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ANNOTATED

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VOL. 31

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT *and*

I. FREEMAN

PATENT AND TRADE-MARK CASES

RUSSEL S. SMART

CONSULTING EDITORS

E. DOUGLAS ARMOUR, K.C.

ALFRED B. MORINE, K.C.

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CASES REPORTED

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TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 31 INCLUSIVE.

BOUILLON v. THE KING.

Exchequer Court of Canada, Audette, J. November 2, 1916.

1. WATERS (§ I A—6)—TEST OF NAVIGABILITY—FLOATABLE—CROWN DOMAIN.
A river is navigable and floatable *à trains et radeaux*, when, with the assistance of the tide, small craft or rafts of logs can be navigated for transportation purposes in a practical and profitable manner; it, therefore, forms part of the Crown domain.

2. FISHERIES (§ I A—2)—EXCLUSIVE RIGHT—SPECIFIC GRANT.
A specific grant by the Crown, especially expressed and clearly formulated, is necessary to create an exclusive right of fishing.

3. CROWN (§ II—20)—ACTION AGAINST—TORTS—FISHING RIGHTS.
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Statement.

PETITION OF RIGHT seeking recovery of revenues from fishing right in the River Matane, P.Q., of which the suppliant alleged he was deprived by the Dominion Government.

L. Taché, K.C., for the suppliant.

G. G. Stuart, K.C., for the Crown.

Audette, J.

AUDETTE, J.:—The suppliant brought his petition of right to recover from the Crown, as representing the Dominion of Canada, the sum of $2,400, he having at the trial abandoned his claim for the sum of $540 mentioned in paragraphs 15 and 16 of the petition.

By his petition of right, he sets forth, *inter alia*, that he is proprietor of a certain piece of land, at Matane, abutting on the River Matane, which he says is neither *navigable nor floatable*, and therefore claims his proprietary rights extend to the centre of the river, *usque ad medium filum aqua*: That the Federal Government, from the year 1884 to 1896, took hold of his fishing rights, opposite his property, and rented the same to different parties up to the date of the judgment of the Supreme Court in the *Fisheries* case in 1896 (26 Can. S.C.R. 444), which was followed by the decision of the Judicial Committee of the Privy Council, [1898] A.C. 700, and he concludes in asking by par. 13: "Que le dit gouvernement fédéral a occupé *illégalement* le dit droit de pêche et en a retire des rançons pendant douze ans;"—and by par. 14 he further claims: "Que le dit gouvernement

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fédéral d'Ottawa a privé ainsi votre pétitionnaire d'un revenu de deux cents piastres par année pendant douze ans, formant une somme de $2,400 que votre pétitionnaire a droit de réclamer du gouvernement fédéral d'Ottawa."

These two paragraphs are here recited in full with the object of enabling us in arriving at the true understanding of the nature of the present action. Indeed, counsel at bar, contends on behalf of the suppliant that the present action is in revendication of a real right (un droit réel, immobilier) consisting in a fishing right, of which the substance and the enjoyment are the object of a right. He adds that *the substance having disappeared* it cannot be claimed, and this action is the only course left to him; that is, to claim the value thereof by par. 14 above recited.

The respondent's plea alleges, among other things, that the River Matane opposite the suppliant's property is *navigable et flottable*, and that the latter's rights do not extend to the middle of the river, and therefore he has no right of fishing in the same; and that while the Crown, in the right of the Dominion of Canada, granted without warranty, up to 1896, the right of fishing in the estuary of the River Matane as might belong to the Crown, if the suppliant had any rights to such fishing he was at all times at liberty to exercise them, and if such recourse exist it is against the lessées of such right; concluding that if he had such rights they are prescribed and that the cause of action is unfounded in fact and in law.

The issues involved in the present case may be said to be resolved in the solution of the three following questions, viz.: (1) Is the River Matane, opposite the suppliant's property, *navigable et flottable en trains ou radeaux*? And did the *seigneur* by his grant have the exclusive right of fishing in the same and so transferred such right to the suppliant? (2) Do the issues herein disclose an action in tort, and does it lie against the Crown? (3) Does an action lie against the Crown for the recovery or repetition of the moneys received in good faith under an error of law, and under the circumstances of the case. Is there privity between the suppliant and the respondent?

(1) It may be stated, as a general and recognized principle, that if the river is *navigable ou flottable a trains et radeaux* opposite the suppliant's property that the action fails, unless he has such

rights as are derived from a Crown grant giving the *seigneur* an *exclusive* right of fishing in the *locus in quo*.

The River Matane was, on two recent occasions, the subject of two distinct judicial pronouncements with respect to its navigability. One by the late Larue, J., in the case of *Irwin* v. *Bouillon*, unreported, in which the Judge pronounced the river navigable and floatable, and the other by Lemieux, J., now Sir Francois) in the case of *A.G. of Quebec* v. *Bouillon*, in which he adjudged the river neither navigable nor floatable.

This question of navigability is obviously one of fact which has to be decided under the circumstances and the evidence submitted to the Court in each case.

Therefore having been made aware in the course of the trial of these two conflicting judgments or findings, I ordered *une descente sur les lieux* (the object of the litigation—Pigeau, Procédure Civile, 2nd ed., p. 227) that is a visit to, and examination of the river, at high tide on the next day at 5 o'clock in the morning of July 5 last, and directed both parties to be there represented. McKinnon, a witness heard on behalf of the suppliant, stated that the season at which the river is lowest is July and August. At the time so appointed for the visit, I crossed from north to south upon the bridge, which appears on the plan ex. 15, filed herein; walked to the suppliant's property, and in company of both the suppliant and respondent's counsel we walked down from the King's highway opposite the suppliant's place to his floating landing, where two boats sent by the Crown's counsel were in readiness for us. Before embarking I ascertained that between the highway and the river there was a small piece or parcel of land belonging to the suppliant which made him a riparian proprietor on the river—small as the piece might be. Accompanied by the suppliant and two men we started in a 20 ft. boat, travelled from this place to about the centre of the river, over the pass (or goulot) in the rapids, and travelled west past the bridge indicated on the plan. The whole of the river presented then the appearance of a large lake, without any indication whatever of any rapids below the bridge in question. In the river, slightly above the church, there was a schooner moored at a wharf—notwithstanding some evidence at the trial that it was impossible for a schooner to go up beyond the Price wharf at the mouth of the river.

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Now, the evidence adduced in this case discloses that the suppliant is and has been the owner for a number of years of a gasoline launch, which up to 2 years ago was 25½ ft. long, drawing 28 inches, and two storeys high, as put by the suppliant, meaning, I suppose, an upper deck, and on which yacht he crosses over to the north shore. Two years ago he lengthened this launch by 8 feet, making it 33½ ft. long. Now, while this launch on the date of the trial was kept some short distance below the suppliant's property, it appears from the general evidence that the launch, while at times kept closer to the mouth of the river, was usually and for most of the time kept opposite the suppliant's property. That this launch was also seen, on several occasions, running up to or within a few yards of the bridge.

That transatlantic vessels lying in the current in the St. Lawrence, opposite the estuary of the River Matane or thereabouts, are from time to time during the summer being loaded with lumber, taken in *bateaux*, from Price's wharf at the mouth of the river; and that ever and anon, while these vessels were being loaded, boats of 20, 25 and 30 ft. keel, drawing from 18 to 20 inches, manned by two, three and four men, came up the river on some occasions with two puncheons and one barrel, to fetch fresh water for the vessels, and that such water was procured at the rapid above the bridge, and that they would go up as far as the slab-wharf marked "D" on the plan. Some of the suppliant's witnesses say that the salt water runs up with the tide to the foot of the dam, beyond the bridge. Vaillancourt, a man on the river all the summer, says that in small tides the salt water runs up like 50 to 60 ft. beyond the bridge, but does not cover the small rapid above the bridge.

Then a schooner on one occasion came up beyond Bouillon's property. The evidence is conflicting as to whether she went up to point "C" or "D," marked on plan ex. 15.

However, the most important point of the evidence bearing upon the subject in question, is that for a number of years the Price people, proprietors of the sawmill above the bridge, took their lumber from the mill in rafts down the river Matane to Price's wharf at the mouth of the river. The rafts were made at the foot of the mill above the bridge and were 60 ft. in length, 12 ft. in width, with a depth varying from 18 to 27 inches. This

lumber is now carted down from the mill to Price's wharf. The floating of rafts, as well as the taking of lumber in sluices at one time, were abandoned, not for the reason mentioned in the case of Lemieux, J., above referred to, but for the reasons in evidence in the present case, because the owners of the vessels refused to load wet lumber. And that is too obvious, because ships loaded with such lumber are liable to take a list. The floating by rafts was carried on for at least ten years, and it is in evidence that the river was in the same state then as it is to-day, therefore the river is obviously *flottable en trains ou radeaux*.

In *Bell* v. *Corp'n of Quebec*, 5 App. Cas. 84, it was held that, "according to the French law, the test of navigability of a river is its possible use for transport in some practical and profitable manner." And that decision is followed in the case of *Att'y-Gen'l of Quebec* v. *Fraser*, 37 Can. S.C.R. 577, where it is held that: "A river is navigable when, with the assistance of the tide, notwithstanding that at low tides it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth." See also *Wyatt* v. *Att'y-Gen'l of Quebec*, [1911] A.C. 489.

The distinction between rivers *flottable à trains et radeaux* and those *flottable à bûches perdues* is clearly stated by Sir Charles Fitzpatrick, C.J., in the case of *Tanguay* v. *Canadian Electric Light Co.*, 40 Can. S.C.R. at p. 8.

Dalloz, Rep. Jur. Eaux, No. 61: Proudhon, Domaine public, vol. 3, Nos. 857-860, where the difference of *flottage par trains ou radeaux* and *flottage à bûches perdues* is established, and where a description is given of what is meant by a *train* or *train de bois*.

And in Sirey, 1823, I., 317, is found a reported case holding that: "Les rivières ne doivent être considérées comme dépendant du domaine public que lorsqu'elles sont flottables *à trains ou a radeaux*."

Beaudry-Lacantinerie, Des Biens, p. 134, No. 174, says: "*Les fleuves et les rivières navigables ou flottables.* Ce sont des chemins qui marchent, dit Paschal. . . . Il n'y a que les rivières flottables avec trains ou radeaux qui fassent partie du domaine public."

See also 2 Plocque, Législation des Eaux, No. 174, and Fuzier-Herman, vbo. "*Rivières*," Nos. 80 *et seq.*

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The judgment of Girouard, J., in *Tanguay* v. *Canadian Electric Light Co.* (*supra*, p. 24), cites also a number of authorities in support of the same proposition, *inter alia*, Isambert, vol. 20, p. 232.

In *Bell* v. *Corp'n of Quebec*, 5 App. Cas. 84, 7 Que. L.R. 103, Chief Justice Dorion says: "It is not so much the volume of the water that the river carries, as the fact that its course is devoted to the public service, which gives it its legal character."

See also *Lefaivre* v. *Att'y-Gen'l P.Q.*, 14 Que. K.B. 115; *Gouin* v. *McManamy*, 32 Que. S.C. 19; *The King* v. *Bradburn*, 14 Can. Ex. 419, 433; and the *Fisheries* case, 26 Can. S.C.R. 444, [1898] A.C. 700; *Hurdman* v. *Thompson*, 4 Que. K.B. 409, 434.

As appears by exs. "E" and "F," on October 19, 1877, a port has been created at Matane, under the provisions of 37 Vict. ch. 34, and the Acts amending the same, and the port is declared to extend from the parish church situate in the village of Matane, a distance easterly of two miles and a similar distance westerly from the same point.

Flowing from the doctrine expounded in the numerous cases above cited, coupled with the fact that the tide backs from the River St. Lawrence some distance beyond the bridge in question, thus forming a large lake or river upon which boats and rafts of timber have been for years transported for commercial purposes, the necessary conclusion is that the river is necessarily navigable and especially *flottable a trains ou radeaux*.

It was a moot question at one time, before the decision in the *Fisheries* case, *supra*, as to whether fishing rights in rivers which were Crown property belonged to the Crown in the right of the Dominion, or in the right of the Province. However, up to the time of the decision in the *Fisheries* case, the Federal Government was considered as vested with the control of such waters and did exercise it. After the decision in the latter case, the Crown in the right of the Province of Quebec, must have assumed, as the Federal powers had previously done, that the Matane River was part of the Crown domain as a navigable and floatable river, since both governments have at one time and the Quebec Government is now leasing the fishing right upon the same.

The suppliant himself must have shared that opinion after the decision of the *Fisheries* case, since he filed with or handed to

the Quebec Government the following admission, filed herein by the Crown, as ex. "D," and which reads as follows:—

Je soussigné, Alfred Bouillon, de la paroisse de St. Jérome de Matane, médecin, reconnais que le club incorporé sous le nom de The Matane Fishing Club a le droit exclusif de faire la pêche dans la rivière de Matane en vertu d'un bail consenti à ce club par le Commissaire des Terres, Forêts & Pêcheries de la Province de Québec.

Je reconnais la validité de ce bail a toutes fins et je m'engage à ne pas pêcher dans la dite rivière et à ne pas troubler les membres de ce club dans l'exercice de leurs droits de pêche et à n'intervenir en aucune façon à l'encontre de leurs droits de pêche au saumon dans la dite rivière pendant la durée de leur bail.

St. Jérome de Matane, 19 juin, 1899.

Proc. de M. Alf. Bouillon, A. BOUILLON, M.D., L. TACHE.

On the face of the admission, again the suppliant would be out of Court.

The suppliant's property, acquired by him on September 5, 1893, originally formed part of a grant or concession of land made, on May 29, 1680, in the name of the King of France, by His Intendant Duchesneau, to Sieur Mathieu Damours.

By this grant two pieces of land were granted to Damours, as appears in the recitals of the deed. First, in the middle of the first page of the deed, he asks for

une lieue de front sur une lieue et demie de profondeur situee sur le fleuve St. Laurens, à prendre une demye lieue de chaque costé de la dite rivière.

And secondly, but further on, at the foot of the second page of the deed,

et de luy donner et accorder par *augmentation* de concession une lieue de terre sur le dit fleuve, a prendre joignant la demye lieue du costé de la rivière Mitis sur pareille profondeur d'une lieue et demye, comme aussy le droit de peche sur le dit fleuve.

Then in the *habendum* clause of the deed we find the following:—

Avons accordé et accordons au dit Sieur Damours la ditte lieue et demye de terre de front, et une lieue de profondeur, scavoir une demye lieue au deca, et une demye lieue au dela de la rivière Matane.

Et par augmentation une autre lieue de terre de front aussy sur une lieue et demye de profondeur y joignant, à prendre du costé de la rivière Mitis, avec le droit de peche sur le dit fleuve St. Laurens, pour en jouir par luy, ses successeurs ou ayant cause en titre de fief et seigneurie.

From the reading of these descriptions in the grant would it not clearly appear that two separate pieces of land are granted as described in the recitals, and as repeated in the *habendum* clause? Indeed, it appears, Damours asks first for a defined piece of land, and secondly, by augmentation, for another piece

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of land, with the right of fishing upon the River St. Lawrence, and the *habendum* clause grants as asked. If that is the case, it is obvious the right of fishing, as described in the grant, only relates to the second piece of land which is not opposite the land in question herein, but starts half a league up the St. Lawrence from the western shore of the River Matane. *Expressio unius est exclusio alterius.*

Be that as it may, assuming the right of fishing as mentioned in the grant has been given for the whole area of the seigniory on the St. Lawrence, the right given is not an *exclusive* right. Therefore, under the decision of the case of *Cabot* v. *The Att'y-Gen'l of Quebec*, 15 Que. Q.B. 124, affirmed on appeal by the Judicial Committee of the Privy Council ([1907] A.C. 511), on the true construction of the grant, the claim flowing from the seigneur's title for exclusive fishing could not pass.

A specific grant, especially expressed and clearly formulated, was necessary to allow an exclusive right of fishing to pass: *Leamy* v. *The King*, 23 D.L.R. 249, 15 Can. Ex. 177.

I may also repeat here what I have said in that case (now pending on appeal to the Supreme Court of Canada): How should such a grant be construed and interpreted? The trite maxim and rule of law for our guidance in such a construction or interpretation is well and clearly defined and laid down in Chitty's Prerogatives of the Crown (p. 391).

See also *Wyatt* v. *Att'y-Gen'l of Quebec*, [1911] A.C. 489, and *Fraser* v. *Fraser*, 2 Que. S.C. 61, 2 Que. K.B. 215, and arts. 1019 *et seq.* C.C.P.Q.

It is also well to bear in mind that the right of fishing mentioned in the grant is in the St. Lawrence, and not in the River Matane.

Before leaving this question of title, it may be said that on perusing the chain of the suppliant's titles, filed by him at trial, I came across ex. No. 8, which is a deed by Jane McGibbon, then proprietress of the Seigniory of Matane, whereby she grants and *concedes* to Mde. widow John Grant (*sic.*) on June 22, 1824, a tract of land, covering the lands in question herein, together *with the right unto the said grantee her heirs and assigns of fishing and hunting in front thereof.* The grant is made free from all annual and seignorial rents during the grantee's lifetime and the

lifetime of her then living children and as long as the said tract of land shall remain her property and her children's property. The deed also provides, as follows:—

It is further agreed between the said parties that she the said grantee and her said children shall not sell, exchange or bargain the said tract of land without giving to the said seignioress the privilege of the same previous to signing any deed of sale or exchange and that in case the said property should in any manner or form fall into stranger's possession, the purchaser, or then the owner of the same, shall and will be bound and obliged to exhibit his title to the said seignioress or her representative and then take a deed of concession for the said land the same as the other tenants in the said seigniory of Matane, *otherwise all and every title or deed transferring the property aforesaid shall be null and void*, with the right unto the said seignioress to take full possession of the same without any form of justice and without compensation on her part for whatever improvements that shall then have been made on the said land.

From the date of this deed, the property changed hands several times before it came into the suppliant's possession on September 5, 1893, without any evidence of the compliance with the conditions, restrictions and reserve mentioned in this deed of June 22, 1824.

One feature of this deed of June, 1824, which should not be passed without some notice, is that the suppliant's counsel seems to attach some importance to it, and he relies upon it as transferring to the suppliant this right of fishing in the river. This is the only deed, between 1824 and the present day, in which the question of fishing and hunting is mentioned. This fishing privilege is not repeated in the chain of titles from that date (1824) down to the date of the suppliant's title (1893).

Can the suppliant now on the one hand invoke and rely upon that deed (which is part of the chain of his title) for this alleged right of fishing, and on the other hand derogate from it? *Qui approbat non reprobat.* And a person is said to "approbate and reprobate" when he endeavours to take advantage of one part of a document and rejects the other. This rests on no artificial rule, but on plain, fair dealing. Therefore, is there then a flaw in the suppliant's title? In view of the case of *Labrador Co.* v. *The Queen*, [1893] A.C. 104, deciding that inasmuch as a claimant had disclosed *the true root of his title*, he could not hold his land by prescription and immemorial possession, and that the law of prescription did not apply. Can the suppliant now set up interversion or prescription? Are the several deeds, subsequent

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to that of June 22, 1824, with the above conditions, restrictions and reserve absolutely ignored, good or bad, and have they transferred any proprietary rights? *Quod initio vitiosum est lapsu temporis convalescere non potest.* Mignault, Droit Civil Canadian, vol. 9, p. 388.

However, in view of the important questions raised in the present issues, it is unnecessary to consider what is the effect of such documentary evidence adduced by the suppliant himself upon his own title.

(2) Do the issues herein disclose an action in tort and does it lie against the Crown? What is a tort? "Tort is an act or omission giving rise, in virtue of the common law jurisdiction of the Court, to a civil remedy which is not an action of contract. Pollock on Torts, 6th ed., p. 5.

"The very essence of a tort is that it is *an unlawful act, done in violation of the legal rights of some one.*" Per Miller, J., in *Langford* v. *United States*, 101 U.S. 345. "A tort in its legal sense is a wrong independent of contract:" *Milledgeville Water Co.* v. *Fowler*, 58 S.E. 643.

Pothier, Bugnet, 2nd ed., vol. 1, p. 43, vol. 2, p. 57, No. 116. Laurent, vol. 20, p. 384.

By pars. 13 and 14 of the petition of right, the suppliant claims that the Crown has *illegally occupied* (occupé) the fishing right and has drawn therefrom revenues during 12 years, and that by so doing the suppliant has been deprived of yearly revenue of $200 during that period, making in all the sum of $2,400. And by the prayer of his petition of right, he asks that the Crown be condemned to pay him the sum of $2,400 and costs.

This is not an action claiming a real right against the Crown in any sense of the word. It is of the essence of a real right that it should be referable to immoveables, a right recognizable in face of the world, and as against every one. This action does not claim the substantive right of fishing as against the Crown in the right of the Dominion, but it claims the loss of revenues through the *illegal* deprivation of the same by the Dominion Crown during a certain period. It is not *une action reelle* asking the Crown to recognize a real right; but it is a personal action arising in damages against the Crown for having interfered with his alleged right of fishing—a pure action in tort. In other words he does not claim

any fishing right, as against the Crown, but he assumes he has that right, and his action is against the Crown for trespassing upon such right by collecting rents for the same, and for such trespass he concludes in condemnation against the Crown for $2,400 damages. The petition of right asks for a condemnation in money founded upon an alleged illegality by the Crown.

The suppliant does not either claim the amount which the Crown collected under its leases, but a larger amount, assuming he would have collected as much as he claims, and his *damages* are reckoned by him on that basis. He does not claim the rents actually collected by the Federal Government, but an amount which, in his estimation, would represent the *damages* he suffered.

This case is not a disguised claim of damages, but it is clearly a claim sounding in tort, and an action in tort will not lie against the Crown, except under special statutory authority. This doctrine is too well known and accepted to necessitate the citing of authorities in support thereof.

Therefore, whether the River Matane be navigable *or flottable a train ou radeaux* or not, the action as instituted cannot lie against the Crown.

There are a number of other questions raised both by the pleadings and by the oral argument. For instance, can it be said there is any privity as between the Crown and the suppliant with respect to the amount of these rents paid by the tenants up to 1896? Is not the recourse of the suppliant, if he has any, against the tenants; and is not such recourse extinguished by prescription? Furthermore, under the English law, the doctrine is, says Middleton, J., in *O'Grady* v. *City of Toronto*, 37 O.L.R. 139, that "Equity has never yet gone so far as to afford relief by maintaining an action brought, directly or indirectly, to recover money paid under mistake of law," citing a number of authorities in support of the same. Does the same doctrine obtain in the Province of Quebec, under par. 2 of art. 1047 of the C.C.?

However, these are all questions upon which it is unnecessary to pass in view the decisions arrived at in answering Q. No. 1, and especially No. 2 above referred to.

Under the circumstances, I have come to the conclusion that the suppliant is not entitled to any portion of the relief sought by his petition of right. *Petition dismissed.*

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ROBILLARD v. SLOAN.

Quebec Court of Review, Archibald, A.C.J., Charbonneau and Demers, JJ. February 12, 1916.

OFFICERS (§ I E 1—46)—DISQUALIFICATION OF MAYOR—MUNICIPAL CONTRACTS—QUO WARRANTO.

A municipal councillor (mayor) who has received compensation for work done by him under a contract with the corporation, is disqualified under art. 205, M.C. (Que.) from holding his office, notwithstanding that the contract has been performed and payment received before the issue of the writ of *quo warranto*.

[Arts. 5935-5951, R.S. Que. (1909), considered; *Bouchard* v. *Bélanger*, 8 Que. S.C. 455; *Martineau* v. *Debien*, 20 Que. K.B. 512, applied; *Robillard* v. *Sloan*, 22 D.L.R. 538, 45 Que. S.C. 496, affirmed.]

Statement.

APPEAL from the judgment of Weir, J., 22 D.L.R. 538, 45 Que. S.C. 496, which is affirmed.

The defendant, mayor of the Township of Litchfield, executed for the municipality work of repair on a municipal road and furnished for the purpose materials to the amount of $113. The corporation paid him on December 7, 1913. On February 6, 1914, the plaintiff caused to be issued against him a writ of *quo warranto* under the provisions of art. 205 M.C. and of art. 5936 R.S.Q. (1909).

The defendant claims that having been paid before the issue of the writ of *quo warranto* he had at that time no contract with the municipality and retained his capacity to sit as mayor.

The Superior Court maintained the action, and its judgment was confirmed by the majority of the Court of Review.

Wright, Gamble & Smart, for plaintiff.

D. R. Barry, K.C., for defendant.

Archibald, A.C.J.

ARCHIBALD, A.C.J., concurred with DEMERS, J.

Demers, J.

DEMERS, J.:—Art. 205 M.C. provides that whoever shall receive any money or other consideration from the corporation for his services is disqualified from being appointed a member of the council and from acting as such.

This incapacity proceeds from the payment; it exists then after the payment and cannot exist before it. The services of a councillor are gratuitous and he cannot procure payment to himself for any work that he has performed for the corporation: *Bouchard* v. *Bélanger*, 8 Que. S.C. 455.

I am of opinion that arts. 5935-5951 of R.S.Q. (1909), have no application; this is not the case of a contract but of a quasi-contract.

The case of *Martineau* v. *Debien*, 20 Que. K.B. 512, appears

to me to be applicable. The defendant in performing the work for the corporation, furnishing his own material and procuring payment to himself for his services even at their proper value, has violated his trust and, in my opinion, incurred the loss of office, and the proper recourse against him appears to me to be the one adopted.

Charbonneau, J.

CHARBONNEAU, J. (dissenting):—The defendant, mayor of the Township of Litchfield, is proceeded against by *quo warranto* on account of certain work that he had executed and materials that he had furnished for the municipality in repairing a municipal road. The amount of his account was $113, which was paid and settled on December 7, 1913, while the writ of *quo warranto* was issued against him on February 6, 1914.

The action was evidently brought under the provisions of art. 205 M.C. But it appears to me that the object of this article is to prevent a municipal councillor from sitting so long as he has any contract with the municipality, and from the time this contract disappears this incapacity disappears, as when the councillor ceases to have his domicile and place of business in the municipality. There is no doubt that the fact of having a contract, just as the fact of ceasing to be domiciled in the municipality, disqualifies the councillor, but this is not a permanent disqualification as in the case of a minor or a person in sacred orders or of other disqualifications of this kind which cannot be made to disappear. It is true as one of the Judges of the Court of Appeal observed in the case of *Martineau* v. *Debien*, *supra*, that this article thus interpreted might not be considered as very efficacious but the law should be interpreted as it is and we cannot give it a value which it does not possess. Moreover, the legislature has so understood it since it afterwards supplemented this article by other provisions under arts. 5935-5951 of R.S.Q. (1909), of which I will speak later and where this insufficiency of the Municipal Code is intimated. I ask myself how in the face of art. 205 and of the facts proved in this case the Court can decide that at the time when the writ of *quo warranto* was issued the defendant had a contract with the municipality and it is absolutley necessary to decide this point to apply the sanction of *quo warranto* as provided by art. 205. All that this article says is that a councillor who has a contract with the corporation cannot act as a member of the council. In this case when the writ was issued he had no

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ROBILLARD v. SLOAN.

Charbonneau, J.

longer any contract nor any lien which would disqualify the councillor precisely the same as if having lost for a time his domicile he had resumed it before the issue of the writ of *quo warranto*.

There has been an attempt to apply arts. 5936 *et seq.* of the Revised Statutes to justify the present action and there is no doubt that art. 5936 is much wider than art. 205 M.C. and that the fact of having had a contract with the municipality would justify the conclusions of an action brought under the provisions of this Act. But such action is entirely different from that which was brought in this case. Disqualification for 5 years which is provided for in that article is not asked for; the plaintiff contents himself with asking the actual disqualification of the defendant with a fine of $400 under the provisions of the Act respecting *quo warranto*. But the penal action should be accompanied by the special formalities provided for this class of action as among others for security. That has not been done in this case. Art. 5949 says that every suit under the provisions of this section shall be instituted by a penal action. Even if this procedure had been followed I would have had serious doubts as to the right of the plaintiff to take such conclusions because in this case there has not been what could be called a contract. The defendant furnished certain goods with no profit to himself but merely to accommodate the municipality and because he could not procure the work to be done and the materials to be furnished otherwise.

In these circumstances I am of opinion that the judgment should be reversed.

Vide Schneider v. *Petelle*, 21 Rev. Leg. 292; *Foster* v. *Currie*, 48 Que. S.C. 103. *Appeal dismissed.*

QUE.

C. S.

REX v. POULIN.

Quebec Court of Sessions, Hon. Charles Langelier, J.S.P. September 16, 1916.

DESERTION (§ I—10)—FROM MILITARY UNIT—EVIDENCE.

Under the Order-in-Council of January 6, 1916, the proof of engagement for overseas service by the soldier charged with being absent without leave is complete on production of the signed enlistment paper and proof that the accused had been passed as fit for military service and that the military unit had been regularly established; and *primâ facie* proof of absence without leave may be made by the production of a letter to that effect from the officer commanding the Military District; it is no answer for the accused to shew at the trial that the age he gave at enlistment as under 45 was incorrect and that he was over that age.

[See Annotation on Military Desertion Law at end of this case.]

Statement.

PROSECUTION for desertion from military unit.

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REX v. POULIN.

Langelier, J.

LANGELIER, J.:—The defendant is prosecuted for having absented himself without leave from the 57th Battery since the 10th of August, and of not having returned since.

It has been proved by the attestation paper that the accused was enlisted in the overseas forces on the 9th December, 1915, in presence of Capt. Goulet. He took the oath at the same date at Beauceville before Nap. Mathieu, J.P., for the district of Beauce; at the same place and date he went through the medical examination before Dr. J. A. Desrochers and was declared fit for service and afterwards was accepted by Lieut.-Col. Theo. Paquet, commanding officer of that unit.

The action has been taken in virtue of an order-in-council dated January 6th, 1916, which was passed in virtue of 5 Geo. V. ch. 2, sec. 6, called The War Measures Act.

Capt. Goulet swore that the accused, on his own request, had been transferred the 14th April last to the 57th Battery duly organized for active service as it appears in the Official Gazette of Canada at the date of 2nd September, 1916, p. 729.

The Crown has produced the engagement of the accused, signed by him, also a letter of General Fages, the officer commanding our military district, stating that the accused had been absent without leave. Beside that, Capt. Goulet has proved the arrest after the desertion.

The 57th Battery, overseas, has been regularly organized as a unit for overseas service by an order-in-council, published in the Official Gazette of Canada the 2nd September, 1916, at p. 729.

The accused, when he signed his engagement, declared upon oath that he was born the 28th August, 1872; his certificate of birth, which he now produces, states that he was baptized on the 27th August, 1869.

The learned counsel for the defence has contended that art. 243 of the King's Regulations, declares that enlistment is only allowed for men between 18 and 45, and the accused being 47, he could not become a soldier.

The War Measures Act, by decreeing the country in a state of war, has given extraordinary powers to the Governor-General in Council; it authorizes them to enact all regulations they think proper to assure the peace and the good defence of Canada.

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Taking advantage of such powers the Executive has declared in art. 3 of the order-in-council above cited, that the simple production of the attestation paper shall be a sufficient proof of such engagement. It is clear that it has been intended to put aside the strict rules of the King's Regulations. At present, all that is required by the law is that the man should be fit for military service; well, we have the certificate of a doctor which says that the accused possesses all the qualifications required to be a soldier. The Court has not to go further in the present case.

Capt. Goulet swore that he found the accused hidden in his cellar at Beauceville at 2.30 in the morning.

The contentions of the accused are the following:—

1. It has not been proved that the accused was a soldier.

2. To be a soldier one must have complied with the King's Regulations, par. 243, which allows enlistment only from 18 to 45 years of age.

3. The doctor who made the examination was not a military doctor and had no authority to examine him (par. 248 King's Regulations).

4. It has not been proved that his battery had left for overseas service.

Let us examine these different points.

The War Measures Act, 1914, states in sec. 5 that Canada is in a state of war since the 4th August, 1914, till the contrary is declared by a proclamation of the Governor-General in Council, and consequently, Parliament has given the Executive extraordinary powers, especially those mentioned in sec. 6 which empower them to make any regulations they think proper to assure peace and order and the defence and welfare of the country.

In virtue of these powers an order-in-council was passed on the 6th January, 1916, in which it is stated, by art. 3, that the simple production of the engagement in a military unit shall be a sufficient proof that the accused was duly enlisted; that a letter signed by the officer commanding a military district in Canada and stating that the accused is absent from the unit to which he belongs shall be *primâ facie* proof that the accused is absent from such unit.

It is to be noticed that the article makes a distinction between the proof of the engagement and the proof of the absence; the latter may be rebutted but not the former.

It has been proved: (1) That the accused has enlisted voluntarily in a unit for the overseas military service; (2) that such unit has been created according to law by an order-in-council; (3) that the accused has been declared fit for military service; (4) that he absented himself without leave. That is all that the prosecution had to establish to make out his case.

After all, the accused has signed a contract at an age when he is supposed to know what he was doing, himself and his family have benefited by it, and it is only when his battery is on the eve of leaving for the front that he discovered he was more than 45 years and could not be enlisted. The engagement is a serious contract (and not a mere "scrap of paper") which must be honoured.

If he wanted to be released from his contract why did he not apply to the proper authority? Why did he run away, setting such a bad example for his comrades?

I declare him guilty of the offence of which he now stands accused. *Defendant convicted.*

Annotation—Desertion (§ I—10)—From military unit. **Annotation.**

A new order-in-council in substitution for that of January 6, 1916, was passed at Ottawa on August 5, 1916, in the following terms (P.C. 1873):—

"Whereas it has been found that the Regulations made and established by order-in-council 6th of January, 1916, P.C. 3057, with the view of punishing and preventing the offence of absence without leave from the Active Militia and the Overseas Expeditionary Force, need amendment, therefore, the Governor-General in-Council is pleased to order that the said order-in-council shall be and the same is hereby cancelled.

"The Governor-General in Council, with the same purpose in view, and under and in virtue of the power conferred by section 6 of the War Measures Act, is further pleased to order and it is hereby ordered as follows:—

(1) Every man of the active militia of Canada, and every soldier of the Canadian Overseas Expeditionary Forces who absents himself from the corps or unit to which he belongs, without the leave of the Commanding Officer of such corps or unit, is guilty of an offence and liable upon summary conviction under the provisions of part XV. of the Criminal Code to imprisonment, with or without hard labour, for a term not exceeding two years.

(2) Notwithstanding anything contained in the Criminal Code, or in any other Act or law, any justice of the peace, police or stipendiary magistrate shall have jurisdiction to hear, try and determine any charge of an offence of absence without leave, although the offence may have been committed or be charged

Annotation. to have been committed outside the territorial division in which such justice, police or stipendiary magistrate ordinarily has or exercises his jurisdiction.

(3) The production of a Service Roll or Attestation Paper purporting to be signed by the accused and purporting to be an engagement by him to serve in the corps or unit from which he is charged with being absent without leave shall be sufficient proof that the accused was duly enlisted in the said corps or unit, and a written statement purporting to be signed by the Officer Commanding or administering a Military District in Canada and stating that the accused is absent from the corps or unit to which he belongs, shall be *primâ facie* proof that the accused is absent without leave from such corps or unit, and shall be sufficient to cast upon the accused the onus of proving that his absence from the corps or unit was duly authorized.

(4) Nothing in these regulations shall in anywise limit or affect the right of the military authorities to proceed in respect of any such offence according to the provisions of military law, but a person accused shall not be subject to be tried both by a military tribunal and by a civil Court for the same offence.

(5) The military pay and allowances of any person who has been convicted of absence without leave from his corps or from the unit to which he belongs may be stopped to make good any loss, damage or destruction by him done or permitted to any arms, ammunition, equipment, clothing, instruments or regimental necessaries, the value of which the Minister of Militia and Defence has directed him to pay."

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REX v. HURLEY.

Ontario Supreme Court, Kelly, J. February 21, 1916.

1. INTOXICATING LIQUORS (§ III H—90)—SEIZURE—GOVERNMENT ANALYSIS AS EVIDENCE—CERTIFICATE.

A municipal constable or policeman is not an "officer of the Crown" within the meaning of sec. 106 of the Liquor License Act, R.S.O. 1914, ch. 215, so as to make admissible in evidence for the prosecution under that section a certificate of analysis of alleged intoxicating liquors seized by him and forwarded at his instance to the provincial government analyst for analysis and report.

Statement. MOTION to quash the conviction of the defendant by the Deputy Police Magistrate for the City of Stratford for having, on the 19th December, 1915, kept intoxicating liquors for sale, without a license therefor, in violation of the Liquor License Act, R.S.O. 1914, ch. 215.

F. R. Blewett, K.C., for defendant.

J. R. Cartwright, K.C., for the Crown.

Kelly, J. KELLY, J.:—On the 7th January, 1916, Jerry Hurley was convicted by the Deputy Police Magistrate for the City of Stratford of having, on the 19th December, 1915, kept intoxi-

cating liquors for sale, without a license therefor. The present motion is to quash the conviction.

Hurley was the keeper of a restaurant in the city of Stratford; and, on the evening of the 19th December, the Chief of Police for the city and one of his officers entered the premises, and, finding two men in a room in the act of drinking the contents of two bottles which were purchased from the accused, seized the bottle in the possession of one of the men, Mallion, from which only a portion of the contents had been taken. Other bottles were also seized; but in his written reasons for his decision the magistrate confined his conclusions to the contents of the bottle taken from the possession of Mallion. The evidence of the Chief of Police is that he sent the Mallion bottle to the Government analyst at Toronto on the 21st December, and on the 23rd received the analyst's certificate, which was produced at the hearing, that the contents contained $7\frac{31}{100}$ per cent. of proof spirit.

By the Liquor License Act, R.S.O. 1914, ch. 215, sec. 2 (*i*), any liquor which contains more than $2\frac{1}{2}$ per cent. of proof spirits shall be conclusively deemed to be intoxicating.

The magistrate based the conviction on the evidence contained in the analyst's certificate; he says that, apart from that evidence, he would not have found the accused guilty. That, though the only finding against the accused, would be sufficient to sustain the conviction if the certificate was admissible in evidence.

Section 106 of the Liquor License Act provides: "In any prosecution under this Act the production by the Inspector or any officer of the Crown of a certificate signed or purporting to be signed by the Government analyst as to the analysis of any liquor and of an affidavit attesting the signature of such analyst, shall be conclusive evidence of the facts stated in such certificate."

One ground of attack on the validity of the conviction is in respect of the meaning of the words "Inspector or any officer of the Crown" in that section. Other grounds are also urged. "Inspector," when used in the Act, means an Inspector of Licenses appointed for a License District under the Act (sec. 2 (*d*)). In this instance it was the Chief of Police for the city who not only produced, but also procured, the analyst's certificate, and this, as far as the evidence shews, without the instructions, request or

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assistance of any other person, except the assistance of his subordinate in making the seizure and transmitting the bottles to the analyst. Admittedly he is not "the Inspector," and no claim can be or is made that he acted in that capacity.

But the position taken by the prosecution is that he comes within the designation of "officer of the Crown" as used in sec. 106. On this the whole case turns. He is not employed by or on behalf of the Crown (Municipal Act, R.S.O. 1914, ch. 192, sec. 360); remuneration for his services is not paid by or out of moneys of the Crown (secs. 363 and 368). So far as these indicate, he is an officer appointed by the city—the city's employee or servant. There is nothing before me to the contrary.

But sec. 129 of the Liquor License Act is appealed to as authority to support the Crown's contention that he is an officer of the Crown, within the meaning of sec. 106.

Section 126 of the Act authorises the appointment by the Lieutenant-Governor of one or more Provincial officers whose duty it shall be to enforce the provisions of the Act, and especially those for the prevention of traffic in liquor on unlicensed premises, and declares that any of these officers may be designated "Provincial Inspector;" that section also sets forth their duties and powers.

Section 128 empowers the Board (of License Commissioners appointed for any License District under the Act), with the sanction of the Lieutenant-Governor in Council, to appoint one or more officers to enforce the provisions of the Act, and especially those for the prevention of traffic in liquor by unlicensed houses, and declares that every such officer shall, within the License District for which he is appointed, possess and discharge all the powers and duties of Provincial officers appointed under sec. 126 other than those of the Provincial Inspectors.

The early part of sec. 129 is: "Every officer so appointed under this Act and every policeman or constable, or Inspector, shall be deemed to be within the provisions of this Act;" and to this the prosecution points as an expression by the Legislature of an intention to clothe all these persons with the right and authority to proceed under sec. 106, and produce, as conclusive evidence, a certificate such as that on which only the present conviction can be sustained. Though it is by no means easy to determine what the Legislature intended to convey by the language of doubtful

meaning used in this part of sec. 129, I am far from believing that it was the object to bring within the class "officer of the Crown," and clothe with the important powers conferred upon an Inspector or officer of the Crown by sec. 106, that numerous class of persons, scattered throughout the Province, answering to the name of policeman or constable, or that so important a part in the administration of an exacting law as laying the foundation for and procuring a piece of conclusive evidence not based on oath or affirmation should be entrusted to any one or other of that numerous class. If the framers of that legislation had in mind such procedure, they were unfortunate in their manner of expressing themselves.

But, when the remaining part of sec. 129 is examined, it speaks rather against the construction put upon the earlier part by the prosecution. Following immediately after the part of the section above quoted, and separated from it by a semicolon, is this: "and where any information is given to any such officer, policeman, constable, or Inspector that there is cause to suspect that some person is contravening any of the provisions of this Act, it shall be his duty to make diligent inquiry into the truth of such information, and to enter complaint of such contravention before the proper Court, without communicating the name of the person giving such information;" etc. This certainly does not assist the prosecution. Rather does it define—if indeed it does not limit—the duties of the officer, policeman, constable, or Inspector of making inquiry and entering complaint where information is given that there is cause to suspect a contravention of the provisions of the Act. But, of itself, this does not constitute the persons named officers of the Crown; and I know of no other reason for so considering them.

It is significant, too, that the Legislature has been careful, in just such cases as the present, to provide for the appointment for certain specific purposes of persons as Provincial officers (sec. 126), and for giving persons appointed by the Board of License Commissioners, with the sanction of the Lieutenant-Governor in Council, the powers and duties of Provincial officers (sec. 128). But such powers are not expressly conferred upon one holding only the position of Chief of Police, policeman, or constable; and the Chief of Police in this instance holds no such appointment and has had no such powers conferred upon him.

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I have not attempted to interpret fully the meaning of the earlier part of sec. 129, but I have no hesitation in saying that it cannot be so construed as to make of a policeman or constable an officer of the Crown with the powers conferred on such an officer by sec. 106.

The conviction cannot be sustained, and must be quashed; but, under the circumstances, without costs; and there will be an order of protection to the magistrate. *Conviction quashed.*

B. C.
C. A.

CHAMPION & WHITE v. VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. October 3, 1916.

WATERS (§ I C 4—41)—SEA-WALL—PRIVATE RIGHTS—ACCESS TO WHARF—INJUNCTION.

The erection of a sea-wall authorized by statute (False Creek Terminal Act, B.C. 1913, ch. 76), upon a foreshore owned by a municipality, cannot be enjoined because it partly interferes with a private right of access to a wharf.

[Navigable Waters Protection Act, R.S.C. 1906, ch. 115, considered.]

Statement.

APPEAL by defendant from the judgment of Hunter, C.J.B.C. Reversed.

J. E. Bird, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—By the judgment appealed from, defendants (appellants) were perpetually enjoined from constructing a sea-wall, a work which threatened to impede plaintiffs' access to their wharf on their own land. The defendants assert their right to build the wall under and by virtue of an order of the Governor-General in Council, passed pursuant to powers contained in the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, and an Act of the Provincial Legislature to which I shall presently refer.

I am of opinion that the order in council cannot in any way govern or assist in the decision of this appeal. As the guardian of the public right of navigation the Governor-General in Council permits the erection of the wall and so makes it lawful as against that right, but he does not purport to authorize interference with the private rights of owners of land of access to their own properties.

The injury which the plaintiffs apprehend from the erection of the wall is not to their rights as members of the public but to their private rights, and I think it has been abundantly proved that such injury would be occasioned by the erection of the wall.

False Creek is in reality an arm of the sea, and for the pur-

poses of this case counsel agreed that it is a public harbour within the meaning of that term as used in the B.N.A. Act. Whether it is in fact such is of no importance except as explaining the plaintiffs' title to the foreshore on which their wharf is erected, and as defendants do not dispute their title to the land, this subject, as I view it, may be dismissed from consideration.

This brings me to the substantial question involved in this appeal. The provincial statute referred to above is known as the False Creek Terminals Act, being ch. 76 of the Statutes of 1913. It confirmed an agreement entered into between the city of Vancouver and its co-appellant the railway company. The agreement is incorporated in and made part of the statute. Those sections and articles which relate to that part of False Creek east of Main street are not in question in this appeal. They relate to the reclamation of the shores of the creek for the purposes of the railway company, and contain some provisions for the protection of the rights of private owners. This action has to do with that part of False creek west of Main St., and with works intended to be of benefit to the city of Vancouver.

The city is the owner of the foreshore immediately to the south of plaintiffs' said land and wharf. The Act above referred to, *inter alia*, authorizes the city to construct reclamation works and to erect on their said foreshore a sea-wall commencing at the southerly boundary of the plaintiffs' wharf to be carried in a southerly direction to the city's market wharf. The effect of this erection would be to cut off plaintiffs' access to a portion of the southerly side of their wharf, and would thereby lessen their enjoyment of it.

Art. 18 of the agreement referred to authorizes the city to erect the sea-wall in question on the site on which it is proposed to erect it.

No powers of expropriation are given by the said False Creek Terminals Act because, I presume, none were required, the city being owner of the land on which its wall is to be built, nor is it expressly enacted in said Act that compensation shall be made to owners of lands injuriously affected by the erection of the wall. It is clear, however, from the language of said art. 18 itself that the legislature had in mind the fact that injuries to others might be occasioned by the erection of the wall. By the last clause of that article the city agrees with the railway company, its contractor

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for the work, to indemnify the railway company against "all claims of any person on account of any lands or rights in lands taken or injuriously affected by reason of works referred to in this article." The legislature, however, did not see fit to specifically enact that the city should make compensation to those so injuriously affected.

I refer to this anomalous situation not for the purpose of considering the effect of the clause just quoted in relation to a possible right in the plaintiffs to compensation (that question not being before us) but of distinguishing this case from *Metropolitan Asylum District* v. *Hill* (1881), 6 A.C. 193-208. There it was said that the legislature indicated no intention that the powers given should be used to the injury of the rights of others. Here, it appears on the face of the agreement ratified by the legislature, and made part of the statute, that the property and rights of others might be injuriously affected by the execution of the works authorized to be done. There is another clear distinction between this case and *Hill's* case, there, no specified site for the hospital was authorized, while here the site is fixed within narrow limits of deviation where *ex facie* it must cause the very mischief of which the plaintiffs complain.

If the statute were mandatory there could be no question of enjoining the defendants, but it is said that it is not mandatory, but merely permissive. Assuming this to be so, it is not, in my opinion, distinguishable from the statute in question in *Mayor, etc. of East Fremantle* v. *Annois*, [1902] A.C. 213. Each of these statutes grants powers to a public body to make municipal improvements. In each case the powers may be exercised or not in the discretion of the governing body. In the case at bar the city council by the sanction of the ratepayers as well as of the legislature undertook the precise thing which they have been enjoined from doing.

It may be that the legislature inadvertently omitted from the Act a compensation clause, or assumed that compensation could be claimed under the city's Act of incorporation. But it is needless to speculate as no attempt was made by plaintiffs' counsel to shew that, by the terms of any statute, payment of compensation was made a condition precedent to the defendants' right to proceed with the erection of the wall.

In these circumstances, I think the judgment cannot be supported, and that the appeal must be allowed and the action dismissed.

MARTIN, J.A.:—I concur in allowing the appeal which I think, in principle, comes within *East Fremantle Corp.* v. *Annois*, [1902] A.C. 213, and see also the next case in the same volume, p. 220, *Can. Pac. R. Co.* v. *Roy*; and *Hornby* v. *New Westminster S.R. Co.*, 6 B.C.R. 588; *Leighton v. B.C. Elec. R. Co.*, 18 D.L.R. 505, 20 B.C.R. 183; *Att'y-Gen'l for B.C.* v. *Can. Pac. R. Co.*, [1906] A.C. 204; *Laurentide Paper Co.* v. *The King* (1915), 15 Can. Ex. 499; and *Mayor of Hawthorn* v. *Kannuluik*, [1906] A.C. 105, the last of which is an instructive illustration of the deferred negligent exercise of statutory authority by a municipality.

GALLIHER, J.A.:—The trial Judge granted an injunction restraining the defendants from proceeding with certain works in the bed of False creek in the city of Vancouver, which works it was claimed by the plaintiffs (who are contractors and owners of a certain wharf contiguous to said proposed works) would interfere with their right of access to said wharf and brought their action for damages and for an injunction.

The short point is—does such action lie?

The defendant, the city of Vancouver, has obtained Crown grants from both the Dominion and Provincial Governments of the *solum* of False creek adjoining the plaintiffs' wharf, and they have obtained the sanction of the Governor-General in Council to erect a sea-wall and fill in the tide flat to the rear of it, and have entered into an agreement with the other defendants, the C.N.P.R. Co., to divide and reclaim the land, and this agreement has been confirmed and ratified by an Act of the legislature of British Columbia, being ch. 76 of the Statutes of 1913.

The order in council is dated August 25, 1914.

It is admitted for the purposes of this suit that False creek is a part of the harbour of Vancouver. The harbour commissioners have given their assent to the work being carried out.

The plaintiffs have from the outset opposed this work as it will undoubtedly interfere with their free access to their wharf on the south side, entirely as to 150 ft. in length, and as to the remaining 150 ft. the city's plans are so drawn as to leave a space of water 100 by 150 ft. as access, the access to the other sides of the wharf not being interfered with.

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In so far as the order-in-council gives authority, that order was granted in face of the plaintiff's protest, and after examination and report by the government engineers, and after due consideration, and was for the erection of specific works according to plans and specifications and covering a definite area.

If the defendants can, as they urge, rely on this order-in-council as sufficient to entitle them to proceed with the work, then I think the order on its face is an answer to the plaintiffs' action.

I think, however, this order-in-council, which is granted under the powers given by the Navigable Waters Protection Act, R.S.C. 1906, ch. 165, extends only to public rights of navigation and is not applicable to any private rights of the plaintiffs that might be infringed.

We then turn to the Act of the local legislature above referred to, confirming the agreement between the respective defendants, incorporating its terms and giving to the respective parties thereto the power to enter into and carry out the proposed works.

This Act contains no conditions precedent which if not complied with would entitle the plaintiffs to an injunction: moreover, the Act recognized that the doing of the work in the specified area in which it is authorized to be done is likely to cause injury to particular individuals and provides for indemnity by the city to the railway company, and brings it within the principle referred to by Lord Blackburn in *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 203.

It may be that plaintiffs are entitled to relief in some other form if the work proceeds, upon which I express no opinion as the only point before us is as to whether the injunction should have been granted, and in my opinion it should not.

This injunction should be set aside and the action dismissed with costs.

McPhillips, J.A.

MCPHILLIPS, J.A. (dissenting):—The evidence discloses that the respondents' predecessors in title constructed a wharf upon the foreshore in front of the lands and access to the lands is over the wharf, and this wharf has been in use for many years. It would appear that an application was made to the Dominion Government for leave to construct a wharf sometime in 1903 or

1904, but the wharf was built without awaiting any express leave, and it is questionable, in fact, it would look as if, at the time, the statute law did not require any leave to be first had and obtained. It would also appear that in 1908 the respondents' predecessors in title obtained a Crown grant from the Government of the Dominion of Canada of the *solum* of False creek adjoining the lands covered by the Provincial Crown grant, and the plan attached to the Dominion Crown grant shews thereon that the area so granted was to have erected thereon a wharf which at the time, as a matter of fact had been for some years already constructed, and it is the interference with access to this wharf and the access to the lands of the respondents and threatened further works that forms the subject-matter of the action.

