, certain declarations as to title, and personal judgment against the defendant Hoffman.

The property is an hotel property, and is used also as a place of residence by the defendant Hoffman, and the question arises whether or no the property comes within the class described in sec. 2, sub-sec. 10 of the Exemptions Act, R.S.S. 1920, ch. 51, as follows:—

"The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of three thousand dollars."

The authorities on the subject appear to be conflicting. But it seems to me, having in mind the purpose of the Exemptions Act, and giving to the words of the sub-section their plain and ordinary meaning, that this hotel property would come within the contemplated class.

Sask.

K.B.

If this be so, then this hotel property must also come within the class contemplated by sec. 2, sub-sec. 1 of the Homesteads Act, R.S.S. 1920, ch. 69, as follows:—

"1. "Homestead" means a homestead under the provisions of paragraphs 9 and 10 of section 2 of The Exemptions Act, and except for the purposes of section 9 and form C in the schedule hereto, it shall also include any property which has been such a homestead at any time within the period of one year immediately preceding the date of the transfer or other instrument referred to in section 3.

Provided that a homestead under said paragraph 10 shall not for the purposes of this Act be restricted in value to $3,000."

Now, this particular mortgage fails to comply with the Homesteads Act in that it is not signed by a wife, nor yet is there any affidavit that here is no wife, or that the property is not a homestead. See the Homesteads Act, sec. 6, sub-sec. 1:—

"(1) Every transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in land, and every mortgage or incumbrance which does not comply with the provisions of the last two preceding sections shall be accompanied by an affidavit of the maker (form C) either that the land described in such instrument is not his homestead, or that he has no wife."

Further, there was no evidence at the trial that there is or that there is not a wife of the mortgagor, although I take it from the tone of the argument that there is in fact a wife.

But in any event, assuming that in a case of this kind there is no proof even that the land is or is not the homestead, and there being a total absence of evidence as to the existence or non-existence of a wife, must not the plaintiff mortgagee fail?

The evident purpose of the Homesteads Act is the protection of wives in the transfer and encumbering of the homestead by the husband. With this object in view, the whole Act, including sec. 6, sub-sec. 1, above referred to, is passed to ensure that with respect to a mortgage, etc., there must be proof in all cases that the property is not a homestead, or if it is a homestead, then there must be a signature of a wife to the instrument, or proof that there is no wife. I agree with the reasoning of MacDonald, J., in *Biggs* v. *Isenberg*, [1920] 3 W.W.R. 357, at pp. 362, 363, 364.*

In the case here under consideration, there is, I think proof that the property is a homestead as contemplated by chs. 51 & 69 above referred to; but there is no signature of a wife to the

*This decision was affirmed by an equally divided Court (1921), 56 D.L.R. 329, 14 S.L.R. 96.

mortgage, nor proof by affidavit of there being no wife. And there is no evidence at the trial of there being no wife. Such being the circumstances, it seems to me that to give the plaintiff the relief prayed for would be to utterly disregard the plain purpose for which the statute was passed. It is impossible that proper regard can be had to the intention of the statute in a case of this kind if one fails to require positive proof that there is no wife in existence.

The plaintiff is, however, entitled to a personal judgment on the covenant in the mortgage in the sum of $1,900 and interest thereon at 3% *per annum*, and costs against defendant Hoffman. As against the other defendants the action will be dismissed with costs.

SIMMS v. CHERRENKOFF.

Saskatchewan King's Bench, Maclean, J. December 29, 1921.

CURRENCY (§I—1)—*Agreement for sale and purchase of land —Payments to be made in Chicago—Agreement not stating whether payments to be made in Canadian or United States currency—Payments to be made in country where money is made payable.*]—Action to recover the sum due under an agreement for the sale and purchase of land. [See *La Corp'n des Obligations Municipales* v. *Ville de Montreal Nord* (1921), 61 D.L.R. 542, 59 Que. S.C. 550, 27 Rev. de Jur. 57.]

J. L. McDougall, for plaintiff; *D. Wadderspoon*, for defendant.

MACLEAN, J.:—In an agreement in writing dated May 18, 1918, the plaintiff agreed to sell, and the defendant agreed to purchase a quarter section of land in Saskatchewan at a certain price, to be paid in instalments. The agreement was executed by the defendant in Canada, and by the plaintiff in the United States. The agreement provides that "the instalments of purchase price and interest are payable at the Northern Trust Co., Chicago, U.S.A." The agreement does not state whether the payments shall be made in United States currency or in Canadian currency, and the currency denomination (dollars) mentioned in the agreement is the currency denomination of the United States and of Canada.

The only question between the parties is whether payment shall be in Canadian dollars or in United States dollars. The principle I deduce from the cases is that, under a contract such as this one, where a payment originating in one country is to be made in another country, and the currency denomination specified is that of the country in which the payment is to be made, although it may be also the currency denomination of the country in which the payment originates, the payment must be

Sask.
C.A.

made in the currency of the country where the money is payable, unless by express terms or necessary implication payment in some other currency is required, and the rate of exchange between the two countries must be taken as at the date on which the payment should have been made. *Crawford* v. *Beard* (1864), 14 U.C.C.P. 87; *Hooker* v. *Leslie* (1868), 27 U.C.Q.B. 295; *Kearney* v. *King* (1819), 2 B. & Ald. 301, 106 E.R. 377; *Di Ferdinando* v. *Simon*, [1920] 2 K.B. 704; *Barry* v. *Van-Den Hurk*, [1920] 2 K.B. 709; *Societe des Hotels du Touquet-Paris-Plage* v. *Cumming*, [1921] 3 K.B. 459.

On December 31, 1920, there fell due an instalment of principal and interest amounting to $677.60. The rate of exchange against Canadian money in the United States on that date was 17¼ %. The plaintiff is entitled to a sum in Canadian dollars which would have produced in Chicago on December 31, 1920, $677.60 in United States dollars, at the above rate of exchange. The plaintiff is also entitled to interest at 7% *per annum* from December 31, 1920, until judgment.

The defendant paid into Court the amount calculated in Canadian dollars, without adding exchange. That amount will be paid out of Court to the plaintiff or his solicitors. The plaintiff will have costs on the King's Bench scale.