Unquestionably the works contemplated by the appellants and against which they have been enjoined would irreparably interfere with the respondents proper enjoyment of a very large portion of their wharf, to the extent of at least 150 ft. of the frontage thereof, and also prejudicially if not irreparably affect the respondents in their enjoyment of riparian, littoral or other rights appertaining to their lands.

The city of Vancouver, the appellants, has obtained Crown grants from the Governments of the Dominion of Canada and the Province of British Columbia to the *solum* of False creek adjoining the wharf, and have obtained the sanction of the Governor-General in Council to the erection of a sea-wall, and to fill in the tide flat to the rear of it for the purpose of creating a terminal area for the Canadian Northern Pacific R. Co. (also defendants in the action, but not appealing), the area so created to be conveyed to the railway company by the city of Vancouver, the scheme and the agreement entered into between the appellants and the railway company being ratified and confirmed by the Legislature of the Province of B.C. by the False Creek Terminals Act (ch. 76, 3 Geo. V. 1913).

It was strongly urged upon the Court below that the respondents' predecessors in title had unauthorizedly constructed the wharf, that although applying for leave, leave was not granted under sec. 7 of the Navigable Waters Protection Act (ch. 115, R.S.C. 1906), at the time of the construction of the wharf; however, the Act did not expressly refer to the construction of wharves.

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It may be remarked that it is common public knowledge and such as may be taken judicial notice of that for many years, and even up to the present time, the Provincial Government constructed and maintained hundreds of wharves throughout the province without leave being obtained; so also did the inhabitants of the country, as at many points by the utilization of wharves only could settlement be carried out and lands enjoyed, there being no transportation facilities by roads save to and from the wharves dotted along the hundreds of miles of coast line.

I am in agreement with Hunter, C.J., that the wharf cannot be said to have been illegally constructed, in fact, it may well be said that the wharf was authorized, if any authorization was necessary from the Crown, in that the Dominion Crown grant contemplated the erection of the wharf, and at that time the Navigable Waters Protection Act did not require leave to be first had and obtained; further, it has not been shewn that the wharf interferes in any way with navigation or is a nuisance, and the Crown is not a party to these proceedings: in my opinion, it must be held that the respondents are rightly entitled to maintain the wharf and be protected in the enjoyment thereof.

It is to be remembered that without statutory ratification and confirmation, the agreement ratified and confirmed by the False Creek Terminals Act would be without the power of the city of Vancouver to enter into (ch. 54, 64 Vict. 1900; Vancouver Incorporation Act, 1900), under which agreement the proposed works are to be carried out and where the city of Vancouver, in the ordinary exercise of its powers, injuriously affects any lands, compensation is payable, and if not agreed upon, such compensation shall be determined by arbitration.

The *modus operandi* by which the proposed works are to be carried out is, by having the railway company do the work, that is, the contractual obligation entered into between the railway company and the appellants; this is clearly shewn by reference to art. 18 (*a*), (*b*) of the agreement as set forth in the schedule to the False Creek Terminals Act.

It may be said that the "foreshore rights, interests or rights of access" are rights and interests confined to the lands specifically mentioned, but when the False Creek Reclamation Act and the False Creek Terminals Act and the agreement made a

schedule thereto, the foundation upon which the appellants must rest in undertaking and executing the proposed works, are carefully read, there is the statutory requirement to make compensation, in my opinion, for all foreshore rights, riparian, littoral rights or rights of access affected by the carrying out of the undertaking. This is punctuated and clearly brought out by reference to the following words to be found in sec. 2 of the False Creek Reclamation Act, "and rights littoral, riparian interests, or rights of access to the waters of False Creek, or foreshore rights, in, on, or contiguous or appertaining to the same," if, however, I should be wrong in this, then the compensation would have to be arrived at by the necessary preliminary steps and the procedure as laid down in the Vancouver Incorporation Act, 1900. It cannot be that the works, being merely approved under the provisions of the Navigable Waters Protection Act (Dominion), means that no compensation is payable, especially when it is considered that the subject-matter is within the definition: "Property and Civil rights in the Province" (B.N.A. Act, 1867, sec. 92 (13)).

Hammersmith v. *Brand* (1869), 38 L.J.Q.B. 265, and many cases following that decision are strongly relied upon by the appellants as absolving them from the requirement to pay compensation. It is to be observed, though, that that case, of the highest authority of course, proceeded upon the provisions of the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act, and further, it was there held that it was not established that any lands were injuriously affected: no land was taken nor was the access to any land affected, the latter of which is the case here. The case can readily be distinguished.

The case of *Leighton* v. *B.C. Electric R. Co.* (1914), 20 B.C.R. 183, may also be distinguished where *London and Brighton R. Co.* v. *Truman* (1885), 11 App. Cas. 45, was followed.

The present case is one where the municipal authority is given statutory powers to execute certain works, but it still remains the same municipal authority with corporate existence under provincial legislation, viz., Vancouver Incorporation Act, 1900, and in the exercise of powers of expropriation must make compensation for real property taken or used or injuriously affected (*vide* ch. 54-64 Vict. 1900, sec. 133 (5)), and it is plain

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that compensation must be payable if not under the provisions of the False Creek Reclamation Act and False Creek Terminals Act, then under the Vancouver Incorporation Act, 1900, that the powers conferred by the former Acts must be considered wholly apart from the statutory obligations imposed under the Vancouver Incorporation Act, 1900, would not seem tenable when it is observed that the by-law approving of the agreement statutorily ratified and confirmed by the False Creek Terminals Act was voted upon by and received the assent of the electors of the city of Vancouver in conformity with and in the manner provided by the provisions of the Vancouver Incorporation Act, 1900. Can it be reasonably said, in view of this, that the obligations in regard to compensation would not be applicable when lands will be injuriously affected in the carrying out of the works as well as riparian, littoral or foreshore rights, interests or rights of access?

The respondents in the present case are not only entitled to the same right and privilege, but, in their case, they have the right in the *solum* of the bed and foreshore of False Creek adjoining their lands, and upon which the wharf is situate, a grant from the Dominion of Canada, in point of time anterior to the grant made to the appellants, and described to be, by the plan attached, a site for a wharf.

The sea-wall, the proposed works, admittedly will affect the respondents in obtaining access to the sea, and is an injurious affection and deprivation of that privilege referred to by Lord Dunedin in *Odlum* v. *Vancouver*, *sub nom.*, *False Creek Reclamation Act* (1915), 22 D.L.R. 117, at 120, and takes away value from the land apart from the very grave damage occasioned to the respondents in the enjoyment of their wharf, and the shipping privileges connected therewith. Lord Dunedin refers to the necessity for the approval of the Crown where works are to be constructed in navigable waters.

It is evident, therefore, that the approval by the Crown of the proposed works of the appellants confers no title in the lands, and it is clear that the appellants are not possessed of the riparian interests in the lands of the respondents to be affected by the works, those interests admittedly being in the respondents. It would follow that it cannot, with any hope of success, be claimed

that the effect of the allowance by the Crown to construct the sea-wall operates to exclude all right to compensation, or that the respondents have not the right to have an injunction restraining the appellants from so constructing the works as to prevent their obtaining access to the sea from their lands or any part thereof and the enjoyment of the wharf and shipping facilities over the same.

Turning to the case of *Buccleuch (Duke)* v. *Metropolitan Board of Works* (1872), 41 L.J. Ex. 137, L.R. 5 H.L. 418, it will be found that the decision of the House of Lords was, and it is peculiarly applicable to the present case, that when lands are injuriously affected by the construction of works authorized by an Act of Parliament, the owner is entitled to compensation if an easement appurtenant to the lands is taken, just as he would be if part of the lands was taken.

Corporation of Parkdale v. *West*, 56 L.J.P.C. 66, held, that notwithstanding the order of the Railway Committee, the railway company were not enabled to take land or interfere with private rights without complying with the provisions of the Railway Act, and that all provisions of the Act were applicable to compensation for land injuriously affected, and that the company were bound to make compensation under the Act before interfering with the respondent's rights. In that case, as in the present case, no notice was given to the respondents nor was any compensation offered, although based upon different statute law than that at present under consideration, yet, in my opinion, we have equally forceful legislation, and the principle laid down in the case is applicable here.

In the present case, in my opinion, it was a proper case for the granting of an injunction.

The *Parkdale* case was followed in the Privy Council by *Saunby* v. *London Water Commissioners*, 75 L.J.P.C. 25, [1906] A.C. 110.

Should I be wrong in my opinion that the appellants are by reason of the provincial legislation compellable to pay compensation and compellable to take the steps and have the compensation fixed before proceeding therewith, but that the appellants in the construction of the proposed works are entitled to construct the same, subject only to the allowance by the Crown

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under the Navigable Waters Protection Act, which imposes no compensation, then, my opinion is, that the Navigable Waters Protection Act being permissive only in its terms, not imperative, the appellants are liable to the respondents and cannot evade that liability by pleading the Order in Council granted in pursuance of the Navigable Waters Protection Act, and this liability will exist even if the works were to be executed, without negligence, and where injury is shewn or will admittedly ensue if the works are constructed, the proper remedy is an injunction restraining the construction of the works. That this is the law, it is only necessary to refer to *C.P.R. Co.* v. *Parke*, [1899] A.C. 535, 68 L.J.P.C. 89.

The judgment of Lord Watson in its entirety is very instructive, and is a clear demonstration of the law that, where the legislation is permissive as clearly the Navigable Waters Protection Act is, the right granted to the appellants to construct the sea-wall is conditional upon it being done without injury to other lands and the rights appertaining thereto, which, in the present case, is at the very least the right as defined by Lord Dunedin in *Odlum* v. *City of Vancouver, Re False Creek Reclamation Act*, *supra*, at p. 120: "The right of going over the foreshore whether covered by water or not and so obtaining access to the sea," but, in my opinion, upon the special facts of this case the respondents have other and greater rights to the enjoyment of which they are entitled, and they are all those rights and shipping privileges that are attendant upon the ownership of the wharf and the right to maintain the same, and the free access to the same from the fairway, and that the appellants are rightly entitled to the injunction granted by the Chief Justice of British Columbia at the trial, viz., an injunction restraining the appellants, their servants, agents and workmen from so constructing the sea-wall and the works generally, as to interfere with the respondents' rights of access to the sea from all or any portions of the lands held by them, and the right of access to the sea over the whole frontage of the wharf and shipping facilities over the same and restraining the appellants generally from any act to the injury of the respondents' rights and privileges.

I am therefore of the opinion that the judgment of the Court below should be affirmed and the appeal dismissed.

Appeal allowed.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 11, 1916.

RELIGIOUS SOCIETIES (§ III A—21)—CONVEYANCES TO—CHURCH LANDS ACT—INSURANCE.

Even though the form set forth in sec. 1 of the Church Lands Act, R.S.M. 1913, ch. 31, is not exactly followed, the statute applies to land conveyed to trustees and their successors and assigns in trust for a church congregation, if the name of the church or congregation is set forth in the conveyance; the trustees, though not a corporation, may hold the land and may procure the insurance of buildings on the land. (Per Howell, C.J., Cameron and Haggart, JJ.). No opinion on this point was expressed by Richards, J., It was held by Perdue, J., that the form set forth in the Act must be strictly followed.)

Statement.

APPEAL by defendant from the judgment of Galt, J., in favour of plaintiff in an action upon a policy of insurance. Reversed.

C. P. Fullerton, K.C., and *Colwill*, for appellant.

T. J. Murray, for respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—The conveyance by which the land was acquired upon which the church, the subject-matter of this action, was built, was made between the grantor and three trustees whose names are given, and then follows, "as trustees of the Greek Ruthenian Church of East Selkirk." In the effective portion of the conveyance the following appears:—

He, the said party of the first part, doth grant unto the said parties of the second part, their successors and assigns forever.

The *habendum* clause is:—

To have and to hold unto the said parties of the second part, their successors and assigns to and for their sole and only use forever.

It will be observed that the *habendum* clause does not set forth the trust as fully as form No. 1 in the schedule to the Church Lands Act, R.S.M. ch. 31, and at the threshold we must consider whether sec. 2 of the Act requires that the conveyance must be in the identical form given in the schedule in order that it may come within the Act.

Form No. 1, in addition to giving the operative words, gives also exact covenants, and I can imagine that churches might want to buy equities of redemption or long leaseholds, and generally may want to acquire titles where covenants in that form are not applicable and should not be used. In this conveyance the grantees are clearly, at law, trustees for the congregation therein mentioned although perhaps without the Act there might be no remedy. I think the meaning to be given to sec. 2 is that

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if a conveyance is executed to trustees in trust for some church or congregation, the name of which is set forth in the conveyance, with limitation to successors, the Act applies.

Then, if the Act applies to this conveyance

> such trustees and their successors in perpetual succession by the name expressed in the deed . . . may take, hold and possess the lands therein described and maintain and defend actions and suits for the protection thereof and of their property therein.

The above quoted portion of sec. 2 was apparently copied from the Ontario Statute, 36 Vict. ch. 135, and the various consolidations following it. Proudfoot, V.-C., in *Trustees* v. *Maguire*, 23 Gr. 102 at 105, held, under the first-mentioned statute, that the above quoted words created an artificial person or quasi-corporation capable of holding land, and of bringing an action, and he does not think it necessary to hold that they are an incorporated body. He is apparently supported in this view by the late Hagarty, C.J., in *Trustees* v. *Grewer*, 23 U.C.C.P. at 533, and by the late Gwynne, J., in *Humphreys* v. *Hunter*, 20 U.C.C.P. 456 at 461.

I feel justified in following the decisions of these distinguished Judges, and in holding that the trustees and their successors by the name expressed in the deed may hold this land, and I think, further, may in that name enter into contracts of insurance of the buildings erected upon the land.

It appears about 40 people of Slavic origin in East Selkirk contributed the money to purchase this land, and that these people erected a church upon the property. From time to time for several years services were held in the church, in which apparently the congregation joined; but, apparently, dissensions arose in which one faction wished to have the church, its priests and services in communion with Rome; the other faction was desirous of remaining independent of Rome. It appears that an ecclesiastic named Bishop Budka represented those Ruthenians of the Greek Church in this province who were in communion with Rome, and apparently they called their church or society the "Ruthenian Greek Catholic Church."

On February 22, 1913, some years after the land had been acquired, and the church built, a meeting was held at which apparently a large portion of the congregation was present and resolutions were passed for the purpose of incorporating under sec. 4 of that Act.

Resolutions were passed and at the beginning of them it is declared to be "a general meeting of the Greek Catholic Church of East Selkirk." The first recital is:—

Whereas the members of the congregation known as the Greek Catholic Ruthenian Church of East Selkirk . . . deem it expedient to incorporate the said church.

The enacting part of the resolution is as follows:—

Be it therefore resolved as follows,—

That the said Church shall be known by and incorporated under the name of the "Trustees of the Greek Catholic Ruthenian Church of East Selkirk in the Province of Manitoba."

Those parties, members of the congregation, not wishing to be in communion with Rome were called "Independents," or the "Independent Greek Church."

After this meeting, owing to the dissentions, no services were held in the church for more than a year, and finally, on May 5, 1914, a settlement was arrived at by which the whole property was to be vested in the Bishop.

To carry that into effect a document in the nature of a quit-claim deed with a statement that $200 was paid to the parties of the first and second parts and a further sum of $300 was to be paid in the future, was drawn up, the parties of the first part being a large number of individuals described as "Trustees of the Greek Ruthenian Church of East Selkirk," the parties of the second part being two individuals described as "Trustees of the Ruthenian Greek Catholic Church in Communion with Rome of East Selkirk." The party of the third part is described as "Nicetas Budka, Bishop of the Diocese of Canada of the Ruthenian Greek Catholic Church in Communion with Rome," and the same was executed by the parties of the first and second parts.

A regular conveyance was then drawn up between three persons, each of whom claim to be members of the Independent Greek Church, and are therein described as "Trustees of the Greek Ruthenian Church of East Selkirk" of the first part, and the said Bishop, described as in the above mentioned document, of the second part. This conveyance was executed by the three trustees, and these two documents constituted the settlement of the matters in dispute.

It seems clear that the above conveyance had no effect whatever as there was no compliance of any kind with the requirements of the statute, but I refer to these documents to shew that

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the plaintiffs treated with those who claimed to be Independents as a body who had rights, and that they thought that trustees by the name expressed in the original deed were the proper parties to convey the land.

The plaintiffs had assumed a different name from that expressed in the deed, and perhaps it was agreed by way of settlement that the Independents should use that name and convey the land to the Bishop.

Whether trustees under sec. 4 of the Act can incorporate under a different name from that expressed in the deed as provided in sec. 2, and whether the provisions of the Act have been complied with and a corporate body by the plaintiffs' name has been created, are questions that I do not think necessary to discuss in this suit.

After the erection of the church building the defendants insured it, but it is not clear what name was given in the policy to the insured. However, the term of insurance expired, and after the church meeting, and on February 5, 1914, the policy of insurance sued on was issued, apparently by way of renewal of the old policy. The old trustees, not those appointed at the meeting, effected the insurance, and they gave the required premium note and the policy was issued insuring the building against loss by fire, in the name of the "Greek Independent Church."

The trustees who actually procured this insurance, and who gave the premium note were not friendly with those who wished to be in communion with Rome, and no doubt wished to insure in favour of the other faction, and I conclude from the evidence that the word "Independent" used in the policy clearly shews that the party in favour of communion with Rome was not intended to be covered by the risk. There was no mistake in the the policy; it was issued in the form intended by the applicants.

That there were two separate parties in the congregation the evidence of the Bishop given at the trial clearly shews, and the parties to the deeds to the Bishop, above referred to, shews the names, one party is "Trustees of the Greek Ruthenian Church," and the other is "Trustees of the Ruthenian Greek Catholic Church in Communion with Rome," and these two parties endeavoured to settle their dispute as to the ownership of this church building. Before the settlement the trustees—the parties

of the first part in the deed—procured the insurance, but took it in the name of "The Greek Independent Church," which is not the name of either party.

As before stated, I think that "The Trustees of the Greek Ruthenian Church of East Selkirk" had power to insure the church building, because they were the owners and were by the statute given power to act as a body. If the policy sued on was intended for their sect and by mistake it was made in its present form, and if they or their sect were the plaintiffs, the matter might require serious consideration; but the opposite is the fact. The parties who really procured the insurance are not plaintiffs, and the insurance was not intended for the benefit of the plaintiffs.

There is no policy or contract of insurance under seal issued by the defendant company to the plaintiffs, and when the contract was applied for or entered into, it was not intended to be for the benefit of the plaintiffs but for another party, and the plaintiffs do not pretend that they procured that other party's rights to the insurance. If anyone acquired that right to this property and the insurance, it was the Bishop.

I cannot in any way see how the letter to the defendants of October 23, 1914, and the change made in their policy-register without any change in the policy can create a new parol insurance binding on the defendants.

The appeal must be allowed with costs.

Howell, C.J.M.

HAGGART, J.A., agreed.

Haggart, J.A.

RICHARDS, J.A.:—The evidence of Bishop Budka as to the existence of the Independent Church is, I think, more reliable than that of the members of the congregation called in rebuttal.

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A man who has been admitted to the priesthood and attained to his rank in the church, must necessarily know more about such matters than men in the position of life of those members. Apart from that, the evidence was against his own interest. He distinctly said that there was such an independent body, and that they were known as "Independents."

The word "Independent" may or may not have been part of the title or name of that body, but its use in the name given in the policy shews that it refers to that body. It is apparently used ordinarily to distinguish that body from the Greek Catholic Ruthenian Church in communion with the Church of Rome.

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It could, therefore, not in any way be held to refer to the body so in communion.

The church named in the policy as "Greek Independent Church" can necessarily not be that so in communion, and for which the plaintiffs claim to be trustees.

Both the original policy and that sued on were applied for by men who had been chosen trustees of the Independent Church, and who never went over with the majority of the congregation to allegiance to the Roman Church. It seems to me that they were acting for the Independent Church when the insurance was first effected. They applied for the renewal without disclosing that they represented any other.

It is true that, after the second policy was issued, the defendants were informed that the Church was "no more Greek Inpendent" but was "acknowledged Ruthenian Greek Catholic Church," and were at the same time paid an assessment, which they accepted, and that the name was changed in the policy register in accordance with that notice. But the policy itself was not changed, and there is no evidence of any transfer of it from the Independent Church in whose name it issued, or from the latter's trustees.

Assuming the deed from the original owner, Morrison, to have been within the purview of the Church Lands Act (as to which I express no opinion) it was clearly, I think, a deed to trustees of the Independent body. There is no conveyance shewn from them to the church in communion with Rome, or to its trustees. The election of the latter trustees, if duly made, would not make them the successors of the trustees of a separate religious body.

It is true that the last named trustees purported to convey the land to Bishop Budka, but that conveyance states no trust in favour of his religious body, which the plaintiffs claim to represent, and there was no evidence of such a trust. It was not made under the provisions of the Church Lands Act as to sales of church lands, and was therefore, I think, inoperative.

I am unable to see that the title to the policy, or to the land, ever departed from the Independent body; and that body is not a party to this action.

There are decisions shewing that a contract of insurance may, under certain circumstances, exist without the issuance

of a policy. But, as far as I can see, none of them say that such a contract may be made in variance of an existing policy.

The statement of claim does not seek to reform the policy. It describes it as one in favour of the plaintiffs, which I think it is not.

I think it unnecessary to express an opinion on the questions whether the plaintiffs ever were incorporated, or are a legal entity, or on any of the questions raised other than what I have dealt with above.

I would allow the appeal with costs and set aside the judgment in the Court of King's Bench, and enter judgment there in the defendants' favour.

Richards, J.A.

PERDUE, J.A.:—Words of limitation are not necessary in a conveyance of land in this Province: R.S.M. 1913, ch. 181, sec. 12. The grantees therefore took an estate in fee simple in the land, but the words that appear on the face of the deed shew that there was a trust in favour of the Greek Ruthenian Church of East Selkirk. These persons, therefore, held the land in trust for the Church, but if there should be a change in the trustees a conveyance to the new trustees would be necessary unless the provisions of the Act apply. The purpose of sec. 2 of the Act was to enable the trustees to hold the church land in such manner that upon a change of trustees, duly made in accordance with the provisions of the Act, the land would automatically pass to the new trustees without the necessity of a conveyance from the former trustees. The Act gives the form of a deed which will have this effect. It does not provide for any departure from it. The provision in the Act prescribing a means by which land may pass from one person to another, without any form of conveyance, is a radical interference with the law of real property. The form of deed provided by the Act should, I think, have been followed in so far as the operative part of it is concerned. So vital a departure as the omission of the *habendum* clause prescribed and the insertion of one of a completely contradictory character, precluded the deed from conferring the extraordinary quality contemplated by the Act. There is no evidence that the Greek Ruthenian Church of East Selkirk was ever incorporated. The land upon which the church was built would only pass from the original trustees by a deed of conveyance duly executed by them or the survivors of them.

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On January 6, 1911, an application for insurance on the church in the amount of $800 was made to the plaintiffs by "John Koliski, and John Kalecki, trustees of church." I take it that the name Koliski is the same as Kolencki who is one of the grantees in the deed. A policy for $800 was issued by the defendants insuring the church for three years from 6th January, 1911. This policy has been lost, but the register of the defendants contains the following entry: "Name of insured church, John Kolinski, post office East Selkirk." On January 6, 1914, when the first policy was about to expire, an application for a new policy was made to the defendants for the same amount by "John Kolinski and Steve Evanczuk, trustees of church." In the application the property is described as a dwelling house, but the defendants knew that the church was intended to be insured, and I do not think that anything turns upon what was manifestly a verbal error.

A policy was eventually issued for $800, dated February 5, 1914, for three years from that date. The name of the insured was given as "Greek Independent Church, Lot 16, Townsite of East Selkirk." The church was destroyed by fire on April 4, 1915, and it is upon this policy that the present action is brought by the plaintiffs. A letter (ex. 4) had been written on January 6, 1914, by one Popham, the defendants' agent at Selkirk, to the defendants' manager, enclosing the application for the new policy and describing it as from "John Kolonski, Trustee of Greek Independent Church." He goes on to say: "This Church was described last time as being a united Greek and Polish Church. The Poles have built a church for themselves since, so the Greeks are left to themselves now." However erroneous the statement in the last sentence may have been, it was from this letter that the defendants received information as to the name of the church to be insured.

About the end of the year 1912 a dispute arose between two religious factions in the congregation, one being known as the "Independents" and the other, the "Ruthenian Greek Catholics." The difference between these two bodies is given by Bishop Budka, the head of the Greek Catholic Ruthenian Church in this Province, the religious sect to which the plaintiff congregation belongs. He says the "Independents" are so called because they are "independent from the Bishop." He further states that the Greek Catholic Ruthenian Church is in communion with Rome while

the "Independents" are not. Kolencki, Kolonski or Kolinsky, as the name is variously spelled, who was one of the first trustees, gives the name of the church to which he belongs as the "Greek Ruthenian Independent." According to his evidence the first three priests who conducted the services in the church after it was built were Independents, and were not in communion with Rome. They conducted the services in Ruthenian. Under the fourth priest, Marcovitch, who was a Pole and an Independent, but conducted the services in Latin, the dissention in the church broke out. From early in the year 1913 until May, 1914, few, if any, services were held.

On February 22, 1913, a meeting was held by a number of persons calling themselves the congregation known as the Greek Catholic Church of East Selkirk in the Province of Manitoba. This meeting purported to have been called pursuant to the Manitoba Church Lands Act. A resolution was passed declaring that the church should be known and incorporated under the name of the "Trustees of the Greek Catholic Ruthenian Church of East Selkirk in the Province of Manitoba." It was further resolved that five trustees should be elected at the meeting who should have all the powers of trustees under the Act. It was also declared that all persons who may have acted as trustee or trustees of the church in the past should cease to be trustee or trustees of the church. It does not appear that the provisions of section 4 of the Church Lands Act were sufficiently complied with, but I do not base the decision in this case upon that objection.

No conveyance of the land from the trustees named in the Morrison deed to the plaintiffs was ever procured.

On May 5, 1914, a settlement was made between the dissentient parties. A document was drawn up in the form of a deed in which the parties of the first part were some thirty-two persons named and also the "Trustees of the Greek Ruthenian Church of East Selkirk." The parties of the second part were one Skalecky and one Znak, described as "The Trustees of the Ruthenian Greek Catholic Church in communion with Rome, trustees of the Greek Catholic Church at East Selkirk." The party of the third part was "Nicetas Budka, Bishop of the Diocese of Canada of the Ruthenian Greek Catholic Church in communion

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with Rome." The document recites that a "difference of opinion has arisen among the members of the Greek Catholic Church at East Selkirk as to the right to the use and occupancy of the said Church," and that the parties of the first and second parts have agreed to release to the party of the third part, Bishop Budka, all claim on the property. The consideration was the payment of $500 to the parties of the first and second parts payable, $200 in cash and $300 in annual instalments. The document purports to grant the land on which the church stood to Bishop Budka, and contains certain covenants, one of which is, that the parties of the first and second parts will not interfere with the management and control of the church. There is another covenant for the giving of a mortgage to secure the payment of part of the purchase money. The document was signed by the trustees of the Greek Ruthenian Church of East Selkirk, whose names were Evanczuk, Micak and John Kolinski, but it was not signed by the other persons mentioned as parties of the first part. The trustees named as parties of the second part also signed. This instrument was followed by a deed in the usual form, dated May 15, 1914, from Evanczuk, Micak and Kolinski "Trustees of the Greek Ruthenian Church of East Selkirk," to "Nicetas Budka, Bishop of the Diocese of Canada of the Ruthenian Greek Catholic Church in communion with Rome," conveying the land to the latter. None of the persons who received the grant of the land in the first place as trustees of the church signed either of the above conveyances, except John Kolinski.

The policy in question had been issued some three months before the above conveyances were made. No assignment of the policy was executed either to the Greek Catholic Ruthenian Church or to Bishop Budka and no consent or permission to assign was given by the defendants. Under the 4th statutory condition indorsed upon and forming part of the policy, written permission to assign must be indorsed upon the policy, and if the policy is assigned without such permission it is to be void. By sec. 42 of the Mutual Fire Insurance Act, R.S.M. 1913, ch. 101, under which the defendants were incorporated

failure to notify the company of any change in the title or ownership of the insured property and to obtain the written consent of the company thereto shall render the policy void, and no claim for loss shall be recoverable there-

under unless the board of directors in their discretion shall see fit to waive the defect.

There is no pretence that the board ever did waive the defect.

In October, 1914, the defendants sent an assessment notice calling for a payment of $6.40 on the premium note which had been signed by S. Evanczuk and John Kolinski as trustees, presumably, of the Greek Independent Church. This amount was paid by one Andry Skalecky on behalf of the Ruthenian Greek Catholic Church, who wrote to the defendants saying, "Our church is no more Greek Independent, but is acknowledged Ruthenian Greek Catholic Church." The defendants then changed the name in their policy-register, but the policy itself was not changed. The notification to the defendants only called attention to a change of name and not to a change of ownership from one religious sect to another. In June, 1914, Mr. Hastings, a solicitor, wrote to the company that the property had been sold to Bishop Budka, and that his clients had taken a mortgage back. The manager wrote in reply stating that it was necessary that the sale clause should be filled out on the back of the policy and signed by the trustees, the collateral security clause signed by Bishop Budka, the policy forwarded along with a premium note from the Bishop and payment of assignment fees made. None of these requirements were ever complied with. Whether the letter in reply was received by Hastings or not does not make any difference. The absence of any assent on the part of the defendants to the change in ownership of the property is a complete bar to recovery on the policy. See *Peuchen Co.* v. *City Mutual Fire Ins. Co.*, 18 A.R. (Ont.) 446.

The evidence, both oral and documentary, clearly shews that a large number of the persons comprising the congregation of the church belonged to a sect commonly known by the name "Independents," and that the services in the church were for several years conducted by priests belonging to that sect. Kolencki, one of the original trustees mentioned in the deed from Morrison, states that the original church built on the property was the Greek Ruthenian Independent. In the deed the name of the church is given as the Greek Ruthenian Church. The only difference is in the use of the word Independent. I think the evidence establishes that the church property was held by the

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grantees in the Morrison deed in trust for the sect or denomination commonly known by the name "Independents."

The insurance in question was effected while the dispute over the possession of the church was still proceeding, and the insurance was taken by the trustees of and for the benefit of the sect known as the Independents. I have already shewn that there was no assignment of the policy to the plaintiffs and no permission to assign given by the defendants. It appears to me impossible to hold that the insurance was effected in reality for the plaintiffs. The "Greek Independent Church" is the party insured by the policy and made one of the defendants' members under the Act and the terms of the policy. It would be strange to find the trustees of that sect insuring the church in the name of their own particular denomination and signing the premium note, while the benefit was to go to another sect which was bitterly contesting their right to the ownership of the church.

If the deed of May 5, 1914, is effective, it debars the plaintiffs from any interest in the church property. The purpose of that deed is to vest the property in the Bishop. It purports to be executed by the trustees of the plaintiffs. If the property belongs to the Bishop he should sue for the insurance. In no aspect of the case can I find any right in the plaintiffs to maintain the action.

Although the foregoing reasons are sufficient to disentitle the plaintiffs to recover, I would briefly refer to another difficulty in their way. At the time the application was made for the insurance, namely, January, 1914, the contest between the rival factions in the church was still proceeding and no services were being held. No intimation of this was given to the defendants. These facts were material to the risk and should have been disclosed under the statutory conditions. One can scarcely imagine any insurance company accepting the application for insurance on this church if it was aware of the actual state of affairs existing at the time. It is significant that the plaintiffs in their statement of the loss furnished to the defendants say that the fire is believed to have been of incendiary origin. The facts given in the proofs of the loss seem to afford a foundation for this belief.

I think the appeal should be allowed with costs and the action dismissed with costs.

CAMERON, J.A. (dissenting):—The defendant company set up various defences, amongst them, alleging the condition in the policy regarding change material to the risk, and that there was a change of ownership of the property insured (of which the company was not notified), the circumstances of which are set out in detail.

The main contention of the defendant company is set forth at length in par. 15 of the statement of defence, which states the conveyance from Morrison to Kolenki, Paceka and Volanik, January 15, 1909, Trustees of the Greek Ruthenian Church of East Selkirk, describes the dissentions between the Polish and Greek Ruthenian Catholics under Marcovich until May 2, 1914, sets forth the proceedings at the meeting of February 22, 1913, when the resolution for incorporation was passed, relates the circumstances of the application for and issue of the policy of insurance to Kolenki and Evanczuk, as Trustees of the Greek Independent Church, and alleges that in 1913 Bishop Budka, having arrived in Canada, two distinct factions arose in the Church, one favouring Father Marcovich and the other Bishop Budka, whereupon, on May 5, 1914, a settlement was arrived at as set out in the indenture of that date, whereby a conveyance was made of the property to Bishop Budka which was a change in the property material to the risk.

This is not precisely the contention put forward at the trial or on the argument before us. It is now urged that the Church originally established in East Selkirk was a Greek Independent Church, or, as Kolenki calls it, Greek Ruthenian Independent not in communion with Rome, and that Bishop Budka secured the adherence of a number of the members of the Independent Church to the organization he represented, which was the Greek Catholic Ruthenian Church, and the members who allied themselves with the Bishop held a meeting and incorporated. The Greek Independent Church or Greek Ruthenian Independent Church is, it is contended, a body entirely different from the Greek Catholic Ruthenian Church, which by its trustees is the plaintiff here.

The history of the dissensions in the church is set out in the judgment of Galt, J. It is a question of fact and there is con-

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flicting evidence. His conclusion is that there never was such a church in East Selkirk as the Greek Independent Church until after the dissension which arose on the appearance of Bishop Budka. That is to say the rupture was the cause of the founding of the Independent faction. This original body remained as it was—Greek Catholic Ruthenian. While Kolenki and other witnesses give testimony to the contrary, I find there is ample evidence in support of the finding of the learned trial Judge. I refer particularly to the evidence of Karanko, Znak and Adams. Karanko was the secretary of the Ruthenian Greek Catholic Church of East Selkirk before, at, and after the time when the land was bought—and was elected a trustee in February, 1913, and with the others elected and continued to act until the meeting on May 5, 1914. He gives the members of the Ruthenian Catholics as from 50 to 60, and of the Independents as from 15 to 20. He says the Independents, as a result of the settlement, ceased to be part of the original body, seceded from it and proceeded to erect a church of their own. The trial Judge accepted the history of the case as set forth by the plaintiff's witnesses as he was justified in doing.

It is apparent even from the evidence of the defendants' witnesses that they considered the dissensions arose only when Bishop Budka came and requested that the church property be transferred to him.

Without going further into the evidence, I repeat there is, in my judgment, sufficient on the record to justify the finding of the trial Judge. There was the one original body for which Kolenki, Paceka and Volanik took the conveyance of January 15, 1909, as trustees of the Greek Ruthenian Church of East Selkirk. That body was subjected to two secessions or defections, first of the Polish members, and subsequently of those who seceded and became independent at the meeting of May 5, 1914. But the original congregation and the corporation formed when the trustees took the conveyance in 1909 remained. Under sec. 2 of the Church Lands Act, ch. 31, R.S.M., the trustees became a corporation or a quasi-corporation, even if the provisions of sec. 4 are not complied with. So that the objection that proper notice was not given is immaterial. The original trustees and their successors have perpetual succession, and if they have

or have not become merged in a corporation under sec. 4 of the Act, the plaintiffs here are rightly designated.

I consider it established, as the trial Judge finds, that the policy sued on was a renewal of the previous policy. Popham, the defendant's agent at Selkirk, so treated it in his letters of Jan. 6 and Feb. 2, 1914.

The fact that the policy is worded in favour of the "Greek Independent Church" seems to me merely an error in description for which the defendants' officers and not the trustees were responsible. When it is made clear what were the identity and proper name of the body or parties effecting the insurance, this error becomes of no consequence. The insertion of a wrong name in a policy does not prevent the true owner from recovering: Beach on Insurance, sec. 396.

A question was raised as to the wording of the deed of Jan. 15, 1909. It is argued that it does not come under the Church Lands Act because the *habendum* clause does not conform to that set out in the schedule. But the deviation from the form, such as it is, does not effect the substance of the conveyance or of the transaction, nor is it calculated to mislead anyone. See Interpretation Act, ch. 105, sec. 18. On the contrary, the grantees are described as Trustees of the Greek Ruthenian Church, and they take in that capacity. The Court will always admit evidence designed to shew the real objects of a trust. I would refuse to give effect to this objection.

The conveyance, or pretended conveyance, to the Bishop can be disregarded for the reasons assigned by the trial Judge. What evidence there is on the subject points to the conclusion that the Bishop was nominal owner (if owner at all) for the body occupying the church. It is the universal rule that ecclesiastical authorities everywhere hold church lands in this manner for individual bodies or congregations. There is no pretence, indeed, there is no allegation, that the Bishop holds as beneficial owner. Following the settlement, the congregation continued to use and occupy the premises precisely as before, and these plaintiffs have shewn their ownership by paying the insurance premium and by other acts, and evidently have no other idea than that they are the true owners. There is no evidence to shew that their ownership is disputed. Kolenki's evidence points to the conclusion that the ownership of the Bishop or Archbishop, as the

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case might be, would be nominal only. Par. 14 of the statement of defence makes the direct assertion that Bishop Budka was trustee for these plaintiffs. I confess I can see no difficulty whatever on this point. If Bishop Budka has any title at all under the alleged deed to him, I think it a matter of common sense to draw the conclusion that his title is a pure matter of form interfering in no way with the real ownership by the plaintiffs.

On the above grounds, I have reached the conclusion that the judgment of the trial Judge should be affirmed.

Even if defendants had made good their contention that the Greek Independent Church was the organization, and the only organization insured, I think the Court would be inclined to accede to the view put forward that the correspondence between the parties and their actions and conduct had the effect of creating a policy of insurance in which these present plaintiffs are directly named as beneficiaries. I refer to the letter of October 23, 1914, from Andrij Skalecy, ex. 12, informing the defendant that "our Church is no more Greek Independent but is acknowledged Ruthenian Greek Catholic Church." To this the defendant's manager replies the next day thanking Skalecy for his remittance and notifying him that the name had been duly changed on the company's books.

These facts seem to me sufficient to construct a policy of insurance in favour of these plaintiffs in the terms and on the statutory and other conditions of the policy then in force. That is to say, the parties agreed to consider that the policy already issued should stand with the substitution of name as set out in the correspondence. There was nothing concealed in the transaction, all the facts were known to the parties.

Mike Adams told Popham in June, 1915, about the agreement that had been entered into the month before, and said he wanted the policy changed from John Kolenki's name to that of the Greek Ruthenian Catholic Church. This was in the presence of others, Adams speaking English. Popham said that if the property was burned, those who paid the premiums would get the money.

There is authority for the construction of a policy in these circumstances. A parol contract for fire insurance is valid. Bunyon on Fire Insurance, 6th ed., 184. Where there is an agreement to insure by correspondence or otherwise, the assured

can take it for granted that a policy will issue accordingly: Laverty, Insurance Law, 71. I refer to *Coulter* v. *Equity Fire Ins. Co.*, 9 O.L.R. 35, where the cases are referred to by Garrow, J., at p. 39; also to *Hemmings* v. *Sceptre Light*, [1905] 1 Ch. 365.

Sec. 42 of the Mutual Fire Insurance Act, ch. 101, R.S.M., provides that policies executed as therein provided shall be binding on the company, but that does not say, nor does it imply, that the company cannot be bound otherwise.

Assuming once again, that the defendants' contention is well founded, that the plaintiffs are an entirely different body from that originally named in the policy sued upon, then the acts of the defendants in accepting the cash forwarded by these trustees, with the notification of the true name of the organization, in accordance with which the defendants in acknowledging the receipt, changed the name in their books and gave notice thereof to the plaintiffs must be considered as precluding them from denying the validity of the policy on the ground of the conditions relating to change material to the risk. When they received the plaintiffs' notification they had, we must assume, the alternative to cancel the policy or to continue it as altered. The two positions were inconsistent and they elected to continue the policy as so changed. They are bound by their action, taken with knowledge of the circumstances, and cannot now avail themselves of this defence. See Cameron on Fire Insurance, pp. 125 *et seq.* The company by its acts had led the insured to rely upon the policy as a substituting security against the loss which subsequently happened. To use the language of Gwynne, J., in *Lyons* v. *Globe Mutual*, 28 U.C.C.P. 62. Condition 20 in the policy, making any waiver by the company void unless in writing signed by an agent of the company, does not affect this case. See *Caldwell* v. *Stadacona Fire Ins. Co.*, 11 Can. S.C.R. 212, where it was held that acts constituting an estoppel are entirely distinct from waiver under such a condition as that above stated.

I would affirm the judgment appealed from. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 24, 1916.

RAILWAY BOARD (§ I—2)—TELEPHONE RATES—USE OF LONG DISTANCE LINES. The Railway Board has power under the Railway Act (R.S.C. 1906, ch. 37, and amendments) to authorize an additional toll to the established rates of a telephone company for the use of its long distance lines; to order compensation for loss in local exchange business occasioned by

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giving independent companies long distance connection; to authorize payment of a special rate by competing companies obtaining long distance connection, though not subjecting non-competing companies to a like toll. [*Independent Tel. Co.* v. *Bell Tel. Co.*, 17 Can. Ry. Cas. 266, affirmed.]

Statement.

APPEAL from the Board of Railway Commissioners for Canada, by leave of the Board, on certain questions of law.

Said questions of law are the following: (1) Whether the Board had power, under the Railway Act and amending Acts, to authorize the charging of any additional toll or charge outside the established rates of the Bell Telephone Co. of Canada as a condition precedent to or compensation for the use of long distance lines of the said Bell Telephone Co. of Canada. (2) Whether the Board is authorized, under the Railway Act and amending Acts, to give compensation in respect of the loss of business to the Bell Telephone Co.'s local exchange business, occasioned by giving independent companies long distance connection. (3) Whether the Board has power to authorize the payment of a special toll as a condition precedent to companies competing with the Bell Telephone Co. obtaining long distance connection with the Bell Telephone Co. while not subjecting non-competing companies to a like toll in view of the provisions of the Act relating to discrimination.

Gamble, K.C., for appellants.

Cowan, K.C., and *Hoyles*, for respondents.

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FITZPATRICK, C.J.:—The Bell Telephone Co., hereafter referred to as the company, operating under a federal charter, carries on business throughout Canada. At its origin the company established a system of telephone lines to serve local needs of cities, towns and villages, and, as the necessities of its customers increased, long distance lines were built to connect those localities with one another and with localities similarly situated in the United States. Finally, the system developed to such an extent that practically the whole Dominion east of Port Arthur was provided with a complete telephone service operated free from public control, and, consequently, without regard for the public convenience, except in so far as consistent with the interests of its shareholders. In the course of this development, the desire for telephone service spread so that, to satisfy the wants of rural municipalities, which were dissatisfied with the service rendered, small local companies were organized, sometimes in competition with the local exchanges of the company, and, in some instances,

in places to which the latter had not furnished a service; those companies so established are known in these proceedings as "independent companies."

In the course of time, the communities served by the independent companies desired closer connection, but presumably the capital and experience necessary to establish and profitably maintain the connecting links were not available. A convenient way to satisfy that desire was found in the company's long distance system. Apparently, the latter company, not anxious to satisfy the wants of their local competitors, refused the relief asked for, hence the usual agitation, resulting in an application to parliament for the appointment of a parliamentary commission of inquiry, and, on the report of that commission, an Act was passed the purpose of which, as disclosed by the title, was to bring telegraph and telephone companies under the jurisdiction of the Board of Railway Commissioners.

By that Act, ch. 61, 7 & 8 Edw. VII., complete control was given to the Board for the regulation of the business of the company.

By sec. 4, sub-sec. 5, of the Act, it is provided, in substance, that any company, province, municipality or corporation, having authority to construct and operate a telephone system, and which desires to be connected with and to use any long distance telephone system then in existence, and whether such company is under the control of parliament or not, may apply to the Board, if no private agreement can be obtained, for relief, and the Board may, in the words of the section,

> order the company (*i.e.*, the company which owns, controls, or operates the long distance telephone system) to provide for such use, connection or communication upon such terms as to compensation as the Board deems just and expedient, and may order and direct, how, etc., when, where and by whom, etc. . . .

By sub-sec. 6 of sec. 4 it is provided that the Board shall, in addition to any other consideration affecting the case, take into consideration the standards of efficiency and otherwise of the apparatus and appliances of such telephone systems or lines, and shall only grant the leave applied for in case and in so far as, in view of such standards, the use, connection or communication applied for can, in the opinion of the Board, be made or exercised satisfactorily and without undue or unreasonable injury to, or interference with, the telephone business of the company.

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So that, in effect, the statute provides for the use by local companies of long distance lines on two conditions: (1) The Board must be satisfied, as a condition precedent, that the apparatus of the applicant company is of such a standard as to efficiency or otherwise as to permit the use or connection without undue or unreasonable injury to the long distance line; and (2) the Board may order the connection with and the use of the long distance line upon such terms as to compensation as it deems just and expedient.

It is quite obvious that the Act, whilst giving the Board absolute power of control over all companies for the purpose of regulating the interchange of business in the public interest, has been careful to require a proper standard of efficiency with respect to equipment and provides for the protection of the rights of the shareholders of the company, whose property may be appropriated to the use of the independent companies. But the statute does not contemplate the regulation by the Board of competition between public service corporations, and I can find nothing in the reasons given by Comm. McLean, speaking for the majority of the Board, to justify the assumption that the Board attempts to do anything in that direction.

I quite agree with the late Chief Comm. Mabee, who said that in most public services competition is desirable in the public interest, but a duplicating of telephone systems is a nuisance. What is required and what the Act contemplates is efficient regulation of the conditions under which the telephone companies are to co-operate in the exchange of business facilities.

In 1911 an application was made to the Board, under the Act, by several independent companies, for permission to connect with and use the long distance line of the company. At the time, about 378 private contracts had been made for that purpose, and, as a result of that application, it was ordered that the company should connect its long distance telephone system or line with the lines of the applicant companies, subject to certain conditions as to cost of building the connecting lines. The order also provides for the payment to the company on outbound traffic of a connecting toll of 15 cents for each long distance message originating upon the lines of the applicant companies and transmitted over the line of the company, in addition to their long distance tariff.

It is to be noticed that what is called "inbound traffic"— that is to say, traffic originating upon the company's system destined to local points upon the lines of the various applicants—is exempt from this toll.

So that, in substance, it was decided that, if the apparatus of the applicant companies was of the required standard of efficiency, the long distance line built and operated at the expense of the shareholders and subscribers of the company should, with its staff of operators, be placed at the service of the applicant companies subject to the conditions above mentioned.

It was provided at the same time that this order was to remain in force for a period of at least 12 months, leave being reserved to move to rescind or vary the order at the expiration of that period should any of the parties so desire. Taking advantage of this reservation, the company asked to have the order rescinded. The independent companies, in reply to that application, asked to have the order maintained, and, at the same time, said that the charges for long distance connection have been and are unfair to the shareholders of those independent systems inasmuch as the toll for long distance connection is altogether too large. There is apparently no complaint with respect to the charge for connecting the lines.

As the result of that application an order was made by the Board providing for, as regards non-competing companies, (1) payment of an annual charge by way of compensation for loss to the company, as well as for the factor of convenience to the independent subscriber; (2), as regards competing companies, an annual charge is imposed and also a surcharge of ten cents on each communication. The Chief Commissioner dissented from the order.

I am of opinion, as I have already said, that the evident intention of parliament was to give the Board, in the public interest, absolute power to regulate this public utility, which has grown to be almost an essential factor in the every-day life of the whole community, and for that purpose has conferred the widest discretion upon the Board. In that view I fail to see the practical use of this reference, but the questions are before us and must, therefore, be dealt with.

The statute authorizes the Board to oblige the company to

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(1) Give a connection with its long distance line to local companies; (2) to give those local companies the use of its long distance line for the benefit of the subscribers of such local companies.

In other words, the Board is authorized to expropriate the company for the benefit of the independent companies, but the Act provides, as common sense and the general principles of law applicable in like cases require, that this may only be done "upon the condition that the equipment of the connecting company shall be such as not to impair the efficiency of the service" and upon such terms as to compensation as the Board may deem "just and expedient."

In other words, the statute requires that the company should not, in the language of the Quebec Code, be compelled to give up its property "except for public utility and in consideration of a just indemnity previously paid."

I, therefore, construe the Act to mean that power is given the Board to expropriate the company, to a limited extent, for the benefit of those independent companies, provided it can be done consistently with an efficient service and upon payment of compensation. And large discretionary powers are given with regard to the compensation to be paid by the use of the words, "just and expedient." That is to say, it is left to the commissioners to decide what compensation is, in all the circumstances, "just and expedient" for the use of the connection or communication. If an additional toll or charge, outside of the established rates of the company, is, in the opinion of the commissioners, necessary to compensate that company for the use of its long distance line, then the statute authorizes the Board to make that charge.

I have no doubt also that the statute authorizes the Board to give compensation with respect to the loss of business of the company occasioned by giving to local companies long distance connection, and also to make a distinction between the local companies which are called competing companies and those known as non-competing companies.

Speaking of the conditions under which the company carries on its operations (See 17 Can. Ry. Cas. 266 at 269).

If, as found by the Board—and the fact is not disputed—the long distance line is a charge on the whole Bell system because it was built out of the general capital and is maintained at the

expense of the profits made out of the operation of the local exchanges, then it would seem "just and expedient" that, in fixing the compensation to be paid for the use of that long distance connection by a company which has not contributed either to the initial cost or to the maintenance cost, the factor of competition as it is described in the question, with the local exchange should be considered.

In other words, if the long distance lines are, as we must assume, when built, a charge on the company shareholders and subscribers, and if in their operation a loss is incurred which must be borne by the local Bell Telephone exchanges, then is it not just and equitable that the independent company operating in the same area as the local exchange should also contribute by the surcharge to that loss in the upkeep of the long distance line which is placed by the Board at their disposal? The subscription of the Bell customers being, of course, fixed by the charges which the company has to meet for the upkeep of its whole system, which includes the long distance and local service, then it is just and expedient that the shareholders of the independent companies who have the use of the same service should also contribute by the surcharge to the maintenance of the long distance service.

If the commissioners deem it expedient to place those localities to which the company has not given a local service on a more favourable footing, it is within their discretion so to do.

DAVIES, J.:—The three questions of law which are submitted for our consideration and answer by the Board of Railway Commissioners do not call for or justify any consideration on our part of the desirability or undesirability of duplication and competition, which were referred to and discussed shortly at the argument. Those are matters entirely for the Board to consider and weigh in coming to their conclusions.

The answers we are to give to these three questions depend upon the construction we give to sub-secs. 5 and 6 of sec. 4 7 & 8 Edw. VII. ch. 61, and such parts of the Railway Act as may apply.

It seems to me, in construing these sections, that two things have to be decided by the Board: First, whether the application for long distance use and connection *should be granted at all;* and, next, if so, upon what tems as to compensation.

Sub-sec. 6 expressly enacts that the Board shall, *in addition*

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to any other consideration affecting the case, take into consideration the standards as to efficiency and otherwise of the apparatus and appliances of the applicant's telephones, systems or lines, and shall *only grant* the leave when, in view of such standards, the connection asked can be "exercised satisfactorily and *without undue or unreasonable injury to or interference with* the telephone business of the company," with which connection is sought.

I would construe this section as prohibiting the granting of the connecting order unless the Board, after considering everything affecting the matter of the application, including the applicants' standards of efficiency and its appartus and appliances, was satisfied that the connection and use sought would not *unduly injure or interfere* with the telephone business of the company sought to be connected with.

The Board must, before granting the order, be satisfied that no such undue injury will result from granting the connection asked for. If they cannot so satisfy themselves, they should not grant an order at all.

The language of sub-sec. 5 is permissive—may order the connection sought. That of sub-sec. 6 is conditional—they shall *only grant* when under certain conditions specified they find the granting of the order will not cause *undue or unreasonable injury to the business of the long distance company.*

When they have so decided, then and then only can they proceed to the question of compensation. It is not a question to be determined that there shall be no loss to the long distance company, but that there shall not be *undue or unreasonable* loss to the business of the company. Some loss evidently was contemplated as naturally arising from the granting of the connecting order. If that loss would constitute "undue or unreasonable interference with the telephone business of the company," the order should not be made.

Sub-sec. 6 provided for the conditions under which the order should or should not be made, and sub-sec. 5 for the compensation which should be granted if and when made.

Comm. McLean construed sub-sec. 6 as confined to injury or interference with the company's business arising out of the use of improper appliances by the connecting company. I cannot put such a narrow construction upon it, in view of the language

used: "Upon any such application the Board shall *in addition to any other consideration affecting the case* take into consideration the standards, etc."

These latter were, from being specially mentioned, no doubt very important factors for the Board to consider; but they constituted only one factor "in addition to any other consideration affecting the case."

The result of my construction would be that no order should be granted in any case where it was found that it would result in *undue or unreasonable interference* with the company's business, and that, where such a result was not found and the order was made, the compensation which sub-sec. 5 authorized them to award as just and expedient was confined to compensation "for the use, connection or communication" granted, as expressed in the sub-section, and did not authorize compensation for losses which possibly or probably would or might be caused to the company with which the connection was ordered in its local exchange business. I am quite in accord with Sir Henry Drayton's statement, in his reasons for the dissenting opinion he delivered, that he was "unable to read the somewhat extended clause here applicable as creating a new and novel law of compensation covering the business losses suffered by one public service corporation as the result of competition with another public service corporation."

I agree with him that these possible business losses were not matters the Board was concerned with unless they were found so great as to justify the refusal of the order, as before explained, and that, as Sir Henry puts it, "compensation for the actual use, connection or communication for the actual facilities supplied and for its subsequent use" is all that the Board can consider and award.

I will not elaborate the matter further, but, in view of what I have said, would answer the questions as follows. Q. 1. A. Yes. Q. 2. A. No. Q. 3. A. Yes.

I answer the third question in the affirmative because of the special reasons for its insertion in the order as explained by the assistant chief commissioner in his written reasons, concurred in by the other commissioners, except the chief commissioner. It seems to have been a clause expressly desired by the appel-

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lants and agreed to by respondents, and was not a clause inserted in the order by the Board of its own volition, but simply because it was agreed to by the parties themselves.

IDINGTON, J.:—This appeal suggests we should once more turn to the rules in *Heydon's* case, 3 Coke 8 (76 E.R. 637), to be found in Craies' Hardcastle, p. 104 (2nd ed.), and have regard especially to the holding following them expressed as follows:—

> And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.

What was the mischief intended to be remedied by the enactment in 1906, 6 Edw. VII. ch. 42, sec. 31, and substituted by 7 & 8 Edw. VII. ch. 61, sec. 4, sub-sec. 5?

That suggests another question: What was the mischief intended to be remedied by the Railway Act's provisions constituting a Board of Railway Commissioners? Was it not that the railway companies had forgotten that they owed a duty to the public to furnish facilities for traffic, interchange of traffic, and equality of treatment, both as to rates and otherwise, of everyone offering them business?

It was, no doubt, shocking to the minds of those railway managers, who acted in the single pursuit of what they imagined was their only interest and duty, to be told that they must serve the public, and each member of the public, upon the same basis of compensation and accommodation, and give every facility for accomplishing that service, no matter if it should turn into a rival's lines part of the haulage they had previously deemed their own preserve. To enforce these obligations the Board of Railway Commissioners was created.

And when the principles in question had been thus by law established and thus enforced, it seemed to open to parliament the way for applying similar treatment to the respondent and other like companies dealing not in haulage, but means of communication.

Their rivals in business insisted that it was the public that was to be served and facilitated in business, and, in order that the public might be properly served, connections must be made.

The cases were so much alike; the remedies to be applied so

much alike; and the interference with vested rights, bringing liabilities to losses of business to be reaped by upstart rivals, so much alike, that it would seem as if parliament had only to recognize these facts and then place the telephone companies under the jurisdiction of the Board. Of course, all that was very shocking to those who had, by the gracious wisdom of parliament, acquired valuable rights over public highways without giving any compensation or even asking leave of those concerned.

It would seem, however, after having been so favoured, that the public in many cases was not adequately served or charged too much for the service, and hence I gather there sprang up local rivals, more willing to serve or more moderate in charges, or possibly both.

It is suggested even municipalities and provinces were possibly willing to supply the needed want of rural telephone service especially.

Parliament deemed it proper that the respondent and others should not refuse those rivals proper and efficient service, and ordered accordingly, by amending the Railway Act, and by making the provisions of that Act applicable as follows:—

> The several provisions of the Railway Act with respect to the jurisdiction of the Board, practice and procedure, upon applications to the Board, appeal to the Supreme Court or the Governor-in-Council, offences and penalties, and the other provisions of the said Act (except secs. 9, 79 to 243, both inclusive, 250 to 289, both inclusive, 294 to 314, both inclusive, 348 to 354, both inclusive, 361 to 396, both inclusive, 405 to 431, both inclusive), in so far as reasonably applicable and not inconsistent with this part or the special Act, shall apply to the jurisdiction of the Board and the exercise thereof, created and authorized by this Act, and for the purpose of carrying into effect the provisions of this part according to their true intent and meaning and shall apply generally to companies within the purview of this part.

Of those enactments thus made applicable in principle, there appear under the caption of "Equality," a number of sections which the order appealed against seems to me to clearly transgress.

And let it be observed that in the first two lines of sec. 5 I have just quoted, it is "with respect to the jurisdiction of the Board," these parts of the Railway Act stand effectual. Why did parliament so enact if it intended in truth to help respondent to squeeze rivals out of existence by means of gross inequalities of tolls and impositions?

Clearly, each of these companies had gathered together, by

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local influence and energy and low rates, a business that the respondent might have had, but, for want of energy or timidity or excessive charges, had failed to acquire and hold. And that business must be paying its way, but possibly doing no more. And this inequality (expressed in the order now complained of), in defiance of what the provisions of the Railway Act, by being left applicable thereto, surely intended to be the measure of the Board's jurisdiction, may enable the respondent to reap where it had not sown. Such a clear purpose cannot be swept away by the interpretation of the words, "and the Board may order the company to provide for such use, connection or communication upon such terms as to compensation as the Board deems just and expedient, etc."

If parliament really intended to compensate by the destruction of other companies, it should and, no doubt, would have said so.

Moreover, I repeat, it was the public that was to be served and that upon an equal basis of service was what parliament had in view. It never could have intended that rural subscribers to the only 'phone company they could get in communication with, were to be penalized for so subscribing. It is not a question of the rate compensating, for admittedly the ordinary rate would be ample for the service, and needs no surcharge, unless when people have been wicked enough to ignore the respondent. Substantially such things as set up by respondent happened many times to rival railway companies in the administration of the Railway Act in the new departure made, and intended to make the companies realize that it was the public service that must be the keynote of their conduct towards each other.

The *London Interswitching* case, 6 Can. Ry. Cas. 327, when before this Court, seemed to me a pretty strong application of the principles invoked therein, and on the basis adopted below for doing justice herein seemed possibly to work an injustice, but I never doubted the correctness of the law as laid down by the late Killam, J., acting as Chief Commissioner of the Board, and maintained by this Court.

That kind of thing resulting from this sort of legislation never can have been conceived as an injustice by the legislature enacting it. They recognize it may to-day work apparent injustice in one

place and give a compensating advantage in another. And, if not, the march of events can take no account of such gains or losses as injustice.

And when parliament imposed upon the Board the duty in question of fixing a just compensation, it never could have intended the Board to do more than the words mean, a just compensation for a service which cannot be measured in one town or township by one method or measure and an entirely different method or measure resulting in lower charges for the service in the next town or township, perhaps further away.

The limited power or jurisdiction of the Board to try and do justice, in making its orders, by importing into the business in hand a something not provided in the Act, but yet a smoothing out of the crudities of the legislature and avoiding injustice, was well illustrated in the case of *G.T.P. R. Co.* v. *City of Fort William*, 43 Can. S.C.R. 412, where the Board, on an application to run over a public street, imposed the condition that the adjoining owners on the street should be compensated.

The majority of this Court held that, by virtue of the power in sec. 47 to make conditional orders, the order of the Board might be upheld. But this was reversed by the Judicial Committee of the Privy Council, holding such an order null.

It strikes me this attempt to do justice as an incident to fixing a just compensation stands on similar legal footing. The only difference I see is that there the Board attempted to grapple with a hoary-headed species of injustice, and here the quality of the justice is not by any means so clear.

All the Board has power to deal with is to fix a just compensation for the service if the thing be expedient. We must try and reach the common-sense meaning rather than, by cutting sentences into slices, try to extract a meaning from a legislator's language which would startle him.

Expedient compensation can mean nothing. The draftsman evidently had reference to the occasion and expense relevant to the connection, if expedient, and not the measure of compensation for the service itself once that connection made or ordered to be made.

I think the Board had no power to import into their consideration the question of competition, for a competitor serving the

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public is entitled, in performing such service, to get the accommodation and service and be treated as if not a rival.

The appeal should be allowed with costs and the questions answered accordingly.

I respectfully submit the first question is ambiguous and can hardly be answered by a simple yes or no. My opinion is that there can be no discrimination in favour of respondent or any one else, or as against anyone. But it may be necessary to alter the established rates from time to time to award proper compensation, and that is within the jurisdiction of the Board.

The other two questions I answer in the negative.

Anglin, J.

ANGLIN, J.:—Three questions are submitted by the Board of Railway Commissioners for the opinion of the Court. While these questions, as framed, are rather questions of jurisdiction than of law, and as such more properly the subject of an appeal by leave of a Judge of this Court, they may perhaps be regarded as substantially asking the opinion of the Court upon the question whether, in determining the amount of compensation which should be paid, under sub-sec. 5 of sec. 4 of 7 & 8 Edw. VII. ch. 61, to the Bell Telephone Co. by independent telephone companies given the advantage of connection with the trunk lines of the former company, the effect upon its local business should be taken into consideration.

By sub-sec. 5 the Board is empowered "to order and direct how, when, where and by whom and *upon what terms* and conditions (the) use, connection or communication (of, with or through long distance lines) shall be had, constructed, installed, operated and maintained." (And) "to order the company (*i.e.*, the company owning the long distance lines) to provide for such use, connection or communication upon such terms as to compensation as the Board deems just and expedient."

The clause of the sub-section first quoted covers all "terms" other than those as to compensation. The only "terms" dealt with in the clause last quoted are those "as to compensation." While the Board is authorized to direct the company "to provide for such use, connection or communication," it is not *for* this service that it is empowered to order compensation, which, in that case, might mean merely "remuneration," but, as a condition of directing that such use, etc., shall be provided, the Board is authorized to impose "compensation," *i.e.*, indemni-

fication to the company directed to provide it. Murray defines "compensate" as meaning "to counterbalance, make up for, make amends for," and "compensation" as "amends or recompense for loss or damage." We are perhaps most familiar with the use of the term "compensation" both in legislation and jurisprudence, in regard to the expropriation of property for public uses. Cripps on Compensation (5th ed.), p. 102.

See also, Brown and Allen on Compensation (2nd ed.), p. 97, and authorities cited by both authors.

If mere payment or remuneration for the service to be rendered were what parliament intended should be allowed, that idea would have found expression in some phrase very different from, and much more restricted in its scope, than "upon such terms as to compensation as the Board deems just and expedient."

I also agree with the view expressed by Comm. McLean that the addition of the word "expedient" after the word "just" affords a strong indication that it was the purpose of parliament to entrust to the Board the widest discretion, not merely as to the amount of the compensation to be directed, but also as to the elements which should be taken into account in fixing it.

There can be little doubt that, in determining the prices to be charged for telephones to local subscribers, the Bell Telephone Co. takes two elements into account, the value and cost of the local service and the value and cost of the long distance service. A company which does not maintain or provide a long distance service cannot reasonably exact as high a price for telephones from its subscribers and it can well afford to furnish local service at a lower rate. I confess that I fail to appreciate the justice of a demand that the Bell Telephone Co., which owns and maintains long distance lines, shall place them at the disposal of other and rival companies on any terms other than indemnification against loss or damage which it may sustain in consequence. Should it be obliged to do so, the probable result in places where the Bell Telephone Co. operates a local exchange in competition with an independent company would be either an actual discrimination against Bell subscribers or a compulsory reduction by the Bell Company of its charge for local telephones to the level of the charge made by the company without long distance lines. As is well known, the existence of competition is treated

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in the Railway Act as affording justification for a difference in railway rates which would otherwise be obnoxious to the anti-discrimination provisions of that statute.

These latter considerations do not apply to independent companies within whose territory the Bell Co. does not operate local exchanges. They afford reasonable ground for differentiation in the compensation to be made by companies of the two classes.

I would, for these reasons, answer the questions submitted in the affirmative.

Brodeur, J.

BRODEUR, J.:—This is a reference by the Board of Railway Commissioners under the provisions of the Railway Act.

There is no doubt with regard to the answer to be given to the first question. It should be in the affirmative. The Board of Railway Commissioners, by sec. 4 of ch. 61, 1908, has the power to determine the tolls that are to be charged by any telephone company. That power is as wide and general as possible, and the tolls can be increased or reduced according to circumstances.

That question, however, does not cover the main issues in this reference, for that reference has been made with the purpose of ascertaining whether the Bell Telephone Co. was entitled to compensation for the loss of its local exchange business occasioned by giving the appellant companies long distance connections and whether there should be discriminating rates or tolls between competing and non-competing companies.

It was found by parliament, after careful investigation and inquiry, that the Bell Telephone Co. had first built its service lines in cities and towns and then in villages. Connecting trunk lines had been made and long distance connections had been established between those various towns, cities and villages as the public required.

In some rural municipalities the local people interested, finding themselves without telephone service, had local companies formed for the purpose of serving their locality. The service which those companies were giving was not very dear, because they had no long distance lines to keep and maintain. Sometimes, too, those local companies were established because they thought that the service given by the Bell Telephone Co. was too expensive.

It was found, however, at one time that those local companies, being deprived of long distance connections, were not giving to their customers as good service as the Bell Telephone Co. The parliament was then seized of the request that the Bell Telephone Co. should be bound to give the use of the connection or communication of their long distance lines to the subscribers of those local companies. But parliament, in granting that power of expropriation to the local companies over the lines of the Bell Telephone Co., decided by sub-sec. 5 of sec. 4 of the Act of 1908, ch. 61, that the Board of Railway Commissioners could order the Bell Telephone Co. "upon such terms as to compensation as the Board deems just and expedient" to provide for such use, connection or communication.

The Board dealt with the question in 1911, after having heard all parties interested, and determined the compensation which was to be paid, and, according to the views expressed by the then Chief Commissioner Mr. Mabee, they determined that the compensation should cover all the damages which could be suffered by the Bell Telephone Co., including damages arising out of the loss to the Bell Telephone Co. of its local exchange business.

In 1913, a new application was made by the appellants in this case, asking connections with the Bell Telephone Co. on their long distance line.

All these appellant companies are in their locality competing lines with the Bell Telephone Co. The majority of the Board of Railway Commissioners were of the opinion that permission should be given to use the long distance lines of the Bell Telephone Co. on the condition, amongst others, that they should compensate the Bell Telephone Co. for the loss of its local exchange business.

I am of opinion that this order had been rightly issued. Parliament was very willing to give to those local companies the right to use long distance lines, but on the condition that they should compensate the Bell Company for all damages arising out of that use.

It has been found as a question of fact by the Board that the Bell Company's subscribers contributed not only to the initial cost, but also to the maintenance of the Bell long distance

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equipment. If the Bell Company, then, wants to maintain its long distance lines, it has to levy upon its subscribers a certain rate which is necessarily higher than the rate charged by the local companies, those companies having no long distance lines to maintain.

It is pretty evident that if the subscribers of the local companies have the same advantage as the Bell subscribers for long distance connections, all the business done locally by the Bell Company will necessarily disappear, because no subscriber, for example, will pay $20 per year to the Bell Company, if they can get for a smaller price the same local and long distance connections in subscribing to the local companies.

That matter had to be considered by the Board, and I think that, under the powers which are given by the statute, the Board had the right to take into consideration the compensation for the losses which the Bell Telephone Co. was going to incur as a result of giving long distance connections.

The compensation contemplated by the statute covered the interference with any private right appurtenant to the property expropriated. The value of the property of the Bell Telephone Co. is reduced by the long distance connections which are granted to those local companies, and should then be made the subject of compensation. Halsbury, vol. 6, p. 47.

I would be, then, of opinion that the second question should be answered in the affirmative. These same reasons would apply to the third question, which should also be answered in the affirmative.

The appellant should pay the costs of this reference.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Garrow, Maclaren, Magee and Hodgins, JJ.A. April 3, 1916.

1. EVIDENCE (§ X D—700)—HEARSAY—JUDGE'S OPINION IN CIVIL ACTION—VERACITY OF WITNESS—ADMISSIBILITY IN CRIMINAL PROSECUTION.

Reasons for judgment unfavourable to the credibility of a party in a civil action are inadmissible in evidence to impeach his veracity, when testifying in his own behalf, in a criminal prosecution.

2. NEW TRIAL (§ II—5)—IMPROPER ADMISSION OF EVIDENCE—"SUBSTANTIAL WRONG."

The improper admission of evidence in criminal proceedings as to

which it cannot be said that substantial wrong or miscarriage of justice was not thereby occasioned is ground for a new trial under sec. 1019 of the Criminal Code.

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CASE stated by the Senior Judge of the County Court of the County of York, before whom and a jury, at the General Sessions of the Peace for the County of York, the defendant was tried and found "guilty" on a charge of conspiracy—that the defendant did unlawfully conspire with one Gariepy and others to prosecute one Stimson for an alleged offence, knowing Stimson to be innocent thereof, contrary to the Criminal Code.

Statement.

Only two questions were argued before the Court, viz.: (1) Was the trial Judge right in referring to the judgment of MIDDLETON, J., in a civil action, to which the defendant was a party, in which that learned Judge expressed an opinion as to the veracity of the defendant? (2) Was the passage from the reasons for judgment of MIDDLETON, J., which was given in evidence, and to which the first question related, admissible in evidence?

I. F. Hellmuth, K.C., and *T. C. Robinette*, K.C., for defendant.

J. R. Cartwright, K.C., and *J. B. Clarke*, K.C., for Attorney-General.

MEREDITH, C.J.O.:—Case stated by the Judge of the County Court of the County of York.

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The defendant was tried and convicted at the General Sessions of the Peace for the County of York on a charge of conspiracy.

The conspiracy charged was that the defendant, "at the city of Toronto . . . between the 15th day of May and the 6th day of July, did unlawfully conspire with one Albert Joseph Gariepy and other persons to the informant unknown, to prosecute George Alexander Stimson, of the city of Toronto, investment broker, for an alleged offence, knowing the said George Alexander Stimson to be innocent thereof, contrary to the Criminal Code."

There were other counts in the indictment, but it is not necessary for the determination of the questions we are called upon to answer to say anything further as to them.

The questions submitted for the opinion of the Court are six in number, but only one of them, the fifth, was discussed upon the argument before us, the contention of the defendant as to the matters to which the other questions relate having been abandoned.

The fifth question is: "(5) Was I right in referring in the manner I did to the judgment of the Honourable Mr. Justice

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Middleton in which he expressed an opinion as to the veracity of the accused, Edward Levi Baugh?"

It appearing in the course of the argument that the point intended to be raised by the fifth question was not wholly covered by that question, the argument proceeded upon the footing that another question, viz., whether the passage from the reasons for judgment of Mr. Justice Middleton which was given in evidence, and to which the fifth question relates, was admissible in evidence, was before the Court.

In order to understand the nature of the charge, it will be necessary briefly to summarise the main facts appearing in evidence. There was a dispute between the prosecutor Stimson and the defendant in reference to a mining transaction. An action was brought by Stimson against the defendant to recover a large sum of money, which was claimed to be owing by him to Stimson as the result of this transaction. There was a conflict of evidence at the trial. The testimony of Stimson as to matters upon which he relied as entitling him to recover was directly contradicted by the testimony of the defendant. Stimson succeeded in the action, and recovered judgment against the defendant for a large sum. Stimson lives in Toronto and the defendant in Montreal.

After the recovery of the judgment, in order to obtain the fruits of it, it was necessary that proceedings should be taken in the Courts of Quebec to obtain what, as I understand, was a judgment of the Quebec Court for the amount of the judgment that had been recovered in the action brought by Stimson in this Province. Such proceedings were taken by Stimson, and were resisted by the defendant. Criminal proceedings were then instituted in Montreal by the defendant against Stimson, whom he charged with fraud in connection with the recovery of the judgment in Ontario, and it was in respect of these proceedings that the conspiracy was charged. The case for the Crown was that the defendant and Gariepy conspired to fabricate and forge letters purporting to have been written by Stimson, which, if genuine, would have established the defence of the defendant in the Ontario action, and which the defendant alleged had been fraudulently concealed by Stimson.

Both Stimson and the defendant were examined as witnesses at the trial in the General Sessions, and there was a direct conflict

in their testimony. There was also a direct conflict between the testimony of the defendant and that of Gariepy and other Crown witnesses examined.

The evidence to the reception of which objection is taken was elicited in the cross-examination of the defendant. He had been asked as to the result of the action in which judgment was recovered against him, and had answered that it was adverse to him. He was then shewn the Weekly Notes containing a report of the reasons for judgment of Mr. Justice Middleton, and later on he was asked:—

"Q. Do you know that Judge Middleton made this finding in regard to your recollection, 'I entirely disbelieve Baugh's account of his ignorance of what had been done?'"

"Q. Do you also know that this is part, 'There is much in Baugh's evidence, when analysed with care, to indicate his utter unreliability?'"

"Q. The Judge had specifically stated that he considered you to be a man of utter unreliability?"

These questions were allowed to be put to the defendant, and he was required to answer them, against the strenuous and repeated objection of his counsel that the questions were improper.

In his charge to the jury the learned Judge, referring to this evidence, said: "I was very much pleased to hear Mr. Robinette speak so complimentarily of Mr. Justice Middleton. I corroborate him in every statement as to that. Mr. Justice Middleton is one of our foremost Judges at the present day, and his judgments are respected by every one. You heard what Mr. Baugh admitted as to Mr. Justice Middleton's idea as to him. That does not exactly say that he is telling an untruth here. It is for you, however, to consider that in connection with the veracity of the parties, to see whether he is reliable or unreliable, whether he is false or true; whether these other men are swearing to what is right. If you accept their evidence, then it is your duty to bring in a verdict under your oath, according to that evidence, of 'guilty.' If, however, you do not accept their evidence, but believe Baugh as against them all, then you bring him in 'not guilty.'"

We were not referred to any case, and I have found none, in which the question as to the admissibility of such questions as those which are objected to as being improper has arisen.

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In *Henman* v. *Lester*, 12 C.B.N.S. 776, the defendant was charged with having made a fraudulent representation as to the price which certain seedsmen in London would give for certain seed, whereby the plaintiff was induced to sell for a lower price than he would otherwise have done. The defendant, who appeared as a witness, having in his examination in chief denied the alleged misrepresentation, was asked on cross-examination whether there had not been proceedings against him in the County Court at the suit of one Agutta, in respect of a similar claim, which he had resisted, and upon which he had given evidence; and the jury, notwithstanding, found their verdict for the then plaintiff. It was objected by the defendant's counsel that questions relating to the contents of public judicial proceedings, which must be in writing, could not be asked, but that the record must be produced. The objection was overruled, and the questions were allowed to be put. A verdict having been found for the plaintiff, the defendant moved for a new trial, on the ground of misreception of evidence in permitting him to answer the questions that were put to him as to having had a cause in the County Court and lost it, and as to the question in issue there. The objection was not to the right to make the inquiry as to the matters on which the defendant had been cross-examined. As was said by Willes, J.: "It was hardly disputed that the inquiry was admissible, as going to the credit of the witness; and it is not denied that in point of fact such proceedings did take place in the County Court" (p. 787); but the contention was that "such evidence was inadmissible even for the collateral purpose of testing the witness's credit, without producing, or otherwise formally proving, the record of the proceedings in the County Court" (*ibid.*); and that contention did not prevail.

I think it must be taken as the result of this case that the inquiry was proper, and that it was not necessary to prove the facts as to which it was directed by producing or otherwise formally proving the record of the proceedings in the County Court.

Nothing that was said gives any support to the argument of the learned counsel for the Crown, in the case at bar, that it was proper to inquire of the defendant as to the reasons upon which the judgment of my brother Middleton was based. What was done was in substance and effect to put in evidence these reasons as far as they dealt with the credibility of the defendant. He was

bound to submit to having his credibility attacked by eliciting from him the fact of the previous trial having taken place, what the issues in the action were, the fact that he and Stimson had been examined as witnesses at the trial, and the result of the trial—but not, in my opinion, the views expressed by the trial Judge as to his credibility.

In *Houstoun* v. *Marquis of Sligo* (1885), 29 Ch.D. 448, the defence of *res judicata* by a judgment of an Irish Court was set up, and a question arose as to whether the matters which were in controversy in the Irish action were the same as were in issue in the subsequent action. The defendant offered in evidence a verified copy of the transcript of the notes of the shorthand writer who took shorthand notes of the report to the Divisional Court in Ireland of the trial Judge, which contained a *resumé* of the evidence given by the plaintiff in Dublin, and concluded as follows: "I directed a verdict for the plaintiff on the construction of the lease of 1883. I considered there was no evidence that the lease was executed under any mistake, certainly not by Lord Sligo, and in effect directed a verdict against the special defence." And it was held that the report was admissible as evidence of what took place before the trial Judge and what he decided.

I am not aware of any case in which the notes of the trial Judge have been admitted as evidence in another action except for the purpose of ascertaining from what took place at the trial whether the matters in controversy in that action were the same as those in controversy in the subsequent action, and what was decided by the trial Judge.

The matters as to which the questions were allowed in *Henman* v. *Lester* were all matters within the personal knowledge of the witness. What was said by my brother Middleton in delivering his judgment was not said in the presence of the defendant, and the effect of allowing evidence of this to be given was to admit hearsay evidence, and what was done was in substance to admit as evidence the report of the reasons for judgment of my brother Middleton; and it was not, in my opinion, admissible even on the cross-examination of the defendant.

It was argued by the learned counsel for the Crown that, if the evidence was improperly admitted, no "substantial wrong or miscarriage was thereby occasioned on the trial;" and the pro-

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visions of sec. 1019 of the Criminal Code were invoked; but I am not of that opinion.

The fact that my brother Middleton had discredited the testimony of the defendant in the civil action was emphasised by the trial Judge, as was also the weight that should be attached to the finding of so eminent a Judge.

I am, for these reasons, of opinion that both of the questions submitted must be answered in the negative and a new trial directed.

Garrow, J.A.

GARROW, J.A.:—I agree.

Maclaren, J.A.

MACLAREN, J.A.:—I agree in the result. In my opinion, the evidence objected to should not have been received. I do not think that the objection that it is hearsay evidence places it upon the proper ground. I think it would be equally objectionable if the learned Judge whose remarks are quoted had given them as sworn testimony in open court at the trial of the present case. Even then it would, at the highest, be opinion evidence on a point on which opinion evidence is not admissible. It would also be evidence as to moral character and unveracity, based upon a single incident, and on that ground also would be objectionable.

I have some doubt as to whether what was said and done at the trial on this point "occasioned some substantial wrong" to the appellant; but, in view of the opinion of my brethren upon this point, I concur, with some hesitation.

Magee, J.A.

MAGEE, J.A. (dissenting):—The accused Baugh, with one Proctor, had been sued by one Stimson upon a promissory note which had been signed by Proctor for both himself and Baugh.

At the trial in Toronto before Mr. Justice Middleton, Stimson had sworn that the defendant had agreed to purchase a mining property from him, and that the note was given on account of the purchase. Baugh had sworn that it was not a purchase but an option to purchase, and denied Proctor's authority. Judgment was given by Mr. Justice Middleton against Baugh upon the note, for a sum exceeding $30,000, and this was subsequently affirmed on appeal. As Baugh lived in the Province of Quebec, it was necessary for Stimson to sue him there upon the judgment, and he retained legal advisers there for that purpose. Baugh countered by instituting criminal proceedings at Montreal against Stimson, alleging perjury at the trial.

Stimson's letter-books were seized in Toronto, and, when

produced, were found to contain press copies of letters purporting to have been written by him which would be inconsistent with his evidence at the trial in Toronto and would support that given by Baugh.

Confronted with this evidence in his own books and with a criminal prosecution in another Province, Stimson was induced to release his judgment, and the criminal proceedings were dropped. The present criminal charge against Baugh is in effect that he had conspired with one Gariepy, before launching the criminal proceedings in Montreal, to have Stimson's letter-books stolen from his office, and forged letters copied at blank pages in spaces found therein or inserted, and then the books returned to the office, so that it would appear that Stimson had concealed the copies of letters and sworn to what was not true—for the Crown wished to prove this charge conclusively; and, though Baugh was sworn on his own behalf and denied his complicity and called other witnesses, the jury found him "guilty;" and the evidence would seem fully to warrant this verdict.

During the trial, the fact of the action on the note and the trial before Middleton, J., were several times referred to without objection, as well as the facts which I have mentioned as to the statements by Stimson and Baugh; and the fact that, despite his statements, the defendant had judgment given against him, and the fact of the criminal proceedings against Stimson and his release of the judgment, were also shewn. While Baugh was giving evidence as a witness on his own behalf, he was asked by his counsel whether he had given any authority for the signing of the note, and denied having done so, and judgment went against him. Then he was asked by his own counsel whether at the time of the civil trial he was satisfied that everything was produced, to which he replied that he was positive it was not. Then he was asked whether the letter-books were produced or carbon copies, and answered that there were some little sheets of yellowish carbon copy stuff, which afterwards he referred to as "those blasted carbon copies."

Then he put in a statement shewing that he had paid in connection with the mining property over $40,000—and, being asked if that was exclusive of Stimson's judgment against him on the note, he said he "never counted the judgment, and, if Stimson had told the absolute truth, he would not have got a judgment

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against me." Later on, he said he had been told there was a lot of information in the letter-books in letters between one McNeil and Stimson, and it was on these McNeil letters he had been recommended by counsel in Montreal to have a warrant issued against Stimson. Some of these letters were read to the jury as not having been before Mr. Justice Middleton. Then on cross-examination he volunteered the statement that he had been unsuccessful in the action because his principal witness had been intimidated and gone to the States. He could not say, as to one of the McNeil letters read, whether it was before Middleton, J.; and then the Court—apparently desiring to ascertain whether the judgment had referred to them—asked Baugh whether he had a copy of Mr. Justice Middleton's judgment, to which he replied that he had seen it in the Weekly Notes, and that the McNeil letter was not referred to; and he said that Stimson had contended that he had not seen the letter. Then Baugh was asked, where did Mr. Justice Middleton get the evidence to form his conclusion that McNeil had been opposed to the purchase by Stimson of the mining claim? and said from a Taylor letter.

Then his counsel objected to the reference to the decision in another Court, and was told by the Court that he had himself gone into the whole matter with Mr. Baugh, although Mr. Greer (for the Crown) objected; and, later on, that the Court wished to find out whether Mr. Justice Middleton had the evidence which Baugh said he had not. Then Baugh stated that the letters were not in.

It is thus evident that Baugh, acting as a witness, was trying to give evidence not merely denying the conspiracy, but going to shew that Stimson was untruthful, and to explain away, at the instance of his own counsel, the fact of the judgment obtained against him as being owing to the absence of the documents, which, so far as appears, really had no material bearing on the issues involved. No serious attempt was made to shew the genuineness of the alleged forgeries. In these circumstances, it was, I think, open to the prosecution to shew that the judgment had not proceeded upon the absence of the practically immaterial documents, but that the Court had found upon the fact of the untruthfulness of the defendant's own statements. As to th mode of proving that, it was done from the source to which h himself referred as shewing that the documents had not been

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referred to; and I do not find that any objection was taken to the mode of proof, but only to the admissibility of the questions.

Then, even if the questions were strictly inadmissible, it does not appear to me that any substantial wrong or miscarriage was occasioned, as required by sec. 1019 of the Criminal Code. I read the charge of the learned Judge as cautioning the jury that, while they had heard the opinion of Mr. Justice Middleton as to the evidence of Baugh, that did not say he was telling an untruth before them, and it was for them to consider that.

I therefore think the conviction should stand.

Hodgins, J.A.

HODGINS, J.A.:—The only possible grounds upon which the remarks made by a trial Judge, in his judgment, could be introduced in evidence, are: (1) that, if made in the presence of the party affected, and uncontradicted by him, they might form a quasi-admission; or (2) that they themselves were evidence of *res judicata*.

In this case the opinion of Mr. Justice Middleton was put in writing after the trial, and therefore the first ground is not open, even if it were the law, as to which see *Child* v. *Grace*, 2 C. & P. 193, and *Regina* v. *Britton*, 17 Cox C.C. 627.

As to the second point, authority is against the position that the reasons for, as distinguished from the fact of, a judgment, bind or estop any party, even if the judgment itself were admissible in a criminal prosecution. See *Re Allsop and Joy's Contract* (1889), 61 L.T.R. 213; *King* v. *Henderson*, [1898] A.C. 720. If not admissible upon either of the preceding grounds, then their introduction in a cross-examination as to credit can only result in establishing the opinion formed, in a civil action, of the truthfulness of the accused in relation to particular facts therein involved, by a third person well qualified to judge.

This is of course hearsay evidence. The cases would seem to limit the proof in a case of this kind to evidence of a formal record of adjudication reciting the desired fact, as in *Watson* v. *Little* (1860), 5 H. & N. 472; or to an official copy of the report of the trial Judge, required and admissible by law in Ireland, as in *Houstoun* v. *Marquis of Sligo*, 29 Ch.D. 448; or, failing the production of the record, to a willing admission by the accused of the result of a former trial and of the fact that in it he had given evidence, as in *Henman* v. *Lester*, 12 C.B.N.S. 776.

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I am afraid that the way in which the views of Mr. Justice Middleton were insisted upon and used, as well as the invitation of the trial Judge to the jury to consider them in dealing with the veracity of the accused, compels the conclusion that a substantial wrong was or may have been done.

The result is, that both the questions must be answered in the negative and a new trial directed.

New trial ordered; MAGEE, J.A., *dissenting.*

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ORMSBY v. TOWNSHIP OF MULMUR.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. April 14, 1916.

HIGHWAYS (§ IV A 5—150)—LIABILITY FOR DAMAGE FROM SAND DEPOSITS—NON-REPAIR—NOTICE TO MUNICIPALITY.

An action for damages to land by a deposit of sand caused by the damming of water which naturally flowed across a highway to and over the plaintiff's land is not for non-repair, although the sand came from a cutting in the road not kept in repair, and consequently a failure to give the notice required by sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, is not a bar to the action.

[*Strang* v. *Township of Arran*, 12 D.L.R. 41, distinguished.]

Statement.

APPEAL by the plaintiff from a judgment of a County Court Judge dismissing an action for injury to plaintiff's land caused by negligent and unskilful work on a highway.

W. E. Raney, K.C., for appellant.

C. R. McKeown, K.C., for defendants, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.—The plaintiff's action was brought to recover damages for the flooding of his land by the defendants; not flooding it with water, for he admits that the natural and proper outflow of the water is over his land, but for flooding it with sand—not that alluvium which has an enriching effect, but sand of a nature which has a deleterious effect; and it must now be taken as settled that his claim was a just one, because a jury, who ought to know a good deal about such things, have given a verdict in his favour and have assessed his damages at $125. But, notwithstanding the verdict, the trial Judge has, after taking time for consideration, directed that the action be dismissed; and this appeal is brought against that judgment and seeking a judgment giving effect to the verdict.

The grounds upon which the judgment in appeal was based were: that the action was really one for damages caused by the neglect of the defendants to keep a highway vested in them in repair, and that no notice of the action had been given; in other words, that the plaintiff had no right of action, except under

the 460th section of the Municipal Act, which provides that no such action shall be brought unless notice of the claim and injury complained of has been given within thirty days after the happening of the injury—and no such notice was given.

The only ground for holding that the action was one based upon such neglect is, that the sand which was deposited on the plaintiff's land came from a cutting made by the defendants in the highway for the purpose of more effectually draining it: but how can that circumstance make the claim one for neglect of the statute-imposed duty of the defendants to keep the road in repair? It is quite immaterial to the plaintiff, so far as the matters in question in this action are concerned, what state of repair the road may have been in, or where the sand came from, or in what manner lodged upon his land, or whether the cutting was repair or neglect to repair: all he is concerned with is that the defendants brought it there, to his injury, which they had no right to do, and so are answerable to him for the loss he has sustained by that unlawful invasion of his property-rights.

The trial Judge seems to have relied upon the case of *Strang* v. *Township of Arran*, 12 D.L.R. 41, for the conclusion reached by him, and it may be that the wide view taken in that case of the section of the Municipal Act to which I have referred, afforded encouragement to him in the conclusion which he eventually reached; but it is obviously no authority for that conclusion, having been an action brought expressly under the provisions of that section of the Act and supported upon it only. The most substantial and primary question in that action was, I should have thought, whether the plaintiffs individually had any cause of action, whether their true remedy was not by way of indictment—a question very little, if at all, discussed in it. If there be such a private right of action, there are many municipalities in which such actions might be brought on in legions; and it would be rather anomalous for those whose indirect duty it was to repair, or pay for the repair of, the highways, to be entitled to damages for a breach of such duty, and so be paying indirectly the damages and costs recovered by the numerous litigants. If such a practice became general, the remedy would of course lie in something in the nature of a "reversion to type" in the shape of repair of highways by means of frontage obligation and taxation; which

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would not be a novelty nor going so directly back to original methods as is done and seen throughout the winter in the clearing of the snow from the sidewalks of the highways by the occupiers of the land abutting upon them. My own idea would have been that the duty to repair highways was not imposed for the benefit of the land-owner, rather that the duty to repair still rests upon the land-owner, though indirectly through the municipal corporation, the council of which is chosen by the ratepayers, from whom the money for all municipal purposes, including road repairs, is obtained by taxation, and that the duty to repair is imposed for the benefit of those lawfully using the highway, generally, but perhaps hardly accurately, described as "all His Majesty's liege subjects," and that they only would have a right of action for injury sustained through nonrepair; and, if this be so, it would be the more abundantly plain that the plaintiff should retain his verdict.

The appeal must be allowed, and effect must be given, in the County Court, to the verdict of the jury.

Riddell, J.

RIDDELL, J.:—The plaintiff is the owner of land in the township of Mulmur, lying west of a certain highway. For many years the water running down south on the east side of that road crossed it by a culvert, and for some time at least, the culvert being stopped up, over the culvert and upon the plaintiff's land. This did little or no damage to him; but in course of time the road at this point was cut into by the water, and it became necessary for the township corporation to repair it. In 1912, their servant did repair the road, but cut through a bank of hard material on the east side of the road, just south of the culvert, and thereby allowed the water which formerly crossed the road to run further south on the east side of the road through a sandy place or more than one sandy place, gathering sand in its course; then to cross the road at a point further south, carrying with it the sand and depositing it on the plaintiff's land, to his detriment.

The plaintiff sued; at the trial, the defendants desired to set up the statute, R.S.O. 1914, ch. 192, sec. 460, as no notice had been given—and, after the jury had found a verdict for the plaintiff, the defendants were allowed to plead the statute, on terms of paying the plaintiff's costs. Effect was given to the

defendants' contention, and the learned County Court Judge Fisher, of the County Court of the County of Dufferin, dismissed the action—the defendants to pay the plaintiff's costs.

The plaintiff now appeals.

The first objection is, that the trial Judge should not have allowed the amendment setting up want of notice. I think that the course taken was wholly unexceptionable. It is true that, in a case in which the amendment was not asked for until all the evidence was in, the Chancellor refused an amendment to set up the statute: *Longbottom* v. *City of Toronto* (1896), 27 O.R. 198; but, in a not dissimilar case, a statute was allowed to be pleaded: *Williams* v. *Leonard* (1895-6), 16 P.R. 544, 17 P.R. 73, 26 S.C.R. 406. Such defences as this, based upon the provisions of a statute, however distasteful they may be to some —and I have often heard a very learned Chief Justice inveigh against the defence of the Statutes of Limitations—are defences "on the merits," and must be given full effect to. And our Courts are not becoming more technical, but the reverse, in allowing matters of fact to be proved, and the law based upon the facts of the case made effective, whatever mistakes the lawyers may have made in putting their cases on paper.

But I do not think that the statute requires notice in the present case.

The case of *Strang* v. *Township of Arran*, 12 D.L.R. 41, was cited as deciding that the section refers not simply "to damages to the person or to damages arising from some accident, but includes any cause of action resulting from the municipality's default:" see p. 47. Then it is said that the *ratio decidendi* in that case was, that the statute required notice only in the case of "accident," and that the change in the statute to the word "injury" will take the present out of *Strang* v. *Township of Arran* on this point. I do not think it necessary to decide whether the dictum already cited from p. 47 correctly sets forth the law —as at present advised, I am not prepared to assent to that statement of the law.

But here the damage had nothing to do with the want of repair of the highway—it is true that, in the course of repairing, the defendants acted negligently, but that does not make the resultant damage due to nonrepair, any more than if, in blasting on

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the highway to repair it, a negligent blast sent a rock upon the plaintiff's land. The injury is wholly independent of any state of repair or of nonrepair of the road—it might have happened had the road been the finest macadam or asphalt, and a model to all municipalities.

Riddell, J.

That an action lies is shewn by *Smith* v. *Township of Eldon* (1907), 9 O.W.R. 963, and the cases cited.

I think that this ground of defence must fail.

There is ample evidence upon which the jury could have found as they did.

I would allow the appeal and direct judgment to be entered for the plaintiff for $125 (the amount found by the jury) with costs; the appellant to have the costs of this appeal.

Lennox, J.

LENNOX, J.:—I agree in the conclusion reached by the other members of the Court, but in doing so prefer to put my judgment upon the ground that the right of the plaintiff to recover damages is not limited, in the way set up by the defence, by the provisions of sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, and I do not understand *Strang* v. *Township of Arran*, 12 D.L.R. 41, to be a decision to the contrary.

Masten, J.

MASTEN, J.:—This is an appeal from a judgment of the County Court Judge of the County of Dufferin. The action is brought to recover damages for injuries done to the plaintiff's land through the deposit thereon of sand and detritus brought there by water. The allegation is that the defendants have interfered with the natural flow of the surface water, and that such interference has resulted in the deposit on the plaintiff's land of the sand, and the consequent injury.

At the close of the plaintiff's case, the defendants moved for a nonsuit, on which judgment was reserved, and the case then went to the jury, who found in favour of the plaintiff, with damages assessed at $125.

The learned County Court Judge has directed a judgment giving to the defendants leave to amend their defence by pleading the provisions of sec. 460 of the Municipal Act (that the plaintiff's right of action is barred by failure to give notice), and directing that upon such amendment being made the action should be dismissed, the defendants to pay all costs.

The question that arises is, whether, upon the facts shewn, the case comes within sec. 460 of the Municipal Act.

I am of opinion that it does not. Section 460 relates exclusively to highways. So long as the water and sand which injured the plaintiff's land remained on the highway, no cause of action accrued to him. The defendants were entitled to deal with their highway and manage it in any way they chose, but at their own risk they interfered with the watercourse in such a way as to discharge water and sand on the plaintiff's land. It was only when the water and sand left the highway and came upon the plaintiff's land as a result of the action of the defendants themselves that a cause of action arose. For such a cause of action and for such an injury the plaintiff's right remains, in my opinion, unaffected by sec. 460.

I have considered the case of *Strang* v. *Township of Arran*, 12 D.L.R. 41, but I do not think it governs this case. In *Strang* v. *Township of Arran* the damage arose (if I understand the case) from injury to the plaintiffs' lands, occasioned by deprivation of access over the highway. The defendants failed to repair a bridge forming part of the highway, which bridge and highway was essential to the ready access to the plaintiffs' lands. The claim, therefore, arose directly from the failure of the defendants to repair the highway.

The present action does not arise from anything on the highway, but, as I have indicated above, from something done off the highway, viz., on the plaintiff's lands, so that *Strang* v. *Township of Arran* has, I think, no application.

It is further suggested that the injury arose from floods and the act of God, and was, therefore, not a thing for which the defendants were responsible. I cannot see that this is the true view to take of the case. For thirty or forty years, through spring and fall, through flood and drought, these lands were in the same position as they now are, and no harm came to them until there was an artificial interference by the defendants with the flow of the surface water.

I think that the appeal should be allowed, and judgment should be entered for the plaintiff for $125, with costs here and below.

Appeal allowed.

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REX v. ARMSTRONG.

Ontario Supreme Court, Boyd, C. February 16, 1916.

1. WITNESSES (§ III—59)—TAMPERING WITH WITNESS—PROSECUTION PENDING.

Tampering with a witness *on* any prosecution under a provincial liquor license Act (R.S.O. 1914, ch. 215, sec. 78 and R.S.C. 1906, ch. 152, sec. 150), does not include tampering with a possible witness *before* the commencement of the prosecution.

[*Ex parte White* (1890), 30 N.B.R. 12, and *R.* v. *LeBlanc* (1885), 8 Montreal L.N. 114, applied.]

2. SUMMARY CONVICTIONS (§ VIII—85)—UNCERTAINTY—PARTICULARS—PREJUDICE.

A summary conviction for attempting to tamper with a witness upon a prosecution for illegally keeping liquors for sale is not invalid because it does not recite what allegations the witness was asked to swear to falsely, if the conviction follows the words of the statute, and there was no prejudice to the accused as to what was the issue being tried.

[*R.* v. *Lawrence* (1878), 43 U.C.Q.B. 164, referred to.]

3. CONTINUANCE AND ADJOURNMENT (§ I—4)—ADJOURNMENT FOR JUDGMENT IN SUMMARY PROCEEDINGS.

A summary conviction by two justices following a reservation of judgment to a fixed date is not invalid because then delivered by one of them in the unavoidable absence of the other, where both had met on a prior day and had then concurred in written reasons for judgment and signed the formal conviction.

[*Ex parte McCorquindale, R.* v. *Haines* (1908), 15 Can. Cr. Cas. 187, 39 N.B.R. 49, discussed.]

4. CONSTITUTIONAL LAW (§ II A—275)—QUASI-CRIMINAL MATTERS—CONJOINT FEDERAL AND PROVINCIAL LEGISLATION.

A summary conviction purporting to be made under sec. 78 of the Liquor License Act, R.S.O. 1914, ch. 215, for attempting to tamper with a witness in a prosecution under that Act, will not be quashed on the ground that the Ontario legislature had not authority to deal with the subject-matter, as the federal parliament has enacted similar legislation applicable to prosecutions under provincial liquor laws in the Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 150, and the magistrate had jurisdiction under the conjoint legislation.

[*R.* v. *Lawrence* (1878), 43 U.C.Q.B. 164, referred to.]

Statement.

MOTION to quash two convictions of the defendant made by two Justices of the Peace, under sec. 78 of the Liquor License Act, R.S.O. 1914, ch. 215, for attempting to tamper with two witnesses upon a prosecution of the defendant for keeping intoxicating liquor for sale without a license, in violation of the provisions of that Act.

J. R. Cartwright, K.C., for the Attorney-General.

Boyd, C.

February 16. BOYD, C.:—On the 26th January, 1916, an information was laid against Armstrong for keeping liquor for sale without a license, and he was served with a summons on the 27th January. The matter was duly prosecuted before two Justices of the Peace, Gibson and Ballachey; and McArthur and Hyde were examined as witnesses for the prosecution. The attempt

made by Armstrong to induce McArthur to misstate facts was in a conversation on the 25th January, and the magistrates find it was on that day—which was a day before the information was laid. The objection was taken at the close of the evidence that no prosecution was pending at the time of the alleged offence.

The case against Armstrong for illegal sale was dismissed, but he was convicted, under sec. 78 of the Liquor License Act, R.S.O. 1914, ch. 215, of attempting to tamper with the witness Hyde and with the witness McArthur.

The motion is now made to quash these convictions, upon the following grounds:—

(1) That no offence is stated, as the conviction does not state, nor does the information, in what way the witness was asked to swear falsely.

(2) That sec. 78 is *ultra vires* of the Ontario Legislature, and the magistrates had no jurisdiction.

(3) That the case was heard by two magistrates, and that the adjudication was made by one in the court-room on the day of adjournment, in the absence of the other.

These objections are common to both convictions, but as to the conviction in the case of the witness McArthur there is the further objection that the alleged offence occurred before there was any prosecution.

The main matter discussed was as to the jurisdiction of the Justices under the Liquor License Act.

The law to-day is the same in our statute-book as it was in R.S.O. 1877, ch. 181, sec. 57. That enacts that "any person who, on any prosecution under this Act, tampers with a witness, either before or after he is summoned or appears as such witness on any trial or proceeding under this Act, or by the offer of money, or by threats, or in any other way, either directly or indirectly, induces or attempts to induce any such person to absent himself, or to swear falsely, shall be liable to a penalty of $50 for each offence." That section was passed upon by the Court in 1878, and was regarded as being beyond the powers of the Provincial Legislature: it had to do with the crime of subornation of perjury, and that was a crime already dealt with in the Criminal Code of Canada: *Regina* v. *Lawrence* (1878), 43 U.C.R. 164. Notwithstanding this judicial condemnation, the provision in identical

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terms was continued in R.S.O. 1887, ch. 194, sec. 84; R.S.O. 1897, ch. 245, sec. 85; and down to date in R.S.O. 1914, ch. 215, sec. 78.

Perhaps some explanation of the continuance of the enactment may be found in concurrent temperance legislation of the Dominion. In 1878, the Canada Temperance Act was passed, and had some special provisions relating to the local liquor laws of the Provinces, and among the rest this, as sec. 114: "Any person who, on any prosecution under any of the said Acts, tampers with a witness, either before or after he is summoned or appears as such witness on any trial or proceeding under any such Act, or by the offer of money, or by threats, or in any other way, either directly or indirectly, induces or attempts to induce any such person to absent himself, or to swear falsely, shall be liable to a penalty of $50 for each offence:" 41 Vict. ch. 16, sec. 114 (Dom.) This provision, in the same words, appears in the Canada Temperance Act in the last revision of the Dominion statutes in 1906, ch. 152, sec. 150.

The magistrates regarded sec. 78 of the Liquor License Act as validated by the Canada Temperance Act, and this appears to be the practical outcome of this somewhat unusual legislation. The magistrates had jurisdiction in a summary way under the combined legislation of the Province and the Dominion. The Dominion has chosen to legislate in a special way as to offences under the Temperance Act, and to extend its prohibition to the Provinces in regard to the tampering with witnesses in liquor cases. The provisions as to subornation of perjury are more stringent under the Criminal Code, but that is no reason why both may not stand together: *Regina* v. *Gibson* (1896), 29 N.S.R. 88, where Graham, E.J., said (p. 89): "I think there was a reason for dealing in a summary way * * * with the offence of tampering with witnesses summoned in the prosecutions before Justices of the Peace, under the Canada Temperance Act." He refers to the need for prompt steps being taken and in an expeditious way in order to repress dangers likely to result from an easy conscience in these liquor prosecutions. This affords another example of the conjoint legislation of Ontario and Canada, in order to secure the efficient operation of the two, relating to temperance—a subject I had occasion to consider as to Sunday legislation in *Kerley* v. *London and Lake Erie Transportation Co.* (1912), 26 O.L.R. 588, 594, 6 D.L.R. 189.

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On this ground the convictions are immune from attack.

There is nothing in the first point as to want of certainty in the information and conviction. The words of the statute are followed—there was no misapprehension of what was involved, and the case cited for the applicant, *Regina* v. *Lawrence*, disposes of it.