THE KING v. ASSINIBOINE VALLEY UNION HOSPITAL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 14, 1921.

COURTS (§ 11A—151)—*Hospital—Establishment of—Union Hospital Act, R.S.S. 1920, ch. 213—Poll taken on scheme—Motion in nature of quo warranto to have poll declared invalid—Controverted Municipal Elections Act, R.S.S. 1920, ch. 91—Jurisdiction of District Judge—Prohibition.*]—Application for a writ of prohibition directed to a District Court Judge prohibiting him from proceeding with a motion authorised by his fiat authorising the relator to serve notice of motion in the nature of *quo warranto* in order to have it determined that a poll held in connection with the establishment of a hospital had not been conducted according to law and that the hospital scheme had not therefore been duly adopted. Prohibition granted.

J. F. Frame, K.C., L. McK. Robinson, W. B. Carss, for applicant, Assiniboine Valley Union Hospital.

W. A. Doherty, for relator Ortynski.

The judgment of the Court was delivered by

TURGEON, J.A.:—Some time prior to the date of the poll which gave rise to these proceedings, the Lieutenant-Governor in Coun-

cil, acting under authority conferred by sec. 44 of the Union Hospital Act, ch. 213 of R.S.S. 1920, defined and established an hospital district consisting of the town of Kamsack, the village of Togo, and certain areas forming parts of different rural municipalities adjacent to the said town and village. On March 31, 1921, a poll was taken upon the hospital scheme, including the estimated costs of the building and site, and on April 7 the returning officer made his return, certifying that the poll had resulted in the adoption of the scheme by the necessary majority consisting of at least two-thirds of those voting, as required by sec. 49 of the Act. Subsequently the relator in these proceedings, purporting to act under the provisions of sec. 19 of the Controverted Municipal Elections Act, R.S.S. 1920, ch. 91, applied *ex parte* to the Judge of the District Court at Yorkton for a fiat authorising him "to serve a notice of motion in the nature of a *quo warranto*" in order to have it determined by the Judge that the said poll had not been conducted according to law and that consequently the said hospital scheme had not been duly adopted. The fiat was granted and the notice of motion served upon the respondents. Upon the hearing of the motion before the District Court Judge, counsel for the respondents raised certain preliminary objections, the principal objection being that the District Court Judge had no jurisdiction to entertain the motion, either under the provisions of the Controverted Municipal Elections Act or otherwise. Upon this point the Judge gave a written judgment, in which he held that the necessary jurisdiction was vested in him by virtue of the said Act, and the various municipal Acts of the Province, and he directed that the motion be proceeded with and the matter disposed of on its merits. Thereupon the present application was made to this Court by the respondents for an order for a writ of prohibition to be directed to the District Court Judge prohibiting him from proceeding with the motion authorised by his fiat.

The District Court Judge has formally decided that he had jurisdiction over the subject-matter of the controversy before him and he declares that he intends to proceed with the same and adjudicate thereupon. In such circumstances, if he is in error in so deciding, prohibition will lie against him.

In my opinion, the District Court Judge does not possess the jurisdiction which he has assumed. In dealing with this question, the rule to be followed is that the jurisdiction which is asserted must be shewn to be vested in him, either expressly or by necessary implication, by the provisions of the District Courts Act, R.S.S. 1920, ch. 40, or of some other statute. *Peacock* v.

Sask.
C.A.

Bell (1668), 1 Wm. Saund 73, 85 E.R. 84; *Crayston* v. *Massey-Harris* (1898), 12 Man. L.R. 95.

The contention is that sec. 48 of the Union Hospital Act confers the necessary jurisdiction. This section is as follows:—

"48.—(1) The poll shall be taken in each polling division of the hospital district, and all proceedings thereat and preliminary and subsequent thereto, shall, subject to the provisions of this Act and to any directions given by the Minister of Municipal Affairs, be conducted in the same manner, as nearly as may be, in the respective municipalities or portions thereof as at the annual municipal elections.

(2) The persons entitled to vote shall be the persons entitled to vote at the annual municipal elections."

It is argued that the words "subsequent thereto" are sufficiently comprehensive to incorporate, not only the provisions of the Town Act, R.S.S. 1920, ch. 87, the Village Act, R.S.S. 1920, ch. 88, and the Rural Municipality Act, R.S.S. 1920, ch. 89, but also the provisions of the Controverted Municipal Elections Act. In my opinion this contention is wrong. I have examined these various Acts with care, as well as the above cited sec. 48. It will be observed that that section adopts the proceedings which prevail in municipalities *at the annual municipal elections*. All the Acts in question contain distinct provisions concerning the proceedings "at elections and preliminary and subsequent thereto," separately headed, e.g. in the case of towns, "preliminary proceedings," "the poll," and "proceedings after the close of the poll." In my opinion these are the provisions intended to be adopted *mutatis mutandis* by sec. 48, and that section cannot be construed to go further and to bring in as well the provisions of the Controverted Municipal Elections Act.

The District Court Judge, in his judgment, refers to the irregularities alleged to have been committed in respect to the taking of the poll, amounting in his opinion to fraud, and states that a remedy must surely exist to prevent the scheme in question from being foisted upon the people of the district by means of such fraud. Assuming the situation described by him to exist, this still raises no presumption of jurisdiction in the District Court Judge to set matters right. Our duty is to construe the statutes according to their language, even although it may appear that the Legislature ought to have provided some remedy, and I can find nothing in the language used to establish the jurisdiction which is asserted in this case. *Re Prince Albert Election* (1906), 4 W.L.R. 411, per Sifton, C.J.

The order should be granted with costs to the respondents.

CROSS v. MOHR and SAUER.

Sask.

C.A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. November 28, 1921.

DAMAGES (§ IIIA—70)—*Sale of horses—Failure to deliver—Measure of compensation—Payment of poundage fees—Time spent by purchaser looking for strays—Inability to sell those delivered.*]—Appeal by plaintiff from the judgment at the trial of an action upon a lien note given for the price of horses purchased by the defendant from the plaintiff. Judgment varied.

H. M. Allan, for appellant; *D. A. McNiven*, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—Bearing in mind the conflicting evidence which was given in this case, and giving due effect to the findings of the trial Judge upon this evidence, and putting aside certain legal considerations which were urged and which can have no effect upon the result, I think that the facts may be summarised shortly as follows:—

The contract for the sale of the horses by the appellant to the respondents was made at Regina on Monday, April 26, 1920. At the time the contract was made the parties believed the horses to be in Gettinger's field near Edenwold. Delivery of the animals was to be made from that place after the lien note was signed. In reality, the horses had escaped from Gettinger's field several hours before the contract was made. By reason of this escape, delay was occasioned in the delivery of 17 of the horses and 3 of them were never delivered.

Dealing with the appellant's claim upon the lien note the trial Judge awards him the amount of the note ($2,000), less the value of the 3 undelivered horses at $105 per head and the sum of $100 for one horse repurchased by the appellant from the respondents at that price. He gives him judgment upon his claaim for $1,585. I think that no fault can be found with this part of his judgment.

In addition to the matters of claim and set-off disposed of as above, the respondents set up a counterclaim against the appellant on two counts. In the first place they claim damages for time and money spent by them in helping to find the horses which had strayed away and which were not delivered at the time and place contemplated in the contract. Upon the second count they state that the horses were purchased by them, with the knowledge of the appellant, for the purpose of re-sale to farmers in time for the spring work of 1920, and that they lost so much time looking for the stray horses that they were unable to attend to the selling of those they had, and had to keep and

Sask.
C.A.

care for them for a longer period than would otherwise have been the case, whereby they suffered damage.

On the first count the trial Judge allowed the respondents' claim in the sum of $488.65. On the second count he allows them damages at the rate of $2 per head per month for the care and keep of 44 horses during May and June and of 35 horses during July and August, making a total of $300.

With deference, I think that the trial Judge is in error in both these particulars. On the first count I think the respondents are entitled only to the poundage fees paid by them and which aggregate $101.60. The appellant would have been required to pay these fees in order to make delivery of the impounded animals according to his contract, and moreover there is evidence that the appellant suggested to the respondents that they should go to the pound-keepers and redeem these animals. But in so far as the other items of expense are concerned, I do not think they are recoverable. It was the appellant's duty to deliver the horses. The respondents took it upon themselves to go out and look for them and to spend money trying to find them. I cannot find from the evidence that the respondents can set up any promise, either express or implied, made by the appellant to pay them for their services or to re-imburse them for their expenses in connection with this search; and in the absence of some agreement to pay, the appellant is not liable. I think, therefore, that the amount allowed the respondents on this count should be reduced by the sum of $387.05.

As to the second count of the counterclaim, I think the damages claimed should be disallowed entirely. The respondents base their claim upon the loss of the market through the failure of the appellant to deliver some of the horses at the time agreed upon. But the reason they give for their failure to sell is that they could not attend to the matter because their time was taken up hunting for the stray horses. But, in my opinion, that reason cannot avail them anything. They ought more reasonably to have attended to selling the horses they had on hand, leaving it to the appellant to see to the delivery of the balance. In my opinion they have not made out a proper case of loss of profits on a re-sale, and cannot succeed in obtaining damages upon that ground. The judgment in their favour should therefore be reduced by the further sum of $300.

In the result, the judgment in the Court below in favour of the appellant upon his claim in the sum of $1,585 should stand; and the judgment in favour of the respondents upon their counterclaim should be reduced to $101.60. The appellant

should have all the costs of the action and the respondents the costs of the counterclaim; with the right to set-off. The appellant should have his costs of the appeal. *Judgment varied.*

Sask.
C.A.

Re THE LANDLORD AND TENANT ACT.
CHADWICK v. KERSCHTEIN.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay, J.A., and MacKenzie (J.A. ad hoc). November 14, 1921.

APPEAL (§ IA—1)—*Application under Landlord and Tenant Act, R.S.S. 1920, ch. 160, sec. 42—Order made by District Court Judge—Appeal to Judge of King's Bench in Chambers—Appeal to Court of Appeal—R.S.S. 1920, ch. 48.*]—Application to set aside a notice of appeal and quash the appeal from an order of a Judge of the King's Bench in Chambers dismissing an appeal from a District Court Judge on an application under the Landlord and Tenant Act (Sask.). Appeal quashed.

Hugh Taylor, for appellant.

P. H. Gordon, for respondent-applicant.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—By an order made by a District Court Judge in an application by the landlord under sec. 42 of the Act, R.S.S. 1920, ch. 160, the tenant was ordered to pay the costs of the application. An appeal on this point was taken to a Judge of the Court of King's Bench in Chambers, who dismissed the appeal with costs, (1921), 61 D.L.R. 382. The tenant then gave notice of appeal to this Court from the order of the Judge in Chambers, and the appeal has been set down for the present sittings of the Court.

Application is now made to set aside the notice of appeal and quash the appeal.

Section 6 of An Act respecting Judges' Orders in Matters not in Court, being ch. 48 of R.S.S. 1920, provides that there shall be no appeal from an order made by a Judge acting as *persona designata*, unless an appeal is expressly authorised by the Act giving the jurisdiction, or unless special leave is granted by the Judge.

There is no express authority in the Landlord and Tenant Act for an appeal from the order of a King's Bench Judge made under sec. 45 of that Act, and, in my opinion, the Act does not contemplate or provide for any other or further appeal than appeal from the Judge of first instance acting as *persona designata*. Even if there was a further appeal, it could only be brought by special leave of the King's Bench Judge, which has not been granted in this case.

The notice of appeal must, therefore be set aside and the appeal quashed, with costs.

Alta.

S.C.

Re YOUNGBERG ESTATE.

Alberta Supreme Court, Hyndman, J. December 21, 1921.

WILLS (§ III G—120)—*Devise of real estate—Devise of personal estate for sole use and benefit during lifetime to be used "as she shall see fit"—Construction—What property primarily charged with payment of debts—Life estate or absolute fee of personal estate.*]—Application by executors of an estate for directions as to the interpretation which should be put upon certain terms of a will.

W. H. O'Dell, for the executors.

E. F. Ryan, for the beneficiaries.

A. Stewart, K.C., for the widow.

HYNDMAN, J.:—This is an application made by the executors of the said estate for directions as to the interpretation which should be put upon certain terms of the last will and testament of the said Youngberg. Will reads as follows:

"I, Swan John Youngberg, of Wetaskiwin, in the Province of Alberta (carpenter) being of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking all former wills by me at any time heretofore made.