The next objection is, that judgment was given by one Justice and the other was absent. There is no merit in this. The affidavit of Armstrong shews that he was first tried for breach of the Liquor License Act, and after that came the trial upon the charges of tampering with witnesses; this was on the 27th January; judgment was reserved in all until the 2nd February, when Magistrate Gibson was sick, but the Court was opened in Gibson's office by the other magistrate, who announced that the charge of keeping liquor was dismissed, and thereafter he announced that Armstrong was found guilty on the other charges. It appears from the papers that the magistrates had conferred and come to a conclusion, giving reasons in writing signed by both, that the defendant was guilty; and had signed, both of them, the actual conviction dated on the 31st January, Monday. The delivery of judgment, *i.e.*, the announcement of the result, was on Wednesday. The action of the magistrates was determined both for the dismissal of the one charge and the guilt on the others on the 29th, and the mere accident of Gibson's illness and inability to attend did not frustrate the action of the other in announcing the acquittal on the one head and the guilt on the other on the same occasion. The return of all the papers on this motion is certified to by both Justices.

The only colour for this objection is the judgment of Gregory, J., in *Ex parte McCorquindale, Rex* v. *Haines* (1908), 15 Can. Cr. Cas. 187, 39 N.B.R. 49, where he thinks that both Justices must be personally present at the oral delivery of judgment; but the opinion of Barker, C.J., at p. 51, commends itself as good sense and good law; he says: "If two Justices have met and considered their judgment together and have both signed the judgment, I should not think there was any impropriety in one reading the judgment alone." This objection is overruled, and the conviction as to the witness Hyde stands affirmed with costs.

There remains the point raised as to the witness McArthur. The offence is defined thus: "Every one who, *on any prosecution* under this Act, tampers," etc. It is a special statutory offence

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which contemplates that the prosecution has begun. It does not say "before" or "in view of" a prosecution, but "on" it, as an existing proceeding. Allen, C.J., in *Ex p. White* (1890), 30 N.B.R. 12, says (on a section in *pari materiâ* with the one in hand): "The tampering with a witness after the commencement of a prosecution, either before or after he is summoned as a witness, or appears as such, is a violation of the 121st section of the Canada Temperance Act" (p. 14). And Mr. Justice Ramsay, in a careful judgment on a cognate offence, embracery, says it is essential to the existence of the offence that there should be a judicial proceeding pending at the time that the offence is alleged to have been committed: *Regina* v. *Le Blanc* (1885), 8 Legal News (Montreal) 114.

I think this conviction must be quashed, but I give no costs, as all the other grounds fail, and the witness was tampered with.

One conviction affirmed and the other quashed.

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Re SOLICITOR.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee and Hodgins, JJ.A. May 29, 1916.

SOLICITORS (§ I B—10)—DISBARMENT—NEGLIGENT INVESTMENT—SUMMARY ORDER.

Unwise investment of a client's funds and failure to implement an undertaking with respect to funds do not necessarily amount to misconduct warranting the striking of a solicitor from the rolls; he may merely incur the minor penalty of being summarily ordered to perform any undertaking which he may have made to his client.

Statement.

APPEAL from the judgment of Clute, J., granting a motion for the payment by a solicitor of $2,144 and interest, pursuant to his undertaking and agreement with his client, and in default that his name be struck from the roll of solicitors of the Supreme Court of Ontario. Varied.

M. Wilkins, for the solicitor, appellant.

Harcourt Ferguson, for the client, respondent.

Garrow, J.A.

GARROW, J.A.:—The main facts are not in dispute. The applicant describes herself as an English working girl, now at service. She owned, when she came to Canada, two shares of railway stock in England, which she desired to have sold and the proceeds invested in Canada. She consulted the solicitor about it, and he recommended as an investment the bonds or debentures of the Excelsior Brick Company.

So far as the evidence shews, he did not himself sell the English shares. Instead, he procured transfers of them to be made by

the applicant to a friend of his called Frain, residing at Bay City, in the State of Michigan, in exchange, it is said for 15 bonds of that company held by Frain, of the par value of $200 each, which were transferred by Frain to the applicant. Frain subsequently, as he reported to the solicitor, for some reason not explained, sold the English shares and realised the sum of $2,144.

On the 4th February, 1914, the solicitor wrote to the applicant a letter, in which he says: "As you are aware, I closed the exchange of your railway stock . . . for fifteen debenture bonds in the Excelsior Brick Company Limited, whose works are located at Beamsville, Ont. . . . As I mentioned to you at the time of the exchange, I am willing to take these bonds off your hands for the amount that your stock taken in exchange would realise, at any time after September 1st. I now find that the amount realised on this stock amounted to $2,144, and, as above mentioned, I am willing to let you have this amount for the fifteen bonds above mentioned any time after September 1st, of this year. . . . ."

The applicant, after the 1st September of that year, repeatedly demanded from the solicitor performance of his undertaking, with no result. The terms of the solicitor's undertaking are too explicit to admit of doubt, and that he is in default in performance is also equally beyond question. Nor is there, I think, any doubt as to the power and jurisdiction of the Court to enforce performance of such an undertaking on the part of a solicitor on a summary application such as this.

Several of the cases on the subject are referred to and discussed by Hamilton, J., in *United Mining and Finance Corporation Limited* v. *Becher*, [1910] 2 K.B. 296, referred to by Clute, J.

The real difficulty in the matter is as to the consequences to follow disobedience of the order to pay. Do they, on the authorities, warrant the extreme measure, upon default, of removing the solicitor from the roll? Not without doubt and hesitation, I have arrived at the conclusion that they do not.

Failure to implement an undertaking has never, I think, in itself, been held to be such misconduct as the Court will act upon in striking from the roll. In the technical sense, it is not necessarily misconduct at all. An illustration of this occurs in the case to which I have referred, where the solicitor holding the money

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was not even charged with dishonourable or discreditable conduct, and really appeared to have been anxious to get rid of the money if he could have done so safely. See also *In re Pass* (1887), 35 W.R. 410. The Court enforces an ordinary uncomplicated undertaking "with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers:" *per* Coleridge, J., in *In re Hilliard* (1845), 2 D. & L. 919.

A solicitor is only struck off the roll for misconduct. What is called misconduct has been defined in a number of cases referred to in Cordery's Law of Solicitors, 3rd ed., pp. 176 *et seq.*, but to which it is unnecessary to refer in detail. The result of them is that, speaking generally, to constitute misconduct the misconduct must be either criminal or fraudulent. Mere delay in paying over a client's money is not sufficient. Misappropriation of it is. Conduct amounting to negligence, even gross, is not misconduct. It must be shewn that the conduct is dishonourable to the solicitor as a man and dishonourable in his profession. See *per* Lord Esher, M.R., in the case of a solicitor, *In re Cooke* (1889), 24 L. J. Notes of Cases 237.

In *In re A Solicitor* (1895), 11 Times L.R. 169, Wills, J., in the Divisional Court, said: "There must be something amounting to misrepresentation or deceit, and not merely the fact that the money has not been paid over."

Clute, J., in his very full and careful review of the evidence, says that the solicitor's examination was, to say the least, unsatisfactory, and comments upon his failure to appear before him personally to supplement it by further explanations, for which purpose he had let the matter stand over. The learned Judge also expresses the opinion that "there can be no doubt that the bonds were absolutely worthless, and it is difficult to believe that the solicitor did not know it. He was one of the directors of the Excelsior Brick Company, the company that issued the bonds."

It is to be observed, however, that there is no finding that the exchange with Frain was not a real transaction, and that it was Frain and not the solicitor who sold the English shares and received the proceeds. Both have so sworn, and there is no evidence to the contrary.

The applicant admits that she knew before parting with the English shares that it was proposed to invest the proceeds in the bonds of the brick company. She did not, she says, know that the solicitor was a director in the company or indeed that he had any personal interest in it. If she had known, it is not easy to say what effect the knowledge would have had. She was in the hands of the solicitor, ignorant of such matters herself, and perhaps the more likely to have thought well of the investment because the solicitor had invested his own money in it.

That the investment was an improper and unsafe one is now perfectly clear. The company was organised only about the end of the year 1912, and on the 24th April, 1914, it was placed in liquidation. The solicitor said that he personally held bonds of the company to the extent of $20,000 and stock to the extent of $10,000, which he acquired early in the year 1913, and which he still held when the order to wind up was made. He had thus given some evidence of his own faith in the enterprise, further supported, I think, by his volunteering the undertaking to take the bonds off the applicant's hands at the price the English stock had sold for.

If, when he wrote the letter of the 4th February, 1914, he had been aware of the worthlessness of the bonds, he would scarcely have been so willing then to assume definitely that responsibility.

Upon the whole, while there is certainly reason to be suspicious, there is also justification, I think, for regarding the solicitor as dupe rather than knave. When the negotiations began, however absurd it may seem now, he may quite honestly have considered that he was proposing to the applicant a reasonably safe and sound investment, which would considerably increase her income; and he therefore, in my opinion—erring, if I err, on the side of mercy—has incurred only the minor penalty of being summarily ordered to perform his undertaking, which in the end may even be more beneficial to the applicant than if the order to pay was to be followed by an order taking away his means of earning money with which to pay.

The order should be amended accordingly, and there should, under the circumstances, be no costs of the appeal.

MACLAREN and MAGEE, JJ.A., concurred.

Maclaren, J.A.
Magee, J.A.

HODGINS, J.A.:—I agree with the judgment of my brother Garrow. I think that, before an order to strike off the roll can

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be made, misconduct and not mere negligence must be established. The relationship between solicitor and client is a fiduciary one; and, if a definite finding of improper conduct had been made by the learned Judge appealed from, I would have been in favour of affirming the present order. But, as I read his judgment, it falls short of this, perhaps because the evidence, so far as it went, just failed to prove it conclusively.

The circumstances were suspicious, but no great attempt seems to have been made to develop the real situation.

In agreeing to the variation proposed I think express provision should be made for the handing over of the bonds and coupons upon payment, so that the solicitor will be held to the position taken by him on his examination, that the arrangement under which he advanced $155 to Miss Morris was that he would be able to reimburse or repay himself when the Excelsior people paid their second coupon. It ought not to be recoverable or set off except against the interest on the $2,144, nor until payment of the full amount of the balance thereof. *Order varied.*

N. B.

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THE KING v. LAWLOR: Ex parte DOYLE.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., and White and Grimmer, JJ. June 23, 1916.

INTOXICATING LIQUORS (§ III H—90)—ORDERS FOR DESTRUCTION—VALIDITY—STATUS OF INFORMANT.

An order for the destruction of liquor condemned, following a conviction under the Canada Temperance Act for storing the liquor, is entirely separate and distinct from the conviction itself. The magistrate, therefore, may properly order the liquor to be destroyed by the complainant on whose information the conviction was made.

[*Ex parte Dewar*, 39 N.B.R. 143, followed; *Ex parte McCleave*, 35 N.B.R. 100, distinguished.]

Statement.

THE defendant, Dennis Doyle, the agent of the Canadian Express Co. at Newcastle, was convicted by James R. Lawlor, police magistrate for the town of Newcastle, on February 14, 1916, on the information of William H. Finlay, inspector under the Canada Temperance Act for the town of Newcastle, for having unlawfully stored intoxicating liquor brought into the county of Northumberland contrary to the provisions of Part II. of the Act. The only evidence of storing was that the man employed to attend the trains and receive and deliver packages arriving by express, on January 29, 1916, in the performance of his duty, attended at the station on the arrival of the train and received from the express car, among other packages, a barrel, which he

placed on the station platform, intending to put it in the company's wareroom. Before he had an opportunity of doing so it was seized by the inspector, opened and examined, and sent by him to the police station. The defendant was not present and personally had nothing to do with the transaction. An order for the destruction of the liquor was made by the magistrate on the same day the conviction was made, but was separate and did not form part of the conviction. This order was directed to the complainant for execution.

Statement.

At the April session of the Court a *certiorari* to remove and a rule *nisi* to quash the said conviction and order was granted on the grounds: (1) That there was no evidence that the liquor was stored in contravention of the Act. (2) That the conviction and order were bad, because the order for destruction was directed to the complainant for execution.

J. J. F. Winslow shewed cause against the rule *nisi*.

P. J. Hughes, in support of the rule.

The judgment of the Court was delivered by

GRIMMER, J.:—On February 2, 1916, an information was laid before James R. Lawlor, police magistrate of Newcastle, against one Dennis Doyle, charging him with storing intoxicating liquor brought into the county of Northumberland, contrary to the provisions of Part II. of the Canada Temperance Act. The matter was heard before the magistrate, witnesses were examined, and on February 14 Doyle was convicted and adjudged to pay a penalty of $50 and costs.

Grimmer, J

The motion is to quash the conviction, a writ of *certiorari* having been ordered by this Court on April 11, to bring the proceedings up in the usual course.

The grounds upon which the writ issued were as follows:—1. The liquor seized was never stored by defendant. 2. The order for destruction is made to the complainant.

Sec. 127 of the Canada Temperance Act, as amended by the Act 7-8 Edw. VII., ch. 71, sec. 2, provides that:—

> Every one who by himself, his clerk, servant or agent, in violation of Part II. of this Act (*d*) delivers to any consignee or other person, or *stores, warehouses*, or keeps for delivery, any intoxicating liquor so sent, shipped, brought or carried, shall on summary conviction be liable to a penalty, etc.
>
> (2) Every one who, in violation of Part II. of this Act, in the employment or on the premises of another (*d*) so delivers, stores, warehouses or keeps any intoxicating liquor, is equally guilty with the principal, etc.

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Grimmer, J.

This case clearly comes within the scope of this section, which I think disposes of the first objection. As it is pointed out in the *King* v. *Hornbrook, Ex parte Morrison* (1909), 39 N. B. R. 298, which is binding upon this Court in this case, and, as therein stated by Barker, C.J., at 301:

> No question is suggested as to the sufficiency of the information, or that the magistrate had not jurisdiction over the offence charged as well as over the person charged with the offence. That being the case, as the right of *certiorari* to remove the proceedings to this Court has been expressly taken away, any supposed miscarriage in the inquiry, from the insufficiency of the evidence or as to its irregularity, cannot be inquired into by this Court.

In respect to the second ground I cannot think that, because the officer who is ordered by the magistrate to destroy the liquor is the same officer who had previously, in the performance of his duty, seized the liquor, and laid the complaint upon which the conviction is made, the order for the destruction of the liquor should thereby be invalidated or rendered void.

The order for destruction is not and cannot be made until after conviction, which means that all the steps leading up to it, including hearing, etc., of the cause, have been taken and are concluded; and the duties of the officer making the complaint are fully completed and ended. An entirely new phase of the matter is entered upon, a ministerial act is being executed, and, in my opinion, the personality of the officer at this stage of the proceedings cannot make the slightest difference to, or work any injury to the person convicted of a violation of the Act.

Section 137 of the Canada Temperance Act relating to the destruction of liquor seized under warrant among other things provides:—

> and such order shall thereupon be carried out by the constable or peace officer who executed the said search warrant, or by such other person as may be therewith authorized by the officer or officers who have made such conviction.

In view of this, I think it cannot be successfully contended that the complainant in this case was not a proper person or officer to be intrusted with the destruction of the liquor, and that because he was therewith authorized by the magistrate, therefore the order for destruction is invalid and should be set aside.

As stated in *Ex parte Dewar* (1908), 39 N. B. R. 143, at 144 :—

> as the sole ground put forward on the motion for the rule here was that the prosecutor of the offence had also laid the information for and executed the search warrant by which the evidence was obtained on which this conviction was based, we think the rule should be refused.

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So here for the reasons stated and supported by *Ex parte Dewar*, which, with this case, is distinguished from *Ex parte McCleave* (1900), 35 N. B. R., 100, in that the order for destruction of the liquor is not contained within the conviction, but is separate and distinct therefrom, I think the rule must also be discharged on the second ground. *Conviction affirmed.*

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REX v. LEITCH.

Ontario Supreme Court, Boyd, C. February 15, 1916.

INTOXICATING LIQUORS (§ I C—34)—LOCAL OPTION—BEING FOUND DRUNK IN "PUBLIC PLACE."

A "public place" within the meaning of the Liquor License Act, R.S.O. 1914, ch. 215, as amended 1915 Ont. Stat. ch. 39, sec. 33, includes a place to which the public habitually resort, although they may have no legal right to do so; and a conviction for being found drunk in a blacksmith shop in a village where a local option by-law was in force will not be quashed on the ground that the shop was not a "public place," if the evidence shews that people congregated there.

[*R.* v. *Cook* (1912), 20 Can. Cr. Cas. 201, 8 D.L.R. 217, 27 O.L.R. 406, distinguished; *R.* v. *Wellard*, 14 Q.B.D. 63, referred to.]

Statement.

MOTION to quash the conviction of the defendant by a magistrate for an offence against sec. 141 of the Liquor License Act, R.S.O. 1914, ch. 215, which is in part as follows: "Where in a municipality in which a local option by-law is in force or in which no tavern or shop license is issued, a person is found upon a street or in any public place in an intoxicated condition . . . he shall be guilty of an offence against this Act." By clause (*a*), added by 5 Geo. V. ch. 39, sec. 33, "public place" includes "any place, building or public conveyance to which the public habitually resort or to which the general public are admitted either free or upon payment," etc.

James Haverson, K.C., for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

Boyd, C.

BOYD, C.:—There is some evidence that Leitch was seen in an intoxicated condition in Morris's blacksmith-shop, in the village of Newburg, and was committing an offence against the provisions of sec. 141 of the Liquor License Act.

The offence must be in some public place, and that is defined by the Act of 5 Geo. V. ch. 39, sec. 33, as any place to which the public habitually resort. One may take judicial notice that in the ordinary country village the forge of the village blacksmith is a place of popular resort when work is going on. Several people were congregated in this shop on the day in question, talking about

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horses and races and so passing the time. The amendment of the Act was subsequent to the case of *Rex* v. *Cook* (1912), 20 Can. Cr. Cas. 201, 8 D.L.R. 217, 27 O.L.R. 408, decided by my brother Kelly, who construed the old section as controlled by the word "street," and held that it did not extend to a place where, as a hotel, persons are permitted to go for accommodation such as a hotel affords.

"Public place" is a fluctuating term, and the meaning varies with the context, but as a general thing the words of Grove, J., in *Regina* v. *Wellard* (1884), 14 Q.B.D. 63, are suggestive: "A public place is one where the public go, no matter whether they have a right to go or not."

I am not disposed to disturb the magistrate's finding; and the application is dismissed with costs. *Motion dismissed.*

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HEINRICHS v. WIENS.

Saskatchewan Supreme Court, Lamont, J. October 1, 1916.

CONSPIRACY (§ III B—16)—CHURCH BOYCOTT—INJURY TO BUSINESS.

Where officers of a church enter into a combination to expel a member of their congregation from the church for insufficient reasons, the effect of which is a boycott and deprivation of his business, they are liable to him in damages for his resultant business losses.

[*Temperton* v. *Russell*, [1893] 1 Q.B. 715; *Quinn* v. *Leathem*, [1901] A.C. 495, followed. See also *Heinrichs* v. *Wiens*, 23 D.L.R. 664, and annotation 21 D.L.R. 71.]

Statement.

ACTION for damages for wrongfully conspiring to injure plaintiff's business.

J. A. Allan, K.C., for plaintiff.

The defendants appearing in person.

Lamont, J.

LAMONT, J.:—In this action the plaintiff seeks damages against the defendants, on the ground that they entered into a combination or conspiracy to interfere with his business as an oil merchant and to effect a boycott of his goods.

The plaintiff resided at Osler, and dealt in gasoline and kerosene and machinery. The defendant Wiens is Bishop, and the other defendants are officers and preachers of the Neuanlage Mennonite Church, situate at the village of Neuanlage, near Osler. The great majority of the plaintiff's customers were members or adherents of the defendants' church. Prior to April, 1913, the plaintiff, in addition to his oil business, had also carried on a hardware business. This hardware business he—on April 14, 1913, by an agreement in writing—sold to one A.

D. Schellenburg. The agreement provided that the price to be paid for the hardware stock was as follows: The wholesale cost plus freight and drayage laid down in Osler for all new and salable stock in perfect condition, and on any stock used or not in perfect condition a discount of 25% was to be allowed off said cost price. Two experts were employed to take the stock and compute the value thereof. These two found the value of the stock to be $6,596 and at that price Schellenburg took it and paid $2,200 in cash and gave his notes for the balance. The first note of $1,300 fell due in June, 1913, and was paid. The second note, for $1,000, fell due November 15, 1913, and was not paid. Heinrichs entered suit against Schellenburg to enforce payment thereof. A few days later Schellenburg interviewed the defendants, who appeared to meet together for discussion and consultation whenever the business of the church or congregation required their attention. In that interview Schellenburg informed the defendants that in the computation of the amounts due Heinrichs for the hardware stock there had been some serious errors; as, for instance, that one item of 51 spools of barbed wire had been charged up in two different places. The defendants appointed two of themselves, John Wall and P. H. Klassen, to interview Heinrichs. This they did. Heinrichs testified that they told him that Schellenburg had been to see them, and that it appeared that some errors had been made in computing the amount due on the hardware stock; they asked him to allow Schellenburg the amount of these errors. To this Heinrichs says he objected, and pointed out that it was now impossible to check over the stock so as to see if the account had been rightly taken. He says he told them that if Schellenburg had come within a month or so of the sale, and before a considerable portion of the stock had been sold and while it was possible to check it over, he would have rectified any errors in the computation, but as that was now impossible, and they had chosen two experts to take the stock and compute the amounts, he did not see how it was possible at that date to make any allowance, both of them having accepted the experts' figures. He says they told him he must settle with Schellenburg, and that, if he did not, they had agreed that they would summon him to Neuanlage for the following Thursday, and that if he did not obey he would be put out of the church and deprived of his business.

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Lamont, J.

Both Wall and Klassen admit that they went to Heinrichs to get the errors in the Schellenburg account fixed up, and they both admit that Heinrichs refused to make any settlement in respect thereof, and that they summoned him to appear at Neuanlage the following Thursday, but they deny that either of them intimated that disobedience on the part of Heinrichs to that summons would result in his being expelled from the church or deprived of his business. In his evidence John Wall stated that they "did not tell Heinrichs what would be the consequence of disobedience on his part as he already knew that."

Heinrichs did not attend on Thursday as directed. On the following day the defendant Klassen, either alone or in company with the defendant Loeppky, called on Heinrichs and asked him why he had not attended on the Thursday. Heinrichs replied that he had not been guilty of anything. He was told that the Bishop and preachers waited for him and he had not appeared. He says they further told him that if he did not appear the following Thursday with a settlement from Schellenburg, or with Schellenberg in person, he would be put out of the church and deprived of his business. Heinrichs did not attend on Thursday, but went to church on the Sunday following. After service was over a meeting was held in the church, and Heinrichs asked to be present. He was asked if he had made settlement with Schellenberg, and, on replying that he had not, the defendant J. P. Wall said: "they should take straight action against him as he would not obey." The defendant Wiens, however, gave him until the following Thursday to procure a release from Schellenberg or to come with him in person. Heinrichs did neither. On Friday the defendant Loeppky called on him and informed him that he would be excommunicated. On or about December 7 he was excommunicated.

It is part of the doctrine of the defendants' church that a person expelled from the church is to "be shunned and avoided by all members of the church." They are "to have nothing to do with him." Following his expulsion from the church, the plaintiff's customers who were members or adherents of the defendants' congregation ceased to purchase his goods, to the great detriment of his business.

In their evidence the defendants stated that, in addition to

the plaintiff's refusal to settle with Schellenberg, another reason for his expulsion was that he was suing in the Courts to collect accounts due to him. They said that it was against their teaching for one member of the church to sue another. Although this may have had some influence upon the defendants, there is on the evidence, in my opinion, no escaping the conclusion that the real reason why they summoned Heinrichs before them and finally expelled him from the church was because he refused to settle the claim made against him by Schellenberg, in respect of the errors which Schellenberg alleged had crept into the account. In the meantime Schellenberg had paid the note sued on. In April, 1914, Schellenberg brought an action in the Supreme Court of Saskatchewan against Heinrichs to have corrected the errors which he claimed existed in the account; these—according to the statement of claim—amounting to $994.79. This action was tried before my brother Newlands, who gave judgment for Heinrichs. No appeal was taken from this judgment, and it is therefore final. That judgment establishes that Schellenberg's claim was an unjust one, and that Heinrichs was right in refusing to settle it. On these facts, is the plaintiff in the present action entitled to recover?

The allegation against the defendants is that they conspired to interfere with the plaintiff's business and to effect a boycott of his goods.

A conspiracy has been defined to be a combination of two or more persons to do or procure an illegal act or to do or procure a legal act by illegal means. In order to hold the defendants liable for the loss suffered by him, the plaintiff must shew either that the act procured by the defendants was illegal or that, in procuring it, they used illegal means. The loss of business to the plaintiff followed as a result of the members of the defendants' church refusing to continue to purchase his goods. Why they ceased to purchase his goods is not expressly shewn by the evidence as none of the plaintiff's customers were called as witnesses, but I think the inference is irresistible that they withdrew their custom because the plaintiff had been expelled from their church, and it was a part of their church's doctrine that they must have nothing to do with an expelled member. The evidence does not shew that after the plaintiff's expulsion the defendants inter-

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viewed the members of their congregation and expressly requested or directed them to have no dealings with the plaintiff, but in my opinion this is not necessary. The defendants well knew that this expulsion would result in the members of the church having no further dealings with him. Knowing and intending as they did that such would be the result, the defendants in my opinion are in precisely the same position as they would have been if, without expelling him, they had gone to the members of their congregation and said: "Heinrichs refuses to settle Schellenberg's claim, you must therefore have nothing more to do with him." If the defendants had done that, and the members obeying that direction had ceased dealing with the plaintiff, there does not seem to be any doubt but that the defendants would be liable, unless they could shew just cause for the action, for although the members would be within their legal rights in ceasing to deal with the plaintiff, not being under a contract to continue so doing, yet to procure without just cause or excuse a boycott of the plaintiff's goods is to commit an actionable wrong against him if he suffers damage thereby

This proposition seems to be established by the following authorities: *Temperton* v. *Russell*, [1893] 1 Q.B. 715, at 731.

In *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 534, the House of Lords held that a combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers not to deal with him is actionable if it results in damage to him.

See also judgment of Buckley, L.J., in *National Phonograph Co.* v. *Edison Bell*, [1908] 1 Ch. 335 at 359.

In the present case, if I am right in holding it to be shewn that the plaintiff's customers, who were members of the defendants' church, ceased trading with him as a result of his expulsion, it seems to me to follow that defendants were guilty of a legal wrong towards him. They endeavoured to coerce him into settling Schellenberg's unjust claim, and they advised and counselled his expulsion for his refusal to settle it. They expelled him, knowing and intending that thereby he would lose business. They did this, not to secure or advance any material interest of their own, but solely to punish him for disobedience to their orders. This, in the light of the above authorities, was a clear invasion of his

legal right to have his customers trade with him without interference. For this invasion the defendants must be answerable in damages unless they can justify their conduct. Was there any justification for his expulsion? I cannot find any. Only two grounds were suggested; (1) Because he would not settle Schellenberg's claim, and (2) because he sought the aid of the Courts in collecting some overdue accounts.

His refusal to settle Schellenberg's claim is no justification, because the Court has held that that claim was an unjust one and that the defendant did not owe it. Neither can any justification be found in the action of the plaintiff in issuing writs to enforce payment of his accounts. It is the right of every citizen of this country to appeal to the Courts. It is his right to call for the aid of the Court either in enforcing a just claim on his own part or in protecting himself from an unjust one on the part of another. Of that right he cannot be deprived by any regulation or doctrine of any church or other association, nor can he be expelled from church for so doing, except, possibly, where he has expressly bound himself not to exercise such right on pain of expulsion. Nothing of the kind is shewn to have existed here. Not only is it not shewn that the plaintiff ever agreed to forego his right to appeal to the Courts, but it is not shewn that there is any regulation of the defendants' church forbidding its members to have recourse to the Courts to advance or protect their interests. In the minister's manual filed, there occurs the following, at p. 102:

> When difficulties occur between members of the church, in relation to secular affairs, the deacon, in the first place, shall make an effort to bring them to terms, and settle the matter between themselves. When this cannot be accomplished, the deacon shall advise them to choose arbitrators from among the brethren in the church, whose duty it will be, upon the appointed time, to examine the matter in dispute, receive the testimony of witnesses, and impartially, and to the best of their knowledge and judgment, decide the matter. . . .
>
> But if one of the contending parties should be unwilling to submit to the decision of the arbitrators, and the counsel of the church, and continue in his self-righteousness and in-submission, a certain time for consideration of the matter should be given him, and if he then still refuses to submit and acknowledge his error, he must, according to Matt. 18 : 17, be excluded from the church, until he repents, becomes willing to acknowledge his error, and desires to be readmitted into the fellowship of the church.

This is not a prohibition against having recourse to the Courts; to deprive a citizen of that right the language must be clear and explicit, in fact, in this very case the defendants themselves are

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appealing to the Court to determine whether or not they are liable to the plaintiff. But even if the clause could be interpreted as prohibiting an appeal to the Courts, the person so appealing is to be expelled only if he refuses to submit to the decision of the arbitrators. In their dealings with the plaintiff the defendants did not have "the matter in dispute" referred to arbitrators. They appear to have decided themselves in Schellenberg's favour even before they heard Heinrichs' version, and, certainly, without ever taking the evidence of the experts who took the account and who were in a position to testify as to its correctness. In so deciding they were wrong, as the Court subsequently determined. I am, therefore, of opinion that the defendants have failed to establish any legal justification for their act in expelling the plaintiff from their church. The natural and probable consequence of that expulsion was the loss of business to the plaintiff; for that loss the defendants are liable.

The plaintiff claims loss of profits on the sale of oil and on the sale of machinery. In 1913 his profit on oil amounted to between $1,200 and $1,300. The much greater portion of his oil business was done with the members and adherents of the defendants' church. His profits on the sale of machinery were in the neighbourhood of $500, and resulted from the sale of threshing machines. His claim for loss of profit on this head I disallow, on the ground that it does not follow that because an agent sells a threshing machine in a community in one year he can sell, in the same community, another machine in the following year. Every community requires only a certain number of threshing machines to do the threshing. It is not shewn that in 1914 any members of the defendants' church bought a threshing machine of the kind for which the plaintiff was agent.

I cannot, therefore, say that but for his expulsion he could have sold a threshing outfit to these people in 1914.

His oil business, however, stands on a different footing. It was shewn that the members of the community practically all used kerosene for lighting purposes, and that most of the farmers dealing with the plaintiff had small gasoline engines to run their crushing machines, milk separators, etc. There would, therefore, be a demand for gasoline and kerosene in 1914 similar to that in 1913. This custom the plaintiff lost, in so far as his business was with the members of the defendants' congregation.

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It is difficult to fix the loss accurately, but in my opinion it would amount to fully $1,000. This loss the defendants must make good. There will, therefore, be judgment for the plaintiff for $1,000 damages, with costs. *Judgment for plaintiff.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 24, 1916.

CONTRACTS (§ I E2—70)—STATUTE OF FRAUDS—DEBT OF ANOTHER—PRIMARY OR COLLATERAL UNDERTAKING.

Money advanced to pay the debts of a corporation, on the request of its president, may form a primary liability of the latter, and not a debt of the company, and in that case the fourth section of the Statute of Frauds does not apply to the promise of the president to pay, as it is not a promise to pay a debt of the company.

[*Brown* v. *Coleman Development Co.*, 26 D.L.R. 438, 35 O.L.R. 219, reversing 24 D.L.R. 869, 34 O.L.R. 210, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, *Brown* v. *Coleman Development Co.*, 26 D.L.R. 438, 35 O.L.R. 219, reversing the judgment at the trial, 24 D.L.R. 869, 34 O.L.R. 210, in favour of the defendant.

The action in this case was brought against the appellant and the Coleman Development Co. to recover moneys advanced by respondent for the company's operations, which, he alleges, appellant promised to repay. It was referred to a referee, who found that the promise of repayment was made, and gave judgment against the appellant and for the company. On appeal, Middleton, J., accepted the findings of fact by the referee, but reversed his judgment on the ground that the appellant's agreement was one to answer for the debt of the company and void under the Statute of Frauds. He gave judgment against the company, and dismissed the action against the appellant. The Appellate Division restored the judgment of the referee.

H. S. White, for the appellant.

McCullough, for the respondent.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J. (dissenting):—It has been assumed that this case is concluded by the authority of decided cases, of which *Lakeman* v. *Mountstephen*, L.R. 7 H.L. 17, is a leading case. I think that is far from correct. All that was before the House of Lords, in that case, was the question whether there was evidence to go to the jury. *Per* Lord O'Hagan: "Our judgment proceeds merely on the ground that there was evidence to go to the jury."

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In the present case, whilst fully admitting that there was evidence on which it was possible for the referee to find a primary liability of the appellant, this Court has also to consider whether the facts establish such liability.

Although this Court is reluctant to disturb findings of fact arrived at in the Courts of original jurisdiction, yet this rule calls for a less strict observance where the finding is not of a Judge or jury, but a referee, whose decision may not command so much confidence. In the present case, moreover, the finding of the so-called fact is, in reality, rather an inference from the facts.

I am far from satisfied that the evidence shews an original primary liability of the appellant to the respondent, but there is more than this. Lord Selborne, in the case above-mentioned, when laying down that there can be no suretyship unless there be a principal debtor, adds: "Who, of course, may be constituted in the course of the transaction by matters *ex post facto* and need not be so at the time."

In my view, the evidence does not support the conclusion arrived at below, and I would allow the appeal with costs.

Davies, J.

DAVIES, J.:—The sole question in this case is whether the contract made between Brown and Gillies for the advances made by the former to the Coleman Development Co. was one which involved a personal liability on Gillies' part, and, if it did, whether it came within the Statute of Frauds and was a promise to pay the debt of the company.

Counsel for appellant argued that the subsequent transactions with the company shewed that the contention as to Brown being a primary debtor was incorrect and, in fact, impossible.

I am unable to accept that contention, and think these subsequent transactions are quite consistent with Gillies' primary liability for the moneys advanced by Brown. I agree with the Second Appellate Division in its conclusion as to the law on the proved facts. The findings of fact of the referee were accepted by Middleton, J., who determined, however, against Gillies' primary liability.

Gillies' promise to Brown was, in effect: If you advance these moneys to pay the accruing liabilities of the company, which I had agreed to do, but find myself at present unable to do, I will return them to you. It matters not that the moneys advanced

were for the advantage of the company. I think both parties fully understood that Gillies was the primary debtor to whom Brown looked for payment, and that the evidence shews this to be so.

It does not seem to me that the Statute of Frauds applies at all to a case such as this. That statute applies only to cases where the promise is made to the creditor or person to whom the debt is owing. A promise to a debtor to pay his debts is not within the statute. *Eastwood* v. *Kenyon*, 11 Ad. & E. 438, in 1840.

I would dismiss the appeal with costs.

IDINGTON, J. (dissenting):—The question of law raised is whether or not the contract, if any, between appellant and respondent falls within the Statute of Frauds, sec. 4.

In order to appreciate properly the facts, which one must have an accurate conception of in such cases in order to apply the law, I read the respondent's evidence, and found myself, from the peculiarities I found therein, compelled to read and consider the entire evidence in the case.

It is, unfortunately, by reason of the death of the learned referee, one of those cases where we cannot, as I conceive, rest satisfied with findings of fact, so far as dependent upon the relative credibility of the parties, by the Judge upon whom it has devolved to finish a half-tried case. This is not the first of that kind to come here. He is in little, if any, better position than we when re-hearing trials upon mere depositions. Indeed, he may, in a sense, sometimes be in a worse, in case those coming before him happen to be possessed of a demeanour to impress him favourably.

The appellant was the owner of some mining claims and promoted the incorporation of the defendant company; became, and continued throughout, its president and possessor of $200,000 face value of its stock, as the price of conveying his claims to the company, and, later, acquired a very large number of shares to recoup him for advances to develop the property, and the solicitor who procured the charter was assigned stock in the way of compensation for his services, and became one of the directors.

Others seem to have taken merely the necessary stock to qualify them as directors, and a purchase by respondent from

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appellant, in the spring of 1906, of 500 shares left the appellant more deeply interested than all the rest combined in the success of the company.

By reason of his falling ill in July, 1906, and being unable for a time to look after the business, the solicitor suggested engaging respondent at $10 a day for 2 days in each week, and to this appellant assented.

He was engaged accordingly, and soon became also the secretary and a director of the company, which position he held during all the time we are concerned to know anything of their affairs.

He presented an account of $192—substantially— for services, at a meeting in July, 1906, and took payment in shares at 25c. a share.

On October 29, 1906, he presented another account for $800, and accepted payment in shares issued on same basis. He would seem thus to have become a shareholder of a greater number of shares than any other person besides appellant. His present claim rests upon an alleged conversation had in December, 1906, and the construction put thereupon.

His evidence is as follows:—

Q. When did you commence advancing moneys? A. Along in December. Q. Of what year? A. The fall of 1906. Q. How did you come to make those advances? A. Mr. Gillies' money had run short, and he didn't want to discontinue the operations and have the company die out. He wanted to keep working, and he told me that if I would advance this money and keep the thing alive, that he had moneys coming in and he would return it to me. Q. When you say "advanced" this money—what money? A. Money to the workmen or to keep the operations of the company going. There were supplies and wages. Q. When do you say that arrangement was made? A. Prior to the payment of this 4th December to William Hill. Q. Well, did you agree to that? A. Yes, I agreed to it.

Either this story is true or false. It is unsupported by anything that can properly be called corroboration. It is absolutely denied by the appellant.

A perusal of the entire evidence leaves a most unpleasant impression as to each as a witness. The respondent, notwithstanding what he would have the Court believe as to this bargain with appellant in December, 1906, presented, at a meeting January 22, 1907, an account for $2,800, admittedly comprising advances of the character he had just bargained so recently to look to appellant for repayment of.

If his story is true, then he had no right to render this account

to the company, so far as it embraces items for advances. His doing so tends to destroy belief in his story and helps us to credit appellant in his denial.

But what could he expect in way of repayment? He knew the company had no cash. And less than 2 months had elapsed since, if his story is to be believed in the sense he now asks the Court to accept and act upon it, he was to look to appellant alone.

In presenting the account to the company, we hear nothing from him but a demand for stock at 25c. on the dollar, although believed by those at that meeting, including himself, to be worth par or perhaps twice its face value. He did not, when appellant resisted him, there turn round and demand the repayment from him of the money advanced. Why? Can there be a doubt in the mind of any one reading his evidence that he much preferred stock at 25c ?

Passing these men for the moment, there was in the person of the solicitor, also a director, another witness. He is one of repute and standing, whose veracity has not been questioned, and his version of what transpired does not agree with that of the respondent. And he denies the adoption of a resolution, whilst he was present, which is found afterwards written up in the minute book by the respondent in the following terms:—

Resolution passed by the Directors of the Coleman Development Co., Limited, on the 22nd day of January, 1907, at 9.30 p.m.

Present:—James F. Gillies, N. B. Brown, John McKay.

Moved, seconded and resolved, that the account of N. B. Brown amounting to the sum of twenty-eight hundred dollars, be paid by issuing stock at twenty-five cents per share amounting to eleven thousand two hundred paid-up shares, and the same is issued.

Carried—JAMES F. GILLIES, *President;* N. B. BROWN, *Secy.*

The appellant denies this, but has to admit his signature thereto. And counsel asks us to look at these signatures in the minute book and find, what he contends, that all appellant's signatures to a series of minutes were written at one time with the same pen and ink. I did not hear this challenged as fact in argument, and, without posing as an expert, I may say it is to be regretted the point was not developed by expert testimony. Whatever may be the facts, there is certainly a curious appearance in this alleged resolution, in which I take the liberty above of making the spelling conform with the signed minute instead of that in the printed case.

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The sequel to this alleged resolution is also curious.

No stock certificates were issued until the following August, and then as of course by the respondent.

Assuming for the moment this is only an accident and the resolution quite regular, if these two parties could manufacture wealth in that manner, why should the appellant not look to the company? Why should he pick out a man likely only, if paying personally, to pay only dollar for dollar, and let go the chance of multiplying wealth by an issue of stock?

The attitude of mind of the respondent Brown towards this company and its stock is illustrated by the following letter, March 10, 1907:—

> Dear Sir,—Your favour of the 8th inst. to hand, and, in reply, beg to say that, so far as I am concerned, I have no objection whatever to your selling your stock at $1.75. I would not like to see it put on here for less than 2.00, as a great many of the holders of it here have paid two and up as high as 2.60, the party who would be buying your stock would, in all probability, hold it at 2.00 or better—in that event there could be no harm done the holders here, as they are all pretty well satisfied it will yet make them some money. Mr. Gillies has ordered a compressor plant, and when it is installed, which will be in the course of a couple of months, together with the depth we will be then on the big vein, I think the stock should sell at 5.00, they are down on the big vein about 10 to 12 ft. from where they are sinking to where the find was made it is as straight as a gun shot through that swamp the vein where they are sinking is about as wide but has not metal in it of course it is perhaps twenty feet higher than where it was first found. Mr. Gillies is in Toronto, has been sick I believe. I am expecting him back every day; you did not say if you got the bag of ore samples which I sent you. N. B. BROWN.

When brought face to face with this letter, he says he did not believe what he asserts therein. I prefer to believe his letter to his frail memory.

And in that letter, read in light of the minutes of that January meeting, I can easily understand why a man, acting as the respondent did in relation thereto and holding such high hopes of the stock, should prefer looking to the company to recoup his advances by issues of stock at 25c. on the dollar, to charging up his advances dollar for dollar against appellant, whose possible means of repayment may have been dependent on same source.

Better an investment that might multiply 10 or 20 times than one that could yield only 5% per annum.

He has chosen to put his own interpretation upon the meaning of the conversation I have quoted by his own acts.

It seems to me the circumstance of the sending of an account by the plaintiff in the case of *Lakeman* v. *Mountstephen*, L.R. 7 H.L. 17, in 1874, had not by any means the same force as I think should be given here. I need not dwell on the attendant circumstances there. After all, that case had been submitted to a jury, and, as Lord Cairns presents the matter, all that was really involved in that case was whether or not there was evidence which should be submitted to a jury, and the jury had found for the plaintiff. I think Middleton, J., was right in the conclusion he reached, and that his judgment should be restored.

In all these cases the question is really one of fact, and, these once correctly appreciated and comprehended, there is not much difficulty in the law.

There is not much doubt in my mind but that, resting not on the alleged conversation of December, 1906, but upon what transpired between these parties later, the appellant owed the respondent in respect of some of the later advances, but the case has not been so developed as to enable any one to determine the exact truth and found a judgment thereon.

Mrs. Brown's evidence indicates and perhaps corroborates such a view. Beyond that her evidence cannot be stretched. The notes and cheques referred to by the parties needed some explanation by credible witnesses, who, no doubt, could have been got to render that part of the story intelligible and susceptible of judicial determination. The memorandum of release signed by the parties suggests as much, but is far from furnishing proof of an indebtedness by appellant to the extent of $7,000. It is the combined indebtedness of the company and of appellant that is therein dealt with. That document, so far from being corroborative of the respondent's story and claim, seems to me destructive thereof.

The appellant certainly admits by it owing something for himself, but both parties clearly admit the company owed something as well as the appellant. And, whatever each owed respondent, he agreed both together should be discharged for the sum of $7,000.

According to the contention now set up by respondent, the company owed him nothing. He had no contractual relations with them involved in the matters thus disposed of. But it may be said his wages were intended. They were already obliterated.

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Anglin, J.

I think the appeal should be allowed and the judgment of Mjddleton, J., restored.

ANGLIN, J.:—It has been held by an official referee acting as trial Judge in this action, by Middleton, J., on appeal, and again, on a further appeal, by the four Judges who constituted the Appellate Division, that the defendant made a promise of some sort to repay the moneys advanced by the plaintiff to the Coleman Development Co. That finding is sufficiently supported by evidence, and the appeal against it is hopeless.

The only difference of opinion in the provincial Courts was that, while it was the view of the official referee and of the learned Judges of the Appellate Division that Gillies' promise was absolute and that of a primary debtor, Middleton, J., held that "The promise made by Gillies was, in truth, a promise to answer for the debt of the company. . . . I think the true finding of fact ought to be that the company became debtor," and he discharged Gillies under sec. 4 of the Statute of Frauds.

Gillies absolutely denied any promise whatever. His denial was not accepted.

There is no direct evidence of any undertaking of liability by the company, although there is no doubt that the moneys were advanced for its benefit. Upon this evidence I agree with the Judges of the Appellate Division that a case of direct and primary liability on the part of Gillies is made out.

There were, no doubt, a number of circumstances, as Middleton, J., points out, which afford somewhat cogent evidence that there was some sort of understanding that Brown would be paid by the company—the facts that accounts were tendered by him to the company covering both wages (for which its liability is admitted) and the advances which he claims Gillies promised to repay, and that the present action was brought against the company as well as Gillies. On the other hand, the plaintiff's particulars clearly distinguish between the two claims, and, in a document evidencing a settlement of the amount of Brown's claim at $7,000, Gillies authorized payment of that sum by one Cartwright, who held an option on Gillies' shares in the company.

Although the evidence in chief given by Brown was heard before another officer since deceased, Gillies' evidence and Brown's evidence in rebuttal were heard by the referee who gave

the judgment, and who thus had an opportunity of observing the demeanour of both parties as witnesses. A careful study of the evidence in the light of the argument has not convinced me that the conclusion reached by the referee and unanimously affirmed on appeal by the Appellate Division, that the defendant became the primary and direct debtor of the plaintiff, is so clearly erroneous that it should be disturbed in this Court. While I have little doubt that it was expected that in some way the moneys advanced by Brown would be obtained from the company—and, had its affairs prospered, that would in all probability have happened—I cannot find in the record any evidence which establishes that it ever incurred legal liability to him.

The appeal fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—This action had been brought to recover payment of advances made by the respondent, Brown, against the Coleman Development Co. and the appellant, Gillies. His action was dismissed with regard to the company, but was maintained against the appellant.

The issue of fact was whether the defendant, Gillies, had agreed to reimburse those advances.

A long *enquête* has taken place, and it was found that the promise to pay, alleged by the plaintiff, was proved. The defendant now claims that his contract with the plaintiff was a contract of suretyship and not a direct obligation to pay.

I have perused the evidence in that regard, and I am unable to find that the facts disclosed shew that Gillies became the surety of the Coleman Development Co. He simply agreed to pay those advances.

It is true that Brown was in the employ of the mining company and that his salary was paid by the latter by way of issue of stock; but it is true equally that some advances previously made to the mining company by Brown were paid also in the same way. But, when large advances were to be made, it was agreed with the appellant, Gillies, that he would reimburse those advances. It was a personal and direct liability on his part, and he cannot now invoke the Statute of Frauds to prevent him from being liable under that contract.

The appeal should be dismissed with costs.

Appeal dismissed.

B. C.

C. A.

HIGGINS v. CREECH.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. October 3, 1916.

VENDOR AND PURCHASER (§ I E—27)—RESCISSION—VENDOR'S MISREPRESENTATIONS—LACHES—CONCLUSIVENESS OF FINDINGS.

Rescission of an agreement of sale may be decreed notwithstanding a considerable delay in bringing action therefor, where there is evidence of the vendor's misrepresentations as to the drainage of the land and its fitness for agricultural purposes; the findings of the trial Court, based on such evidence, cannot be disturbed on appeal.

Statement.

APPEAL by the defendant from the judgment of Clement, J., of November 25, 1915. Affirmed.

W. J. Taylor, K.C., for appellant.

Bullock-Webster, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal. The case is one of fact, and its decision is dependent largely on the view which the trial Judge took of the credibility of the witnesses. It cannot even be said that there is great preponderance of evidence on one side or the other. It was a case peculiarly for the trial Judge to decide, and it is unnecessary for me to say more than this, that after a careful perusal of the evidence, not confined to the portions to which we were specifically referred, I cannot say that the Judge came to a wrong conclusion.

Martin, J.A.

MARTIN, J.A.:—In my opinion no good ground has been shown for disturbing the judgment of the trial Judge.

Galliher, J.A.

GALLIHER, J.A.:—It is with considerable hesitation that I agree in dismissing this appeal.

The evidence is very conflicting and the trial Judge has found in plaintiff's favour. On the other hand, the length of time the plaintiff retained the property and made payments thereon and exercised acts of ownership over same are not in his favour.

His excuse for this is that he relied on the defendant's representations as true and took action to rescind the agreement as soon as he found these to be false.

He did not wholly do so as we find him wiring a friend—a Mr. Hoard—and receiving a favourable reply regarding the property, and had that reply referred to the drainage of the land to which the chief objections as to misrepresentations are made, in my opinion *Redgrave* v. *Hurd*, 20 Ch. D. 1, would have been applicable.

Considerable conflict of evidence exists as to the sufficiency of the drainage and the finding is in favour of the plaintiff's

contention; at the same time, I can quite conceive that land properly drained at the beginning may after years of neglect in maintaining the ditches and allowing them to be tramped down by stock and obstructed by beaver dams get into such condition that parties examining it in that condition might very well come to an adverse conclusion as to the sufficiency of the draining to what they would if they had seen the land when the drainage was completed and in proper condition.

We all know how even a year or two of neglect alters the appearance of any farm whether requiring drainage or not.

McPHILLIPS, J.A.:—This is an appeal from the judgment of Clement, J., rescinding the agreement for sale entered into between the appellant and the respondent under date of October 29, 1912, the sale price of the lots sold, viz.: lots 161 and 167, Comox District—in area about 288 acres—being $31,680. The trial Judge held that the respondent was induced to purchase the lands upon the false representations of the appellant—that the lands were drained and all kinds of agricultural products could be grown thereon and with the exception of a few acres the land was of the richest, being from 2 to 6 feet of black vegetable mould and would make a good dairy ranch—the representations were made by the appellant in person and by his agent to his knowledge and upon information given by the appellant to his agent.

McPhillips, J.A.

The evidence is somewhat voluminous and the trial would appear to have extended over 3 days, and the facts attendant upon the sale have been exhaustively gone over and although there are points of evidence that would seem to militate strongly against the respondent, *i. e.*, the obtaining of a report from a surveyor at the time of the purchase (shown later not to be an examination of the lands upon the ground), intimation that the lands might not be all that they were represented to be and long delay. Yet it would not appear that the respondent really became aware of the falsity of the representations made to him, until on or about June 8, 1915, nearly three years after entering into the agreement for the purchase of the lands. It is clear though that throughout all this time the respondent continued to rely upon the representations made to him by the appellant and on June 14, 1915, the present action was commenced. The lands are situate considerably over 100 miles from the city of

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Victoria the place of residence of the respondent, and it was not until the latter part of May, 1915, or the first part of June, 1915, that the respondent by going upon the lands with two civil engineers had it borne in upon him that the representations made to him were false, the examination proving that the lands were far from being agricultural lands capable of growing all kinds of agricultural products, but really a swamp, not drained as represented, in fact, not capable of being drained and entirely unsuitable for a dairy ranch. Notwithstanding that, it would appear that the representations were false and fraudulent, there is some evidence which might be said to have called upon the respondent to have made earlier enquiry as to the nature of the lands, and the time which has elapsed is in itself some evidence of laches, disentitling a Court of equity decreeing recission, yet in my opinion upon all the facts no sufficient case has been made out entitling a Court of Appeal to disturb the judgment of the trial Judge. The weight to be given to the judgment of the trial Judge is set forth in the judgment of the Court of Appeal in *Coghlan* v. *Cumberland* (1898), 67 L.J. Ch. 402.

The law with regard to when the party defrauded must elect to avoid the contract was dealt with by Mellor, J., in delivering the judgment of the Court in *Clough* v. *London and North Western R. Co.*, L.R. 7 Ex. 26-34.

The *Clough* case is referred to and quoted in the judgment of Lord Atkinson in delivering the judgment of their Lordships of the Privy Council in *United Shoe Co.* v. *Brunet* (1909), 78 L.J.P.C. 101, at 104. The present case is close to the line, especially in view of the fact that at the time of purchase and for some time after there was present a very active and speculative land market which has subsided and there has been a great falling off in the values of land, and the position of the appellant has been undoubtedly affected. Still it cannot be said upon the facts that there was any undue delay after knowledge upon the part of the respondent. The representations made were not in the contract, *i. e.*, the agreement for sale, but were made collaterally to it, and the present action was rightly brought, being before the taking of a conveyance, and the remedy of rescission was properly decreed, *Rutherford* v. *Acton-Adams*, [1915] A.C. 866.