I hereby appoint Swan August Anderson, Claus H. Swanson and Edward Bye, all of Wetaskiwin, in the Province of Alberta, to be my co-executors of this my last will, directing my said executors to pay all my debts, funeral and testamentary expenses out of my estate, as soon as conveniently may be after my decease. After the payment of my said debts, funeral and testamentary expenses, my real estate shall be divided as follows:—One-third to my beloved wife, Amanda Youngberg, as her legal rights; two-thirds to be divided equally among my five children, Mrs. H. Hornstrom, of Calgary, Alberta; Charles Youngberg, of Daizey, North Dakota, U.S.A.; Mrs. H. R. Gray, of Camrose, Alberta; Mrs. J. Allonby of Calgary, Alberta, and Edward Youngberg, also of Calgary, Alberta.

All my personal estate, I give, devise and bequeath to my beloved wife, Amanda Youngberg, for her sole use and benefit during her lifetime, to be used by her as she shall see fit.

In witness whereof I have hereunto set my hand this first day of April, in the year of our Lord, one thousand, nine hundred and twenty-one."

The question for determination is whether the debts should be first charged against and paid out of the real estate, and the personal estate be exonerated, or should the debts be charged upon the personal estate alone, or against the personal and real estate ratably. The law with regard to payment of debts

Alta.

S.C.

in relation to the real estate and personal estate is laid down, I think correctly, in *Banks* v. *Busbridge*, [1905] 1 Ch. 547, 74 L.J. (Ch.) 336. Buckley, J., at p. 549, uses the following language:

"The personal estate is primarily liable for the payment of debts and funeral and testamentary expenses; but the testator may exonerate it, either by express words or by an indication of intention to be found in the will, which leads to the Court being judicially satisfied that it was the testator's intention to exonerate it. It is not enough that he charges his real estate with the payment of debts. It is necessary to find, not that the real estate is charged, but that the personal estate is discharged. This need not be done by express words, but there must be found in the will plain intention or necessary implication to operate exoneration."

In the case just cited the testator gave all his property to K., and devised certain real estate to his trustees subject to the payment of his just debts and funeral and testamentary expenses to K. and other persons. The testator also in his will expressed the wish that none of his real estate should be sold whilst there was any male descendant of his own surname. It was held that the personalty was not exonerated from the payment of debts and funeral and testamentary expenses.

The facts are not dissimilar to these in the case at Bar, with the exception that he expressed the desire that the real estate should not be sold whilst any male descendant of his survived. But apart from that it seems clear from the decision in the case mentioned and the authorities cited there that the general principle is that the personal estate is primarily liable, unless it is clear that the testator not only charges his real estate with payment of the debts, but that there was a plain intention or necessary implication that the personal estate is exonerated.

A careful reading of the will to my mind does not show an intention to exonerate the personal estate. The argument chiefly relied on was that inasmuch as in the same paragraph the testator directs "that after the payment of his said debts, funeral and testamentary expenses his real estate should be divided," and in another paragraph "bequeaths all his personal estate to his widow," is sufficient from which to draw an inference that he intended to place the burden of payment of debts on the real estate and exonerate the personalty.

I am, however, unable to agree with this argument, for it might very reasonably be said to the contrary, namely, that if it were his intention that the real estate should be used to discharge his debts it would be impossible perhaps to divide it in the way

Alta.

App. Div.

directed *after* the payment of the debts, and it would almost seem that it is not only not clear that he intended the real estate to bear the burden of the debts, but on the contrary by implication he intended the very opposite.

In order to uphold the contention of the widow I think a clearer intention should have been expressed, or there should be something appearing from which the Court would feel compelled to infer an intention that the real estate only should bear the debts. One might reasonably expect to find an expression or direction to the effect that the executors should dispose of the real estate and out of the proceeds thereof pay the debts, or that it was the testator's will that the widow should take all the personal estate free and clear of the debts. One cannot find any clear expression on this point. That being so, the rule I have referred to with regard to payment of debts must prevail.

Another point raised was whether or not the moneys owing on an agreement for sale of land sold by the testator in his lifetime was real or personal estate. While I am unable to cite any specific case at the moment, it has been held over and over again in this Court that such moneys are treated as personal property.

I was further asked to say whether or not the bequest to the widow of the personal estate, "for her sole use and benefit during her lifetime to be used as she see fit," gives a life estate only or an absolute estate. I have no doubt but that the language used in the will confers an absolute estate and not one for life only. A case almost identical came before me some time ago (not reported) *In re Macdonald*, in which I decided that the widow took an absolute estate and not a life estate only. In *Re Cooper Estate* (1921), 61 D.L.R. 315, Embury, J., decided a case very similar to this one, where the expression used was "Everything I possess at my death to my dear wife absolutely as long as she may live," holding that this gave the widow an absolute interest.

Counsel for the estate and for the beneficiaries, as also A. Stewart, K.C., who acted for the widow at my request, will be entitled to their taxed costs payable out of the estate.

Re ALBERTA ELECTION ACT.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Clarke, JJ.A. December 17, 1921.

ELECTIONS (§ II C—74)—*Disposition of various deposits—Candidates failing to secure one-half of the votes cast—Elections Act*, 1909 (*Alta.*) *ch. 3, sec.* 138 (4, 6), *construction—Application.*]—Reference of certain questions of law by order of the Lieutenant Governor-in-Council, under the provisions of ch. 9

(Alta.) 1908, entitled an Act for Expediting the Decision of Constitutional and other Legal Questions.

G. V. Pelton, for the applicants.

H. H. Parlee, K.C., for the Attorney-General.

The judgment of the Court was delivered by

STUART, J.A.:—The matter arises out of the election in July last of five members to the Legislative Assembly to represent at large the constituency of Edmonton. It is a question of the disposition of the various deposits made by a number of candidates who failed to secure one-half of the votes cast for any of the elected candidates.

Section 138 of the Elections Act, 1909, (Alta.), ch. 3, sub-sections 4 and 6 read as follows:—

"(4) The sum so deposited by any candidate shall be returned to him in the event of his being elected or of his obtaining a number of votes at least equal to one-half the number of votes polled in favor of the candidate elected as decided in the final count, or in the event of his withdrawal as hereinafter provided within twenty-four hours after the nominations have closed.

(6) If such candidate has not obtained the number of votes in sub-section (4) hereof mentioned the said deposit shall be transmitted by the returning officer to the clerk of the Executive Council and by him deposited to the credit of the general revenue fund of the province."

It is obvious that these sections were drafted with the idea that only one candidate was to be elected from each constituency.

But this was not the case even when sec. 138 was originally passed. In 1909 the Act respecting the Legislative Assembly by sec. 2, ch. 2, provided that each of the electoral districts of Calgary and Edmonton should elect two members. In 1913, ch. 2, the two member system for the one constituency of Edmonton was continued, but it was discontinued for Calgary. In 1917, ch. 37, it was discontinued for Edmonton also. Then in 1921, ch. 5, the Act was again changed so as to give the one constituency of Edmonton five members, that of Calgary, five members, and that of Medicine Hat, two members.

Throughout all these changes, no change was made in the wording of sub-sections 4 and 6 of sec. 138 of the Elections Act above quoted. They continued to refer to "the candidate elected," as if there were to be only one such.

The questions referred to us by the Lieutenant-Governor-in-Council are as follows:—1. Is section 138 (6) of the Alberta Elections Act being ch. 3 of the Statutes of Alberta, 1909, applicable to the electoral division of Edmonton, having in view the pro-

Alta.

App. Div.

visions of sec. 2 of an Act respecting the Legislative Assembly of Alberta being ch. 2, Statutes of Alberta, 1909, as amended by ch. 37, Statutes of Alberta 1917, and sec. 36, ch. 5, Statutes of Alberta, 1921? 2. If the said section is applicable to the said electoral division, in what manner in such an electoral division is the number of votes which must be obtained by the defeated candidate in order to avoid forfeiture of his deposit under section 138, sub-section 6 to be determined?

In my opinion, there is nothing in the Elections Act to indicate that the Legislature did not intend sec. 138 to apply to every electoral district or division. The first three sub-sections certainly apply, and there is nothing saying that in any particular case the application of the section must stop with sub-sec. 3. There is no excluding clause or section. Section 138 is obviously intended to be of general application. There cannot be the slightest doubt about that. It only remains, therefore, to enquire whether there is anything which makes it impossible upon a reasonable interpretation to apply sub-secs. 4 and 6 to the electoral district of Edmonton. The question is simply reduced to this. Can the expression "the candidate elected," be given any reasonable interpretation which will make it apply where there are five to be elected. In my opinion it can. And it is the duty of the Court to give such an interpretation, rather than make the statute say nothing, if the language used is reasonably capable of being so interpreted.

I think the use of the word "forfeiture" in connection with the matter is perhaps unfortunate. The Act simply says that a proper nomination must include the deposit of a certain sum of money with the returning officer. Then it declares what is to become of that sum. In certain contingencies, over which the candidate has not by any means absolute control, he is to get it back. In other contingencies it is to go to the revenues of the province. Usually a forfeiture is suffered when a person fails to do something that he has obligated himself to do by covenant or agreement. A candidate does not agree to get himself elected.

If sub-section 4 cannot be interpreted so as to be applicable to such an election as took place in Edmonton then there is nothing to say that any defeated candidates are to get their deposits back at all. Possibly if sub-sec. 6 cannot be applied the money must remain with the returning officer but there would be nothing giving the candidate any right to reclaim it.

Furthermore, what would be the position of all those candidates who, though not elected, did obtain half as many votes as some one of those who were elected? If the section is not

applicable then they too would be without any right of reclaimer.

We must find an interpretation consonant with the spirit of the Act and the obvious intention of the Legislature and not impossible to be extracted from the words used.

There were five candidates elected, with votes as follows: McLennan 6430; Bowen 5711; Boyle 5330; Hefferman 5325, and McClung 5281. In my opinion, any one of these candidates comes within the meaning of the phrase "the candidate elected." Which one shall we choose for the purposes of the section? It seems to me that it should be that one with whom the defeated candidates were in final competition. That is the principle upon which the section is based. There is supposed to be a contest between two rival candidates. If one does not get half as many votes as the other he does not get his money back. Where there are five to be elected the real final rivalry and competition is between the lowest of the highest five and all the others. So far as all the others are concerned "the candidate elected" is the one who beat them but beat no one else; that is, the candidate elected who has the lowest number of votes of those elected.

I would, therefore, answer the first question in the affirmative and also say that the answer to the second question is sufficiently indicated by what I have already said.

IMPERIAL LUMBER Co. v. CLEMES & FLUET.

Alberta Supreme Court, Harvey, C.J. December 16, 1921.

CONTRACTS (§ II F—371)—*For sale of lumber—Assignment of contract by purchasers—Failure to take delivery—Notice—Waiver—Assignment of agreement—Breach of contract—Damages.*]—Action for damages for breach of contract.

S. W. Field, K.C., for plaintiff.

G. W. Archibald, for defendant.

HARVEY, C.J.:—On August 4, 1919, the plaintiffs and defendants entered into an agreement for the purchase by the plaintiffs from the defendants of 200,000 feet of lumber to be delivered at the defendants' mill "from time to time and in such manner that the whole of such lumber is received by them on or before November 15, 1919."

The plaintiffs assigned the contract to the Frontier Lumber Co., and on September 17 notified the defendants. On October 6 the defendants wrote to the Frontier Lumber Co., the following letter:

"Referring to contract between Imp. Lumber Co. and Clemes & Fluet, I beg to say that owing to risk of loss by fire or otherwise and the Imp. L. Co. failing to take delivery from time to

Alta.

S.C.

time or make other arrangements, I have been compelled to dispose of the greater part of the lumber mentioned in the contract. I have, however, about 50,000 ft. more of it about ready for delivery but judging by past performances it would be very unwise for me to hold same for them or cut any more of the contract before same has been removed. Resp. Yours. O. H. Fluet, rep. Clemes & Fluet."