I would dismiss the appeal. *Appeal dismissed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 24, 1916.

INSURANCE (§ III A—48)—DELIVERY OF POLICY TO AGENT—ILLNESS OF ASSURED.

Where a policy of life insurance contains a clause that "this policy shall not take effect until the same has been delivered, the first premium paid, and the official receipt surrendered to the company during the lifetime and continued good health of the assured," and the agent withheld delivery after hearing of the illness of the assured, even though the premium had been paid, the company is not liable upon the policy. Delivery by the company to the agent is not sufficient to bind the company.

[*Donovan* v. *Excelsior Life Ins. Co.*, 26 D.L.R. 184, 43 N.B.R. 580, affirmed.]

Statement.

APPEAL from a decision of the Supreme Court of New Brunswick, Appeal Division, 26 D.L.R. 184, 43 N.B.R. 580, affirmed.

Daniel Mullin, K.C., for appellant.

Fred R. Taylor, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This appeal should be dismissed with costs.

Davies, J.

DAVIES, J. (dissenting):—The defence set up by the insurance company in this action is, in my judgment, an unrighteous one. I am glad to be able to find that, so far as I am concerned, it cannot prevail.

The real questions, and indeed the only material ones, in my judgment, are whether the policy of insurance was legally delivered before there was a change in the nature of the risk, and, if so, whether condition 1 of the policy prevented it attaching.

The application for insurance of Mrs. Donovan was taken by the provincial manager and forwarded by him to the company. On March 18, 1912, they had received the application, and wrote to their manager as follows:—

> We have accepted this application, and are issuing policy, but, before delivering the same, you will please ascertain from Dr. Pratt that he has sent in his confidential report, and that it is satisfactory. It is not yet to hand.
>
> You will also reconcile Dr. Pratt's statement that the applicant is sixty-five, whereas the applicant herself gives her age as sixty-four. In a case of this kind, in future, in view of the age, it is best that proof of age be submitted, with a view of the same being admitted on the policy.
>
> E. MARSHALL General Manager.

Now I take it as clearly decided by this Court, in the case of *North American Life Assur. Co.* v. *Elson*, 33 Can. S.C.R. 383, that if the letter contained nothing more than the first two statements: "we have accepted this application and are issuing

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policy," just as soon as the policy was executed and posted to the general agent, the contract of assurance would have been complete. If it was destroyed in the mail or otherwise lost, that would not have affected its validity nor could any action of the local agent do so. There would then have been a completed contract of assurance, the premium having been paid and accepted.

The question, however, in this case is whether the letter did not shew a qualified or conditional delivery, and, if so, whether the conditions were complied with. I think it did, because the general agent was informed he was not to deliver the policy until he had ascertained, first, that Dr. Pratt had forwarded his confidential report and that it was satisfactory, and had "reconciled Dr. Pratt's statement that the applicant was 65, whereas the applicant herself gave her age as 64."

The policy itself, a 20-year endowment policy for $1,000 on the life of Julia Donovan, was issued by the defendant under its seal from the head office in Toronto, payable, in the event of the death of the insured, to her daughter, the plaintiff. The manager in St. John received it in due course of mail, and, in his evidence, says "he presumed he called upon Dr. Pratt," but could not remember whether he saw him, but he would not undertake to say that he did not see him.

He, then, to carry out his instructions, on March 26, called on the insured to reconcile Dr. Pratt's statement that the applicant's age was 65 years with the applicant's statement that it was 64.

The trial Judge found as a fact that there had not been any wilful misrepresentation as to age, and that *at this time, March 26, when Ferris called, the applicant was in good health.* The Judge says: "I accept her statement that when Mr. Ferris called—that is to say, on March 26—her mother was in good health."

Mr. Ferris admitted that, in calling the plaintiff's attention to the alleged discrepancy between the age mentioned in the application and that reported by Dr. Pratt, she at once stated that her mother would be 65 on her next birthday. The agent and inspector of the company, Dr. King, who filled in the application, stated in his evidence that Mrs. Donovan had told him her age was 64 *at that time,* consequently she would be 65 on her next birthday, and the doctor had put her age for insurance purposes at 65, her next birthday.

These facts reconciled the apparent discrepancy, and Mr. Ferris, the provincial manager, then accepted from the plaintiff the $4.15 of additional premium, calculated on the age of 65, told her, after receiving it, that he would send back the policy to have the age and the premium corrected, and that, while it would be some days before he would receive it back, "in the meantime everything was all right." In this both the plaintiff and Mr. Ferris, the manager, agree.

He did mail it back to the head office the same day, March 26, and on April 4 he received a corrected policy in accordance with the age discrepancy he had "reconciled."

At that time, Mr. Ferris says that, because he had learned of the then illness of the assured, he did not hand over the policy to her. He said he knew that the premium had been paid and that the company had been informed of the payment.

Now, with respect to the crucial point of the delivery of the policy, what is the proper inference to be drawn from the evidence as to whether the company's provincial agent had ascertained "that Dr. Pratt's confidential report had been sent in and that it was satisfactory," and that he, the agent, had reconciled the age discrepancy? Surely, only one inference can be drawn. He "presumed," he says, "that he went to see Dr. Pratt" before going to see the insured. He cannot remember whether he saw him or not. It was his duty to see him, and the fact that after he "presumed he called upon Dr. Pratt" he went to the insured, reconciled the age discrepancy question, recovered the excess premium of $4.15 from her required because the assured's next birthday would be 65, and, on being asked whether everything was all right now, replied that it was—completes the necessary facts to enable a proper inference to be drawn from them.

The inference then and the only inference which can be drawn from these proved facts is that he had fully complied with the instructions as to Dr. Pratt's confidential report, and had subsequently satisfactorily "reconciled" the age discrepancy and then received the excess premium, and assured the plaintiff that everything was all right.

It seems to me from that moment the contract of assurance was complete, and that the company could have been compelled to issue a policy in accordance with it, and that, if the assured

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died in the meantime, there was a contract which the plaintiff, as beneficiary, could have enforced. The subsequent illness of the assured at the time when the rectified policy came back to the provincial agent, namely, April 4, could not operate to annul a completed contract. Manual delivery of the second or rectified policy was not essential to complete the contract. That was complete when the conditions contained in the letter from the general manager of March 18 had been complied with or at any rate when the new policy was executed and forwarded unconditionally from Toronto. The policy was merely the evidence of the contract.

It does not seem to me that the withholding of the manual delivery of the rectified policy from the assured by the provincial agent on April 4, after he had unconditionally received it, because he heard the assured was then ill, could in any way operate to destroy or impair that completed contract.

The Judges in the Court of Appeal for New Brunswick "inclined to the view that the first policy did not represent a concluded and completed contract expressive of their true intentions between the parties."

But, apart from that they held and, as I understand their reasons, they based their judgment upon the fact that the condition of the policy had not been complied with alike as to its delivery and the surrender of the official receipt. That condition reads:—

> This policy shall not take effect until the same has been delivered, the first premium paid thereon, and the official receipt surrendered to the company during the lifetime and continued good health of the assured.

I have already given my reasons for holding that there was a legal delivery of the policy, if not when the first policy was forwarded to the provincial agent and the instructions enclosing it complied with, at any rate when the rectified and fully executed policy was posted from Toronto on April 1 or 2, directed to the provincial agent *without any conditions as to its delivery*. That unconditional forwarding of the policy to the provincial agent operated in law as a legal delivery from its posting. The agent says distinctly that he did not get any letter of instructions from the company with that policy. They simply enclosed the policy and the official receipt to him, and, as he heard the assured was ill, he returned both to the company, and did not hand them

over to the assured. As to the full premium, that had been admittedly paid and received, and as to the "surrender of the official receipt," there is not a particle of evidence that I can find shewing that any such official receipt ever was given to the assured which could be surrendered. On the contrary, there was merely a receipt for the moneys paid given by the provincial agent, and it could not be contended and was not contended that such a receipt was in any sense an official receipt such as that referred to in condition (1), the official receipt there mentioned being, as I understand it, substantially an interim insurance issued by the head office and held by the assured until he receives his formal policy, and, when the latter is given him, the receipt is to be surrendered.

If no official receipt was given to the assured, and no one says it was, and there is no evidence from which it can be inferred it was, then it is plain that its "surrender" could not be required by the company before the policy attached and that part of condition (1) would not be applicable at all. It is surely plain and clear that the surrender up of the "official receipt" is only necessary in cases where such a receipt has been delivered. In this case there is no pretense that it was delivered.

As authority for this position taken by me, that there was a complete delivery of the corrected policy when, with full knowledge of the facts, it was executed by the officials of the head office in Toronto and mailed without conditions to their provincial agent in St. John, and, secondly, that, when received by that official, he had no power to cancel it, and that physical possession of the policy by the assured was not necessary to complete the contract, I rely not only upon the case already cited from this Court, but also upon the well-known case decided by the House of Lords, after having the opinions of the Judges summoned before them, of *Xenos* v. *Wickham*, L.R. 2 H.L. 296.

The facts of that case, of course, are different from this, but the principles there laid down, it seems to me, govern this case.

That case was decided in 1867. Then, again, in 1896, the case of *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111, was decided by the Court of Appeal, affirming the decision of the Divisional Court.

It determined two points: (1) that when there was no evidence

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of a conditional delivery and when the policy was executed by the directors of the company, the insurance became effective and constituted a completed contract of insurance; (2) that by the recital therein the defendants had waived the condition for prepayment of the premium, and, therefore, the policy had attached. On the first point, the language of Lord Esher is in full accord with the decision of the House of Lords in *Xenos* v. *Wickham*, and admits of no doubt as to the law.

The trial Judge suggests that this decision of *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111, had been questioned by the Privy Council in the appeal of *Equitable Fire Office* v. *Ching Wo Hing*, [1907] A.C. 96, but a reference to the latter case shews clearly that the observation of Lord Davey, in delivering the opinion of the Judicial Committee, was confined solely to the second point decided in *Roberts* v. *Security Co.*, [1897] 1 Q.B. 111, as to the recital in the policy operating as a waiver, and had nothing to do with the first point decided that the execution of the policy by the directors constituted a complete contract, although the assured had not received physical delivery of the policy.

Then there was the case of *Canning* v. *Farquhar*, 16 Q.B.D. 727, where the Court of Appeal decided that, the nature of the risk having been altered at the time of the tender of the premium, there was no contract binding the company to issue a policy.

But in the case before us there is no pretense for saying that, when the premium was paid in full and accepted by the provincial agent, who then wrote to the company, and when the company, acting upon their agent's letter, executed the new or later policy, the nature of the risk had been altered. The learned trial Judge, on this crucial point, as I have already pointed out, found the fact in plaintiff's favour.

Lord Esher, in that case of *Canning* v. *Farquhar*, *supra*, says at p. 731: "When does the contract of insurance commence? It commences at the time when the premium is offered."

If at that time the offer of a premium is accepted and there has been no change in the nature of the risk, the negotiations for a contract have matured and the contract is complete. That I take to be the substance of the decision in *Canning* v. *Farquhar*.

The text writers on the subject of insurance are, I think, quite in accord with what I have written as to the above several decisions which are binding upon us.

The grounds of my judgment for allowing this appeal are that there was no wilful misstatement of fact in the application for insurance by the deceased; that the first policy sent to the assured by the company had been sent for delivery conditionally; that the two conditions, the seeing to the confidential report of Dr. Pratt and the "reconcilement" of the discrepancy between the ages of the assured as stated by her and that stated by Dr. Pratt, had been effected; that at the time the assured "was in good health," and the trial Judge so found the facts; that the company had been informed by its agent of the true facts and of the payment to its agent of the full premium based upon the age of 65, and had then (April 2, 1912), with full knowledge of all material facts, executed the second or corrected policy and mailed it to the agent without any conditions attached; that the contract of insurance was, if not before, then at least fully completed, and that there was no power on the part of the agent, on his receipt of the policy without conditions and simply on his then hearing of a change in the health of the assured, to withhold the policy or to attempt to cancel a completed contract.

I am, therefore, of opinion that the appeal should be allowed and judgment entered for the plaintiff for the amount of the policy executed by the company and mailed from Toronto to its provincial agent in St. John on April 2, 1912, $1,000, with interest from the due date of that policy, and costs in all the Courts.

Idington, J.

IDINGTON, J.:—The findings of fact by the trial Judge and maintained by the Court of Appeal have reduced anything involved in this appeal to the bare question of law relative to the delivery of the policy in question. The delivery of the first policy can certainly not be maintained as complete in face of the terms of the letter of March 18, 1912, by the general manager to the provincial manager. If the conditions set forth in that communication had been complied with, then it would be fairly arguable that the company had intended to deliver the policy. If, for example, the provincial manager had been able to reconcile Dr. Pratt's statement that the applicant was 65 with the fact that the applicant had given her age as 64, there would have been much in favour of the appellant's contention. Inasmuch as it was impossible to reconcile these statements, it would seem to have been his obvious duty to return the policy as he did. There is,

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however, a statement in the application which must be taken to be the basis of the concensus of mind between the parties and to govern the question involved herein relative to the delivery. The application reads thus:—

> That any policy which may be issued under the application shall not be in force until the same be delivered and until the actual payment to and acceptance of the premium by said company, or its authorized agent, in accordance with the company's rules, during my lifetime and continued good health, and said premium shall then be considered to have been paid and the insurance to have been begun at the due date named in the policy.

In pursuance thereof it is competent for the company to define the mode of delivery by which it is to be bound.

The first condition of the policy provides:—

> This policy shall not take effect until the same has been delivered, the first premium thereon paid and the official receipt surrendered to the company during the lifetime and continued good health of the assured.

It seems to me impossible within the language of that condition to hold that it had been the intention of the company to deliver, or be held as having delivered, any policy unless and until the condition had been complied with.

As the policy and official receipt for the premium were not dealt with within the terms of the said condition, the company cannot, I think, be held bound.

To hold otherwise would seem to conflict with the supreme rule, relative to the common purpose or intention of the parties thereto, which must govern this and every other contract.

The Courts in both the cases of *Roberts v. Security Co.*, [1897] 1 Q.B. 111, and the *North American Life Ins. Co.* v. *Elson*, 33 Can. S.C.R. 383, so much relied upon by appellant, observed, or intended to observe, that rule, and only decided that, after fully assenting to an insurance contract, the insurer could not recede.

This company, now respondent herein, would seem to have taken special pains to avoid any misunderstanding by Courts of its intention, though it may thereby have misled others.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—There was no delivery of the first policy of insurance—that sued upon. By a condition of the application, delivery of the policy was made a pre-requisite of the creation of contractual liability. The present case is in several particulars distinguishable from *North American Life Ins. Co.* v. *Elson*, 33 Can. S.C.R. 383, relied on by the appellant, notably in that

in the case now at bar the policy was sent to the company's agent not for unconditional delivery, as in the *Elson* case, 33 Can. S.C.R. 383, but to be delivered only upon conditions stated in the letter from the company to their agent referring to it. Instead of delivery being made when the agent called at the applicant's residence on March 26, he became satisfied that there had been a misstatement of the age of the applicant—one of the matters subject to which the policy had been forwarded mentioned in the company's letter. He appears to have explained to the applicant's daughter (the plaintiff in this action), with whom he dealt on her mother's behalf, the effect which the difference between the age stated in the policy and the actual age of the applicant would have upon the amount that would be payable under the policy, and also to have informed her that for a slight additional premium a policy could be obtained which would entitle the beneficiaries to the full amount of the insurance. Thereupon it was determined that such a policy should be taken rather than the policy which the company had sent to the agent, and the policy so sent was accordingly returned by the agent to the company at Toronto with the additional amount of premium which he had obtained from the applicant's daughter. A second policy of insurance was thereupon prepared and forwarded to the agent, but it was not delivered by him because he learned that the insured was ill. The evidence clearly establishes that when the agent visited the house of the insured on March 26 for the purpose of discussing the difficulty arising out of the misstatement of age in the application for the first policy, the applicant had already become ill. She never recovered and died on April 7. Her daughter deposes that she had been continuously ill for about 3 or 4 weeks before her death, and there is no contradiction of this evidence. In face of it, the finding of the trial Judge that the plaintiff's mother was in good health on March 26 is somewhat difficult to understand. The application made continued good health of the insured at the time of payment and acceptance of the premium a condition of the policy coming into force. The conclusion, therefore, seems inevitable and the risk never attached, and that the judgment dismissing the plaintiff's action is correct and must be affirmed.

BRODEUR, J.:—The question is whether the plaintiff, in those

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circumstances, as a beneficiary under the policy of insurance, would be entitled to recover.

In the policy it was provided that, in order that a policy should be binding, it should be delivered. It is contended by the respondent that there was no delivery in the present case, and that, consequently, the contract was not binding.

It was decided in the case of *North American Life Assurance Co.* v. *Elson*, 33 Can. S.C.R. 383, that an insurance policy having been sent from Toronto on September 27, to the company's agent at Winnipeg and forwarded by him on October 1 to the insured, that the contract of insurance was complete; that the policy and receipt were delivered when the papers were mailed at Toronto on September 27.

It was contended in this case that the policy was binding, and, relying on that judgment in the case of *Elson*, that the policy was duly delivered when it was mailed from Toronto. But the instructions given by the company to their provincial manager in New Brunswick not to deliver the policy until he would have reconciled the different ages given by the agent and by the doctor may and must affect the case and lead me to distinguish this case from the *Elson* case, *supra*.

But when the facts had been ascertained by the provincial manager of the respondent and when he goes to the insured with the policy and when the facts and circumstances reported above have taken place, can it be said that there was actual delivery? I am inclined to answer that question in the affirmative.

Constructive delivery has taken place. It is true that the policy had been given back to the manager to have another one issued for a larger amount, but there was, according to my opinion, a binding contract, which bound the respondent company for at least $800. The representations with regard to the age of the insured are not sufficient to invalidate the contract, because it was formally stated that if some errors happen with regard to the age, the amount of the policy or the premiums varied.

I have come to the conclusion that there was a binding contract for $800, and that the judgment of the Courts below dismissing appellant's action should be reversed.

The appeal should be allowed, with costs of this Court and of the Courts below. *Appeal dismissed.*

Re PARKIN ELEVATOR CO., Ltd.: Dunsmoor's Claim. ONT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. May 26, 1916. S. C.

CORPORATIONS AND COMPANIES (§ VI F 2—357)—WINDING-UP ACT—"SALARY OF CLERK OR OTHER PERSON"—COMMISSIONS.

A sales agent employed on a commission basis is not a "clerk or other person" entitled, in respect of commissions, to rank as a preferred creditor for arrears of "salary or wages" within the meaning of sec. 70 of the Winding-up Act, R.S.C. 1906, ch. 144.

[*Miquelon* v. *Vilandre Co.* (Que.), 16 D.L.R. 316, followed; *Re Western Coal Co.* (Alta.), 12 D.L.R. 401, distinguished. See also *Hives* v. *Imperial Can. Trust Co.* (Sask.), 29 D.L.R. 271; *Re Shirley* (Sask.), 29 D.L.R. 273.]

Statement.

APPEAL from the judgment of Falconbridge, C.J.K.B., reversing an order made by the Local Master under the Winding-up Act, R.S.C. 1906, ch. 144. Reversed.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—*Re Morlock and Cline Limited* (1911), 23 O.L.R. 165, is accepted as the authority in this class of case. I do not find in it, nor in any of the English and Canadian cases cited, nor in the statute (R.S.C. 1906, ch. 144, sec. 70), the implication that the "clerk or other person in the employment" of the company must be entirely and solely in the company's employment to be entitled to be collocated in the dividend sheet by special privilege over other creditors.

I think, therefore, that the appeal must be allowed.

Re G. H. Morison and Co. Limited (1912), 106 L.T.R. 731, and *Re Western Coal Co. Limited* (1913), 12 D.L.R. 401, support this view.

The cases from the United States Courts to which I have been referred are on the construction of special words in special statutes.

The appellant will have his costs here and below.

M. A Secord, K.C., for appellant.

P. Kerwin, for the respondent Dunsmoor.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The respondent was employed by the Parkin Elevator Company Limited as their sole agent for the sale of their goods in the Province of Alberta, and was to be paid, by the company, a commission of ten per cent. on all sales closed by him. The agreement between them is in writing, and provides, among other things, that the commission shall be paid as follows: "Acceptance by us of draft for 5 per cent. and the balance of the commission to be at 30 days;" that "in the event of any of the goods sold by" the respondent "being sold to customers who either refuse to or cannot pay their accounts, or going into liquidation, or for any cause the

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account is not paid to" the company, the respondent should lose his commission on the sale; that "in the event of any cuts in price, to enable" the respondent "to close orders," the respondent should "allow half" his "commission to go against the cut price in the event of its being so much lower that it warrants half the amount of the commission;" and that the contract was accepted and agreed to by the company "on the condition that our business will be properly looked after and that all prospective work will be followed up." Further than that, and a provision that the respondent should "not handle any products of any kind that will in any way enter into competition with our products herein specified," there was nothing imposed upon the respondent as to the time or manner in which he should act as such agent.

The company being in liquidation under the provisions of the Winding-up Act, R.S.C. 1906, ch. 144, the respondent brought in a claim for a balance of $1,629 alleged by him to be owing to him by the company in respect of commissions earned by him under that agreement, and sought, under the provisions of sec. 70 of the Winding-up Act, "to be collocated," in respect of it, "in the dividend sheet by special privilege over other creditors," for the amount of it.

The Local Master allowed the claim, but refused to give the respondent any priority over other creditors in respect of it, holding that the respondent had not brought himself within the provisions of sec. 70 in respect of this claim, though he had in respect of another claim not coming under the terms of the written agreement between the parties, nor having any bearing upon the question involved in this appeal.

Upon an appeal to a Judge of the High Court Division against the disallowance, by the local officer, of the claim for the special privilege, it was held that sec. 70 of the Act does apply to the case, and it was ordered that the claim, as allowed by the local officer, be collocated in the dividend sheet by special privilege over other creditors under that section: and this appeal is brought by the liquidator of the company, by leave as provided for in the Act, against that order, with the object of having the ruling of the local officer restored.

These three facts must be established before any one claiming it can have this privilege given to him: the claim must be one of a

clerk or other person in, or having been in, the employment of the company, in or about its business or trade; for "arrears of salary or wages due and unpaid" at the time of the making of the winding-up order; and must not exceed "the arrears which have accrued . . . during the three months next previous to the date of such order."

One may agree with the learned Judge, whose order is appealed against, and yet be far from able to support that order. One might go further and expressly declare that a person in the position of the respondent, under the terms of the agreement I have mentioned, might very well be a clerk or other person in the employment of the company in or about its trade or business; and yet be far from declaring that as such he is entitled to the special privilege over other creditors provided for in sec. 70: for it is only in respect of arrears of "salary or wages" due to such a person that the privilege extends. The learned Judge in his reasons for overruling the local officer does not mention this view of the case.

It is well in such cases as this to have regard to the nature and the purpose of the privilege, which is against the wide general purpose of the enactment in question as well as other enactments and bankruptcy and insolvency laws generally, their general purpose being equality among creditors. Salaries and wages are generally needed for, and generally expended in, the support and maintenance of the persons earning them, their wives and families and others dependent upon them, and so may well be given priority, for a short period, over debts due to other creditors in the ordinary course of trade or business and generally more nearly related to the profit and loss account of the creditor than his sustenance or that of those dependent upon him: see *Gordon* v. *Jennings* (1882), 9 Q.B.D. 45.

It has been said in some of the Courts in some of the United States of America, that such a preference is one in derogation of common law, and so statutes conferring it must be strictly construed. But the Courts of this Dominion and of this Province are under the statutory mandate to deem every enactment remedial and to give to it such liberal construction as will best ensure the attainment of its object according to its true "meaning and spirit." So treating the enactment in question, the person seeking its benefit must bring his case fairly within its provision: the onus is upon him.

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Looking at the question broadly, one is aided by other enactments, provincial as well as federal, providing for like and other protection of the earners of wages or salaries; for instances: the Wages Liability Act, R.S.C. 1906, ch. 98; the Companies Act, R.S.C. 1906, ch. 79, sec. 166; the Wages Act, R.S.O. 1914, ch. 143; the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 231; and the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 174.

So too the cases interpreting enactments such as that in question, especially interpretations of the Imperial bankruptcy enactment, from which, perhaps through the Insolvent Act which was at one time in force in Canada, the enactment in question seems to be a lineal descendant. We ought to give effect to that which has been pretty generally considered the meaning of such enactments in respect to such a preference as sec. 70 of the Act in question confers.

In the year 1901, in the case of *In re Earle's Shipbuilding and Engineering Co.*, [1901] W.N. 78, it was held by Joyce, J., that a commission on the tonnage of ships turned out from a shipbuilding yard, allowed to workmen in addition to "a fixed salary," came within the meaning of the words "wages or salary" in the provisions of the Imperial bankruptcy laws relating to preferential payments in bankruptcy.

In the year 1904, in the case of *The Elmville* (No. 2), [1904] P. 422, it was held that a bonus to a master of a vessel in certain events, in addition to his wages, was covered by the word "wages" contained in the Merchant Shipping Act, 1894.

In the year 1906, in the case of *Re Klein*, [1906] W.N. 148, it was held by Bigham, J., that a commission allowed to a "commercial traveller" on "all business done by him for the debtor," in addition to a fixed w ekly sum, was part of his "salary," under the same provisions of the same bankruptcy law as those under which the *Earle* case was decided.

A like ruling was made, in the year 1911, in the High Court of Justice of this Province, in the case of *Re Morlock and Cline Limited*, under the provisions of the enactment in question in this appeal; the only difference between the facts of that case and the case of *Re Klein* was, that the amount allowed in the *Morlock* case was of the man's travelling expenses, and in the other case the commission, in addition to the fixed wages; it

being said in the *Morlock* case that, in its circumstances, "his expenses are as much a part of his wages as the fixed sum:" *Re Morlock and Cline Limited*, 23 O.L.R. 165, 169.

And a step in advance of all these cases was taken in the High Court Division here, by a single Judge, in the year 1914, in the case of *Re Hartwick Fur Co. Limited*, 17 D.L.R. 853; it being there held that a "commercial traveller," who was paid only by way of a commission upon the amount of the sales made by him, in that capacity, for the company, was as to such remuneration within the benefit conferred upon persons in the employment of the company in respect of salary or wages due to them by the company, under the enactment in question.

If we should go on thus, step by step in advance, without ever looking back at the enactment, we might very easily get in time even far beyond such a case as this—for instance, the case of a solicitor and his fees, or a physician or surgeon and his. Looking back at the enactment, I cannot but think that the cases have already gone to the furthest extent the elasticity of the words of the enactment in question will permit, whether they have or have not been overstretched in any case. It seems to me quite contrary to any reasonable meaning that can be attributed to the words "salary or wages" which a clerk or other person has earned from the company, to include that proportion of the price of the goods sold which the respondent was to have for the sales made by him; though, having regard to that which the respondent was bound to do under his agreement, he might well be a person in the employment of the company entitled to the special privilege in question, if there were not the other restricting words in the enactment in question: see *Hamberger* v. *Marcus* (1893), 157 Penn. St. 133; *Brierre & Sons* v. *Creditors* (1891), 43 La. Ann. R. 423; *Henderson* v. *Koenig* (1902), 168 Mo. 356; and *Castle* v. *Lawlor* (1879), 47 Conn. 340.

It has not been argued before us, nor does it seem to have been before the Chief Justice whose order is now appealed against, or before the Master, that the respondent has no claim because of the provision, contained in his agreement, that he should lose his commission on his sales if "for any cause the account is not paid to us;" or because it is barred by the three months' limitation contained in the enactment in question. I mention the

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fact so that there may never be any misunderstanding respecting it.

Because the respondent's claim, now in question, never was, in my opinion, within the provisions of sec. 70 of the Winding-up Act, I would allow this appeal and restore the ruling of the Local Master.

Masten, J.

MASTEN, J.:—The liquidator appeals from the judgment of Falconbridge, C.J.K.B., dated the 20th March, 1916, allowing Dugald A. Dunsmoor to be collocated on the dividend sheet by special privilege over other creditors, pursuant to sec. 70 of the Dominion Winding-up Act, for the sum of $2,055.55.

The claimant Dunsmoor acted as sole agent for Alberta on behalf of this company. The agreement between him and the company is as follows:—

"We agree from March 15th, 1909, to enter into an agreement with you, to be sole agent for our products, viz., elevators and sundries connected with them, to be used either in the repair or installation of elevators of any type or style that we manufacture, also on fans, blowers, heating systems and other products of this line.

"We agree to pay you a commission of ten per cent. on all sales closed by yourself, or on all orders sent in from your territory, whether closed by you or by any other party.

"We agree to pay the commission as follows: acceptance by us of draft for five per cent. and the balance of the commission to be at 30 days.

"We also agree that the territory shall be the Province of Alberta.

"You on your part to agree that we shall collect our own accounts, and, in the event of any cuts in price, to enable you to close orders, that you agree to allow half your commission to go against the cut price in the event of its being so much lower that it warrants half the amount of the commission.

"It is further agreed that you will not handle any products of any kind that will in any way enter into competition with our products herein specified.

"The duration of this agreement is for one year, and, in the event of either party desiring to cancel this agreement, it shall be necessary to give three months' notice.

"In the event of any of the goods sold by you being sold to customers who either refuse to or cannot pay their accounts, or going into liquidation, or for any cause the account is not paid to us, you to lose your commission on sale.

"It is also agreed that this contract is accepted and agreed to by us on the condition that our business will be properly looked after and that all prospective work will be followed up."

Section 70 of the Winding-up Act, pursuant to which this claim is made, reads as follows: "70. Clerks or other persons in, or having been in the employment of the company, in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order."

The records of the Court shew that the order for the winding-up of this company was made on the 29th March, 1910, and it appears from the affidavits filed that there accrued to the claimant during the three months next previous to the winding-up order two sums, one of $90 and the other of $1,020, so, if the claimant is entitled to a preference for any sum, it is for $1,110 and no more.

But it is contended by the liquidator that the claimant does not come at all within the purview of sec. 70.

It seems to me that the crucial point for determination is, whether the claimant was (1) a person so in the employment of the company as to become entitled to salary or wages (2) or was an independent contractor for the performance of specific services. The conclusion in this and similar cases must turn upon the particular facts of each individual case; and this circumstance has led to diversity in the decisions, different minds naturally taking different views of the same facts. Under these circumstances, other cases, and particularly cases decided upon different statutes, do not lay down any binding rule of general application.

Nevertheless, it seems to me that some principles helpful to the determination of the question here in controversy can be deduced from a consideration of the cases.

To come within the benefit of sec. 70, the contract must be a contract for service, not a contract for services. It is not to every

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employment that the Act applies. It is confined to employments of which it can be predicated that the person employed receives salary or wages.

Whatever else they may connote, I think that the words "salary or wages" import a contract for service as distinguished from a contract for services.

A book-keeper employed by the year makes a contract for service. A surgeon employed to perform an operation makes a contract for services. The one is paid a salary, the other a fee.

The former is employed to obey his master's orders and submit throughout to his supervision and direction. The latter is employed to exercise his skill and achieve an indicated result in such a manner as is most likely in his judgment to ensure success.

Three cases in our own Courts afford illustrations of the application of this principle. The first is *Re Ontario Forge and Bolt Co.*, 27 O.R. 230. It is a decision by the late Mr. Justice Robertson respecting the claim of an auditor to be collocated as a preferential creditor. The claim was disallowed. After referring to the duties and position of an auditor for the purpose of indicating that he does not perform his work subject to the immediate control and direction of the directors, the learned Judge proceeds as follows (p. 234): "Now there is a very plain distinction between becoming the servant of an individual, and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be said to have contracted to serve each of them: *per* Bayley, J., in *Hardy* v. *Ryle* (1829), 9 B. & C. 603, at p. 611." And, at p. 233, the learned Judge said: "In my judgment, he does not belong to such class of persons any more than a solicitor would who had been asked to investigate and advise on any contract, or transaction, in which the company had been interested." The claim to a preference was disallowed.

In the next case, *Re American Tire Co.* (1903), 2 O.W.R. 29, the claimant was a mechanical expert and inspector to the department of the company having charge of the sale of the "New Departure Coaster Brake." A Divisional Court composed of Falconbridge, C.J.K.B., and Britton, J., held that, in the circumstances of that case, the claimant was not entitled

to any preference under the statute, referring to and following *Re Ontario Forge and Bolt Co.*, above mentioned. The reasons for decision are not given at length in the only report available, and I have not been able to secure the original reasons of the Judges.

The next case in order is *Miquelon* v. *Vilandre Co.* (1913), a Quebec case, reported in 16 D.L.R. 316. In it Globensky, J., held that an accountant temporarily engaged by the day to make an audit of a company's books, and who is not subject to any direction or control in so doing, has no preferential claim under sec. 70 for his remuneration, on the winding-up of the company. In his view, the section is to be restrictively interpreted. He says that the object of the law seems to have been to protect persons whose sole or at least whose chief employment is with one employer and whose principal means of support are derived therefrom—thus emphasising the ideas of service and of personal control by the paymaster.

A second principle is that an employee entitled to wages or salary is *primâ facie* (unless there is other express provision in the contract) subject to the command of the employer as to the manner in which he shall do his work, while an independent contractor chooses the mode in which the work is done and the persons who do it; also, provided control is retained by the employer, the fact that the employee is hired and paid by the piece or by the job, or using his own implements, makes no difference. I refer as illustrations to *Sadler* v. *Henlock* (1855), 4 E. & B. 570; *Simmons* v. *Heath Laundry Co.*, [1910] 1 K.B. 543, at p. 552; and *Re Western Coal Co. Limited*, 12 D.L.R. 401.

This last case is a decision by Beck, J., in the Supreme Court of Alberta. A. was employed to haul coal with his own team and waggon to individual customers of the company. No specific amount of coal was specified, and he could stop work or be discharged at any time. In other words, he hauled by the load. He was subject to direct orders of the company as to place and time and quantity of delivery. In giving judgment, Beck, J., says: "The extent of the right of control seems to be the important question in distinguishing between the position of a servant and that of an independent contractor, rather than the question whether, in addition to the personal services of the servant, he

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employs property of his own to aid him in his services." The creditor was held entitled to a preference.

I am unable to see that the present case is touched by the decisions in *Re Morlock and Cline Limited*, 23 O.L.R. 165, and *Re Hartwick Fur Co. Limited*, 17 D.L.R. 853, 6 O.W.N. 363.

It is true that each of these cases related to the claim of a person employed by the insolvent company to sell its goods; the essential matter is not, however, the work to be performed, but the nature and terms of the contract of employment.

It has been held in *In re Newspaper Proprietary Syndicate Limited*, [1900] 2 Ch. 349, in *Re Ritchie-Hearn Co. Limited*, 6 O.W.R. 474, followed in *Re S. E. Walker Co. Limited* (1913), 12 D.L.R. 769, that a managing-director was not entitled to the benefit of the section, because a managing-director belongs to the master, not to the servant, class. If it were relevant to the decision of this case, I should, while agreeing with the decisions under the English Act, express my doubts of the corresponding decisions under the Canadian Act, because the latter Act seems to me to extend its benefits to any employee of the company, superior or inferior, who is entitled to wages or salary.

In the *Morlock and Cline* case the sole inquiry was as to whether, assuming the *Ritchie-Hearn* case to be law, a commercial traveller or "bagman" was or was not "a thing of higher character than a clerk." One may perhaps suspect, from the elaborately solemn reasoning on this delicate question of "finer clay," that it is more than half judicial sarcasm; but, be that as it may, the case lays down, I think, nothing that assists us in the present inquiry; and the *Hartwick* case is wholly concerned with the question whether the receipt of remuneration by way of commission excludes the claimant from the benefit of sec. 70. I think that the receipt of commission in lieu of salary or wages looks in the direction of an independent contract rather than an employment entitling the claimant to the benefit of the section, but in any case it is only a minor circumstance and may well be overborne by others looking in the opposite direction.

Applying these principles to the facts of the present case, I note that the claimant is made sole agent for products of the company throughout all Alberta; that there is no stipulation in regard to the manner in which the claimant shall perform his con-

tract and his duties thereunder, except that the "business will be properly looked after and that all prospective work will be followed up."

The company retains no power of direct control over or interference with the claimant. The claimant's time is his own; and it is plain that contemporaneously he may be engaged in other business; for the contract provides that he "shall not handle any products of any kind that will in any way enter into competition with our products herein specified."

There is nothing to prevent him from incorporating a company, employing sub-agents, or conducting the business by means of any suitable organisation established by him, and he is to receive commission not only on goods sold through himself, but "on all orders sent in from your territory, whether closed by you or by any other party."

Having regard to these considerations, I think the claimant is an independent contractor and not an employee entitled to the benefit of the statute.

The order now in appeal should be set aside, and that of the Master restored.

RIDDELL and LENNOX, JJ., agreed in the result.

Riddell, J.
Lennox, J.

Appeal allowed.

LYONS v. NICOLA VALLEY PINE LUMBER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. October 3, 1916.

MASTER AND SERVANT (§ II A 4—70)—SAWING OPERATIONS—DEFECTIVE SYSTEM—CONCLUSIVENESS OF VERDICT.

Where a jury, after having viewed a mill and its operations, has found that injuries sustained by a sawyer in course of operations were occasioned by a defective system, and awarded damages therefor, their verdict should not be interfered with on appeal.

[Judgment of Martin, J., in *Yukon Gold Co.* v. *Boyle Concessions*, 27 D.L.R. 672; *McPhee* v. *Esquimalt R. Co.*, 16 D.L.R. 756, referred to. See also *Lilja* v. *Granby Consolidated Mining* (B.C.), 31 D.L.R. *post*.]

Statement.

APPEAL by the defendant from the judgment of Hunter, C.J., upon a trial had with a jury, being an action of negligence and for personal injuries received by the plaintiff (respondent) when acting in the capacity of sawyer in the saw mill of the defendant (appellant). The verdict of the jury was a general one, no questions were submitted, and the finding of the jury was that the plaintiff was entitled to damages under the Employers' Liability Act (R.S.B.C. 1911, ch. 74), and assessed the same at $3,375.

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LYONS v. NICOLA VALLEY PINE LUMBER CO.

J. A. Harvey, K.C., for appellant.

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

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff respondent was injured while employed as a sawyer at defendant's mill. He admitted in his evidence that his whole complaint was that the railing or guard, designed to protect the sawyer from such an accident as happened to him, was not of sufficient strength or stability for the purpose for which it was erected.

The action was tried by a Judge with a jury, and a view of a mill—not the one in which the accident occurred—was taken. No point was made in argument that this view was improperly taken, and I may therefore assume that the jury may have received some assistance from the view. The evidence is conflicting, and if that of the plaintiff and his witnesses were believed by the jury the verdict cannot, in my opinion, be interfered with.

The jury may have taken the view that the log came in forcible contact with the guard and broke it, thereby throwing the plaintiff upon the levers and putting in motion the machinery, without his own volition, and if this view be correct, and I think there is evidence to support it, the fact that the log was forced still further against him by the action of the machinery, thus in the end bringing about his injuries, does not, in my opinion, free the defendant from liability in this action.

In this view of the case it was the weakness of the guard which was responsible for the setting in motion the forces which brought about the plaintiff's injury. I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—There was, in my opinion, evidence to go to the jury upon which their verdict may reasonably have been founded, and there it should not be interfered with.

This is a case wherein the jury had the benefit of a visit to the mill and a demonstration of its operation, and I note the trial Judge in his charge to the jury says:—"For my part and without that model and visit I would have had very little knowledge of what they were talking about."

It seems to me that in such case much weight should be attached to the view had by the Judge and jury and I refer to my recent observations upon this subject in *Yukon Gold Co.* v. *Boyle Concessions*, 27 D.L.R. 672, adding to the list of authorities there considered, *Marshall* v. *Cates* (1903), 10 B.C.R. 153, as an illus-

tration of a case wherein I was of opinion that a view would not be beneficial. And in support of my statement in the latter case, that "a view is undoubtedly evidence of a certain kind" I cite the old and high authority of *Bushell's* case (1670), Vaughan, 135, 142, 147 (124 E.R. 1006 at 1012), which is a mine of legal lore on the duties of jurors, wherein Vaughan, C.J., in giving the judgment of 10 out of the 11 Judges of the Common Pleas, sets forth in enumerating the various heads of "evidence which the jury have of the fact," this fourth one:—

Martin, J.A.

> In many cases the jury are to have view necessarily, in many, by consent, for their better information; to this evidence likewise the Judge is a stranger.

It follows that the appeal should be dismissed with costs.

GALLIHER, J.A. (dissenting):—The unfortunate plaintiff was seriously injured and there is no question as to the amount of the verdict.

Galliher, J.A.

The plaintiff was engaged as a sawyer in the defendants' mill, and according to his story at the time of the accident, he had just finished sawing a log which was on the carriage when another log came down to be placed on the carriage. Instead of coming down straight it came at an angle and, it is alleged, jumped the loaders, one end resting on the carriage and the other breaking through a railing which was put up to prevent the end of the log in just such circumstances from coming over against the levers which were being operated by the sawyer.

The plaintiff says the end of the log which broke through the railing caused the broken railing to fall against his hand knocking it off the lever he was holding, and throwing him over against the levers which operated the carriage, thus setting it in motion, with the result that he was pinned in by the log and suffered the injuries complained of.

His only complaint as to negligence on the part of the company is that this railing was not strong enough. If the railing was not strong enough, and that was the cause of the injury, the judgment should stand.

As to the strength of the railing and the manner in which it was fastened, there is conflicting evidence, and the jury would be entitled to come to the conclusion they did upon the evidence, if they were justified in coming to the conclusion they must have as to how the accident occurred. This, in my mind, is the serious point in the whole case.

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On the one hand, we have the evidence of the plaintiff as to how the accident occurred in the manner I have just described, and, on the other hand, we have the evidence of three employees of the mill, eye-witnesses of the accident, and within a few feet of the plaintiff at the time.

Counsel for the plaintiff sought to throw discredit on the testimony of these witnesses because they were employees, and had dealings with the company.

That, to my mind, is a poor ground of attack, and I must say their evidence impresses me as being fairly and honestly given.

However, the jury could refuse to believe the witnesses, and believe the story told by the plaintiff, and if it rested there we might be powerless to interfere.

The evidence as to condition of guard and post is consistent with the account given by Neilson and the two Waldens as to how the accident occurred, and is, in my opinion, inconsistent with the account given by the plaintiff.

I think, therefore, that the jury could not reasonably find that the accident occurred in the manner described by the plaintiff, and that the action fails.

The appeal should be allowed.

McPhillips, J.A.

McPHILLIPS, J.A.:—The evidence may be said to be very complete and there was sufficient evidence in my opinion to have supported the verdict at common law and much heavier damages could well have been imposed upon one ground alone—that the plaintiff was not given a safe place to work (*Ainslie Mining and R. Co.* v. *McDougall*, 42 Can. S.C.R. 420), the jury, however, would appear to have taken the more lenient view, finding as they did that the liability was under the Employers' Liability Act. It must be assumed and there is sufficient evidence for so finding that there was a defect in the condition or arrangement of the ways and plant in use, and that by reason thereof the plaintiff suffered the injury. Specifically the evidence led at the trial was that the guard rail to hold the log coming down from the deck was insufficient and defectively constructed, not being attached to posts inserted into the floor and securely bolted. The situation was one of the gravest danger to the sawyer, especially if a log at any time in coming down from the deck got out of position.

which would appear to have been the case when the accident happened—*i. e.*, the guard rail gave way and the sawyer at his post of duty was crushed between the log and saw frame and suffered injuries of the most serious character. It would appear that the Chief Justice submitted the issues for trial to the jury with a very complete and proper direction both as to the law and the evidence. This being done, I fail to see with all deference to the able argument addressed to us by the counsel for the appellant how this Court can disturb the verdict and the judgment entered thereon, when it is found that the jury had before them sufficient evidence upon which they as reasonable men might find as they have, a verdict for the plaintiff. The verdict being a general one (*Newberry* v. *Bristol Tramway and Carriage Co.* (1912), 29 T.L.R. (C.A.) 177, at p. 179)—this disposes of all questions such as contributory negligence and the plea of *volenti non fit injuria* (*McPhee* v. *Esquimalt and Nanaimo R. Co.*, 16 D.L.R. 756, 49 Can. S.C.R. 43) and in my opinion no sufficient evidence was adduced at the trial which would have entitled the jury to have found—if questions had been submitted that there was any contributory negligence or that the plea of *volenti non fit injuria* had been established.

It would be impossible to find language more fitting in its application to the present case than that of the Lord Chancellor in *Kleinwort Sons* v. *Dunlop Rubber Co.*, 23 T.L.R. 696, at 697.

Appeal dismissed.

SHIPMAN v. IMPERIAL CANADIAN TRUST CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 11, 1916.

MORATORIUM (§ I—1)—WAR RELIEF ACT—FORECLOSURE—WIFE'S SEPARATE ESTATE.

The War Relief Act, 1915 (Man. 5 Geo. V., ch. 88, sec. 2), does not protect the wife of an enlisted volunteer against proceedings to enforce payment of a mortgage upon her separate estate.

Statement.

APPEAL by defendant from the judgment of Mathers, C.J.K.B. Reversed.

E. L. Taylor, K.C., for appellant, defendant.

C. P. Fullerton, K.C., and *S. R. Laidlaw*, for respondent, plaintiff.

Perdue, J.A.

PERDUE, J.A.:—This suit is brought to restrain the defendant from proceeding further with the sale or foreclosure of a mortgage. The statement of claim shews that the plaintiff is a married

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woman and the wife of one C. S. Shipman, an enlisted volunteer in the forces raised by the Government of Canada to serve in the present war. The plaintiff invokes the provisions of the War Relief Act, 5 Geo. V. ch. 88.

The statement of claim shews that the plaintiff is the registered owner of the land in question, having acquired it subject to an existing mortgage made by the previous owners to the defendant, to secure the payment of $19,000 and interest. The mortgage is in default and the defendant had attempted to sell the property and has applied for foreclosure in the Land Titles office. There is nothing to shew that Shipman has any interest in the property. The defendant demurred to the statement of claim on the ground that the War Relief Act did not apply and therefore no cause of action was disclosed.

The statute relied on is intituled, An Act for the Protection of Volunteers serving in the Forces raised by the Government of Canada in aid of His Majesty and of other Persons. The preamble recites the existence of the war, that a large number of residents of Manitoba have volunteered to serve in the forces raised by the Government of Canada or left Canada to join the armies of His Majesty and of his allies, and that it was desirable to pass the Act for the protection and relief *of all such persons and their families* from proceedings for the enforcement of payment *by all such persons* of debts, etc., and for the enforcement of all liens, etc., and for depriving them of the possession of any or all goods and chattels, lands and tenements during the continuance of the war. The expression "all such persons" where it occurs in the second place naturally means the persons indicated by the same expression where it is first used, and there the persons indicated are those which have either joined the Canadian forces or the forces of the allies.

Sec. 2 is the important one and is as follows:—

During the continuance of the said war it shall not be lawful for any person or corporation to bring any action or take any proceeding, either in any of the civil Courts of this province or outside of such Courts, against a person who is, or has been at any time since August 1, 1914, a resident of Manitoba and has either enlisted and been mobilized as a volunteer in the forces raised by the Government of Canada in aid of His Majesty in said war or has left Canada to join the army of His Majesty or of any of his allies in the said war as a volunteer or reservist, or against the wife or any dependent member of the family of any such person, for the enforcement of payment by any such person of his debts, liabilities and obligations existing

or future, or for the enforcement of any lien, encumbrance or other security, whether created before or after the coming into force of this Act, or for the recovery of possession of any goods and chattels or lands and tenements now in his possession or in the possession of his wife or any dependent member of his family, and, if any such action or proceeding is now pending against any such person, the same shall be stayed until after the termination of the said war.

This section shews that the Act is intended to protect the property of two classes of persons: first, residents of Manitoba who have enlisted or have been mobilized as volunteers in the forces raised by the Government of Canada; second, residents of Manitoba who have left Canada to join the army of any of His Majesty's allies as volunteers or reservists. The "other persons" referred to in the title of the Act may be identified as those of the second class, that is persons who have gone to join the army of any of His Majesty's allies. The protection granted is that during the continuance of the war it shall not be lawful to bring any action or proceeding against any person belonging to either of these two classes, or against his wife or any dependent member of his family, for the enforcement of payment *by any such person of his debts*, etc., or for the enforcement of any lien, encumbrance or other security, or for the recovery of any goods, chattels, lands, etc., now in his possession or in the possession of his wife or any dependent member of his family. There is nothing in the clause which protects the wife of any such person against suits to enforce payment of debts of her own creation. There is nothing which expressly protects the wife against proceedings to enforce payment of encumbrances upon her separate property. Down to the portion of the section which commences with the words, "or for the recovery of possession," it seems clear that the protection granted is the prohibiting of proceedings against a person belonging to either of the two classes mentioned, for the enforcement of payment by "any such person of his debts, liabilities and obligations," or for the enforcement of any lien, encumbrance or other security, existing, as we must assume, against his property. The expression, "or for the recovery of possession of any goods and chattels or lands and tenements now in his possession or in the possession of his wife or any dependent member of his family," must refer to goods and chattels and lands and tenements which are the property of the person previously referred to and included in one or other of the protected classes. The ex-

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pression refers to chattels or lands in the possession of his wife. These may be his property but in her possession. The section nowhere mentions property belonging to the wife. If the intention was to prohibit proceedings against her or her property it should have been so expressed.

It is argued that the including of the wife and the dependents of the volunteer in the prohibition against suits or proceedings for any of the purposes mentioned shews that the intention is to afford protection to the wife and dependents. With this I quite agree. The volunteer can, under the protection given by the Act, leave his wife or his children in possession of his house or his farm and no action or proceeding can be brought against them or any of them to turn them out of possession. So also his goods, chattels, inplements, tools, etc., may be left by him in the possession and use of his wife or family and they will be protected by the statute against any proceeding on the part of any lienholder or chattel mortgagee. If he has made a voluntary conveyance of his property to his wife, no creditor can bring suit to set it aside. In such a case the suit would regularly be brought against her and the husband would not be a necessary party. These instances sufficiently indicate the nature of the protection given to wives and dependents. To explain the presence in the section of the words "wife or any dependent member of the family of any such person," it is enough to shew that some of the actions or proceedings prohibited might be taken against the wife or dependent member of the family without the husband being made a party. It is not necessary to make the words referable to all the actions and proceedings against which the enlisted person is protected.

With great respect for the opinion of the Chief Justice of the King's Bench, I think the proper construction of the section is to confine its application to the prohibiting of actions or proceedings taken against a volunteer, or which affect his property, lands, goods or chattels. The enactment, while affording protection to a most deserving class of persons under exceptional circumstances, seriously interferes with contracts and the legal rights of other citizens. I agree with the principle of construction to be applied to this Act as stated by Mathers, C.J., that it ought to be construed in such a manner as not to interfere with the rights of other persons to any greater extent than is expressly or by

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necessary implication provided. In this province a married woman may acquire, hold and dispose of property in the same manner as if she were unmarried. She may enter into contracts and may sue or be sued apart from her husband in all respects as if she were a *feme sole*. If the statute had intended to protect property acquired and owned in her own name by the wife of a volunteer or enlisted person serving in the war, such a serious interference with the rights of others who had claims against the property would have been clearly expressed.

With great respect, I think the appeal should be allowed with costs and the demurrer allowed with costs in the Court of King's Bench.

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

Richards, J.A. (dissenting):—I concur in the judgment appealed from, and have nothing to add to it. Richards, J.A.

Haggart, J.A. (dissenting):—The question then here is the construction or interpretation that is to be given to said sec. 2 of ch. 88. Does the enactment express the intention claimed by the plaintiff and accorded to it by the Chief Justice? Haggart, J.A.

It is true the statute interferes with serious legal rights and cancels or relieves parties from obligations solemnly entered into, and takes away, for a time at least, the right of a subject to resort to a legal tribunal for redress or the enforcement of his rights. We are met, however, with such canons of construction as the following, some of which I take from Maxwell on Statutes, 5th ed., on pp. 5 and 6, when he is discussing the subject under the title of "Literal Construction." Alverstone, C.J., in *London County Council* v. *Bermondsey Bioscope Co. Ltd.*, [1911] 1 K.B. 445.

It is plain that the intention of the legislature was to encourage enlistment and to provide for the support of the wife and dependents of the soldier.

I think the preamble and sec. 2 express that intention and that the wife as well as the husband was to have exemption from litigation until after the termination of the war. The proceeding before the district registrar is against her and her land. The proceedings are for the enforcement of a lien and in substance for the recovery of possession, because the issue of a final order of foreclosure would take away from her any defence she might have in an action for possession. It is true, as stated by the Chief

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C. A.

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Justice of the King's Bench, that we cannot enjoin the district registrar because he is not a party; but I think that official would respect an order enjoining the mortgagee from taking out the order for foreclosure and would stay proceedings in his office. Unless we give the Act the interpretation and effect given to it by the Chief Justice of the King's Bench, that portion of the statute relating to the wife and dependents of the enlisted soldier and her property would be meaningless.

I would dismiss the appeal. *Appeal allowed.*

ONT.

S. C.

Re PERRAM and TOWN OF HANOVER.

Ontario Supreme Court, Middleton, J. April 14, 1916.

1. APPEAL (§ I A—1)—EXPROPRIATION AWARD—PUBLIC UTILITIES ACT.
The right of appeal from an expropriation award provided by the Municipal Act (R.S.O. 1914, ch. 204, Part XVI.) also exists in the case of an expropriation under the Public Utilities Act (R.S.O. 1914, ch. 204).

2. DAMAGES (§ III L 6—280)—MUNICIPAL EXPROPRIATION OF LEASEHOLD—BASIS OF COMPENSATION—ADVANTAGES AND OFFSETS.
Where a municipality expropriates the unexpired term of a lease it had made, with the water rights in connection therewith, it cannot set off the probable losses of the lessee, nor can the lessee claim the expected profits, if the lease were continued; the proper basis of compensation is the value of the water power and of the use and occupation for the unexpired term, and reasonable expenses for removing the business to another location.

Statement.

Appeal by Perram from the award of the majority of three arbitrators upon the appellant's claim for compensation for the loss of leased premises taken by the Corporation of the Town of Hanover under the Public Utilities Act, R.S.O. 1914, ch. 204.

H. S. White, for Perram.

E. D. Armour, K.C., and *F. S. Mearns*, for the town corporation.

Middleton, J.

MIDDLETON, J.:—A preliminary objection was taken by the respondents that no appeal would lie from the award in question. By the Public Utilities Act, sec. 4, Part XV. of the Municipal Act, R.S.O. 1914, ch. 192, is made applicable to the exercise by the corporation of the powers conferred by the statute in question. This Part, covering secs. 321 to 331 of the Municipal Act, gives power to expropriate land required for a municipal purpose, and it provides, sec. 325 (2), that if the compensation is not agreed upon it shall be determined by arbitration. The provisions as to arbitration, however, are found in Part XVI. of the statute, and these provisions have been assumed to apply. The arbitration has been had and the award made upon this assumption. The municipality now object that

Part XV. only having been made applicable, and the right to appeal from the award being found in Part XVI., there is no right to appeal.

I cannot agree with this contention. It seems to me that when Part XV., giving the right to expropriate, is made to apply to the taking of lands under the Public Utilities Act, and it provides for the determination by arbitration of the amount to be paid, the provisions found in Part XVI., which are auxiliary to the provision found in Part XV. giving the right to arbitrate, also apply; and, therefore, the right to appeal, expressly conferred by Part XVI., exists.

The situation developed before the arbitrators is this. The town corporation owned a factory building adjoining a stream flowing from the town. The factory had been operated by power taken from the head-race and pond used for the storage of water retained to develop power further down stream.

On the 30th May, 1913, the town corporation leased to Perram this factory building and premises for a term of three years, with the right to take from the race or mill-pond sufficient water to give 12 horse power in the mill, at an annual rental of $200.

For the purpose of establishing and operating a pumping station down stream, the municipality desired to acquire this leasehold and water right, so that the whole water power might be available for the pumping plant; and the necessary by-laws for effecting that purpose were passed; and, under a jurisdiction assumed to exist, the County Court Judge made an order giving the municipality immediate possession of the leased premises during the currency of the lease and while it had yet about a year to run. Under this order possession was taken and the arbitration was had to fix the compensation.

The mill, though called a woollen mill, was chiefly used for making yarn, and Perram claimed to have been damnified to the extent of $1,600, upon the theory that, had his business been continued in these premises till the expiry of the lease, he would have realised this profit from the business. The town, on the other hand, took the position that Perram's business was not and could not be successful from a business standpoint, and that he had in fact sustained no damage by reason of the expropriation, that in fact he ought to have been thankful for this strangulation

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of a business in which he was bound to lose money. The majority of the arbitrators have apparently acquiesced in this view, for they have awarded him no damages, and have directed him to pay the costs of all the proceedings.

Perram's claim was largely based upon the expectation of making profits out of war contracts which might come his way, and it is by no means clear that the arbitrators were satisfied that no profit would have been made, for they say: "We do not doubt that there was a probability of this mill being worked at a profit if Perram had been able to open up the mill after September, 1914, when the war made an active demand for yarns, but under the most favourable circumstances we think such profits have been greatly exaggerated."

With all respect to the arbitrators and to the parties, it seems to me that the case has been approached from a wrong standpoint. What the municipality are called upon to pay is the value of that which they have expropriated, and it appears to me that they cannot set off against this value the probable loss that Perram might have sustained if he had continued in business, nor can Perram claim from the municipality the profit that he thinks he might have made if he had continued in business, for the expropriation of this particular building did not necessarily involve his discontinuing his business.

The evidence, not having been presented from what seems to me to be the proper standpoint, is by no means satisfactory. Doing the best I can with it, and allowing to Perram the value of the 12 horse power which he was entitled to for one year, and the use and occupation of the mill, and allowing him a reasonable sum for the expense of removing his business to some other premises, and deducting from this the amount he would have to pay for rental, $200, I would fix his compensation at $300.

It is said that there was $100 additional due by him for rent at the time of expropriation. This, I think, may well be set off so that his recovery would be reduced to $200; and I do not see why the costs of the arbitration and of the appeal should not follow the event—for no compensation appears to have ever been offered by the town corporation.

Appeal allowed.

GALLANT v. THE LOUNSBURY CO., LTD.

N. B.

S. C.

New Brunswick Supreme Court, McLeod, C.J., and White and Grimmer, JJ. June 23, 1916.

1. PRINCIPAL AND AGENT (§ II A—6a)—AUTHORITY TO SELL—WARRANTY.
In an action for damages for breach of warranty in the sale of a horse by an agent, authority on the part of the agent to give the warranty cannot be established merely by evidence that the agent had sold two or three other horses for his principal, there being no evidence that the principal was in the general horse dealing business.

2. DAMAGES (§ III A4—80)—BREACH OF WARRANTY—DECEIT.
Damages awarded by a jury in an action for breach of warranty cannot be sustained on the mere ground that the jury might have been justified in assessing that amount had the action been based on fraud and deceit.

Statement.

APPEAL by the defendant company from a verdict for damages for breach of warranty.

A. R. Slipp, K.C., for appellant.

J. P. Byrne, for respondent.

Grimmer, J.

GRIMMER, J :—This is an action for damages for breach of contract. It was tried at the Gloucester County Court, in November, 1915, before McLatchy, J., and a jury, where a verdict for $230, being $180 for the breach of contract, and $50 for damages to a waggon, was found for the plaintiff.

The facts substantially are that the plaintiff, a widow, resides at Paquetville, in the county of Gloucester; and the defendant company, being incorporated, has a branch office and does business at the town of Bathurst, in said county. Its chief business is dealing in agricultural implements, carriages, harnesses and furniture.

In the spring of 1915 the defendant was represented at Caraquet by one Adelard Dugas, who was using a black horse of the defendant in his work as agent. The plaintiff wished to purchase a horse and communicated the fact to Dugas, who, having received permission from the defendant to sell the horse in question, went to see the plaintiff, whom he met with her boy on the public road. After some conversation, the plaintiff bought the horse, paying Dugas $75 cash, and giving two notes of $55 and $50 respectively for the balance of the purchase price. The plaintiff claims the price was $195, but the amount of money paid and the notes given confirm the statement of Dugas that the price was $180. The plaintiff claims that Dugas warranted the horse to be fit for her and her boy to drive; that it was 9 years of age, perfectly sound, quiet to drive and without faults.

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The defendant denies any such warranty, and also denies that its agent Dugas was authorized to make or give any such warranty. The plaintiff states she told Dugas she wanted a horse she and her boy could drive, and was told by him the one he had for sale was such an animal, and that it was 9 years old and without fault or blemish. This Dugas does not deny, but qualifies the statement by saying or using the words, "so far as I know." The plaintiff took possession of the horse, and some 2 or 3 weeks after the purchase, while driving along the highway, the horse became frightened at a pig and shied, thereby upsetting the carriage, throwing the plaintiff and her son out, damaging the waggon and injuring the plaintiff; after which the horse freed himself from the waggon and ran away. Some other minor evidence was offered of the propensity of the horse to shy, which was fairly met by evidence of the defendant.

After the accident the plaintiff went to Dugas for the purpose of returning the horse and getting her money back. After consultation with the defendant, Dugas refused to receive the horse unless plaintiff was willing to forfeit the money paid. No arrangement being arrived at, the plaintiff took the horse to the place of business of Dugas in Caraquet, and left it there, notifying him she was so leaving it. The defendant refused to receive the horse, and notified the plaintiff by letter that they had instructed that the horse should be cared for and fed at her expense until she took it away, and that unless her notes were paid they would proceed to collect them. She, however, did not take the animal back, but brought this action, claiming $195 for breach of warranty, $100 for damages to the buggy and herself, and $42 for keep of the horse.

At the conclusion of the plaintiff's case, counsel for the defendant moved for a nonsuit, in that: (1) No warranty was claimed in declaration. (2) That no deceit was proved. (3) The damages claimed in the second part of the particulars are too remote, and not recoverable; and as to the keep of the horse, no evidence of liability on the part of the defendant. (4) No proof that Dugas was authorized by defendant to make or give a warranty. (5) The damages claimed exceed the jurisdiction of the Court.

The Court refused the nonsuit, and afterwards submitted the case to the jury, charging them, however, that they were not

to consider the item of keep of the horse, and they found as before stated.

Grimmer, J.

Upon reviewing the facts, I am of the opinion the rule ought to be made absolute for a new trial. While I cannot think or hold there was a warranty on the part of the defendant whereby it was bound, yet there were undoubtedly representations as to the qualities of the horse made by the agent of the defendant to the plaintiff, which, no doubt, assisted in inducing her to make the purchase, and which, under some circumstances, might ripen into a warranty. The jury found the animal did not come up to the full measure of the representations made, but there was absolutely no evidence before them upon which they could found the verdict for damages in respect either to the plaintiff or the waggon. In fact, it may fairly be said there was no evidence of specific damages at all before the jury, the only evidence in respect to the horse being that as to the price asked, and as to which, as stated, the parties disagree, the plaintiff stating it at $195 and the defendant at $180. As to the waggon, there was some evidence of injury to it, but the damage was not appraised, and the plaintiff, in her testimony, stated she did not claim any damages for the waggon. In addition to this, at the time of the sale the defendant took two notes for the balance of the purchase price of the horse, which notes provided a lien upon the horse, whereby the property in it was to and did remain in the defendant until the full price was paid, and under which, in case of non-payment, or default in making the payments as they matured, the defendant, in its discretion, might repossess the horse. While in case of an ordinary sale the plaintiff would not have been entitled to return the horse to the defendant, I am not by any means sure that under the circumstances described, the horse having been found not to come up to the representations made in respect to it, the plaintiff pursued other than the proper course in taking the horse back and leaving it with the defendant. Under all the circumstances, I am of the opinion, as stated, that the full measure of justice will be done between the parties by making an order for a new trial. The plaintiff must pay the costs of the appeal.

White, J.

WHITE, J.:—I think there should be a new trial in this case. It does not appear that Adelard Dugas, who, as appellant's agent, sold the horse to the plaintiff, was authorized by the defendant

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to give the warranty for breach of which the plaintiff recovered damages.

It was contended that, as Dugas was the defendant's local agent for sale of farm machinery, harness and carriages, and had during the term of his agency—a period of about 2½ years—sold for the defendant 2 or 3 other horses, he must be taken to have had an implied authority to give the warranty in question. I am unable to assent to that view. The defendant, although it used horses in its business, and from time to time, as occasion required, sold any of its horses for which it had no further use or which for any reason it wished to sell, was not a horse dealer in the sense in which that term is used in *Brady* v. *Todd* (1861), 9 C.B. 592. Moreover, there is no evidence Dugas ever warranted or was authorized to warrant any of the other horses so sold by him.

With reference to the plaintiff's contention that she is entitled to retain the verdict because the damages awarded are such as the plaintiff could have recovered in an action for deceit, it is sufficient to say that the jury have not distinctly found fraud nor were the damages assessed upon that ground. The evidence that the defendant fraudulently misrepresented the horse to be safe for the plaintiff to drive is, to say the most possible in its favour, but very slight. The only evidence in support of the plaintiff's claim as to there having been fraudulent misrepresentation is, that Dugas, the defendant's agent, had used the horse at intervals during a few weeks preceding the sale, and, therefore, may fairly be presumed to have known of its unfitness for a woman to drive; or else that he had not sufficient knowledge of the horse to warrant him in making the representation he did as to its character, and hence made the representation recklessly and regardless as to whether the same was true or false.

There is, however, I think sufficient evidence to have warranted a jury in coming to the conclusion that the plaintiff was induced to purchase the horse by the material misrepresentation of Dugas that the horse was fit for the plaintiff and her children to drive.

Formerly at common law such a representation, falling short of a warranty and made without fraud, would have given the plaintiff no remedy.

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But now equitable principles govern; and I think the misrepresentation such that an equity Court, in a suit brought for the purpose, could have vacated the sale, ordered the cash paid on account of the purchase to be repaid, and directed the notes given for part of the price to be delivered up to the plaintiff.

The County Court has no power to make such a decree, but, as the horse has been returned to the defendant—and, indeed, by the conditions of sale appearing in the two notes taken for part of the price, the title in the horse remains in the defendant till the notes are paid—the plaintiff may recover in the County Court all moneys she has paid, that is to say, $75, on account of the purchase. As to what would be the effect of such a judgment upon the plaintiff's right to a further recovery in case she is compelled to pay the outstanding notes to an innocent purchaser for value, it will be time enough to decide should the question arise. I think the plaintiff should pay the costs of this appeal.

White, J.

McLEOD, C.J., agreed. *Appeal allowed; new trial ordered.*

McLeod, C.J.

ATTORNEY-GENERAL OF CANADA v. CAHAN AND EASTERN TRUST CO.

CAN.

Ex. C.

Exchequer Court of Canada, Cassels, J. October 20, 1916.

EMINENT DOMAIN (§ III C 4—140)—COMPENSATION—AMOUNT OFFERED—COURT'S POWER TO REDUCE—AMENDMENT.

Where the Crown in expropriation proceedings, and under the terms of the Expropriation Act, offers a definite sum as compensation by the information, and when there is no request to amend the information, and counsel for the Crown at the trial adheres to such offer, it is not for the Court to reduce the same notwithstanding that the evidence may establish a smaller sum as the proper amount of compensation.

[See *The King* v. *Likely*, 32 Can. S.C.R. 47.]

INFORMATION on behalf of His Majesty's Att'y-Gen'l for Canada, to have it declared that certain lands the property of the defendant C. H. Cahan are vested in the Crown.

Statement.

T. S. Rogers, K.C. and *J. A. McDonald*, K.C., for Crown.

H. Mellish, K.C., for defendant.

CASSELS, J.:—The property in question expropriated comprises 140,830 sq. ft. (approximately 3¼ acres). A strip of land has been taken across the property for the purpose of the terminal works, and the excavation for the railway has been constructed.

Cassels, J.

In addition to the land taken for the right of way another small piece of ground comprising 2,880 ft. has been taken for the

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purpose of the construction of a driveway, and the Crown offers by their information to give an undertaking to construct a bridge over the railway cutting in accordance with the plan annexed to the information and to furnish a connection from the entrance east of the right of way to the bridge.

The Crown offers as compensation for the land taken the sum of $9,925.65, and in addition undertakes to open the street referred to and construct the bridge.

The right of way at the point where the bridge is to be constructed is said to be 25 ft. in depth and the approaches to and across the bridge will be an easy ascent.

The whole property prior to the expropriation comprised an area of 14 acres. The right of way as stated takes about 3¼ acres and 2,880 sq. ft. for the proposed road. To the east of the right of way will be left 110,430 sq. ft. (about 2½ acres). To the west of the right of way and partly on the arm is left about 9 acres having a frontage on the arm of about 750 ft. The house is distant from the westerly side of the right of way 180 ft. The house is now supplied with city water and no question of allowance for wells arises.

While unquestionably the property has been injured by the expropriation and the construction and operation of the railway, I am of opinion that the amount offered by the Crown is a liberal allowance coupled with their undertaking to give a new entrance as described. The house is not interfered with in any way. Mr. Cahan has about 9 acres and the house and the whole of the waterfront left to him, besides the portion to the east.

Mr. Cahan occupied the premises during 1911 as a tenant for a year, and the lease contained an option giving him the right to purchase at the sum of $20,000. The following year, 1912, he purchased the whole property for the sum of $17,500. The land was expropriated on March 7, 1913. He retains the greater part of the property including the house and 9 acres fronting on the arm and gets for the lands expropriated more than one-half of what he paid for the whole property, comprising about 14 to 15 acres and including the house.

I have to deal with these cases on the evidence before me. Properties situate on the north-west arm in Halifax do not seem to realize in the market prices that one would have expected, considering the beauty of the location.

On the argument of the case I asked the counsel for the Crown whether they adhered to their tender, and was informed that the Crown offered and were willing to pay the sum mentioned. I thought and still think the amount erred on the side of liberality—but I have always been of opinion that where the Crown in expropriation proceedings and under the terms of the Expropriation Act offers a definite sum as compensation by the information, and where there is no request to amend the information and Crown counsel at the trial still offers the amount, it is not for the Court to reduce such sum.

I therefore find that the sum offered is ample, and the judgment will embody the undertaking.

I understand that the Eastern Trust Co. have been settled with. If not, their rights can be adjusted and the parties can speak to the question in chambers.

The Crown made no legal tender prior to the filing and service of the information. The defendant asks an unreasonable amount. Under the circumstances there should be no costs to either party.

Judgment for plaintiff.

HERON v. LALONDE.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 24, 1916.

TAXES (§ III F—148*a*)—INVALIDITY OF TAX SALE DEED—PREMATURITY—CURATIVE ACT.

A conveyance purporting to be a tax sale deed delivered before the actual expiration of the statutory period of redemption (B.C. Assessment Act, 1888, ch. 111, sec. 92) is ineffectual, and is not validated by subsequent statute (Acts 1903, ch. 53, secs. 125, 153, 156) intended to cure defects in proceedings preliminary to a valid tax sale deed.

[*Heron* v. *Lalonde*, 22 D.L.R. 37, 24 D.L.R. 851, 22 B.C.R. 180, reversed.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia, 24 D.L.R. 851, affirming the judgment of Clement, J., 22 D.L.R. 37, at the trial, by which the plaintiffs' action was dismissed with costs.

The plaintiffs brought the action, as beneficiaries under the will of the late Robert Heron, deceased, for a declaration that certain lands in the city of Vancouver, B.C., had been unlawfully and wrongfully sold at a tax sale of lands for delinquent taxes by the assessor of the District of New Westminster, July 22, 1896, and subsequently, for a second time, by the assessor for the District of Vancouver, December 9, 1903, and for a decree setting

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aside the said tax sales and all deeds, etc., subsequent thereto. The circumstances of the case are stated in the judgments now reported.

James A. Harvey, K.C., for the respondents.

FITZPATRICK, C.J. concurred with IDINGTON, J.

DAVIES, J. (dissenting):—The appeal in this case is absolutely without any intrinsic merits and if successful may cause very grave injustice to *bonâ fide* purchasers of land in British Columbia.

I am glad to find myself fully in accord with the unanimous judgment of the Court of Appeal for British Columbia confirming the judgment of the trial Judge, Clement, J.

The questions relied upon in this Court were that the tax deed in question was dated July 22, 1898, that the time for the owner to redeem did not expire till the end of that day, and, although there was no evidence whatever of any delivery of the deed on the *day* it is *dated*, it must be presumed to have been delivered on that day.

The other point attempted to be raised in this Court as to the jurisdiction of the assessor, E. L. Kirkland, to hold and conduct the tax sale in question was not raised in the Court of Appeal, and was, in fact, abandoned before that Court. The affidavit of Mr. McCrossen who was counsel in the Court of first instance for the defendant respondents and also in the Court of Appeal, makes this quite clear. He not only states that the question of the tax sale deed having been executed, as counsel for appellant alleged, a day too soon "was the only point argued by Mr. Martin" but that "at the conclusion of his argument the Chief Justice of the Court of Appeal for B.C. expressly asked Mr. Martin if that was the only point in the case and Mr. Martin replied that it was the only point in the case."

The judgment of the Chief Justice, who spoke for the whole Court, expressly shews that only one point was there raised and that was the one arising out of the date of the deed.

No affidavit to the contrary was made on behalf of the appellant and I cannot but think that to allow a point abandoned in the Court of Appeal to be raised in this Court would be contrary to our usual practice and would be an injustice to the respondent. In such a case as this, where the appellant has no merits whatever and is relying upon mere technical objections, I do not think

he should be heard on the abandoned point. If the majority think otherwise then I say that I agree with the judgment of my brother Brodeur, which I have had an opportunity of reading, that the objection to the jurisdiction of Kirkland is without foundation.

The other point was that the presumption from the date of the deed necessarily must be the date of its delivery; I decline to accept it. It should not have been in strictness delivered till the morning of the 23rd. If the appellant had tendered his taxes on the 22nd no such delivery on the 23rd or afterwards would have taken place. I would think the proper presumption to draw from all the facts proved is that legal delivery did not take place till after the 22nd had expired in which case, of course, the claim of the plaintiff entirely fails.

I take it as a general presumption of law illustrating the maxim *omnia præsumuntur ritè et solemniter esse acta* that a man acting in a public capacity should, in the absence of proof to the contrary, have credit given to him for having done so with *honesty and discretion*. See judgment in *Earl Derby* v. *Bury Improvement Commissioners*, L.R. 4 Ex. 222, at 226; Broom's Legal Maxims (8th ed.), p. 740.

The proper presumption to be drawn under the facts as proved in this case is, in my opinion, that the tax commissioners, having a number of sales to complete, for convenience had the deeds prepared on the day of the expiry of the redemption period after the sale and dated on that day, but knowing that the tax defaulters had the whole of that day in which to redeem, did not deliver this deed in question to the purchaser until the next day. To presume that he acted contrary to law and in violation of his duty I cannot do in the state of the evidence.

But, if I am wrong on this question of the proper presumption to be drawn from the date of the deed, then I am in full accord with the judgment appealed from and with the reasons in support of it of my brother Brodeur and those of Macdonald, C.J., in the Court of Appeal.

I would dismiss the appeal with costs.

IDINGTON, J.:—I am unable to understand how a bare power given by statute to do anything, only to be exercised by a designated statutory officer within a specified time, and upon certain

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conditions precedent, can be said to have produced anything effective in law when attempted to be exercised at another time than specified without the conditions precedent having been fulfilled and by another statutory officer than the one designated and having no power in the premises. Much less can I see how when the instrument to be produced is a deed, it can when made under such circumstances be called one.

Can the forger if he succeed in getting a specimen of his fine art, wearing the semblance of a tax deed, upon record, by the complaisant negligence of him put on guard as registrar, divest any man of his estate?

The condition precedent to the registrar's authority validating anything is the production to him duly attested of a tax sale deed. How can he validate the forgery? How can he validate that which when it came to him was of no higher legal value than a forgery?

And the appeal to the following curative section in the Taxation Act:—

> A tax sale deed shall, in any proceedings in any Court in this province, and for the purpose of the Land Registry Act and the Torrens Registry Act, 1899, except as herein provided, be *conclusive evidence* of the validity of the assessment of the land and levy of the rate, the sale of land for taxes, and all other proceedings leading up to the execution of such deed, and *notwithstanding any defect in such assessment, levy, sale or other proceedings, no such tax deed shall be annulled, or set aside, except upon the following grounds and no others,—*

does not help further than to substitute the effect of its language for the conditions precedent to the due execution of the power. Its plain language only touches that which precedes the deed. It assumes a deed otherwise pursuant to the power to have been executed and by one competent to execute it.

The contention that the point involved in the question of the status of the officer executing the deed was abandoned below does not appear to be well founded.

The case of *Osborne* v. *Morgan*, 13 App. Cas. 227, relied upon by the learned Chief Justice of the Court of Appeal, does not seem to me in point.

That was a case where the Crown had an interest in the land and had recognized rights in those given by the executive. The Court above merely denied the right of him suing to question in his action that granted and recognized by competent authority.

This is a case, I repeat, of bare power to an officer to do a certain act and nothing more and the question asked whether in law he did so or not—clearly, to my mind, he did not, and I doubt very much on his own evidence if the one who attempted it was the officer who could have executed it.

The appeal being successful as to the first deed renders consideration of the latter sale unnecessary further than to say that the assessor was clearly in error in such a view of appellant's right in refusing to permit any one to redeem unless under the title supposed to have been acquired by virtue of the first sale.

The appeal should be allowed but, I think, without costs throughout. The contention for abandonment is unfounded so far as the legal rights of the parties are concerned.

There was nothing done to estop the appellants or their predecessors but there was such an approach to laches as entitles us properly to refuse costs.

Anglin, J.

ANGLIN, J.:—The respondent's title to the land in question depends upon the validity of an alleged tax sale deed and a certificate of "absolute title" issued under the British Columbia Land Registry Act, 1906, ch. 23.

That the taxes for which the land was sold were in arrear and that the sale was fair and open, though conducted by an official not authorized, are facts not now disputed. But it is admitted that the tax sale deed bears date one day before the expiry of two years from the date of the tax sale—the statute allows the deed to be made only after that period has elapsed—and it has been proved that the person who executed it was not the assessor for the County of Vancouver in which the land was situated, but the assessor for the County of Westminster who had no authority or jurisdiction whatever in the matter.

It is contended that because there is no positive evidence of when the deed was actually delivered it should be presumed that it was delivered in conformity with the statute. But the officer who executed and delivered it was called as a witness and, although the issue as to the date of delivery was distinctly raised on the pleadings, he did not say a word to suggest that delivery was not made on the day on which the deed bears date. Under these circumstances the ordinary presumption that the deed was delivered on the day of its date must prevail. Sheppard, Touch.

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72; *Stone* v. *Grubbam* (1614), 1 Roll. Rep. 3. The matter is of substance because "the right of redemption subsists until delivery of the conveyance to the purchaser at the tax sale."

It was argued that the deed should be deemed merely irregular and voidable because this objection to its validity could have been cured by re-delivery after the expiry of two years. But in that case it would operate as a new deed then delivered and not at all by virtue of any efficacy which it had previously possessed. Moreover, there is no suggestion that there was in fact any such re-delivery before tender of the redemption money. For these reasons I think this objection to the validity of the deed must prevail.

The objection based on the fact that the wrong assessor had executed the deed is, in my opinion, even more clearly fatal to its validity. It was mere waste paper.

Counsel for the respondent maintained that this objection had been abandoned in the Court below, and he supported this contention by an affidavit not altogether satisfactory. Counsel for the appellants read a telegram from the counsel who had represented them in the provincial Courts denying that there had been any such concession. The point is not noticed in the judgments below. If the appellants' success should be dependent upon this ground of appeal, while they would not be precluded from urging it, since the authority of the assessor who executed the deed is expressly challenged in the statement of claim and there is no controversy as to the facts, a question of costs might arise. *McKelvey* v. *Le Roi Mining Co.*, 32 Can S.C.R. 664, and see cases in Snow's Annual Practice, 1916, at p. 1111. The appellants' success on the point as to date of delivery renders it unnecessary further to consider this aspect of the matter.

To meet these difficulties the respondent invokes three curative statutory provisions, secs. 125, 153, and 156 of the British Columbia Taxation Act of 1903-4, ch. 53.

The first of these sections declares valid and of full force and effect "all proceedings which may have been taken for the recovery." of taxes unpaid on December 31, 1902, "under any Act of this province heretofore in force, by public sale or otherwise." The void tax sale deed was not, in my opinion, "a proceeding for the recovery of taxes under any Act of the province" which this provision would validate.

Sec. 153 provides that a tax sale deed shall be conclusive evidence of the validity of all proceedings in the sale "up to the execution of such deed." It is obvious that this provision is predicated upon the existence of a tax sale deed. Its curative effect is expressly limited to proceedings anterior to the execution of the deed. It certainly does not constitute a mere piece of waste paper a valid tax sale deed.

Under sec. 156, if the tax for which the land has been sold was due and it has not been redeemed within the period allowed for redemption, "such sale and the official deed shall be final and binding upon the former owners of the said lands and upon all persons claiming by, through or under them."

The facts that the time for redemption does not expire until the delivery of the tax sale deed, *i.e.*, a valid and effectual deed, and that the existence of the official deed, likewise a valid and effectual deed, is a pre-requisite to the operation of this section, render it inapplicable to the case at bar.

No curative section has been brought to my notice which vests title in the tax purchaser or deprives the owner of his right of redemption where no tax sale deed which can be recognized as such has been executed or delivered.

The defendant also relies upon the provisions of the Land Registry Act of B.C., 1906, ch. 23. A certificate of title under that statute confers on the holder merely a *primâ facie* title: *Howard* v. *Miller*, 22 D.L.R. 75, [1915] A.C. 318, decided in this Court on May 28, 1913. By sec. 31, in case of an application for registration by a purchaser of land at a tax sale, the registrar is empowered, after notice to the persons appearing upon the assessment roll to be interested in the land and in default of opposition by any of them, to register such purchaser as owner of the land. By sec. 32 he is authorized to direct substitutional service of such notice "where it is made to appear to (him) that the notice mentioned in the last preceding section cannot be personally served or cannot be personally served without *undue* expense."

The owner in this case resided in Victoria, where assessment and other notices had been sent to him, as appears by the evidence. An order was made by the registrar for substitutional service upon him, in common with a number of other owners of property sold for taxes, by advertisement and by mailing a notice, ad-

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dressed to him at Vancouver. This order was made apparently without any material. The only affidavit produced, made by one Hartley, was sworn several days after the last insertion of the advertisement, and states, as to some twenty-three property owners, that in the opinion of the deponent "it would entail *considerable expense to serve all* the above parties personally." The registrar, when examined as a witness at the trial, said that he had no personal recollection of the matter or why he had made the order for substitutional service; that it was his practice to do so; that from the papers in the registry office, including Hartley's affidavit, he assumes he made an order for service in this way; that the statute is very broad and wide and he understood authorized a general order for substitutional service without considering the case or position of each particular individual involved. It is fairly obvious that no inquiry was made as to the whereabouts or residence of the registered owner of the lots now in question and that it was not "made to appear to the registrar" that he could not be personally served or could not be so served without undue expense.

Moreover, the notice mailed to the owner at Vancouver was returned to the registrar through the post office undelivered, yet no steps appear to have been taken under sub-sec. 3 of sec. 32 which provides that "on the return of any letter containing any notice the registrar shall act in the matter requiring such notice to be given in such manner as he shall think fit."

In my opinion the order for substitutional service was clearly made without jurisdiction, with the result that registration of the purchaser as owner under sec. 31 was made without the notice required by that section and was therefore ineffectual and the certificate of absolute title issued to the defendant Lalonde claiming under him is invalid.

The defendant finally set up abandonment and acquiescence as an answer to the plaintiff's claim. The circumstances would probably not warrant a defence on the ground of laches being made to an equitable claim. The plaintiffs are asserting a legal right which no mere lapse of time short of the period fixed by the statute of limitations would extinguish.

I do not find in the circumstances anything amounting to a representation by the plaintiffs or their testator to persons dealing

with the property that they would not assert their right to it, followed by action and on the part of the latter of such a nature that an estoppel would arise against any subsequent assertion of their rights by the former. *Anderson* v. *Mun. of S. Vancouver*, 45 Can. S.C.R. 425, at 446 *et seq.*, and 462.

In my opinion the appeal should be allowed with costs here and in the Court of Appeal and the plaintiffs should have judgment for the recovery of the land with costs of the action. If the relief of an accounting and the claim for damages are insisted upon they are entitled to a reference to the proper officer of the Supreme Court of B.C. to have those matters dealt with, the costs of which should be reserved to be disposed of in the Supreme Court of B.C. according to its usual practice.

BRODEUR, J. (dissenting):—The question that arises in this case is whether the plaintiffs may redeem some lands sold for taxes. Robert Heron, the former owner of those lands, never paid any taxes on them from 1893, the date he got them from the Crown, until they were sold for taxes on July 22, 1896.

Those lands were in the assessment district then known as the New Westminster District and the assessor and collector for that district was Mr. E. L. Kirkland.

In 1895, the New Westminster District seems to have been divided in two, one was called the Vancouver District, for which Mr. Bryne was appointed assessor and collector, and the other was called the Westminster District, with Mr. Kirkland as assessor and collector. The lands in question being in the city of Vancouver they became part of the Vancouver District.

There is nothing in the Official Gazette, the only document we have on the matter, shewing that the power of the collector for the old "New Westminster District" to collect moneys for arrears of taxes was cancelled.

In 1896, on July 22, Mr. Kirkland proceeded to sell those lands for the payment of those arrears, and, on July 22, 1898, he made a deed in favour of the person who had bought the property at the public tax sale.

It is now claimed on this appeal that Mr. Kirkland had not the power to sell the lands in question and to execute that deed. There is no doubt that he was the assessor and the collector of the New Westminster District and that as such he could assess

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the lots in question and levy taxes thereon. We have no evidence that his powers with regard to the collection of overdue taxes were cancelled in 1895 as claimed by the appellant. That point was not formally raised by the statement of claim. It is true that some evidence was given which might have some effect on that point but it was not complete and it does not shew that Mr. Kirkland's authority over the taxes then due was at an end by the division of the district.

I do not see that the point was dealt with in the notes by the Judges of the Courts below and we have an affidavit shewing that it was never mentioned in the Court of Appeal.

I consider that the evidence which we have before us does not shew that Mr. Kirkland had no power to deal with the collection of the taxes and the sale of the lands upon which they were imposed and that, in these circumstances, the point raised by the appellants in that regard should not be entertained. I may add that the provisions of the Assessment Act (ch. 179 of 1897) and particularly secs. 27, 78, 81, 87, 92, 94, 96, 116 and 119 give to the assessor who has assessed the property the right to collect the taxes thereby imposed.

From 1896, the date of the tax sale, until 1904, the date of his death, Robert Heron does not seem to have taken any steps to redeem the property. The evidence does not shew either whether he made inquiries with regard to the payment of taxes or the redemption of the property.

In 1904, after his death, his executor, Mr. Brown, found some papers concerning those lands and made inquiries with regard to them. Having found, however, that they had been sold for taxes, he did not exercise any right of redemption which he might have. The property was once more sold in 1906 for taxes. From that date until 1913 no steps have been taken by the Heron estate, the appellants, with regard to that property; but the lands having increased in value they instituted the present action.

There is no doubt as to the validity of the second tax sale. There is no question either with regard to the validity of the first tax sale; but they claim that their right of redemption under the first tax sale still exists because the deed was executed a day before the date at which it should have been made.

Under the Assessment Act of B.C. the owner of land sold for

taxes may "at any time within two years from the date of this tax sale or before the delivery of the conveyance of the tax sale" redeem the estate sold.

The appellants claim that they are still within the time for exercising that right because there has never been delivery of any legal conveyance to the purchaser. Was the tax deed void or voidable? If it is an absolute nullity, then no delivery of conveyance has taken place.

The actual execution of the deed could have been performed at any time after July 22. A new deed could have been executed the very next day and no question could be raised with regard to its validity. If the money had been tendered on or before July 22, 1898, the rights of the appellants could not be denied and the execution of the deed on that date could not have been invoked against them. But no such tender was made and the deed which has been prematurely executed could not be, in my opinion, considered as a nullity. It was simply voidable and now that the deed has its full effect, that it was formally delivered to the purchaser, it seems to me that the right of redemption which the owner of the land possessed has expired. The purchaser's right has become absolute.

Besides, I agree with the trial Judge that the provisions of sec. 255 of ch. 222, R.S.B.C., 1911, have cured any defects which might have occurred in connection with this tax sale.

It is true these curative sections should not be construed in too liberal a way but the statute is drafted in such terms and such language that a deed which has been executed, like the present one, would preclude the appellants from claiming seventeen years after the sale has taken place the right to redeem the property. For these reasons, the appeal should be dismissed with costs.

Appeal allowed.

The "OREGON" (1).

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Prize Court, Victoria, B.C., Hon. Mr. Justice Martin, Judge in Prize for British Columbia, June 26, 1916.

PRIZE COURT—INHERENT JURISDICTION TO PRESERVE CARGO—SEIZURE BEFORE ISSUE OF WRIT.

The Prize Court has jurisdiction, both statutory and inherent, to take all necessary steps to preserve property in its custody, and therefore an order will be made that the cargo of a seized ship should be unladen, inventoried and warehoused to protect it from damage by damp and heat. This jurisdiction begins from the "moment of seizure," and may be exercised before the issue of a writ.

B. C.

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THE "OREGON." (1).

Statement.

PETITION presented by the marshal in prize. The ship, a three-masted power schooner, had been seized by H.M.C.S. "Rainbow," Walter Hose, acting captain, on or about April 23, 1916, in the Gulf of California and brought into Esquimalt, B.C., on May 29, 1916, and, pursuant to sec. 16 of the Naval Prize Act, 1864, delivered up to the marshal on the following day. On June 1, the affidavit as to ship papers, required by sec. 17 of said Act and O. IV. was filed, but no writ had yet been issued. The marshal's affidavit shewed that the cargo, a miscellaneous one of about 245 tons, had been partly damaged by damp and water in the hold, there being about 3 feet of water therein at the time the marshal took possession, and that the vessel was making water at the rate of about 5 inches per day, and had to be pumped out daily; that there was a very bad smell with heat coming from the cargo through the one small ventilating hatch, the main hatches having been sealed up, which led to the belief that certain portions of the cargo were sweating, in consequence of which the marshal unsealed the main hatches and inspected the cargo so far as possible and found that certain boxes of sugar in the lower tiers of stowage had been damaged by water, and also many sacks of corn, and probably other goods; that there were about 50 tons of coffee, and a large amount of cigars and cigarettes, leather, dried bananas, etc., etc., which should be removed without delay in order to be preserved from deterioration from damp and heat and sweaty conditions.

Harold Robertson, for the marshal, moved for an order that a survey should be made of the ship and that the cargo should be unladen and sold, and for that purpose that the ship should be brought to Victoria harbour.

Luxton, K.C., for the officer of the Crown, supported the application.

Lindley Crease, K.C., for Bartning, Guerenay Cia of Mazatlan, Mexico, claimants

Martin Swanson, the master of the ship, being in Court.

Martin, J.

MARTIN, J.:—In my opinion, the statute and rules warrant the making of an order at any time to preserve a ship or a cargo which is in the custody of the Court by its marshal, subject to its orders (sec. 16), and the hand of the Court is not stayed in this, or certain other respects, because the writ has not yet

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been issued. An order, therefore, is now made that the goods "be unladen, inventoried and warehoused," as mentioned in sec. 31, the various consignments being kept distinct, but the time has not arrived to consider the question of a sale which may be better decided upon after the marshal has made his return to the commission, which will issue to him for the aforesaid purposes. It is unnecessary to give any directions to the marshal as to where or how the unlading should take place: that is part of his duty to decide.

I may add that, quite apart from any statute or rule, this Court has inherent jurisdiction to take all necessary steps to preserve any property which is in its custody, and its jurisdiction begins not merely when the ship is delivered to the marshal, but from the moment of seizure: *The "Zamora,"* [1916] 2 A.C. 77, 99, 108, 2 B. & C. Prize Ca. 1, wherein it is stated that "the primary duty of the Prize Court . . . is to preserve the *res* for delivery to the persons who ultimately establish their title."

The question of costs will be reserved to be spoken to later.

Order accordingly.

B. C.

P. C.

The "OREGON" (2).

Prize Court, Victoria, B.C., Hon. Mr. Justice Martin, Judge in Prize for British Columbia, August 22, 1916.

PRIZE COURT—APPEARANCE—LAPSE OF TIME—ENEMY CLAIMANT'S AFFIDAVIT.

Where leave is given to enter an appearance after the expiration of eight days after service of the writ it is not a condition precedent to the granting of the application that an alien enemy should then file an affidavit stating the grounds of his claim.

Statement.

SUMMONS for leave to enter appearance.

Bullock-Webster, in support of application.

Luxton, K.C., for the officer of the Crown.

Martin, J.

MARTIN, J.:—Leave will be given to enter an appearance. The effect of this is to put the applicants in the same position as though they were within the 8 days, and they must conform to the rules as regards an alien enemy or otherwise, but to obtain this leave the filing of an affidavit under O. III., r. 5, is not a condition precedent, though in the case of one who is an alien enemy, it ought to be filed before appearance, and the consequences for not doing so will later be visited upon such defaulting party. It should not now be assumed that the rule will not be complied with at the proper time by the alien enemy, if he is one. The giving of leave is the first step, and the filing of the affidavit is the second.

Order granted.

B. C.

P. C.

The "OREGON" (3).

Prize Court, Victoria, B.C., Hon. Mr. Justice Martin, Judge in Prize for British Columbia, September 12, 1916.

PRIZE COURT—EXAMINATION OF WITNESSES—POSTPONEMENT OF—PLEADINGS—PARTICULARS.

The examination of witnesses, officers of a seized ship, who are about to leave the jurisdiction, will not be postponed until a petition is filed by the Crown.

Pleadings and particulars of the grounds for condemnation will only be ordered in very special cases.

Particulars ordered in the circumstances of the present case, there being no intimation given in the writ of such grounds.

Statement.

SUMMONS for an order that the proper officer of the Crown be directed to file a petition under O. VII. shewing upon what grounds the condemnation of the ship and cargo are sought, and that till that is done the pending examination before the Registrar of the master and three other witnesses, officers of the ship (*viz.*, the purser, engineer and wireless operator) not being British subjects, on behalf of the Crown, pursuant to order already made, be postponed: the said witnesses after their examination proposed to leave British Columbia.

Bullock-Webster, for owners of the ship and certain cargo owners.

Crease, K.C., for Bartning, Gueranay Cia, of Mazatlan, Mexico, part owners of cargo.

Luxton, K.C., for the officer of the Crown.

Martin, J.

MARTIN, J.:—After careful consideration and consulting all the authorities available, I have reached the conclusion that the part of the summons which asks that the Crown do file a petition should stand for further consideration, for it may, probably, be disposed of to better advantage after the result of the examination is known. In the circumstances, I would not be justified in delaying the examination which is to take place within 3 days, and there is no way of detaining these foreign witnesses who are about to leave the jurisdiction for Mexico. The mere fact that there are no pleadings or particulars for condemnation would not warrant the postponement of the examination which at this stage, very largely at least, represents the former examination under the old practice of "three or four principal persons belonging to the captured ship" on the standing interrogatories "within all practicable speed after the captured ship is brought into port" under repealed sec. 19 of the Naval Prize Act, 1864.

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THE "OREGON." (3).

Martin, J.

I give leave to the applicant to amend the summons to ask alternatively for the delivery of particulars. Costs reserved pending further consideration after the examination is finished.

In the view which I am about to express it will be unnecessary for me to decide the important point as to whether or no the Crown can be required to file a petition under O. VII., r. 1. In the case of the "*Sandefjord*", an unreported decision of Drysdale, J., in the Prize Court for Nova Scotia, he (according to what purports to be a copy of his judgment) gave a "ruling as to the proper party to begin such pleading" under said order as follows:—

I think it is the plain intention of the rules that where a party appears and makes a claim, if pleadings are directed, the claimant should begin by filing his petition to which the Crown answers and on the petition and answer the cause goes down to trial in the absence of any further order.

The party instituting the cause may be ordered to file a petition and in a proper case this could be done, but when parties appear and make a claim I think the rules contemplate a petition or statement of claim of such parties in the form of pleadings to which the Crown pleads by what is technically called under the rules an answer. This will be my direction in this case and after the claim or claims be duly made herein, an order will pass for pleadings.

The exact date of this decision is not before me, but it recites that the summons on which it was given was issued on January 12, 1915. Since that time, however, we have the further benefit of the decision of the President of the English Prize Court on March 6, 1915, in the "*Antares*", 1 Prize Cases, 261, 271, wherein that Judge refused an application for pleadings or for particulars of the Crown's claim, saying that:—

I am not going to be a party, except in extremely special cases—there may be some—to the introduction of pleadings, summons for particulars, etc., into these Prize Court proceedings.

But there is no suggestion that when that sort of case does arise the Crown, which is unquestionably included in the expression, "A party instituting a cause" in r. 1 (as it has instituted this cause by issuing a writ under O. II., r. 1) should not be required to file a petition, or give particulars under O. VIII. as the case may be. And it should further be noted that the prior case of the "*Bellas*," 20 D.L.R. 989, wherein the President of this Court, at Ottawa, made an order directing the Crown to file a petition, was not cited to the Judge who decided the "*Sandefjord*", and though such order was not contested yet nevertheless that action was taken without objection as to its propriety.

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But, as intimated above, I am not called upon to express an opinion on this point and, therefore, shall reserve it for a future occasion, should it arise, because I think this in any event is a very special case wherein at least the Crown should give particulars of its bare claim in the writ "for the condemnation of them (*i.e.*, ship and cargo) as good and lawful prize seized and taken as prize by our ship of war 'Rainbow.'" Said O. VIII. does not restrict the delivery of particulars to the case of pleadings, and the form of O. No. 14 refers to matters "alleged" in "the pleadings or other documents in which the allegations are contained." I am the more moved to make the direction because I note that in the "*Zamora*" (1916), 2 B. & C.P.C. 1, the writ set out with brief, yet sufficient particularity, the different grounds of condemnation, as it did also in the "*Antares,*" a fact, which is to be borne in mind in supplying the above quoted remarks of the Judge therein. As the writ herein stands now, I feel that, having regard to all the circumstances of the case, particularly the many different classes of claims, with various claimants in different places, the great distance and difficulty of communication in the present unhappy disturbed state of Mexico, the absence and dispersion of certain witnesses, it would lead to so much expense and delay as to almost be oppressive were all these different claimants required to come into Court with each one necessarily prepared to meet all possible grounds, yet in complete ignorance of any one ground upon which condemnation was sought.

Therefore I direct that particulars be delivered, this to be done on or before October 2 next. Costs to be in the cause.

Order accordingly.

ADAMS v. GLEN FALLS INSURANCE CO.

ONT.
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. April 19, 1916.

INSURANCE (§ VI C1—355)—PROOF OF LOSS—FRAUD—ONUS.

The onus of proving fraud or false statements in the statutory declaration by the assured proving loss by fire, required by the Insurance Act (R.S.O. 1914, ch. 183, sec. 194), is upon the insurance company. Mere suspicion, or even grave suspicion, is not enough. There must be clear and satisfactory proof by the company, not such as would warrant a conviction for fraud and perjury, but strong enough at least to leave no reasonable inference but that of guilt.

Statement.

APPEAL by plaintiff from the judgment of Sutherland, J. Reversed.

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ADAMS v. GLEN FALLS INSURANCE CO.

Meredith, C.J.O.

Leighton McCarthy, K.C., for defendants, respondents.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 10th February, 1916, which was directed to be entered by Sutherland, J., after the trial of the action before him, sitting without a jury, at North Bay, on the 6th and 7th December, 1915.

The appellant carried on a general store at North Bay and lived above his shop, and the building belonged to him. On the 1st August, 1914, he effected an insurance with the respondents the Glen Falls Insurance Company on his stock in trade for $3,000, and on the same day an insurance on it with the respondents the Imperial Underwriters Corporation of Canada for $2,000, and on the 17th September, 1914, an insurance on it with the respondents the Metropolitan Fire Insurance Company for $2,000. He also effected an insurance of $500 on his household furniture and of $1,000 on his building, on the 18th June, 1914, with the Glen Falls Insurance Company; on the 29th October, 1914, an insurance on his household furniture for $600 with the Imperial Underwriters; and an insurance on his building for $1,000 with the Scottish Union and National Insurance Company. The last mentioned insurance is not, however, in question in the action.

On the 11th February, 1915, a fire occurred, which originated in a building adjoining that of the appellant, the result of which, as he alleges, was to do serious damage to his stock in trade and to his household furniture, and some damage to his building, and the action is brought to recover the proportion of the loss thus sustained for which the respondents, as he contends, are liable.

The claim is that the loss and damage to the stock in trade caused entirely by smoke was $3,333.90; the loss and damage to the furniture caused in the same way $150; and the loss and damage to the building $250.

These claims are disputed by the respondents, and they also set up as defences to the action the failure of the appellant to furnish to them proper proofs of his loss, and that the appellant in an account of his loss which he did furnish made false and fraudulent statements with reference to his claim, by which, by virtue of the 20th statutory condition, his claim is vitiated. The

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statements of defence do not shew in what particulars the statements alleged to have been false and fraudulent were so, and no particulars appear to have been delivered.

The appellant on the 17th March, 1915, delivered to the three companies proofs of his loss. The proofs consisted of statutory declarations, in which he declared with respect to the stock in trade that he estimated that he had suffered loss to the extent of $2,900, made up on the basis of 20 per cent. of the value of the stock, which he declared was $14,500, and that the damage was caused by smoke spreading from the fire; and in which he declared, with respect to the building, that it was damaged to the extent of $250, and, with respect to the household furniture, that it was damaged to the extent of $150.

These proofs of loss were objected to by the respondents as being insufficient, and further proofs of loss were furnished on the 17th April following, and it is in them that the false and fraudulent statements are alleged to have been contained. These proofs were in the form of a statutory declaration of the appellant, in which he declared that he had made a detailed statement of the loss sustained on the different articles in his building, and had found that it was necessary for him to "supplement the loss" by claiming the sum of $3,333.90, and with the declaration was delivered a statement marked exhibit A, which he said was a detailed statement shewing the loss he had sustained by the fire. This statement is headed "Copy of Stock-sheet, February 5th, 1915," and contains a detailed list of the various descriptions of articles of which the stock was composed, with their values set opposite, which aggregate $14,150.60. In another column are set out the percentages of damage to the different articles, and in a third column the total amount of damage to them, based on these percentages.

This declaration and the statement were sent by the appellant's solicitors to the respondents' solicitors, and in the letter which accompanied them the writers say, "If there is anything further you require you might let me know." So far as I have been able to discover, no answer was made to this inquiry, and no further complaint was made as to the sufficiency of the proofs of loss that had been furnished. It was therefore not open to the respondents to set up the insufficiency of the proofs of loss, if

indeed it was open to them to object to them when they had definitely rejected and refused to pay the appellant's claim or any part of it: *Morrow* v. *Lancashire Insurance Co.* (1898-9), 29 O.R. 377, 26 A.R. 173.

The question which lies at the threshold of the inquiry, both as to the amount of the loss and the alleged fraud and false statements, is, what was the value of the appellant's stock in trade at the time of the fire?

As to this the learned trial Judge says: "I was not convinced that there was the quantity of stock in the plaintiff's store at the time of the fire that he stated there was."