During October, the defendant sent messages to the Frontier Lumber Co., and himself went to their offices and left word, as he says, "that they must get busy as soon as they could." A few days later McMillan, manager of the Frontier Lumber Co., came to the mill and saw Fluet. Fluet's examination for discovery regarding this interview is as follows:—

"Q. And when he got there what did he say?

"A. Well, as I stated a while ago, they had not commenced delivery of the lumber because they could not get teams; they said they would take it as soon as they could.

"Q. And what did you say?

"A. I said all right.

"Q. So everything was lovely up to this interview with McMillan? There had been no trouble up to this time?

"A. No, no."

This interview was apparently about November 1.

On November 10, Fluet sent a load of lumber to the Frontier Lumber Co., which was accepted. On the 12th and 14th he sent more loads, and on the 14th the Frontier Lumber Co. sent their own teams and instructed defendants' teams to stop and they continued to haul until December 24, on which date Fluet informed the teamsters he would deliver no more lumber.

Subsequently the Frontier Lumber Co., reassigned the agreement to the plaintiff, who now sue for damages for breach of contract.

The defendants argue that time was of the essence of the contract and that it was necessary owing to the character of their business that it should be so. I can see much force in this and would have little doubt that under the original agreement the provisions respecting time were intended to be essential but I also have no doubt that the defendants, by their subsequent acts and conduct, waived the benefit of that and that in consequence of that, time ceased to be of the essence of the contract and a reasonable notice would have been necessary to restore its essentiality, which notice was never given.

The only difficulty I feel is as to whether the waiver should be held to apply to more than the quantity of lumber specified in the letter above set out. This point was not raised before

me, and indeed the statement of defence denies the letter, and when confronted with it on cross-examination with a suggestion that it was a repudiation of the contract Fluet says he was prepared to manufacture as soon as the purchasers were ready to take delivery.

The evidence does not disclose how much lumber was actually delivered, as it was agreed that if the plaintiffs were found entitled to damages there should be a reference, but the statement of claim alleges that 60,000 feet were delivered while the defence denies that *only* 60,000 feet were delivered. Under the circumstances I do not think I would be justified in coming to the conclusion that the waiver of the benefit of the time limit should be considered otherwise than a general one. When the purchasers started, and continued after November 15, to take delivery they certainly had no grounds as far as I can conclude from the evidence to believe that they would not receive the full quantity of lumber called for by the contract.

It is a little difficult to resist the conclusion that the increase in the price of lumber was not an important factor.

On some of the questions of law involved, references may be made to *Tyers* v. *Rosedale* (1873), L.R. 8 Ex. 305, and (1875), L.R. 10 Ex. 195, and to *Panoutsos* v. *Raymond Hadley Corpn. of New York*, [1917] 2 K.B. 473.

In the result I hold that the defendants' refusal to deliver any more lumber on December 24, constituted a breach of the contract, and there will be judgment for the plaintiffs with a reference to the Master to ascertain the amount of damages and report. The scale of the plaintiff's costs will be determined after the reference.

SMITH v. GILBERT.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. December 17, 1921.

VENDOR AND PURCHASER (§ I C—10)—*Agreement for exchange of parcels of land—No title to mines and minerals upon one parcel—Reference to ascertain value—Admission of evidence as to actual agreement—Confirmation of report—Dismissal of action—Right of purchaser to repudiate contract on discovery the vendor has not title agreed to be conveyed*]—Appeal by plaintiff from the judgment dismissing an action on an agreement for the exchange of two parcels of land. Affirmed. [See Annotation, 3 D.L.R. 795.]

Duncan Stuart, K.C., for appellant.

W. T. D. Lathwell, for respondent.

The judgment of the Court was delivered by

Alta.

App. Div.

BECK, J.A.:—This case came on for hearing before Simmons, J., on May 11, 1921. The action is one founded on an agreement for the exchange of two parcels of land. The formal judgment dated October 3, 1921, first reciting that, it appearing on the trial that the plaintiff had not the title to the mines and minerals upon his land, a reference was directed to the Master to find and report upon their value and the Master having made his report on June 30, and the plaintiff having moved to confirm the report, ordered that the Master's report be confirmed and thereupon dismissed the plaintiff's action. The plaintiff appeals. The defendant served a notice in the nature of a cross appeal, contending that the trial Judge erred in directing the reference at all and should have dismissed the plaintiff's action on proof of lack of title, and that the Judge erred in refusing to admit further evidence on the defendant's behalf of the actual agreement alleged to have been made between the parties (sic) should be varied and that the defendants should be allowed to submit evidence that the written memorandum relied upon by the plaintiff set out in the pleadings is not the complete agreement between the parties and should be allowed to submit evidence to prove the alleged complete agreement.

The agreement between the parties was as follows:—

"Calgary, Sept. 18th, 1920.

I, Charles Thomas Gilbert and Jessie Gilbert of Calgary, Alberta, hereby agree to exchange our brick terrace situated on the corner of 13th Ave. and 9th St. West, valued at $35,000, with a loan of practically $20,000 and house No. 720-15th Ave. West, valued at $8,000, with a loan of $3,500—with E. D. Smith of Calgary for his land described as—all sect. 35-35-28-W4th with a loan of $9,000—also, the S.W. ¼-3-26-28W4th with a loan of $4,400 the land valued at $60 per acre all adjustments to be made to date and searches made on Monday, Sept. 20, 1920, and all papers concluded by 20 days later.

Both parties agree to pay the Cal. Realty Co., Ltd., 2½% comm. on their respective properties.

Witness:—

C. B. Munro. .....

C. T. Gilbert. (Seal).

Jessie Gilbert.

I hereby agree to the above agreement, price and terms signed by Mr. and Mrs. Gilbert,

Witness:—

C. B. Munro.

E. Delafield Smith. (Seal).

The plaintiff, in his statement of claim, puts it that the de-

fendant's land was valued at $[illegible]3,000, against which there were stated to be mortgages amounting to about $23,500 (leaving a balance of value of about $19,500); and that the plaintiff's land was valued at $48,000, against which there were mortgages amounting to about $13,400 (leaving a balance of value of about $34,600); which would leave a balance of purchase money owing by the defendants to the plaintiff of about $15,100, and allege that the balance in favour of either party was (by the terms of the agreement) to be adjusted as of the date of the agreement and the transactions fully completed within 20 days later. He claims specific performance and an account of the encumbrances and an order that the defendants pay the net differences in value of the properties after all allowances for interest, insurance and taxes, &c., have been made. The defence is substantially, and so far as relied upon at the trial, that the memorandum of agreement was not complete as a matter of law and "did not in fact contain all the terms of the agreement between the parties; that the Statute of Frauds was not complied with; that the plaintiff was unable to show title for the reason that there are reservations from the title of the plaintiff as described in his certificates of title, which are not mentioned in the memorandum of agreement; and the defence continues: "the defendant Charles Thomas Gilbert hereby repudiates the said agreement so far as made."