Assuming that that means that the appellant had not proved that the stock in the store at the time of the fire was of the value of $14,000, not only is the finding not supported by the evidence, but is directly opposed to it.

That the stock in the store at the time of the fire was of that value was testified to by the appellant and his clerk, Abe Sturt, and there was also the evidence to the same effect of William Baldwin, an independent witness called by the appellant, and of Max Claver, a witness called by the respondents. Not a witness was called by the respondents to speak as to the value of the stock, and it is most significant that neither McKeown, the agent of two of the companies, who took their risks, nor Cory, the adjuster, both of whom were called as witnesses by the respondents, was asked anything as to the quantity or value of the stock, and neither of them ventured to suggest that it was not worth what the appellant alleged was its value.

The question next in importance is, was the stock damaged by smoke?

The only answer to it that it is possible on the evidence to give is, that it was. There was adduced on the part of the appellant a large body of evidence to support his testimony that the store was filled with smoke; and against this there was only the testimony of McKeown that on the morning after the fire he did not detect the smell of smoke when he was in the plaintiff's shop; the testimony of a fireman named McNee, who said that he did not see any smoke when he went upstairs to the appellant's living-rooms; the testimony of the chief of the fire brigade, who said he was in the appellant's store three times, that on the first occasion there

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was not enough smoke to bother and that he did not see much smoke, that on the second occasion the smoke did not seem any worse, that there was smoke upstairs but not very much, and that on the third occasion the smoke had lifted; and the testimony of William Martin junior, who said that looking into the store he could see a slight haze around the lights.

Testimony such as this cannot outweigh the testimony of a witness who speaks of seeing a considerable smoke in the store, so dense that he was "afraid of there being fire there" (McIlvenna, the Mayor of North Bay); of Leonard W. Wilson, car inspector of the Canadian Pacific Railway Company and a member of the town council, who said that "on account of the smoke, although the lights were on in the store, you could not see the back part of the store, you could see the lights at the back, but you could not distinguish the back part of the store;" of William Prior, a carpenter and joiner, who was employed shortly after the fire to repair the furniture that was upstairs, and who said that it was "heavily smoked;" of John Carey, who says that the store was "full of smoke;" of Walter Wright, a fireman who went upstairs after the fire had progressed for some time and says that he "found considerable smoke there;" and of Henry Ritter, who says that about ten minutes after the fire began he went into the store for the purpose of telephoning—I infer for a doctor to see a servant girl who had been badly hurt in getting her out of the building in which the fire started—that the store was "thick with smoke," so thick that he was unable to find the doctor's number in the telephone-book, that he remained watching the fire until two o'clock in the morning, and during all the time he was there "there was more smoke in."

The next question to be considered is, what was the extent of the damage done to the stock?

The view of the learned trial Judge was, that it was "very unfortunate that the plaintiff, with the experience he had with previous fires and his knowledge that a separation of the damaged from the undamaged goods would naturally and properly be expected, did not immediately after the fire make up in detail a list of the goods alleged to be damaged."

It may be open to question whether the appellant was bound to do this; but, even if he was, the observation is, I think, scarcely

fair to the appellant; he might well delay or omit doing this until a request to do it had been made by the respondents. The doing of it would have entailed a considerable interruption of his business and the expenditure of much time and labour; and in the case of the only previous fire in which the course suggested was said but not proved to have been adopted, it was not taken until the company had asked that it should be taken. The appellant may well have thought, and not unreasonably, that, as the damage was general, an estimate could be made of the loss by an inspection of the stock as it lay on the shelves and elsewhere in the store.

I differ also as to the insurance companies having been put off their guard and misled by the appellant's action after the fire. A perusal of the evidence leads me to the conclusion that the agent McKeown knew from the first that the appellant claimed that his stock, furniture, and building had been damaged by smoke, though it is quite possible that McKeown thought that the claim would not be large.

Much was attempted to be made of the fact that in referring to the damage by smoke the appellant pointed to the ceiling, the contention being that this shewed that he was limiting his claim for damage by smoke to the building, and that he had then no idea of making a claim for damage to anything else. That is not the inference I would draw from the incident. There had been a discussion as to the smoke, and the appellant in pointing to the ceiling did so to shew that there had been smoke in the building, and what he did was as much as to say: "You can see for yourself that there was smoke in the building; look at that ceiling; it was white before the fire." So also as to the request to McKeown to go upstairs. It meant, "Go up stairs with me and you will find there evidence that the building was filled with smoke."

However that may be, according to McKeown's own testimony he was told by the appellant as early as the 18th February that he claimed that his stock had been damaged—McKeown says to the extent of 8 per cent., but this is denied by the appellant. Knowing as McKeown did that the appellant intended to make a claim for a substantial amount for damage to his stock by smoke, the fault for the course which the learned trial Judge said should have been taken lies, in my judgment, not with the appellant, but with the insurance companies which McKeown represented. It is incomprehensible to me why the agent Mc-

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Keown and the adjuster Cory did not take means to ascertain definitely whether the stock really had been damaged by smoke, and, if so, to what extent it was damaged. They knew early that the appellant claimed that it had been damaged, and the building bore evidence of smoke in considerable quantity having been in it, yet they did nothing beyond entering the store and concluding, without having made any examination of the stock, that it had not been damaged.

The view of the learned trial Judge was that, "if there had been any appreciable damage to his" (the plaintiff's) "stock by smoke, it was greatly and deliberately exaggerated in the claim made." With that view I cannot agree. Acting as a juror, I cannot but conclude that a stock such as the appellant had in his store, when subjected to the action of a dense smoke for several hours, and especially the articles that were light in colour, would in all probability have been damaged by the smoke. This must have been the view of the respondents themselves, otherwise there would not have been the strenuous effort that was made to shew that there had been little or no smoke in the store. The testimony of the appellant as to the damage was corroborated by Sturt, and to some extent also by the witness Baldwin, who saw the stock very shortly after the fire, and testified that, "taking a rough estimate of it," the damage was between $3,000 and $4,000, and that the damage to the clothing, to which his attention was specially directed, was about 50 per cent., which is 10 per cent. more than the appellant's estimate.

After the best consideration that I have been able to give to the matter, my conclusion is that $2,000 would not be an unreasonable sum at which to fix the damage to the stock; and the appellant is, in my opinion, entitled to recover that sum, to be apportioned of course among the respondents according to the amount of their respective policies, unless the claim of the appellant is vitiated by reason of fraud or false statements in his declaration as to the matters mentioned in the 19th statutory condition. The onus of proving the fraud or false statement alleged to have been made was upon the respondents, and mere suspicion, or even grave suspicion, is not enough. There must be clear and satisfactory proof.

It was strenuously argued by counsel for the respondents that what purported to be a statement of a stock-taking on the 5th

February, 1915, was a document fabricated after the fire, and that there had been no stock-taking at that time. It was contended that it was established that when the respondents' solicitor, Mr. McCarthy, and Mr. Cory, the adjuster, were in North Bay in November, 1915, for the purpose of the examination for discovery of the appellant, Cory found among the papers which were produced to him by the appellant, preparatory to his examination for discovery, a document which purported to shew the result of a stock-taking on the previous 5th February, and the percentages of loss on the various classes of goods then in stock; that this document shewed on its face that alterations had been made in the original figures in three or four places; that it was taken out of a bundle of papers the appellant was asked to produce at his examination, by the appellant, and was not produced at the examination or since, and that the appellant produced at the trial a document (exhibit 22) which was not, although he testified it was, the document which Cory had seen, in which it is said the alterations appeared.

What motive the appellant could have had for inventing the story as to the stock-taking and fabricating the stock-list I cannot conceive, if, as I have concluded, he had stock on hand of the value of $14,000. I could understand his having a motive if the respondents had been able to shew that the value of the stock on hand was much less than that.

According to the testimony of Cory, alterations had been made in the values in four places in the stock-list which he found among the papers handed to him by the appellant. The only alteration he recollected was in the item of underwear, the value of which he said had been changed from $1,272 to $1,372. When shewn exhibit 22, he said it was not the stock-list he had seen; and, when asked as to whether it had a heading, his answer was that he "did not remember whether it had this exact heading." This stock-list had been taken by Cory to Mr. McCarthy. McCarthy testified, referring to the alteration which Cory said he remembered, that it looked as if the figures had been written up $800 or $900; he also said that the top of the sheet had been cut off, as in exhibit 22, and that percentages were shewn as in that exhibit, but that a line had not been run through them, and there was no second column of percentages as shewn in it. He also made the statement that the document "indicated that a person was

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figuring on his percentages and adjusting his values to get his proper summation or total."

I fail to understand how any such thing can have been indicated by the stock-list. It contained no statement of what the damage was, beyond giving the percentages, and there was no summation or total shewn. What possible difference, then, could it have made, as far as the document was concerned, whether the values were more or less than they were stated to be in the stock-list as it was written before the alterations? It is worthy of observation that the propounding of this theory was left to Mr. McCarthy, and was not fathered or supported by Mr. Cory.

It is unfortunate that, having, as they evidently thought they had, found an important piece of evidence which more than threw doubt upon the honesty of the appellant's claim, neither Mr. McCarthy nor Mr. Cory took the precaution of making a facsimile of the incriminating document, but left the question of what it contained and shewed, to be determined by their recollections of what they had seen. What I have said is, I think, emphasised by the fact that, as has been seen, their recollections do not correspond.

Assuming all that was said by Mr. McCarthy and Mr. Cory, except the theory propounded by the former, to be true—and they, no doubt, stated the facts according to their recollections of them—I fail to see the importance of this as affecting the issue to be determined. It may be, unless Mr. McCarthy's theory ought to be accepted, that changes were made at the time the stock-list was written—indeed, there is nothing to shew the contrary—and that the appellant, fearing the fact that the alterations which had been made would be used against him as they are being used, decided to substitute for the document that Mr. Cory had found a clean copy of it which would not shew the alterations. This was, no doubt, an improper thing for him to have done, but the doing of it affords no ground for vitiating his claim.

According to the provisions of the 20th statutory condition, the fraud or false statement must be in a statutory declaration in relation to the particulars mentioned in the 18th condition. Neither in the declarations furnished in March, nor in the declaration furnished in April, is there any statement that there had been a stock-taking on the 5th February and that exhibit A shewed

the result of it. All that the two documents, taken together, mean, when fairly read, is that exhibit A, as the declaration states, "is a detailed statement shewing the loss sustained by me in the said fire."

If this view is correct, it is unimportant, as far as the question of the application of the 20th statutory condition is concerned, whether or not there was in fact any stock-taking. See *Ross* v. *Commercial Union Assurance Co. of London*, 26 U.C.R. 552. I am, however, of opinion that it was satisfactorily shewn that stock had been taken on the 4th and 5th February and that the stock-list, exhibit 22, was the result of it.

I cannot understand why it should be necessary to reach the conclusion that there was no stock-taking and that the stock-list was fabricated after the fire. While it is true that the stock was not taken as it would be taken in a well-conducted business establishment, it must be remembered that neither the appellant nor Sturt was an experienced business man, and that they went about the work in the way that seemed to them most convenient to enable the appellant to find out the value of the stock, and in the way in which, according to their testimony, the work had been done in the previous year. It is difficult for me to believe, and I do not believe, that the whole story as to the stock-taking was an invention designed to enable the appellant to support a dishonest and fraudulent claim against the respondents. It was urged that the slips upon which Sturt said he made his memoranda and handed to the appellant in order that he might make out the stock-list, should have been produced, and that the absence of them was a circumstance that pointed strongly to the conclusion that there never was a stock-taking. I do not think so. On the contrary, I think it was a most natural thing to destroy the rough memoranda after they had answered the purpose for which they were made.

In what particular, then, were there fraud and false statements in the declarations? If at all only in the statement as to the amount of damage done to the stock.

I apprehend that it must always be difficult to determine accurately the extent of the damage that smoke has caused to such a stock as the appellant had, and opinions would naturally differ, and differ perhaps widely, as to it.

As I have already said, the probabilities are altogether in

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favour of the view that, if there was as much smoke in the store as the appellant and the witnesses called on his behalf testified there was, the stock, and particularly the articles that were light in colour, would have been damaged, and I think seriously damaged. Besides the oaths of the appellant and Sturt, there is the evidence of Baldwin, to which I have referred, which corroborates them to some extent at least; and the evidence to the contrary is not satisfactory. It is entirely of persons, and few of them, who either formed their conclusion upon the hypothesis that there had been little or no smoke in the store, or upon that and a very cursory look at the stock. Indeed, the learned trial Judge's finding that the respondents were put off their guard and misled by the action of the appellant is designed to meet the contention that there was an absence of evidence on the part of the respondents to answer the case made by the appellant as to the damage done by the smoke, and the extent of it.

I do not mean to say that the estimate made by the appellant of the damage that had been done to the stock by smoke was not an excessive estimate, but I do not think that it was so excessive as to justify the conclusion that it was dishonestly and fraudulently made. Such a finding ought not to be made unless his estimate is so extravagant as to lead necessarily to the conclusion that the excessiveness was due not to an error of judgment, but was motived by an intention to defraud. It is a very serious thing to find a man guilty of fraud and perjury; and, to justify such a finding, the evidence ought, if not such as would warrant a conviction for fraud and perjury, to be at least clear and satisfactory, and to leave no room for any reasonable inference but that of guilt. As to this, I refer to *Rice* v. *Provincial Insurance Co.* (1858), 7 U.C.C.P. 548; *Park* v. *Phœnix Insurance Co.* (1859), 19 U.C.R. 110; and *Parsons* v. *Citizens' Insurance Co.* (1878), 43 U.C.R. 261.

I am, for these reasons, of opinion that the defence founded on the 20th statutory condition was not made out.

There remains to be considered the claims for damage to the household furniture and to the building. There were two policies covering the household furniture, one of the Imperial Underwriters for $600, and the other of the Glen Falls Insurance Company for $500, and the appellant's estimate of his loss was $150. This claim was supported by the testimony of the witness William

Prior, who said that the damage to the furniture was $175, and there was no evidence to the contrary except that as to there having been little or no smoke upstairs, with which I have dealt. The learned trial Judge appears to have overlooked this claim, and the appellant should have judgment for the amount of it against the two insuring companies, in the proportions of five-elevenths against the Glen Falls Insurance Company and six-elevenths against the Imperial Underwriters.

As I have already mentioned, the building was insured in the Glen Falls Insurance Company for $1,500, and in the Scottish Union and National Insurance Company for $1,000. The claim for damage to it is $250.

The appellant appears to have thought that damage had been done by water thrown on the building having leaked through the roof, and made his claim under that impression. It turned out that this was a mistake, or that the Scottish Union satisfied him that it was a mistake, and he settled with that company on the footing that damage to the amount of $22 only had been done. This sum probably, although the evidence is not clear as to it, represented what the appellant had paid the witness Wallburn for repairs, consisting of re-painting and re-decorating, and putting in some glass that had been broken.

I do not think that the appellant is entitled to recover more than the Glen Falls Insurance Company's proportion of $22. The other company appears to have got the better of the appellant in the settlement with him, as they paid on the basis of the building being insured for $3,000, when, as far as appears in the evidence, it was insured for only $2,500. I do not think that there was fraud or false statement with respect to this claim; but, if there were, it would affect only the right to recovery on the Glen Falls policy on the building. The proportion of the loss on the building which that company should pay I would fix at fifteen twenty-fifths of $22—$13.20.

I would, for the reasons I have given, allow the appeal with costs, reverse the judgment, and direct that judgment be entered for the appellant in accordance with the opinion as to his rights which I have expressed, with costs throughout.

Appeal allowed.

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ALGOMA STEEL CO., Ltd., v. DUBÉ.
DUBÉ v. LAKE SUPERIOR PAPER CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 19, 1916.

MASTER AND SERVANT (§ II A 6 — 122) — HIRED CREW — DANGEROUS MACHINERY—SAFETY—JOINT LIABILITY.

A company which hires machinery and certain operators is liable for injury to the latter from negligence in the management of the machinery, and the company which owns the machinery is liable to its operators for the same injury if the machinery was defectively equipped when supplied; for joint negligence each company is severally liable.

[*Dubé* v. *Algoma Steel Co.*, 27 D.L.R. 65, 35 O.L.R. 371, affirmed in part.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 27 D.L.R. 65, 35 O.L.R. 371, affirming the judgment at the trial in favour of the plaintiff against the Algoma Steel Co. and dismissing her action against the Lake Superior Paper Co.

Anglin, K.C. and *J. E. Irving*, for appellants, the Algoma Steel Co.

T. P. Galt and *McFadden*, for plaintiff appellant and respondent.

Atkin, for the Paper Co.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that the appeal of the Algoma Steel Co. should be dismissed with costs and the cross-appeal of Mrs. Dubé allowed as against the Paper Company with costs, for the reasons given by Maclaren and Garrow, JJ., in the Court below and adopted here by my brother Anglin.

There is evidence to support the finding that the derrick or crane was dangerous as supplied by the Paper Company, and, because of its defective equipment, the crane toppled over and killed Dubé. There was also negligence in the management of the crane by the Steel Company, and both companies, by their joint negligence, contributed to the accident.

If the crane had been properly equipped, it would not have toppled over, and if proper care had been taken in its management, the consequences of the defective equipment might have been overcome. Therefore, I have come to the conclusion that, on the evidence, the verdict of the jury should be supported.

Moreover, the relation of master and servant between Dubé and the paper company continued to exist up to the time of his death. That company was responsible to him for his wages. It alone could dismiss him and he was subject to its exclusive

orders. (Vide Walton Compensation, 38 and 89, Hals., vol. 20, p. 191, No. 421; Dalloz, Répertoire Pratique, Accidents de Travail, No. 44; (1916) Q.O.R.S.C. p. 219.)

DAVIES, J.:—I am of opinion that the appeal of the Algoma Steel Co. must be dismissed with costs and the cross-appeal of Mary Dubé against both companies, seeking to hold them both liable, should also be dismissed with costs. The result would be that Mary Dubé would be entitled to retain her judgment against the Steel Corporation for the full amount of $3,000 awarded as damages by the jury.

The accident which happened and which caused the death of Dubé was not found by the jury to have happened because of any inherent defects in the crane or its equipment. The proximate and determining cause of the accident was found by them to have been the negligent use by the Steel Company of the crane and its equipment without having any one in charge who was, in fact, competent to direct it. In answer to the question put to them as to the use of the crane by the Steel Company, the jury find that the crane, as it was when used by that company, was a "dangerous machine" in "not being properly clamped to the track or blocked under decking and deck of crane *not* being properly ballasted."

But these findings, in themselves, would not have been sufficient to make that company liable. The mere use by the company of a dangerous machine would not be enough unless it was found that such use, owing to the defects of the machine, caused the accident. The next questions asked the jury were:—

(5) Were the defendants, the Algoma Steel Co., guilty of negligence which caused the death of Martin P. Dubé? A. Yes. Q. If so, what is the negligence you find? Answer fully. A. In not having a proper rigger to superintend the work that wanted to be done.

The negligence, therefore, found by the jury, and the only negligence found by them, against the Steel Company was the neglect to provide a proper rigger or competent person to direct and control the working of the crane in the condition it was in and for the work required to be done.

That it was the duty of the Steel Company to have provided such a rigger or competent person is beyond question, and that they failed in that duty is equally clear. That the duty was one which they owed to the deceased engineer seems to me also

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under the facts as proved quite clear. I do not find it necessary to determine whether or not Dubé was, at the time when working the crane, the servant of the Steel Company. I am strongly inclined to think he was. In any event, they owed a duty towards him, as the engineer of the crane they were working, to provide a competent superintendent to direct his working of the engine with safety. Without such directions he could not work at all. At least, that is my conclusion from the evidence, and I think it was admitted on the argument that Dubé, in the caboose or cabin or small box in which he was, could not direct or control and did not attempt to direct or control the proper movements of the crane. The absence of proper superintendence by the company ensuring his safety in the discharge of his work was a negligent disregard of the duty they owed him, quite irrespective of whose servant he was. He moved the machinery just as he was ordered by the person in charge to do, and every act in connection with the working of the crane was done according to the orders of the rigger or controller who was directing its working. Under these circumstances, it became the duty of the company operating the crane to provide a proper system for its operation. That person or those persons, for there appeared to be more than one, was, or were, admittedly inexperienced and incompetent, and the jury found that the negligence which caused Dubé's death was in the employment of such incompetent persons "to superintend the work that wanted to be done."

It seems to me, therefore, quite clear that the Steel Company failed to discharge the duty they owed to Dubé under the circumstances, and that, such failure having been found to be the proximate and determining cause of the accident, they are liable for the full amount of the damages.

The jury's findings against the Paper Company are not such as, under the circumstances, make them jointly liable with the Steel Company. It is true the jury find as against them that they were guilty of negligence "in not furnishing proper equipment clamps and ballast in deck of crane," and that the crane, in the condition in which they hired it to the Steel Company, and in which it was when the latter used it, was a "dangerous machine." But they do not find that this faulty equipment or that it being a "dangerous machine" was the immediate and determining cause

of the accident. On the contrary, that cause was found to be the neglect of the Steel Company to have the crane used, directed and controlled by a competent manager or rigger.

In all respects, therefore, I am in agreement with the judgment of the Court of Appeal.

I have read the several cases on which the parties respectively rely. But I am fully satisfied that, as was so clearly stated by the Lord Chancellor and the other Judges who delivered judgments in the case of *McCartan* v. *Belfast Harbour Commissioners*, [1911] 2 I.R. 143, that each case depends upon its own special facts, and that, except where the decisions formulate some legal principle, the decided cases are only useful as illustrations.

It must be remembered that in the case at bar Dubé was exonerated by the jury from any contributory negligence, and the case was argued on that basis.

Counsel for the Paper Company relied strongly upon the case of *Donovan* v. *Laing*, [1893] 1 Q.B. 629. That was a case where a person directing the operations of a crane, corresponding with the person who is called throughout this appeal a "rigger," was injured by the negligence of the man in charge of the crane, corresponding to the man Dubé in this case. It was the exact reverse of this case, where the man in charge of the crane (Dubé) was killed through the incompetence of the rigger employed by the Steel Company.

Under the special facts of that case, the Court held that, as the owner of the crane, when he hired it to another, had parted with the power of controlling the cranesman with regard to the matter on which he was engaged, though the latter still remained his general servant, he was not liable for his negligence.

If in this case the negligence of the cranesman, Dubé, had been a factor, I could see the relevancy of this decision in the *Donovan Case*, [1893] 1 Q.B. 629. Under the facts as they exist I do not. The Paper Company are sought to be held liable because of defects in the crane and its equipment. As these have not been found the immediate and determining cause of the accident, I have held that company not liable. The Steel Company I have held liable because they failed in their duty to provide a proper system under which the crane was worked and a proper controller to direct its working, and that the jury found such failure on their part to be the negligence which caused the accident.

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I am also of opinion that, although under the findings of the jury the Paper Company cannot be held liable, yet that the case as regards the costs of that company comes within the principle of *Besterman* v. *British Motor Cab Co.*, [1914] 3 K.B. 181, where it was held that the upholding of an order on an unsuccessful defendant to pay a successful company defendant's costs depends, in all cases, on whether it was a reasonable and proper course for the plaintiff to have joined both defendants in the action.

In this case I think it was a reasonable and proper course to join both defendants, and that the Steel Company, which I hold liable, should pay to the plaintiff all such costs against the Paper Company which, under the judgment to be delivered, she may have to pay or have incurred by reason of the joinder in the action of the Paper Company.

Idington, J.

IDINGTON, J.:—I think in the circumstances in question herein that the appellant owed to the deceased a legal duty to take care which it failed to discharge, and thereby caused his death.

I so find quite independently of whether or not there was a legal relationship of master and servant within the meaning of the Workmen's Compensation Act.

In accepting control of, and operating what has been found to have been a dangerous machine, at the time of its so doing, the appellant became bound in law to take due care, in carrying on such operation, that all such persons as might be lawfully in or about said machine were not endangered thereby or should not suffer from its use. Instead of taking such due care, it handed over the direction and management of the operations therewith to those who were not competent, and hence it should abide the consequence.

The deceased and another who went with the machine formed, as it were, but parts thereof, and could not have been considered by either of the companies as a fully equipped crew intended to operate the machine.

I am, therefore, unable to attach that importance to the conversation had between the respective representatives of each company as to the sending clamps along with the machine which appellant's counsel does and presses so far as to suggest must, when coupled with the fact of and legal effect of a contract of hiring, be held a warranty of the efficiency of the outfit.

Anything that transpired between the companies cannot, as I view the principles of law applicable, as between the deceased and the appellant, absolve the latter so long as it was the party dominant in controlling the operations of the machine.

Moreover, when one tries to render it possible to hold these companies jointly liable, we find the very foundation of their relations, which were reduced to writing, is not produced, and at this stage it is impossible to form any very definite conclusion in regard to such relations. All we know is that there was a sort of letting or hiring of something which was not kept by the owners for general public use, but let with such parts, including in that part of a crew, as the parties agreed upon, for which some compensation was to be made.

Their agreement to dispense with clamps cannot affect respondents' rights. And whether or not she might have had an action against the company in whose service her late husband was engaged can form no concern of the appellant; short of that being an action against the companies jointly and founded on a joint liability which I cannot find in the facts.

The common sense of the jury in reaching the verdict first returned of $1,500 against each, if it had been maintained, I suspect might, if the case had been fought out on the lines it indicates as possible, have found some support in law.

As the case stands, it is all or nothing so far as appellant is concerned. Its negligence was the last fatal slip of those concerned and the proximate cause of the death of the deceased.

I, therefore, think the appeal must be dismissed with costs, including the costs of all parties and of the cross-appeal against the Lake Superior Co., which, of course, fails.

The necessity of keeping the latter company before the Court, even by circuitous and cumbrous methods, was fully justified, if we have due regard to the division of opinion in the Court below. If the appellant had ever been found, in the course of this litigation, putting forward and acting upon the principles of law I have proceeded upon and discarding and helping the Courts to discard the application of the Workmen's Compensation Act, I could sympathize with its suffering costs.

By the other course it has possibly got off with a very much more moderate verdict than it might have had returned against it from a common law point of view.

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ALGOMA STEEL CO. LTD. v. DUBÉ.

Anglin, J.

ANGLIN, J.:—That the death of the plaintiff's husband, Dubé, was caused either by lack of proper equipment of a derrick supplied by the defendant, the Lake Superior Paper Co. (hereinafter called the Paper Company), to its co-defendant, the Algoma Steel Corporation (hereinafter called the Steel Corporation) or by the unskilful management, or by a combination of both these causes, scarcely admits of doubt, and was not seriously contested. Nor, contributory negligence on the part of Dubé having been negatived by the jury and there being no appeal from that finding, is there much room for doubt as to the liability of one or the other, if not of both, of the defendants for the damages assessed at $3,000.

The jury has found that the derrick or crane as supplied and used was dangerous, and that its danger consisted "in (its) not being properly clamped to the track or blocked under decking; deck of crane not being properly ballasted."

It would appear that, if properly equipped, the unskilful use of the crane might not have resulted in its collapse; and it would also seem more than probable that, if it had been skilfully used, the lack of proper equipment might have proved harmless. The failure of the Paper Company to furnish proper equipment, the jury finds to have been negligence on its part which caused the death of Dubé; in failing to provide a competent person to direct the use of the crane the Steel Corporation is found to have been likewise at fault.

The Paper Company's omission to supply clamps, etc., could be chargeable against it as negligence—*i.e.*, breach of duty owing to Dubé under the circumstances—only if it should have reasonably anticipated that the derrick would have been put to a use for which this equipment would be required. A finding to that effect is involved in the jury's answers to the first and second questions; and there is evidence to support such a finding. The controverted issues on this branch of the case are the existence of the duty to Dubé by the Paper Company which it is charged with having neglected, and whether its breach was a proximate cause of his death.

On the other hand there is abundant evidence to warrant a finding that a competent supervisor was necessary, and that the omission to provide one (a fact not in dispute) amounted to negligence. Whose negligence is here the vital question.

In order to have a true conception of the duty owing by each of the defendants to Dubé, it is essential to ascertain the relation in which he stood to each of them. There is no suggestion that the Paper Company had undertaken the removal of the Steel Corporation's disused alkali plant as independent contractors. They supplied the Steel Corporation, for a consideration, with the means to effect such removal. They were bailors, and the Steel Corporation bailees, of the derrick. But, upon a consideration of the authorities, I concur in the view of the four Judges of the Appellate Division, who held that under the circumstances in evidence Dubé was throughout the servant of the Paper Company. The case, in my opinion, falls within the principle of the decisions in *Quarman* v. *Burnett*, 6 M. & W. 499; *Jones* v. *Corp. of Liverpool*, 14 Q.B.D. 890; *Moore* v. *Palmer*, 2 Times L.R. 781; *Union S.S. Co.* v. *Claridge*, [1894] A.C. 185; *McCartan* v. *Belfast, Harbour Commissioners*, [1910] 2 I.R. 470; [1911] 2 I.R. 143; *Consolidated Plate Glass Co.* v. *Caston*, 29 Can. S.C.R. 624; and *Waldock* v. *Winfield*, [1901] 2 K.B. 596, at 603-4. The absence of control of Dubé by the Steel Corporation, while performing his duties as "runner" of the crane, and of the right to dismiss him and substitute someone else for him, distinguishes this case from *Donovan* v. *Laing*, [1893] 1 Q.B. 629, *Rourke* v. *White Moss Colliery Co.*, 2 C.P.D. 205, and other cases relied on by the Paper Company. The Steel Corporation's right of interference and the control exercised by it was no greater that than of the shipowner in *McCartan* v. *Belfast Harbour Commissioners*, *supra*.

In my opinion, as its servant engaged in doing work for its profit which his contract with it obliged him to perform, Dubé was entitled to expect that his employer, the Paper Company, would not send him out with a machine so defectively equipped that its use in the work which was contemplated when it was hired would be dangerous unless that danger should be overcome or obviated by the exercise of care and skill by a person not supplied by the Paper Company. Assuming that, as between the defendants, it was the contractual duty of the Steel Corporation to have provided a competent "rigger" as between itself and its employee, I think the Paper Company cannot invoke the failure of its co-defendants to provide such a rigger, whose skill and vigilance, if exercised, might have saved the employee from

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the consequences of his employers' own negligence in sending him out to perform work for which the crane supplied by it was so inadequately equipped that its use was dangerous. Whatever rights (if any) the Paper Company may have against the Steel Corporation because of the absence of a competent rigger, that fact, in my opinion, does not afford a defence to it as against the plaintiff. I also agree with Garrow and Maclaren, JJ.A., that there is evidence to support the finding that the negligence of the Paper Company was a proximate cause of the collapse of the crane, and I incline to think that the plaintiff is entitled to recover against this defendant under the Workmen's Compensation Act as well as at common law, although, but for the existence of the relation of master and servant, unless the Paper Company was under contractual obligation to its co-defendant to furnish a "rigger," it would probably not be liable at all under the doctrine enunciated in such cases as *O'Neil* v. *Everest*, 61 L.J.Q.B. 453, at 455, in 1892. Dubé was killed in the course of his employment, while, and in consequence of, acting in obedience to a negligent order of a person in the employment of the Paper Company, to whose orders he was bound to conform. He was killed owing to defects in machinery negligently supplied to him by his employer for the work he was sent to do. The fact that, although the collapse of the derrick was a natural consequence of the Paper Company's negligence, that negligence became operative because its effect was not counteracted by competent supervision (though the duty to provide that supervision rested on its co-defendant) does not suffice to prevent the Paper Company's negligence being truly a cause and not merely a condition of that collapse happening. *Paterson* v. *Mayor of Blackburn*, 9 Times L.R. 55; *Reg.* v. *Haines*, 2 C. & K. 368; *Engelhart* v. *Farrant & Co.*, [1897] 1 Q.B. 240 at 246-7, *per* Rigby, L.J.; *Burrows* v. *March Gas & Coke Co.*, L.R. 5 Ex. 67; 7 Ex. 96.

The plaintiff's case against the Steel Corporation is perhaps not quite so clear. Dubé was not its servant. The highest degree of care that it owed him was that which is due to an invitee or licensee. It may be that, as between the Steel Corporation and the Paper Company, the latter is under an obligation arising out of warranty which may entitle the Steel Corporation to indemnification. That question is not before us, and I express no

opinion upon it. The existence of such a warranty would afford no answer to a claim by the plaintiff for breach of a duty owing to her deceased husband. Nor does the fact that Dubé was the servant of the Paper Company affect the liability of the Steel Corporation if it was under a duty to supply a competent rigger as the jury has found. Upon the evidence there is some uncertainty as to whether the order of the Steel Company was for "a derrick and crew," by which might be well understood a body of men in number and qualification sufficient to control and operate the derrick, or was for "a locomotive crane with engineer and fireman," as its pleading avers. The written order is not in evidence. Counsel for the Paper Company at the trial made this statement:—

> The Paper Company owned the crane and employed Mr. Dubé as the engineer to run it and McLaughlin as the fireman to fire it. They then hired it with its crew to the Algoma Steel Co.

In his factum counsel for the Paper Company speaks of the Steel Corporation "having hired a derrick with its crew of 2 men only." The evidence makes it reasonably clear that, in addition to the "runner" and the fireman, the crew of a derrick such as that in question should include a competent man known as a "rigger" to supervise the "spotting" of it and the management of the work to be done. The failure to provide such a man was certainly negligence on the part of one or other of the defendants. Inasmuch as the jury has attributed that negligence to the Steel Corporation and not to the Paper Company, it would seem probable that, in its opinion, the contract between these two companies required the Paper Company to furnish only the runner and fireman, leaving the obligation upon the Steel Corporation, which was to order the derrick to be put in operation, to furnish the necessary supervisor. If that be the correct view of the case, and I think it is a fair inference from the jury's findings, which cannot upon the evidence be held to be clearly erroneous, the liability of the Steel Corporation would also seem to be clear. It could not be heard to urge "identification" of Dubé with his employer, the Paper Company, as a defence (see *Child* v. *Hearn*, L.R. 9 Ex. 176, at 182; *Membery* v. *Great Western R. Co.*, 14 App. Cas. 179, at 191); indeed, it would itself be liable to the Paper Company for any damages sustained by it in consequence of the

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breach of the implied undertaking to provide a rigger competent to handle the derrick with reasonable care and skill.

But, whatever may have been the duty in this respect of the two companies *inter se*, I rather incline to think that the necessity for having a competent rigger in charge was so clear that, as to any person likely to be injured through just such an accident as that which happened, whether one of its own employees, a mere stranger lawfully on the premises, or an employee of the bailor, the Steel Corporation, before directing that the derrick should be put into operation, was under an obligation to see that it was in charge of such a rigger. Attempting the removal of such a heavy article as a tank weighing 8,700 pounds without a competent rigger verges very close upon, if it does not amount to, recklessness, such as would entail liability to a mere licensee or invitee.

When the derrick was placed or "spotted" in order to remove the tank, in the carrying of which it collapsed, it was found that, as then adjusted, the arm of the crane would not reach it. Instead of moving the derrick closer, as the evidence shews might easily have been done, one Jeffrey, an employee of the Steel Corporation, directed Dubé to lower the arm of the crane. This had the effect of increasing the distance between the derrick and the end of the arm, thus augmenting the leverage, which proved to be too great when the load was swung out. This was the immediate cause of the collapse. A competent rigger would, in all probability, have either insisted upon the derrick being placed nearer or being secured by clamps or by blocking up the platform before attempting to move this heavy tank with the arm extended practically to its extreme length. It may be that, as against the Paper Company, the Steel Corporation was warranted in assuming that the operation could be fully performed just as it was attempted. But I gravely doubt that it would have been justified in making such an assumption as against any person—even a servant of the Paper Company—whose personal safety was thus jeopardized. In view of the jury's findings, however, it seems to be unnecessary to determine this question.

I am, for these reasons, of the opinion that the verdict against the Steel Corporation must stand. The negligence of both defendants having materially contributed to causing the unfortunate Dubé's death, each is liable for the total result of their

joint wrong, and, whatever may be their rights of indemnity *inter se*, neither can ask to have the damages apportioned as against the plaintiff. The main appeal should be dismissed and the cross-appeal allowed, and the plaintiff should have judgment for $3,000 against both defendants, with costs throughout.

BRODEUR, J.:—In hiring their crane to the Algoma Steel Co., the Lake Superior Paper Co. should have furnished a proper equipment, clamps and ballast, to raise the five or six tons of weight that were mentioned. But they have not done so, and, as a result of that defective equipment, the accident in question has happened to their servant Dubé. The jury has found that they were negligent. There was evidence to justify such a verdict, but the Courts below have not, however, accepted it. That is not a question of law that was being raised on that issue between the Paper Company and the relatives of the victim, but it was a question of fact of which the jury was the judge. (*McCartan* v. *Belfast Harbour Comm.*, [1911] 2 I.R. 143.

Of course, if there had been no evidence to justify the verdict, the latter should be set aside. But there was sufficient evidence to justify it, and it should be maintained. The appeal of Mary Dubé against the Lake Superior Paper Company should then be allowed.

As far as the Algoma Steel Co. is concerned, the jury found also that the latter company was guilty of negligence in not having a competent foreman to superintend the work that had to be done. That verdict was approved by the Courts below and should be maintained.

The judgment should be that the defendant companies are condemned to pay, jointly and severally, the sum of $3,000, of which $1,250 to the plaintiff, Mary Dubé, and the balance distributed in equal shares to the six children of the victim. The defendant companies should pay the costs throughout.

Judgment varied.

HAND v. WARNER.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., and Barry and Grimmer, JJ. September 29, 1916.

VENDOR AND PURCHASER (§ I E—27)—RESCISSION—MISREPRESENTATION IN QUANTITY—"MORE OR LESS."

Where the purchaser of property under an agreement of sale, which described the property as containing "86 acres more or less," was given a deed of conveyance of the property, which he accepted without requiring or receiving in the deed any covenant or warranty as to the acreage, and gave back a mortgage as part payment under the agreement, he can-

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not set up as a defence, in an action for foreclosure of the mortgage, the fact that he afterwards discovered the property to contain only 66 acres. Neither, having accepted the conveyance without question, can he successfully counterclaim for rescission of the contract, on the ground of fraud and misrepresentation.

[*Jolliffe* v. *Baker*, 52 L.J.Q.B. 609, followed.]

Statement.

APPEAL by defendants from a judgment of White, J., in a foreclosure action. Affirmed.

The judgment appealed from is as follows:—

White, J.

WHITE, J.:—This is an action brought by the plaintiff for the foreclosure of a mortgage, given by the defendants to the plaintiff, upon a farm situate near Upper Woodstock, on what is known as the Jacksonville road, in Carleton county, and for sale of the mortgaged property. The mortgage bears date June 20, 1914, and is made to secure the payment, on or before December 1, 1914, of $2,400, with interest at 6% per annum. There is no dispute as to the fact that the mortgage was made by the defendants, nor as to the identity of the property mortgaged, nor that the whole principal and interest secured thereby is overdue and unpaid. The defence set up is, that the defendants were induced to purchase the farm in question from the plaintiff by misrepresentation and false statements, made by the plaintiff, and his agent, to the defendants, that the area comprised in the farm is 86 acres; whereas, in reality, the farm contains only 66 acres and a fraction of an acre. By their answer, the defendants ask to have the mortgage set aside, and that the sum of $2,400, paid by them in cash to the plaintiff as part of the purchase price, should be repaid to the defendants with interest, and that the defendants should be recouped the amount expended by them in improvements they have made upon the mortgaged lands.

From the evidence it appears that the plaintiff, by writing dated April 27, 1914, authorized Mr. Holyoke, a real estate agent, to sell the property in question; and that in the writing, or "listing" as it is termed, furnished to Holyoke for that purpose, he described the number of acres comprised in the farm as 86, whereof 66 was cultivated and 20 in pasture.

Shortly after the property was thus listed, the defendant, Warner, informed Mr. Holyoke that he was desirous of buying a farm. In describing the character of the property he wished to buy, he stated that he wanted it to contain about 100 acres, as that was the smallest area he could work profitably. Holyoke,

both of the defendants, and the plaintiff, met together to examine the farm. They did not go over or around the whole property, but went to an eminence, back of the buildings, whence the greater part of the farm could be seen. Warner, it appears, is near-sighted and what is termed night-blind, and therefore could not see the limits of the farm's boundaries. I mention that fact because the counsel for the defendants appeared to lay some stress upon it, and not because it seems to me to be of much importance. Warner, while the parties were thus examining the land, asked as to the acreage of the farm, and Mr. Holyoke replied that, according to his list, it contained 86 acres. The plaintiff said "yes, that is what I bought it for."

On May 9 following, the plaintiff and his wife, and the defendants, met in Mr. Holyoke's office. Holyoke drew up a typewritten agreement therein stated to be made between Mr. Hand and wife, as vendors, and the defendant, Warner, as vendee. This agreement, as originally drawn and read over by Holyoke to the parties, stated, that:—

the vendor agrees to sell and the purchaser agrees to purchase all that certain farm property, buildings, and improvements, situate at Upper Woodstock, in the said parish of Woodstock, on the north side of the main Jacksontown Road, at present owned and occupied by the vendors, for the sum of $4,800, payable as follows: The sum of $250 on or before May 16 instant; the sum of $250 on or before June 20, 1914; and the sum of $2,400 on or before December 15, 1914, which said last-mentioned sum shall bear interest at the rate of 6 per cent. per annum, until paid.

The purchaser to have the blinds now on the house, the linoleum on the bath-room floor. The vendor to put all the fences now on the property in good condition.

The purchaser to have the privilege of having the house wired for electric lights at any time.

The vendors to be allowed the privilege of occupying the property until July 1, 1914.

This agreement to extend to and be binding on the respective heirs and assigns of the parties hereto.

In witness whereof, etc.

Upon this agreement being read over, Warner called attention to the fact that it failed to specify the acreage of the farm, and declined to sign unless the acreage was stated. Holyoke, in his evidence, says, that he thereupon replied, "well, according to the list, there is 86 acres in the farm;" that I then turned to Hand and asked him if 86 acres was correct. Hand said "yes, it is 86 acres, that is what I bought it for," and I said well, will it be satisfactory to you, Mr. Hand, if I include in this agreement the acreage and

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state 86 acres more or less? He said "Yes." Warner demurred, and asked what I meant by more or less. Well, I said, Warner, in this province the term is used; as a rule, in stating the acreage of a farm, the number of acres is given, and the words "more or less" added; always has been and just why I am not prepared to say, but I presume it covers possible allowances for roads and it may vary an acre or two one way or the other. Mr. Warner asked me how much it would likely vary and I made the statement I didn't suppose it would vary more than an acre or two. Mr. Warner then asked the direct question if there would be at least 80 acres in it, and I asked Mr. Hand what he said about that, and he said "Oh, yes, I should think so," thought it wouldn't vary that much." Then I put in 86 acres, more or less, and the agreement was signed.

As is not unusual where several persons, in testifying, give their best recollection as to the terms of a conversation participated in, or overheard, by them more than a year previously, there is some difference in the evidence given by the witnesses as to just what was said in this conversation by the plaintiff as to the question of acreage. Mrs. Warner testifies that the plaintiff said, "he had never measured it himself but understood it to be 86 acres."

From the evidence, and the agreement itself as I construe it, I think that the words inserted in writing by Holyoke, that is to say, the words, "containing 86 more or less," amount only to a representation by the plaintiff that the acreage of the farm was approximately 86 acres. At the same time, I am convinced Warner would not have signed the agreement had he not been satisfied by the insertion of these words, and from what was said when the agreement was signed, that there was at least 80 acres in the farm. I am likewise satisfied that the plaintiff, at the time the agreement was signed, believed there were approximately 86 acres in the farm. He had been told before he bought the farm that it contained 86 acres. The shape of the farm, and its boundaries, were so irregular that the area of the property could not be readily computed. Although the plaintiff had owned and cropped the land for 3 seasons, I accept his statement that during the whole period of his ownership he believed there was 86 acres in the property. I therefore find that in this

representation made to the defendants, as to the area of the farm, there was no fraud.

By deed, bearing date June 20, 1914, and registered 2 days after its date, the plaintiff and his wife conveyed to the defendant, Warner and his wife, the property in question, for the consideration therein expressed of $4,800. By indenture, bearing even date with the deed, and duly registered, the defendants mortgaged the property to the plaintiff to secure the payment to him of $2,400, on or before December 1, 1914, with interest from date at 6 per cent. The mortgage also provides that interest should be payable at that rate on all principal money at any time overdue. In both the deed and mortgage, the lands conveyed are described as:—

All that tract of land and premises situate, lying and being in the parish of Woodstock, in the county of Carleton, fronting on the road leading to Jacksonville, bounded on the front or upper side by lands now or formerly owned by Samuel Watson, and on the front or lower side by lands now or formerly owned by Hezekiah Stoddard, said lands hereby deeded or intended to be deeded, running back crossing the Foundry Road, so called, and being the same lands and premises owned by the late J. F. W. Wilson, and which lands and premises were owned and occupied by the late J. F. W. Wilson at the time of his decease, and being the same lands and premises owned and occupied by the late W. Wilson at or about the time of his decease, which said lands were conveyed to one Albert Brewer by the heirs of the late W. Wilson by deed, dated February 14, A.D. 1903, and recorded in the Carleton County Records in Book H, No. 4, on pp. 579 and 580, and being the same lands a portion of which were conveyed to the said Chorenia Plummer by W. B. Everett by deed registered in Book S., No. 4, of said Carleton County Records, on pp. 320 and 321, and a portion thereof devised to her by the will of her late husband, G. F. Plummer, and being the same lands and premises conveyed by the said Chorenia Plummer to the said A. W. Hand, by indenture of deed, dated October 4, 1910, and registered in the office of the Registrar of Deeds of the said county of Carleton in Book B, No. 4, on pp. 653 and 654.

It will be observed (1), that the deed was made not to Warner alone, as stipulated in the agreement, but to Warner and his wife. (2), that the description is much fuller than that given in the agreement of sale. There is, however, no question that the property conveyed by the deed is the identical property specified in the agreement. The whole defence rests upon the fact that the land conveyed does not contain 86 acres more or less, as represented in the agreement. There is no statement, much less any warranty, in the deed as to the acreage of the land thereby conveyed.

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Upon these facts I think the defence cannot be sustained. I have no doubt that the representations in the agreement, that the farm contained 86 acres more or less, being both material and false, would have sufficed to have justified the defendants in refusing to accept conveyance of the property; and that because of such misrepresentation the plaintiff could not, in the event of such a refusal, have maintained successfully a suit for specific performance. But, as the defendants accepted the deed, and consequent possession of the property, without requiring, or receiving, in the deed any covenant or warranty as to the acreage; and as the agreement under which the deed was executed itself contains no stipulation that the plaintiff shall make compensation for any shortage in area, I think that the defendants are now without remedy: *Jolliffe* v. *Baker* (1883), 52 L.J.Q.B. 609; *Palmer* v. *Johnson* (1884), 53 L.J.Q.B. 348.

In view of the opinions expressed in *Palmer* v. *Johnson* by the eminent Judges who decided that case, I feel that I ought not, particularly when sitting as a Court of first instance, to attempt to carry the law bearing upon the question before me any further in favour of the purchaser than it has been carried by the judgment referred to; and that, as there is here no stipulation to make compensation and no express warranty as to quantity the defendants must fail in their defence to this action and cannot be granted the relief they seek to obtain.

I assess the principal due upon the mortgage at $2,400, and the interest thereon from June 20, 1914, to date at $262.40. The usual order for foreclosure and sale will be made, all parties to have leave to bid. The defendants must pay the plaintiff the costs of this suit.

A. B. Connell, K.C., for appellants.

F. B. Carvell, K.C., for respondent.

The judgment of the Court was delivered by

McLeod, C.J.

MCLEOD, C.J. (oral):—The Court have considered the judgment delivered by White, J., and have agreed in it. The appeal is dismissed with costs. *Appeal dismissed.*

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LIKELY v. DUCKETT.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. June 19, 1916.

SHIPPING (§ II—7)—CHARTER PARTY—RIGHTS AND DUTIES—SIZE OF SHIP AND CARGO—DEMURRAGE.

Under a charterparty contract, the shipowner is bound to supply a ship so constructed as to be capable of carrying the complete cargo

set out in the contract. The duty of a charterer is carried out when he has supplied cargo in dimensions such as are usual at the port of loading for ships of the size of the chartered vessel. The charterer cannot be held liable under the demurrage clause of the contract for delay in loading and discharging the cargo caused by faulty construction of the ship.

[*Duckett* v. *Likely*, 44 N.B.R. 12, reversed.]

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APPEAL from the decision of the Appeal Division of the Supreme Court of New Brunswick, 44 N.B. R. 12, reversing the judgment at the trial in favour of the defendant. Statement.

Powell, K.C., and *F. R. Taylor*, K.C., for appellants.

Teed, K.C., for respondents.

FITZPATRICK, C.J.:—I am of opinion that this appeal should be allowed. The notes of my brother Judges, both here and below, are so complete that anything I add must be mere surplusage. In my view, the case lies within a very narrow compass. The respondent's undertaking, in the terms of the charterparty, was to furnish a vessel "*in every way fitted*" to receive on board and carry from Apalachicola, Florida, to St. John, N.B., a full and complete cargo, both under and upon deck, of re-sawn yellow pine lumber. And the obligation of the appellants, the shippers, was to deliver an average cargo of the kind described alongside and within reach of the vessel's tackle. A cargo of re-sawn yellow pine lumber of the average lengths and sizes was delivered as provided for, but was not received on board the vessel because of its peculiar construction. It is not disputed that the cargo furnished the "Helen" was, as to sizes and dimensions, the same as had been furnished under similar charters for years at Apalachicola. In their factum the respondents admit that the ship and cargo were not suited to each other. The vessel was fitted out for the fruit trade, and not at all adapted, in accordance with the terms of the charterparty, to receive the lumber which the appellants chartered her to carry. I fail to understand how it can be assumed that the onus was upon the appellants to ascertain whether the ship which the respondents chartered to them to receive a full and complete cargo of lumber, was adapted to carry such a cargo. The special construction and equipment of the vessel was a fact within the peculiar knowledge of the respondents, who must also be assumed to know, when they made the charterparty, what was meant by the term "a cargo of re-sawn yellow pine lumber." At the time the charterparty was entered into, the vessel lay in New York Harbour, and the Fitzpatrick, C.J.

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appellants never saw her until she arrived in St. John. In any event, the respondents' contract was to provide a vessel fitted for the cargo and to receive on board the merchandise mentioned in the charterparty, and this they failed to do, and they must suffer for the consequences.

The appeal should be allowed with costs.

Davies, J.

DAVIES, J.:—The controversy in this appeal is as to the respective obligations of the owner and charterer of a ship chartered by the appellants to carry "a full and complete cargo both under and upon deck of re-sawn yellow pine lumber," from Apalachicola, Florida, to St. John, N.B.

The action was brought by the owners against the charterers to recover damages by way of demurrage or detention and also for dead freight.

The contention of the plaintiff owner was that the charterer was obliged to furnish the steamer with such lengths of lumber as she could well stow and carry to her full capacity, and that, as no special lengths of the "re-sawn yellow pine lumber" were mentioned, the charterer was bound to furnish such lengths only as the steamer could carry, and, not having done so, but having offered timber of lengths the steamer could not carry, was liable for the damages for the dead freight, and that the trade usage did not apply or control.

The defendant's contention, on the other hand, was that he was only bound to provide the lumber stipulated for of the ordinary lengths and dimensions in that trade, and that the accepted trade meaning of the term "re-sawn yellow pine lumber" is such lumber, sawn on four sides, without reference to lengths or dimensions, and that the lumber he furnished was such as was well known to and in the trade as re-sawn yellow pine lumber, sawn on four sides, and practically the same as that furnished by his company under similar charters for many years. There was much difference of judicial opinion in the Courts below. The trial Judge held:—"That the cargo furnished to the 'Helen' at the loading port was quite in accordance with the charterparty and the claim for dead freight could not be allowed. Also, that the ship 'Helen' was unsuitable for the carriage of the freight the plaintiff company engaged to carry, and that defendant company fulfilled its obligation by furnishing a full and complete cargo of re-sawn

yellow pine lumber to the plaintiff company's ship 'Helen' at the loading port.