At the trial the plaintiff proved the execution of the agreement, the refusal of the defendants to carry it out and a formal demand on the defendants by letter of the plaintiff's solicitor to fulfill the agreement. That closed the plaintiff's case.

The defendants then tendered evidence to shew that the memorandum of agreement did not contain all the terms of the real agreement between the parties, but the trial Judge "refused to hear any evidence to vary or add to the written agreement, and held that the said agreement was complete in itself and enforceable." The plaintiff by his counsel, however, stated his willingness to accept the terms of any concluded oral agreement between the parties as part of the contract but disputes the statement of the defendants that the parties had agreed, when signing the contract, to leave certain terms open for future discussion.

The defendants then proved (and this was not contested by the plaintiff) that the plaintiff's title did not include the right to mines and minerals thereon and certain other reservations or exceptions. These latter seem to be as follows:—(1) Exceptions of two roadways. (2) Reservations of rights of expropriation in favour of the C.P.R. for railways, irrigation canals, ditches,

Alta.

App. Div.

reservoirs or works under the Irrigation Act without paying compensation except in some cases to a very limited extent.

At the conclusion of the evidence the trial Judge made an order (May 11, 1921), referring it to the Master to enquire and report upon: (1) the amount of the encumbrances, (2) the taxes, (3) the insurance, (4) the rents and profits of each property, &c., (5) the value of the right to mines and minerals reserved to the C.P.R. in the plaintiff's title and the value of any reservations in the defendant's title and the damages occasioned by any restrictions upon such titles.

The Master made his report on June 30. By consent it was confined for the time being to the question whether or not coal might be found on the plaintiff's land, and its value.

He concluded his report in these words:—5. No practical test has been made, consequently the question of whether or not coal may be found under the land in question at or near a depth of 500 feet, to my mind, is purely a guess. 6. I doubt very much if any thing at all could be obtained for the coal rights, if any person tried to sell them, but on the chance of coal being found in commercial quantities at a depth of not more that 500 feet, in my opinion, the value should be placed at not more than $4 per acre.

As already stated, upon the plaintiff's motion to confirm this report, the same Judge confirmed it but dismissed the plaintiff's action.

Having set out the facts, I have, at this point, come to the conclusion that the Judge was right in dismissing the plaintiff's action.

Some question was raised during the argument as to whether or not, in order to take advantage of his grounds of defence, the defendant ought not to have appealed from the order made by the Judge at the conclusion of the trial directing the reference; but I think that by that order the Judge was not intending to deal with the matters of defence finally, but was endeavouring to ascertain the facts relating to the matters referred, with the view of dealing once for all with all the points in dispute between the parties and, in fact, the formal order does not purport to decide any of the issues. If this is the right view, there was no necessity for the notice by way of cross appeal; for a respondent is entitled to rely upon any grounds appearing in the case to sustain judgment. If this view is incorrect, this Court has a right to give leave for the cross appeal, and if necessary such leave should, I think, be given and be treated as given.

In my opinion, this appeal can be disposed of by the application of the law as declared by this Court in *Innis* v. *Costello*

(1917), 33 D.L.R. 602, 11 Alta. L.R. 109, a case which, while some limitations of the general rule there laid down have been admitted in exceptional cases, e.g., *Pugh* v. *Knott* (1917), 36 D.L.R. 52, 12 Alta. L.R. 399, has been consistently approved by this Court, and is applicable to the facts of this case. In that case it was decided that a purchaser who discovers that his vendor has not the title which he agreed to convey and has no right to demand it from any third person may, if he acts promptly, repudiate the contract and demand back and recover in the Court the money he has paid.

The holding was to the same effect in *Universal Land Security Co.* v. *Jackson* (1917), 33 D.L.R. 764, 11 Alta. L.R. 483, with the addition that, as had been previously held, the purchaser's repudiation can be made effectively by his statement of defence.

I refer also to *Christie* v. *Taylor* (1914), 15 D.L.R. 614, which was affirmed on appeal but not reported.

In the foregoing view it is unnecessary to discuss the Master's report or the other questions raised.

I would, therefore, dismiss the plaintiff's appeal with costs, leaving the action dismissed with costs.

Appeal dismissed.

ADAMS v. ADAMS.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart and Beck, JJ.A. December 24, 1921.

GARNISHMENT (§ III—61)—*Issue of garnishee summons—Affidavit—Requirements—Rule* 648 *Alta.—Grounds of belief—Construction.*]—Appeal from Harvey, C.J., affirming an order of a master setting aside a garnishee summons. Reversed.

J. S. Mavor, for appellant.

W. J. O'Neaill, for respondent.

The judgment of the Court was delivered by

BECK, J.A.:—This is an appeal from Harvey, C.J., affirming an order of Master Clarry, setting aside a garnishee summons.

The ground of these decisions is that the affidavit upon which the garnishee summons was issued fails to comply with the requirements of rule 648 insofar as it requires that the affidavit should "state to the best of the deponents' information and belief that the proposed garnishee (naming him) is indebted to such defendant or judgment debtor and is within Alberta and giving the grounds of such information and belief." The affidavit, in this respect, reads as follows:—

"To the best of my information and belief A. A. McGregor is indebted to the said defendant and is within Alberta. I so believe for the following reasons: I am informed that the said

Alta.

App. Div.

A. A. McGregor did sell certain goods and chattels or livestock belonging to the said defendant and has received and still has in his possession the monies received from such sale."

The Chief Justice says:—

It is apparent that this does not purport to give anything more than the grounds of belief, and if 'grounds of information and belief' means more than 'grounds of belief' it does not fulfil the requirements even if, which may be questioned, it sufficiently gives the grounds of belief. Belief founded on information is of course grounded on the information if the mind accepts it as trustworthy. The information alone, therefore, is not the whole ground of the belief, but there must be coupled with it the mind's approval of its trustworthiness. This involves, of course, the personality of the informant and perhaps, at least, at times, some other elements e.g. the defendant's knowledge of him, the probabilities or improbabilities of the statements, &c. One can quite see that the word 'grounds' is not entirely apt as applying to 'information' and though the expression 'information and belief' is very commonly used it is somewhat difficult to form a single concept including both ideas."

Our rule 416 reads:—

"Affidavits shall be confined to the statement of facts within the knowledge of the deponent, but, on interlocutory motions, *statements as to his belief with the grounds thereof* may be admitted."

The corresponding English rule 523 and Ontario rule 293 each contain the words italicised.

Both Judges and annotators in referring to the rule almost invariably substitute for the single word "belief" the compound expression "information and belief" as its exact equivalent. The Annual Practice, 1922, p. 662, annotating the words: "Statements as to his belief" has these expressions: "Evidence on information and belief"; "the grounds of his information and belief"; "affidavit of information and belief."

Jessel, M. R., in *Quartz Hill Con G.M. Co.* v. *Leall* (1882), 20 Ch. D. 501, at p. 508: "Where an affidavit is made upon information and belief the rules of the Court require that the deponent should state what are the grounds of his information and belief."

Chitty's Forms, 14th ed., p. 847: "Affidavits as to information and belief, not stating the source thereof, are inadmissible."

Lord Alverstone, C.J., in *Re J. L. Young Mfg. Co.* [1900], 2 Ch. D. 753, at p. 754, 69 L.J. (Ch.) 868, 29 W.R. 115: "Statements on their 'information and belief' without saying what

their source of information and belief is." Rigby, L.J., at p. 755: "When a deponent makes a statement on his information and belief he must state the ground of that information and belief."

Form 25, app. B. to the English Rules (1922, p. 1549): "Affidavit in support of garnishee order" is, in Annual Practice, noted: "An affidavit of information and belief is insufficient unless it states the grounds on which the information and belief are based."

It is then common where referring to the words of the rule "belief with the grounds thereof"' to use as an equivalent: "Information and belief with the grounds (or source) of the information and belief."

In *Vinall* v. *DePass*, [1892] A.C. 90, 61 L.J. (Q.B.) 507, the Court was considering the English rule as to attachment of debts (rule 622). The rule requires "an affidavit by the judgment creditor or his solicitor stating that judgment has been recovered; that it is still unsatisfied, and to what amount; and that any other person is indebted to such debtor and is within the jurisdiction." Lord Halsbury says (and the other Lords agree):—

"It is obvious that if you were to give effect to those words by requiring that he must swear to such a matter as being one within his own personal cognizance, and to establish the debt upon that affidavit, in not one in a hundred cases certainly would a person be able to swear in the sense that he could swear to a matter within his own personal knowledge. Therefore, I do not think that the Legislature can have meant that a person should be able to swear upon his own personal knowledge in the sense that he would be required to do if he were called upon to give evidence in the trial of the cause in which the debt had to be proved."

The Court consequently held, notwithstanding the positive words of the rule, that an affidavit of the solicitor for the judgment creditor stating that he had been informed by the manager of the defendant company and truly believed that the garnishee was indebted to the defendant and was sufficient.

This case, I think, shows that the rules of Court ought not to be interpreted with great strictness and that the purpose of the rule is a thing proper to be deduced.

Under our rule with reference to the affidavit required to obtain a garnishee summons, it seems evident that it was not intended to restrict the right of attachment to cases where the deponent could speak only on the information given him by someone else as to the indebtedness of the proposed garnishee. Quite conceivably there may be cases in which the deponent

Alta.

App. Div.

really knows of his own knowledge, or has good reason to believe from seeing certain acts of the proposed garnishee, that he is indebted to the judgment debtor. If the deponent, in order to comply with the terms of the rule in such cases, must use those terms, then the word "information" must be intended to include the case of the mind of the deponent being informed in some other way than by the statement of another person. The terms of the rule, therefore, do not necessitate the statement that the deponent is informed by a person named.

I think it can reasonably be inferred that the purpose of the change in wording our rule from that of the English rule on which it is obviously and (by subjoined reference) admittedly based, was, inasmuch as there is not under our practice, as there is in England, the intervention of a Judge to consider the affidavit, to ensure that indebtedness by a proposed garnishee is not sworn to upon a mere guess but upon some reasonable grounds of belief.

Taking this as the object of the part of the rule under consideration, and taking what may be called the popular use of "information and belief" as equivalent to "belief" simply, I would hold that the affidavit sufficiently complies with the rule in that respect.

Words in statutory provisions, in fact in all cases, are ordinarily to be given a meaning not so much in a strict etymological propriety of language but rather in their popular sense. Beal's Cardinal Rules, 2nd ed., p. 318.

My conclusion is in accord with the decision of Walsh, J., in *Gandara* v. *Davison*, [1919] 3 W.W.R. 915, with which I entirely agree.

The other objection to the affidavit is also sufficiently met by what I have said.

It was also urged that the affidavit upon which the garnishee summons was issued shewed on its face that the debt intended to be attached was one owing by the garnishee McGregor, not to the firm but to one member of the firm only, namely Peter Janet, and that that being so the debt as a matter of law was not attachable. The fact is so but the conclusion urged does not follow. The defendants are four in number—the firm as such and each of the three members. Peter Janet is one of the defendants. It requires no discussion to make it clear that, the action being against him, a debt due to him individually can be the subject of a garnishee summons. Had the firm of which Peter Janet was one of the partners been the sole defendant, and the debt sought to be garnisheed was shewn on the affidavit founding the garnishee summons to be owing to one of the

members of the firm, in my opinion such a debt would be attachable even under a garnishee summons issued before judgment for the reasons given by Harvey, C.J., in *Nohren* v. *Auten and Markham*, (1910) 3 Alta. L.R. 310.

In my opinion, therefore, the appeal should be allowed with costs, and orders of the learned Judge and of the Master should both be set aside with costs.

Appeal allowed.

INDEX

CASES—