He further found that the "'Helen's' construction and equipment delayed the discharge. That the delay was due to the ship itself, and not to the presence of the schooner complained of and certainly not to the defendant."

On appeal to the Supreme Court of New Brunswick, McLeod, C.J., was of the opinion that the defendant company was obliged to fill the steamer to her full carrying capacity and to furnish such lengths of "re-sawn yellow pine lumber as she could carry." Not having done so, he held the defendant liable for the dead freight and for the demurrage at Apalachicola arising out of the fact that the steamer was unable to stow 150,000 ft. per day owing to the long lengths of lumber supplied. For the same reasons he held defendants liable for the 7 days' demurrage at St. John in unloading. Grimmer, J., concurred with the Chief Justice, while Barry, J., in a lengthy, reasoned judgment, in which he cites and discusses most of the authorities bearing upon the dispute, agreed with the trial Judge.

As a fact it seems clear from the evidence and the argument at bar that, while the cargo tendered to the ship was an ordinary cargo of re-sawn yellow pine lumber mentioned in the charter-party, the steamer could not be called an ordinary steamer of her tonnage. On the contrary, she was of a special and unusual build and construction and fitted to meet the requirements of a special trade, the West India fruit trade.

I cannot find any answer, in view of the evidence given of the usage in the yellow pine lumber trade, to the proposition stated by Barry, J.

The case of *Stanton* v. *Richardson*, L.R. 7 C.P. 421, in 1872, affirmed in the Exchequer Chamber, L.R. 9 C.P. 390, in 1874, and in the House of Lords, 45 L.J.Q.B. 78, in 1875, fully sustains this proposition formulated by Barry, J. Brett, J., says, at p. 435 of the report in the Common Pleas:—"I think the obligation of the shipowner is to supply a ship reasonably fit to carry the cargo stipulated for in the charterparty," citing as authorities, *Lyon* v. *Mells*, 5 East 427; *Gibson* v. *Small*, 4 H.L. Cas. 353; *Havelock* v. *Geddes*, 10 East 555. And see Blackburn, J., in *Readhead* v. *Midland R. Co.*, L.R. 2 Q.B. 412.

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Davies, J.

Applying this principle, Barry, J., held that the findings of fact of the trial Judge shewed the cargo tendered at Apalachicola to have been an ordinary and reasonable cargo of re-sawn yellow pine lumber as called for by the charter; that the steamer was not a reasonable ship for the cargo offered; and that he could not say the evidence was insufficient to support the finding that the delay in discharging the vessel in St. John was not occasioned by the fault of the charterers, but was wholly attributable to the unusual construction and equipment of the ship.

After hearing all that could be said in support of the judgment appealed from, and after reading and carefully considering the charterparty and the different parts of the evidence called to our attention by Mr. Teed, I have reached the conclusion that the proposition of law on which the Chief Justice and Grimmer, J., based their conclusions, namely, that it was incumbent on the defendant company to furnish the steamer with such lengths of lumber as she could stow and carry, and that, having furnished lumber of lengths which prevented the steamer stowing or discharging 150,000 feet per running day, they were liable as well for the dead freight as for the demurrage alike in Apalachicola as in St. John, cannot be supported. On the contrary, I am of the opinion that the judgment of Barry, J., founded upon the findings of the trial Judge, is substantially right and is supported by the highest authorities.

The question whether the re-sawn yellow pine lumber offered the ship was of reasonable length was one of fact. The evidence shewed that it was of the customary and usual lengths of that kind of timber shipped in the trade at Apalachicola. That being so, I hold, as the trial Judge found, that it was a reasonable cargo to be carried under the charterparty; that the obligation of the charterer had been discharged when he offered it; and that the inability of the steamer to carry such lengths of timber owing to her peculiar construction was a failure on the part of the shipowner to furnish a suitable vessel to carry that cargo, or, as put by the Lord Chancellor, in the case of *Stanton* v. *Richardson*, 45 L.J.Q.B. 78, "to provide a ship which is reasonably suited to carry that particular cargo."

I would, therefore, allow the appeal and restore the judgment of the trial Judge, with costs in all the Courts.

IDINGTON, J.:—I agree with the construction put by the trial Judge and Barry, J., in the Court of Appeal, upon the charterparty in question herein.

I assume, as they seem to do, that a shipowner, tendering a vessel for a specified service, must supply one reasonably fit for the purpose of being loaded with the freight specified in general terms, as in the charterparty.

They have dealt so fully with the evidence and legal authorities applicable thereto that I cannot add anything useful, for I agree in the general line of reasoning they have adopted in relation thereto, so far as the claim set up for loss of freight and loss by delay in loading is concerned.

If there had been evidence that any substantial part of the freight tendered was of such lengths that men of experience and judgment should say that it was unreasonable to expect it to be shipped on "a vessel of 635 tons net register," specified to be that of the "Helen," the vessel in question, there might be room for Mr. Teed's argument being given effect to.

He has had to contend for that without evidence to support it, and, indeed, is hence driven to urge, what I think is not founded in law, that the charterer takes the risk beyond even that, and must be held to know of the fitness or unfitness of the vessel he charters for the service he contracts for. I cannot assent to such a proposition. The unfitness of the vessel for the service for which her brokers and in effect owners for the time being tendered her, seems to have been the cause of the loss of time in loading and unloading.

In regard to the loss of time unloading, I wish to guard against committing myself to the proposition that, in the case of such a charterparty as before us, the rules governing the harbour master or his hard necessities must bind the parties concerned.

The trial Judge seems to me to have set that aside for the purpose of this case, and attributed the loss to other causes. In doing so, I cannot find he conflicted with the evidence.

I think the appeal should be allowed with costs.

Anglin, J.

ANGLIN, J.:—Upon the evidence I am satisfied that the cargo tendered by the defendant was reasonable and such as a vessel chartered for the purpose of carrying a cargo of "re-sawn yellow pine lumber" from Apalachicola should be able to load to her full

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capacity. That the plaintiffs' vessel was unable to do so was, I think, due to her peculiar construction and the fact that she had been outfitted for fruit carriage, rendering her unsuitable for the business for which she was chartered to the defendant, and thus involving a breach of the plaintiffs' obligation under the charter. The incapacity of the steamer was the cause of the loss of dead freight of which the plaintiffs complain, and also of the demurrage at the port of loading. I agree with the trial Judge that the evidence would not warrant a recovery by the plaintiffs for the 7 days' demurrage at the port of St. John for which they claim. Apparently there was also a delay at St. John of one-half a day, for which the respondents might perhaps be liable, occasioning damage amounting to $50. On the other hand, had he counter-claimed, the defendant would probably be entitled to a larger sum as damages for failure of the plaintiffs' ship to take the full cargo provided for her.

On the whole, I agree in the conclusions reached by the trial Judge, and by Barry, J., who dissented in the Appeal Division, and would allow this appeal with costs and restore the judgment dismissing the action with costs.

Brodeur, J.

BRODEUR, J., agrees with ANGLIN, J. *Appeal allowed.*

B. C.

C. A.

LUCAS v. MINISTERIAL ASSOCIATION.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and Galliher, JJ.A. October 3, 1916.

1. NEW TRIAL (§II—8)—IMPROPER REMARKS OF TRIAL JUDGE.

The making of remarks by the trial Judge during the progress of a trial and in his charge to the jury calculated to prejudice a fair trial of the action is ground for a new trial.

[*Airey* v. *Empire Stevedoring Co.*, 18 D.L.R. 469, 20 B.C.R. 130, referred to.]

2. LIBEL AND SLANDER (§ II F—85)—EVIDENCE OF PUBLICATION.

There is evidence of publication of a libel where it appears that the pamphlet containing the libellous words has come into the hands of co-defendants.

Statement.

APPEAL by the defendant from the judgment of Morrison, J., in an action for libel. Reversed.

S. S. Taylor, K.C., for appellant.

Woodworth, for defendant Harkness.

E. P. Davis, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think there has been a mis-trial. Some remarks of the trial Judge during the progress of the trial and in his charge to the jury were, in my opinion, calculated to prejudice a fair trial of the action.

This, however, does not necessarily dispose of the appeal of the defendant Cotsworth which goes beyond that of the other defendants in this, that he says he ought to have been dismissed from the action at the close of the plaintiff's case. His contention is that there is no evidence to shew that he was responsible for the publication complained of. It appears that he permitted the proofs of a pamphlet which he himself was preparing on the same subject to fall into the hands of his co-defendants, and it is sought to connect him with the alleged libel by shewing that it was from these proofs that his co-defendants extracted the words complained of, or the substance of them. In his evidence on discovery Cotsworth admits that the words in his said proofs and those complained of in this action are substantially the same. I therefore think that he is in no better position than his co-defendants. I would allow the appeal and order a new trial.

Martin, J.A.

MARTIN, J.A.:—It is not without much careful reflection that I am forced to the conclusion that the best interests of justice require the granting of a new trial herein, on the ground that there has been a mis-trial, in the proper sense of that word as defined in *Airey* v. *Empire Stevedoring Co.*, 18 D.L.R. 469, 20 B.C.R. 130, 135. Nothing is better established than that in the exercise of our grave discretion in the granting of a new trial on the ground of misdirection or non-direction, the charge of a Judge must be read as a whole to weight its effect upon the jury, and that isolated or detached expressions must not be fastened upon to set aside their verdict. At the same time, however, it is just as essential to bear in mind that a succession of expressions, none of which taken by itself is vital, may cumulatively result in creating such a forensic atmosphere that one of the litigants has been unfortunately, though unwittingly, prejudiced to such an extent that he has not in the fullest sense been accorded that fair trial which is his right. In order to arrive at a proper conception of the situation in the case at bar, I have endeavoured to put myself so far as is possible, mentally, in the position of one of the jury, and I can only reach the conclusion that as a juror I would have become so affected, even if unconsciously, by certain observations in the charge and during the course of the trial that I should have been unable properly to discharge my duty however much I desired to do so. The principal reason for my long hesitation, above mentioned, is that, happily, the setting aside of a

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verdict for said cause (*i. e.*, the cumulative result of judicial expressions) has been a very rare occurrence in this province, this being the first case of that exact nature wherein that course has been taken which has come to my attention in the course of my judicial experience of over 18 years. And I realize that the case was far from an easy one for the Judge to try.

There is, however, one additional matter which particularly deserves notice, *viz.:* the fact that though Mr. Davis, the leading counsel for the plaintiffs, stated in the course of the trial that his client did not come into Court "asking for any substantial sum of damages at all" and formally withdrew from the record the charge of malice, yet the jury did award him the substantial, though not large, damages of $200 after the Judge had in his charge referred indefinitely and inadequately (if I may say so with the greatest respect) to such a serious matter when it should have been made clear and precise. In my opinion, if a statement of that nature is made it must be understood literally as meaning an abandonment in open Court of any damages other than nominal and to the same extent as though in a case tried before a Judge alone to recover, *e.g.*, $250 on a promissory note the plaintiff's counsel had stated that he would be satisfied with $200 in which case it would be as improper for the Court to allow as it would be out of place for the litigant to expect judgment for a larger sum. No trifling with justice of that description, after statements made of such solemnity, should be for a moment permitted, and the effect of them upon a jury, in a case of this description where political animosities are aroused, could not fail to be unusually insidious. Anything which bears the complexion of the offer of a bargain to the jury to give the plaintiffs a verdict upon any terms whatever, should be inflexibly discountenanced, for it is impossible to tell the harm that may be instantly done by the proposal of it. But in any event, once the statement is made it must be adhered to, therefore the verdict herein for substantial damages, after what I regard in effect as an abandonment in open Court of anything beyond nominal damages, cannot stand. In view of the new trial that is to be had I shall make no further remarks upon the conduct of the proceedings, or the other points raised, adding only in regard to the defendant Cotsworth that he has not made out a good case for the dismissal of the action against himself.

There should be a new trial, the costs of the former one to abide the result thereof. The statute gives the costs of this appeal to the successful appellant.

GALLIHER, J.A.:—I would grant a new trial.

After a careful perusal of the trial Judge's charge to the jury I can come to no other conclusion than that the appellants were prejudiced in a fair trial of the issues. *New trial ordered.*

Re SWEINSSON AND MUNICIPALITY OF CHARLESWOOD.

Manitoba King's Bench, Mathers, C.J.K.B. October 11, 1916.

ARBITRATION (§ III—18)—APPLICATION TO SET ASIDE AWARD—EXTENSION—"SPECIAL CIRCUMSTANCE"—MISTAKE.

Mistake of counsel upon a question of law or practice does not constitute a "special circumstance" justifying the Court in extending the time for an application to set aside an award, within the meaning of sec. 13 (3) of the Arbitration Act, R.S.M. 1913, ch. 9.

MOTION by the municipality of Charleswood to extend the time for making an application to set aside an award made upon an arbitration between that municipality and Gudman Sweinsson under the Municipal Act. Refused.

Statement.

C. P. Fullerton K.C., and *A. E. Moore*, for municipality.

F. Heap, for Sweinsson.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—By sub-sec. 3 of sec. 13 of the Arbitration Act, R.S.M. 1913, ch. 9, a motion against an award must be made within 6 weeks after publication of the award; but the Court or a Judge may, under special circumstances, allow the application to be made after the expiration of that time. The application now made to me is for the exercise of the power conferred by this section. The application is opposed upon the ground that no special circumstances justifying the interference of the Court or a Judge have been shewn.

The facts are these: The award was made on December 23, 1915, and published on January 27, 1916, by notice thereof given by the arbitrators to the municipality. Sec. 702 of the Municipal Act requires the arbitrators to file one copy of the award with the clerk of the municipality, and sec. 707 requires them to immediately after making the award file with the clerk of the municipality for the inspection of all parties interested full notes of the oral evidence given on the reference, etc. This latter section was not complied with until March 30, and the former, as to filing copy

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RE SWEINSSON AND MUNICIPALITY OF CHARLESWOOD.

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of the award, was not complied with until June 2. On June 17 the municipality launched a motion to set aside the award. The motion came on for hearing before myself on July 13. I then held that publication of the award took place on January 27, and the application, not having been made within 6 weeks from that date, it was too late. I accordingly dismissed it, reserving leave to the municipality to make a substantive motion for an extension of time, if so advised.

The solicitor for the municipality swears that upon receiving notice of the award, he considered (1) the question of whether or not sec. 13 of the Arbitration Act applied to such an award, and (2) as to when the time for moving against the award would begin to run; in other words, when publication could be said to have taken place. He says he came to the conclusion that publication could only be said to have taken place after secs. 702 and 707 of the Municipal Act had been complied with, and that upon consulting counsel upon the subject, his interpretation of the statute was confirmed by the opinion which he then received.

I have no doubt but that the failure to move against this award within the time limited was due solely to the *bonâ fide* mistake of the solicitor and counsel of the municipality as to the time within which the motion must be launched.

If such a mistake does not constitute a special circumstance within the meaning of the Act, the application must fail. No other ground for relief is disclosed in the material.

Apart altogether from authority, my own view would be that where a mistake has been made by either solicitor or counsel or both, and the Court is satisfied that the mistake was a *bonâ fide* one, the client ought not to be punished and deprived of his right to relief by that mistake, unless the circumstances are such that the other party cannot be compensated by costs or otherwise. I do not see any difference between a mistake of fact and a mistake of law. It seems to me that both solicitor and counsel are just as liable to make a mistake of the one kind as of the other, and the results are equally disastrous to the client. Unfortunately, in some of the earlier decisions under the Judicature Act, of which *International Financial Soc.* v. *Moscow*, 7 Ch.D. 241, and *Highton* v. *Treherne*, 48 L.J.Ex. 167, are examples, it was held that Courts should refuse in the exercise of their dis-

cretion to extend the time for appeal where failure to act within the time allowed was due to the mistake or misapprehension of the parties' solicitor or counsel. In the later cases that strict practice has been departed from, and now the rule is firmly established that a mistake of a party's legal adviser may, in a proper case, be relieved against, where the discretion of the Court is unhampered by the wording of the rule or statute by which the power to extend time is conferred: *Braun* v. *Davis*, 9 Man. L.R. 534; *Ross* v. *Robertson*, 7 O.L.R. 464; *Baker* v. *Faber*, [1908] W.N. 9; *Rumbold* v. *London C.C.*, 100 L.T. 259. All these cases were decided under rules which did not require special circumstances to be shewn. The last case above cited points out the difference between a rule conferring upon the Court an unfettered discretion and one providing that it can only act upon special circumstances being shewn. In the cases decided under rules requiring special circumstances to be shewn upon an application for an extension of time, the Court of Appeal in England has consistently held (although some members of the Court have acquiesced with considerable reluctance) that the mistake of counsel or solicitor upon a question of law or practice did not constitute a special circumstance justifying the intervention of the Court: *Collins* v. *Paddington*, 5 Q.B.D. 368; *Re Helsby*, [1894] 1 Q.B. 742; *Re Coles and Ravenshear*, [1907] 1 K.B. 1. These cases have been followed by the Full Court of New Brunswick in *Harris* v. *Sumner*, 39 N.B.R. 456. These decisions are, I think, decisive of this application. The legislature has for some reason provided that the 6 weeks allowed for moving against an award should not be extended except upon special circumstances being shewn. Long before 1911, when this enactment was passed, the term "special circumstance" had been interpreted by the Courts as not covering the mistake of the solicitor or counsel, and it must be presumed that the legislature used it advisedly, intending that it should be given the same interpretation: Maxwell on Statutes, 5th ed. 59. Under the circumstances I am compelled to hold, though I do so with regret, that no special circumstances have been shewn entitling the municipality to an extension of time within which to move against this award.

Application dismissed with costs.

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Re TOWNSHIP OF STAMFORD AND COUNTY OF WELLAND.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Meredith, C.J.C.P., and Riddell, Lennox, and Masten, JJ. May 22, 1916.

TAXES (§ III D—135) — EQUALIZATION — FIXED ASSESSMENTS — ACTUAL VALUE.

Lands of industrial corporations, under "fixed assessments" granted by by-law of the municipality in which they are situate, are not assessable for equalization purposes for county rates, beyond the amount of the fixed assessments; except for school rates, the fixed assessment must be regarded, both for county and municipal taxation, as the actual value of the properties.

THE appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX and MASTEN, JJ.

April 14. THE COURT directed that the appeal should be reheard by a Court of five Judges.

[ED. NOTE:—This appeal from a ruling of the County Court Judge of the County of Welland was allowed, RIDDELL and MASTEN, JJ., dissenting. As the issue involved largely depended upon a construction of Ontario Statutes, and the learned Justices sitting in appeal each gave an individual and elaborate decision, it has not been deemed necessary to do more than to quote verbatim those passages of each judgment which seem most material. We do this without comment.]

Statement.

The question involved in the appeal arises under the following circumstances. The Township of Stamford, and other minor municipalities in the County of Welland, passed certain by-laws fixing the assessment of the real properties of certain companies situate in the respective minor municipalities at amounts less than the present values of such properties, for the purpose of promoting the establishment by these companies of industries in such municipalities, and such by-laws were by legislation declared valid.

The respective assessors for the municipalities in question prepared assessment rolls setting forth therein in one column the amounts of such fixed assessments as indicating the total amounts at which they are assessed for all purposes except for school rates, and in another column the amounts at which they are assessed in respect of school rates. For equalization purposes, the county council adopted such fixed assessments, and the Township of Pelham appealed from this action of the county council. All parties agreeing, the appeal was dealt with by the County Court Judge, who made the final equalization of the assessments of the county, as authorised by what is now sec. 87, sub-sec. 8, of the Assessment Act.

Statement.

The view of the learned Judge was, that, for equalization purposes, the actual value of all ratable property in each municipality, regardless of such fixed assessments, should be ascertained, and that the county rates should be levied ratably on the various municipalities in proportion to their aggregate value. The appeal is from this ruling, the appellants contending that the companies enjoying such fixed assessments are not assessable in respect of county rates beyond the amount leviable in respect of the fixed assessments, and that for all except school rate purposes the fixed assessments must be taken as the actual value of the properties in question.

During the argument reference was made to one of these by-laws, namely, that of the Township of Stamford, and the Act of the Legislature declaring the same valid, and counsel conceded that the other by-laws and legislation validating the same were of the like tenor and effect.

D. Inglis Grant, for the Corporation of the Township of Stamford, *H. S. White* and *J. F. Gross*, for the Corporations of the Townships of Crowland and Thorold and the Town of Welland, *T. F. Battle*, for the Corporation of the Town of Thorold, and *G. S. Macdonald*, for the Corporations of the Villages of Port Colborne and Humberstone and the Township of Humberstone, the appellants.

M. Brennan, for the Corporations of the Townships of Pelham and Wainfleet, *G. H. Pettit*, for the Corporations of the Township of Bertie and Town of Bridgeburg, and *L. C. Raymond*, for the Corporation of the County of Welland, the respondents.

Mulock, C.J.Ex.

MULOCK, C.J. EX.:—The real turning-point of this appeal must depend upon the effect of the by-laws in question and of the validating legislation. Take, therefore, the sample by-law, that of the Township of Stamford. It reads as follows:—By-law No. 11. "A by-law relating to the assessment and taxation of the property of the Ontario Power Company.

"Whereas the undertaking and the works of the Ontario Power Company are calculated to contribute materially to the prosperity and well-being of the ratepayers of the Municipality of the Township of Stamford, and it is expedient to grant the request of the said company to the council and fix the assessment of the property within the municipality as hereinafter set forth and the apportionment thereof as hereinafter set forth.

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"Be it therefore enacted by the Municipal Council of the Township of Stamford, for itself, its successors and assigns, and it is hereby enacted, that the annual assessment of all the real estate, property, franchise and effects of the Ontario Power Company, situate from time to time within the Municipality of the Township of Stamford, and used for the corporate purpose of the company, be and the same is hereby fixed at the sum of $100,000 apportioned as follows, namely:—$30,000 upon the gate houses," etc., "and $70,000 upon the other property of the said company," etc., "in the said municipality for each and every year of the years 1904 to 1924 both years inclusive, and that the said company and its property in the municipality shall not be liable for any assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year to the said fixed assessment of $100,000 apportioned as aforesaid.

"And be it further enacted," etc. (This clause has no bearing on this appeal).

"And be it further enacted that this by-law and the provisions thereof shall come into full force and effect immediately after the municipality shall be authorised by sufficient legislative or other authority to pass the same.

"Read a third time and passed the 10th day of October, 1904."

Subsequently the Ontario Legislature, by 5 Edw. VII. ch. 78, enacted as follows:—

"Whereas the Ontario Power Company, of Niagara Falls, has, by petition, represented that a certain by-law of the Corporation of the Township of Stamford, in the County of Welland, being by-law No. 11, and passed by the municipal council of the said township on the 10th day of October, 1904, should be confirmed and made in all respects legal and binding in accordance with the intent and meaning thereof; and whereas it is expedient to grant the prayer of the said petition:—

"Therefore His Majesty, by and with the advice," etc., "enacts as follows:—

"1. By-law No. 11 of the Municipal Corporation of the Township of Stamford, set forth as schedule 'A' to this Act, is legalised, confirmed and declared to be legal, valid and binding, notwithstanding anything in any Act contained to the contrary."

For the respondents it was argued that the limitation in this by-law of the assessment and taxation of the company in question must be construed as confined to assessment and taxation for the use and benefit of the township only, and did not apply to the assessment and taxation for the purpose of the county (other than school) rates.

The by-law is not, I think, open to such narrow construction. Its language appears to me quite plain. In effect it declares that the county assessment of the company's property is limited to a certain sum, and that the company shall not be liable for "taxation of any nature or kind whatsoever beyond" what would be leviable in respect of the fixed assessment. The township, through its officers, is the only body in the county having the right to make assessments in the township for taxation purposes, either on behalf of the township or county, and the limitation to the assessment of the company's property fixed by the by-law means whatever assessment the township had the right to make. Its assessment constitutes the sole basis for taxation either for township or county purposes. The assessment of property below its real value operated as exemption *pro tanto* from liability to taxation. The company is not ratable in respect of the exempted portion of the actual value of its property.

Sec. 40 sub-sec. (1) of the Assessment Act in my opinion has no application whatever to the valuation by county valuators for equalization purposes. It deals merely with the matter of individual assessment of land by the assessors for the purpose of fixing a basis for taxation of the owner in respect of the land. The object of valuation by county valuators for equalization purposes is to secure a just relation between the aggregate valuation of the realty of the various municipalities; and secs. 85 and 86 do not require the valuators to ascertain the actual value of the realty, but merely to determine relative values in order that each minor municipality may be required to bear its just proportion of the county rates.

The solution of the question involved in this appeal is furnished by giving effect to the evident intention of the by-law and validating statute. The excess in values of the properties over their fixed assessments, being thereby exempt from assessment or taxation, should be disregarded by the county valuators, as are places of worship, school properties, municipal buildings, and

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other properties which are not ratable. No distinction can be drawn between exemption by general Act and exemption by municipal by-law given effect to by special statute. Properties exempt from assessment and taxation by the general Act are not valued by the county valuators for equalization purposes, and exempted values of the properties in question should in like manner be disregarded.

MEREDITH, C.J.C.P.:— . . . A reference to *Re Town of Sarnia and County of Lambton*, 1 O.W.N. 184, would have enabled the trial Judge in this matter to obtain from his brother Judge of the County Court of a neighbouring county the full facts of the judgment of a full Board upon the very question, delivered by a County Court Judge of great experience, giving reasons, in accord with the general interpretation of the Act and the long unvarying practice under it to which I have alluded; conclusive reasons, as it seemed to me, for reaching a conclusion the opposite of that contained in the ruling here in question.

So, too, I have always hitherto thought, even a cursory glance through the statutes affecting the question—the Municipal Act and the Assessment Act—should have made it plain that the ruling of the Board in the *Lambton* case was right and that that in question was wrong. Under secs. 395 and 396 of the Municipal Act, absolute power to make the exemptions in question is given; and admittedly that power was duly exercised; and, besides that, in many, if not all, of the instances in question, the by-laws have been confirmed by direct legislative enactment. There is one, but only one, exception out of this power so to exempt certain property from taxation, an exception expressly and clearly made in the enactments relating to public schools, the exception being taxation for public school purposes; to which now the County Court Judge has added taxation for county purposes in the County of Welland; but the Legislature alone has such power. Then sec. 233 of the Assessment Act, the Act containing all the equalization for county taxation purposes legislation there is, provides, as plainly as words can, as it seems to me, that such equalization legislation shall not derogate from or affect such exemptions so given. Its words are: "This Act shall not affect the terms of any agreement made with a municipal corporation, or any by-law heretofore or hereafter passed by a municipal council under any other Act for fixing the assessment of any property, or for commuting or other-

wise relating to municipal taxation. But . . . such fixed assessment, or commutation of taxes or exemption, shall be deemed to include any business assessment or other assessment and any taxes thereon. . . ."

I am obliged to say that it is not understandable to me how this plain injunction could be disregarded by any one aware of its existence.

The reasons for, and the purposes of, the equalization of county valuations of real property within the county used to be very well known. The money needed for county purposes, which must be raised by taxation, is levied by the minor municipalities comprising the county, with, and forming part of, their own rate. This imposition should be made evenly; the basis of such even imposition is the total amount of the assessment made for the purpose of taxation in each minor municipality: quite fair and even, if there were but one assessor for all such municipalities, but uneven and unfair, if, intentionally or unintentionally, land of the same value be assessed at widely different values in different municipalities. All lands should be assessed at actual value, but they seldom are in rural municipalities, and the discrepancies between assessed and actual values in them have been, and possibly still are, in places very glaring; in villages and towns the narrow area, and the great needs, compel assessment at full value, with a high rate of taxation still necessary to raise the sum needed; in rural municipalities the needs are so much less, having regard to the vastly greater area of taxable property, that low assessment and low rates are often sufficient.

The purpose of the Legislature in giving power to municipalities so to induce manufacturing concerns to bring such industries as those in question to Canada, or to create them in this Province, was not for the benefit of the local municipality only, but was much more for the infinitely greater purpose of making the Province a manufacturing country as well as an agricultural one.

I am still very firmly of opinion that the County Court Judge was altogether wrong, as well as being of opinion that he was without jurisdiction, in all that was done by him respecting the assessment of these industrial concerns.

LENNOX, J.:— . . . Property in any municipality having a valid fixed assessment, except as to school rates, is only *ratable* Lennox, J.

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property of the municipality *pro tanto*, that is, to the extent of the fixed assessment. Beyond the fixed assessment, it is exempted property. Can it be said that an assessor or the Court of Revision, in setting out as the "total assessment" of the municipality the fixed assessments provided for by its by-laws and the actual values in all other cases, has not done precisely what the statute requires, and the only thing possible to be done according to law; and, if assessed and returned according to law, what right has a county council to disturb or alter it? The assessment becomes "a fixed assessment," and exemption for the surplus value results by one and the same ordinance, the by-law, and by the corporate entity in which the Legislature vests the exclusive power of assessment, as well for the levy of county as for the general local taxes of the municipality. What is done, if done at all, must be done in the statutory way. The basis of action is defined in sec. 85. It provides for valuators, and lays down the method of procedure by sub-sec. (1).

In a general sense, the valuators shall be under the direction of the county council, but it is only in a general sense. The matter is not left at large, and discretionary powers are not conferred upon either the valuators or council. The work they are to perform is to be of the same character as, but much more circumscribed than, the work allotted to the assessors. They shall only value in sections, and in no case shall they attempt to "exceed the powers possessed by assessors." As in many other instances, the language of the statute is not as definite as it might be. They are to value from five to eight per cent. of sectional portions of the real property of each municipality. The language, as a matter of mere words, is broad enough to include a valuation of lands of the Crown, land held for religious and educational purposes, and in fact exempted properties of every kind; but, as they are only to do what the assessors have done or ought to have done, and their work is primarily for comparison with the work of the assessors, and not to go beyond its range, an interpretation including the valuation of *anything outside ratable real property* cannot be supported. When they have done just what the statute prescribes, and neither less nor more, covering a part of the work to be done by the assessors—and in no case incorporating any valuation which the assessors, as the basis of county rate, had not power to make—they compare their aggregate

valuations of *ratable* property with the corresponding aggregate valuations of ratable property upon the last revised assessment rolls; and, if they nearly correspond, the valuators, and afterwards the county council, shall accept the assessment roll as correct for the purposes of county valuation (equalization?). What the assessors, and the Court of Revision, should do in the first place, or what the valuators, if appointed, should do by way of correction, is, as I understand it, the limit of that which the county council, or, in case of appeal, a Judge, or Board, or this Court, may do by way of equalizing the rolls. Applying this, take, for illustration, the Artificial Abrasium Company of Thorold, with a fixed assessment of $5,000 for all purposes. The man who carries the assessment roll for the township of Thorold does not assess this property for any purpose. This was done by by-law and the special Act exempting it from the operation of the Public Schools Act. (The recent decision of the Privy Council* does not affect the argument.) Mechanically entering these figures upon the roll—which he cannot vary up or down by a fraction of a cent—is not assessment or valuation. He can do this, he must do it, and he can do nothing more. What would the valuators have power to do—and it serves as an illustration for all other cases? Can they do what the assessor cannot do? The statute says they cannot do more; and the statute also says that their valuation must be adopted by the county council as the basis for equalization. I repeat that what the valuators are to do, and what they are empowered to do, is what the assessors ought to have done and have failed to do, and nothing else, and so down to the end of the chain—the county council, the Judge of the County Court, or the Board, and this Court. As to each and all it is a test as to whether the assessments have been made and the rolls finally revised according to law, not a re-assessment but a correction of what has been unlawfully done, and nothing more; what has been done according to law, and all that has been done according to law, must stand. The Legislature gives the power to exempt wholly or partially. I see no distinction between the municipality exhausting its power and wholly exempting, or exercising its power *pro tanto* only by exempting the value beyond the fixed assessment. Nor do I perceive any practical difference between the

Ontario Power Co. of Niagara Falls v. Stamford Corporation, 27 D.L.R. 161, [1916] 1 A.C. 529.

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Legislature granting exemption directly and granting it through its statutory agent, the municipal council.

I cannot think that the Legislature intended that fixed assessments should be disturbed for the purposes of general county rating.

The judgment in appeal should be reversed.

RIDDELL, J.:— . . . It is an elementary rule in the interpretation of a statute that the words employed shall be given their usual meaning, unless there be some cogent reason to the contrary. The valuators, under sec. 85 (1), are to ascertain "the value" of "the real property within the county," and I can find nothing to indicate that any other than the usual and natural meaning is to be given to these words. They have the powers of the assessors in performing that duty, and the assessors are bound to find the "total actual value of the land"—sec. 22 (3), col. 15—*cf.* cols. 13 and 14—i.e., of each parcel of land.

From the first, the valuators were appointed "for the purpose of valuing" the property and with the duty "to ascertain the value of the same."

I cannot see the slightest reason for supposing that the Legislature intended the valuators in later years to act differently from those in earlier times, when there were no such fixed assessments.

Nor can any valid argument be based upon the fact that in some cases the by-laws are validated by statute. The effect of such legislation is simply to make the by-laws valid as though they had been valid *ab initio*—nothing further.

The fact that such establishments must pay full school tax is not without some significance. The Judicial Committee have just decided that such a by-law as is relied upon here is not effective to release them from that duty.

I proceed, however, on the words of the statute itself, and think the appeal should be dismissed with costs.

The above contains the conclusions at which I arrived on the former argument, and I see no reason to modify them in any way.

There is, however, a point brought to our attention for the first time, in the second argument, which seems to me conclusive that the above opinion is right.

In the Public Schools Act, R.S.O. 1914, ch. 266, sec. 92, it is provided that the county shall levy "by an equal rate upon the

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taxable property of the whole county, according to the equalized assessments of the municipalities, a sum," etc., etc.

If in "the equalized assessments of the municipalities" the value of the lands may be taken at the amount fixed by the agreement by-law, it is plain that the land whose price is so fixed will escape payment of its just share of this school rate, which is expressly forbidden by sec. 39. To put it another way, in order that secs. 39 and 92 may be satisfied, it is necessary that the agreement by-law be disregarded in the equalization.

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MASTEN, J.:— . . . The powers and duties of assessors and of valuators are not identical. The purpose is different; the subject-matter is different. The object of assessment is to ascertain the tax payable by each individual ratepayer. The object of the valuation (five per cent. to eight per cent. of the real estate in each township) is to give the county council a basis to assist them in making the equalization necessary to produce a just relation between the different local municipalities.

Masten, J.

With respect to the phrase, "The valuators shall not exceed the powers possessed by assessors", I think this refers to their right to demand information and to the authority conferred on assessors and the duties imposed on ratepayers under secs. 16 and 21 of the Assessment Act, and not to the scope of the valuators' report or to the nature of their duties.

But I do not think that in performing its equalizing functions the county council, or the County Court Judge on rehearing, is empowered to do anything in the nature of assessment, re-assessment, amendment, or re-adjustment of the assessment rolls of the local municipalities, and I am unable to see how a consideration of the powers of assessors, the forms and schedules of the assessment roll, its alteration or amendment, and other details relative to such assessment rolls, can aid us in determining the powers of the county council or the powers of the County Court Judge when performing his duties as equalizer. These equalizing sections seem to me, as I have said, to form a separate category of powers, with a purpose entirely different from assessment, and their interpretation must depend on the sections themselves and not upon the analogy of a different set of powers.

While it is true that the amount to be raised for county purposes is to be assessed equally on the whole ratable property of the county (sec. 89), yet the real property which enjoys a fixed

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assessment does not, I think, on that account become, even *pro tanto*, property not ratable. *Primâ facie*, the jurisdiction of any authority in levying or abating taxation is limited to its own revenues. If that is so, then the jurisdiction of each local municipality to exempt from taxation or to grant fixed assessment is limited to the taxes payable to such local municipality in its own right and for its own benefit, and no by-law passed by it can curtail or interfere with the right of the county to assess and levy against the actual value of the exempted property. See Municipal Act, sec. 297.

To reach this result it is necessary to establish that the lesser municipality is empowered by the statute to withdraw from the taxable area of the greater municipality (the county) such property as it chooses to include in exemption by-laws, the county itself having no voice in such withdrawal.

Such a view seems sufficiently startling to necessitate direct and explicit legislation to warrant it, but I can find no provision in the Act which limits the *primâ facie* right and duty of the county to tax on the basis of actual value all property which is not exempted either by the Assessment Act or by the act of the county itself, and I think that the properties mentioned in the exemption by-laws and agreements of local municipalities remain, to the full extent of their actual value, ratable property for the purposes of county taxation under sec. 297 of the Municipal Act and sec. 89 of the Assessment Act; consequently, that the county, when acting under those sections, and when passing its equalizing by-law, must consider actual values and ascertain the lump sum to be apportioned to the municipality accordingly, while the local municipality raises such sum, having regard to the exemptions which it has itself granted.

If the local municipality can, by passing an exemption by-law granting a fixed assessment, withdraw from the consideration of the equalizing authority one property, it can withdraw two, and if two then three, and so on, until it has so withdrawn all the assessable property in the township, and the equalizing authority, on the appellants' contention, would be powerless to interfere, but is bound to "equalize" on the basis of the exemption by-law. Such a result would be destructive of the fundamental purpose of the Act and might reinstate in full force the evil originally complained of.

The Legislature has not attempted to instruct the council how they are to proceed in order to do equal justice. It has done the best it could in committing to them, in general terms, the duty of equalizing the assessments, so as to produce a just relation, but has necessarily left it to them as best they can to work out the problem. It is not for a Court of law to interfere as regards the reasonableness of the valuations and the conclusions come to on that point. Even if it were, there are various circumstances to be taken into consideration as bearing on a question of computation of which a Court has not the means of judging for want of that local knowledge which the members of the county council must be supposed to possess and doubtless do possess: *Re Gibson and United Counties of Huron and Bruce*, 20 U.C.R. 111. Only in so far as the Legislature has prescribed definite rules for the guidance of the municipal body in the discharge of its duty, and only in so far as it plainly and manifestly violates such rules, can the Court interfere.

The Legislature having thus conferred on the county council, as a body representative of every local municipality, such general discretion, how can this Court say that such discretion is to be limited by an imperative rule of law relative to fixed assessments or by the independent action of certain municipalities in granting fixed assessments without the concurrence and agreement of the other townships interested, unless the statute contains an express provision to that effect, which it does not?

The result, in my view, is that, by sec. 86, the county council is given a broad discretion—so broad that it is entitled to take into its consideration the assessment rolls themselves; its own knowledge of values (see sec. 88); the report of the valuators, if any appointed; and thereupon to form its own opinion as to what is necessary to produce a just relation between the aggregate valuations of the different townships. I think that *primâ facie* the actual and true value of the real property should form the basis on which the equalizing valuation is made by the county council; yet I also think that the discretion conferred by the statute is broad enough to enable the county council to take into account the general benefit and burden to the county and to other local municipalities of the industries established in a particular township in consequence of a fixed assessment, and to give weight to that consideration when, for purposes of county taxation, it

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fixes the aggregate valuation of the real property for the local municipality where such fixed assessment exists.

The question here arising may, I think, be stated as follows:—

Under the Assessment Act, is the county council, when acting pursuant to sec. 86, and the County Court Judge, when acting pursuant to sec. 87, at liberty to ascertain and determine the aggregate valuations ascribable for purposes of county taxation to each local municipality at such amount as will, in the opinion of the county council or the Judge, bring the aggregate valuations of the various local municipalities into a just relation to each other?

Or is the county council and is the Judge bound to make the exemptions or fixed assessments theretofore granted by the local municipality to particular ratepayers, pursuant to sec. 396 of the Municipal Act, the basis of his valuation, no matter what opinion may be entertained as to whether this will result in a just relation between the different valuations?

In other words, is the authority and discretion conferred by secs. 86 and 87 limited or controlled by an imperative rule of law that lands subject to a fixed assessment *must* be valued for the purposes of equalization at the sum named in the exemption by-law of the local municipality? Or does the county council, or the Judge on rehearing, possess a discretion to consider the actual value of the partially exempted properties when fixing the aggregate valuation apportionable to each local municipality?

I think that such discretion is not taken away from the county council or from the Judge, and that the Legislature has throughout these sections (85-93) designedly used words of such broad import as to leave it in the power of the authorities named to have regard to these fixed assessments only to such limited extent as in their opinion may be necessary in order to produce a just relation between the aggregate valuations of the different local municipalities. I do not say that they are to be entirely disregarded. I think they form a proper element for consideration by the county council and by the County Court Judge, but not a governing or controlling basis.

For these reasons I am of opinion:—

(1) That for purposes of county taxation the aggregate valuation apportionable to each local municipality in the equalizing

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by-law is, *primâ facie*, to be based on actual values and not on fixed assessments.

(2) That the county council and the Judge on rehearing possess the widest discretion in doing what in their opinion is necessary to produce a just relation between the aggregate valuations of the various municipalities, and that with that discretion this Court cannot interfere except for positive breach of statutory requirements.

(3) That the order in appeal does not violate any principle of law or misconstrue the statute.

(4) That the appeal should be dismissed.

Appeal allowed; RIDDELL and MASTEN, JJ., *dissenting.*

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New Brunswick Supreme Court, King's Bench Division, McKeown, J. June 29, 1916.

MORTGAGE (§ V—64)—DISCHARGE BY ADMINISTRATOR—AS RE-CONVEYANCE —ESTOPPEL.

Where a widow holds two mortgages on certain property, the first mortgage as administratrix of her deceased husband's estate, the second mortgage in her own name, and she executes and registers a discharge which recites the second mortgage, but is signed by her "as administratrix," she and her assigns are estopped, as against innocent parties without notice claiming title under a foreclosure of subsequent mortgages, from denying that her personal mortgage had been paid and discharged; the discharge operates by law as a re-conveyance.

Statement.

ACTION for trespass to land.

J. C. Hartley, K.C., for plaintiff.

M. L. Hayward, for defendant.

McKeown, J.

McKEOWN, J.:—In this suit the plaintiff asks to recover damages from defendant for trespass to land and for cutting and hauling plaintiff's logs therefrom—and the question is—who owns the *locus in quo?*

The cause was tried before me without a jury at the sitting of the Circuit Court for Carleton County in May, 1916.

The whole dispute between the parties concerns the effect of a discharge of mortgage executed by Mary A. Barry, administratrix of the goods, chattels and effects of Thomas Barry deceased, on June 21, 1886, and the question arises in this wise: Plaintiff and defendant both trace their title back to one David Ebbett who owned the disputed land in 1884. He (Ebbett) gave two mortgages upon the property—the first to T. Barry, dated December 26, 1884, and the second to M. A. Barry on August 10, 1885. Thereafter, viz., on August 24, 1885, the said D. Ebbett conveyed

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his equity of redemption to his two sons Emerson E. Ebbett and J. H. Ebbett; and the latter conveyed his interest to his brother Emerson Ebbett on September 12, 1888, and on August 6, 1892, the latter (Emerson Ebbett) mortgaged the property to Isabella C. A. Connell and Heber H. Connell, executrix and executor, etc., and eventually, by foreclosure and sale under said last mentioned mortgage, and by mesne conveyances, the defendant acquired the rights previously vested in the said E. Ebbett so received by him from his father the said D. Ebbett, and he (defendant) founds his title thereupon. Now the plaintiff comes in under the M. A. Barry mortgage in this way: T. Barry, the first mortgagee, died intestate, and his widow M. A. Barry was duly appointed administratrix of his goods, chattels, etc. On June 21, 1886, she, "as administratrix of the goods, chattels and credits of T. Barry deceased" executed a discharge of mortgage in which she certified that a certain

Indenture of mortgage bearing date of August 10, 1885, made and executed by D. Ebbett and recorded in the said office of the registrar of deeds for the county of Carleton, August 20, 1885, is also paid,

and consented and directed that the said indenture of mortgage be discharged of record. This discharge was executed before G. F. Gregory, who certified that on June 28, 1886, before him, etc., personally came and appeared M. A. Barry, administratrix of T. Barry, deceased, and acknowledged that she signed, sealed and executed the foregoing certificate of discharge of mortgage as such administratrix as aforesaid and as and for her own act and deed as such administratrix, freely, and to and for the uses and purposes therein expressed.

Now the mortgage above alluded to, and in terms discharged, was not T. Barry's mortgage at all, but it was the mortgage personally held and owned by M. A. Barry herself, and it further appears that the same mortgage (so purported to be discharged as aforesaid) was afterwards foreclosed and a sale of said property was had thereunder, and by divers mesne conveyances the land so sold has, if said conveyances are effective, become vested in the plaintiff who thereby claims ownership of it. But defendant, in effect, says to plaintiff: "The mortgage from which your title springs was discharged, and, in the result, the subsequent foreclosure and sale thereunder are of no effect and carry no title to you, such discharge feeds my title and gives it strength, so that, this Barry mortgage being thus out of the way, the full title is in me." There is no evidence that anything was ever done under

the other Barry mortgage—as far as this dispute is concerned it seems to be dropped from consideration as if barred by the Statute of Limitations—plaintiff's position as opposed to defendant's above claim, is that the M. A. Barry mortgage was not discharged, inasmuch as all she did was done as administratrix of T. Barry, and that, although she named her own mortgage in the discharge, she, in reality, meant to deal with the one belonging to the estate of her late husband, T. Barry, so that, as before remarked, it all comes down to the question of the effect of the said discharge of mortgage.

No oral testimony was submitted. A case was stated and filed, consisting for the most part of a summary of the different conveyances, but no explanation is given of the acts of the parties, who, 30 years ago, would have been able, by clear expression of intention, to explain what was meant to be done by the discharge in question. At the present day we now have confronting each other these two irreconcilable facts: (1) that in the paper she executed Mrs. Barry purported to act solely as administratrix of T. Barry, and (2), that in so acting she named, and in terms discharged, her own mortgage—and the Court is asked to say what is the result of her said act, how does the said discharge operate?

It was agreed between the counsel at bar that if plaintiff is entitled to recover, his damages are to be assessed at $800.

The discharge of mortgage was duly registered upon the records of Carleton County on July 4, 1886, and it is shewn by the statement of facts that the registrar of deeds for said county made the customary entry of such discharge in the margin of the registry of said mortgage as by law required. Now, sec. 58 of the Registry Act (ch. 151, C.S.N.B. 1903), provides that, "from the time of the entry thereof, it (*i.e.*, the entry of discharge by the registrar) shall discharge the mortgage and revest the legal estate in the mortgagor, his heirs or assigns," and the difficulty which presents itself to my mind is not so much concerned with determining just how to regard this discharge as between the mortgagor and mortgagee, but rather to satisfy myself as to the position of other parties, who, after this mortgage was in terms discharged, acquired rights in the property. The fact is, as above stated, that the mortgage was, as far as the records were concerned,

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discharged in 1886. For 10 years the title was unclouded, as as far as this mortgage was concerned. During that interval other mortgagees acquired rights, and through these rights defendant claims. Now the action of the registrar of deeds in entering the minute of satisfaction and discharge on the margin of the registry of Mrs. Barry's mortgage was caused by her own act, although in so doing she acted in a representative capacity, and, presumably, made a mistake. My view of the transaction is that, as between the mortgagor and the mortgagee, it would not operate to cancel Mrs. Barry's mortgage, but concerning the subsequent mortgagees, who, I must assume from the statement filed, acted innocently and without knowledge of the facts which now threaten the security of the investment, the question arises —Is not Mrs. Barry estopped from saying that the mortgage was not discharged—and are not her assigns under like disability? The mortgage under or through which defendant claims title was recorded in 1892. It was not until 1896 (or perhaps 1895) that anything was done under Mrs. Barry's mortgage, then it was foreclosed and the mesne conveyances culminate in plaintiff's name.

I am inclined to agree with the plaintiff's contention as an abstract, isolated proposition of law, that if an administratrix by mistake names her own mortgage in a discharge made by her in her capacity as such administratrix, it would not *primâ facie* release her own personal security where there are debts secured from the mortgagor to the estate, and to which, as here, the description in such discharge equally applies. It is a matter of intention, and if the parties concerned are at one upon the question of their true intention, the discharge can be properly carried into effect. But if the parties are not at one, or if, as here, no evidence of what was intended can be provided, it seems to me that it would be unjust to allow plaintiff's predecessor in title to say to defendant: "I made a mistake in what I did 30 years ago with reference to this mortgage, and I am entitled now to correct my error, and to enforce rights against you, although in correcting my said error, financial loss will result to you."

It seems to me that the doctrine of the estoppel furnishes the solution of the problem presented here. I quite agree with plaintiff's argument that the testator himself, having no power

to discharge his wife's mortgage, what his widow did as his administratrix could, *primâ facie*, have no more effect than if he himself had done it; and I further think that it would be a distinct injustice to defendant, under the circumstances disclosed here, if she is not so estopped. Undoubtedly I am governed by the law as authoritatively laid down and there are some decisions, though few in number I think, which approximate the present case.

In vol. 11 Am. and Eng. Ency. of Law, 2nd ed., at p. 397, under the title of estoppel, the matter is more closely touched upon than in any other work which has come under my notice.

Some decisions of the United States Courts are collected in support of the text, and one only, viz., *Metters* v. *Brown* (1863), 1 H. & C. 687, from an English Court. This last case is cited in support of that part of the text which says that a person who has sold real estate as an individual will not be estopped in a subsequent attempt to assert title in himself in a representative capacity. It is the other way about in this case. It is claimed here that Mrs. Barry, who conveyed the property as administratrix, is not thereby bound in her individual capacity. The judgment in the case above named does not deal with this alternate phase of the question. It was a decision by Channell, B., and at 693 he says:—

> The second point is whether the plaintiff, as administrator of his mother, is estopped by his mortgage of the premises in her lifetime from setting up that term. We think he is not. In *Doe d. Hornby* v. *Glenn* (1834), 1 Ad. & El. 49 (110 E.R. 1126), which was cited on the argument, it was held that an agreement entered by an executor *de son tort* did not bind him after he had become rightful administrator. In our opinion, the plaintiff, who sues as administrator of his mother, must be considered in the position of a stranger, and, therefore, the rule as to estoppel does not apply; for whenever a person sues, not in his own right, but in the right of another, he must, for the purpose of estoppel, be deemed a stranger. The authorities on the subject are not very distinct, but it is laid down that generally a stranger shall not be bound by estoppel.

Now, I think this doctrine of a stranger not being bound by estoppel is the distinguishing point between the above case and the one presented here, and gives ample justification and reason for concluding that while an administratrix is not estopped by a deed given by her individually, yet an individual ought to be estopped by a deed given by him as administrator; for in the first case it is open to the administrator to say: "my act in giving the deed binds me personally, but as administrator I now represent one

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who was a stranger to my deed, and I am therefore, as such administrator, a stranger to my own deed. *Non constat*, that I ever was, or expected to be, such administrator when I gave the deed in question, and my act should not bind the interests of him in whose place I now stand." If I may presume to say so, this seems to be to me a reasonable explanation of why the law should be laid down as above expressed by Channell, B. But turn to the other phase presented by this case, and the whole foundation for the above argument or reasons disappears. No matter in what representative capacity one might execute a deed, he never could be considered as in ignorance of the fact that he had his own personal rights in the subject-matter, as well as his rights as representing some one else, and if he chose to ignore or overlook such personal rights, or if, acting as a representative, he alienate his own personal rights of property, they who have been influenced to part with their money or property by such action or oversight, should, I think, be entitled to claim estoppel against him.

Neither in the Amer. Cyclopædia of Law, nor in Halsbury's Laws of England, is the point here at issue dealt with as clearly as in the Am. & Eng. Encyc., but the English case of *Metters* v. *Brown*, *supra*, is cited twice at least in Hals., vol. 13, under the title of estoppel; first at p. 346, in discussing estoppel by judgments, and next at p. 368.

As before expressed, I can see what appears to me to be both reason and justice in holding that a man, when acting as a representative of other persons or interests, should not be bound by a deed previously given by him in his individual capacity, but I do not think these reasons hold at all, when, in his individual capacity, he seeks to avoid the effect of a previous conveyance though executed by him as representing another, and *cessante ratione legis, cessat ipsa lex.*

Turning for a moment to one of the other points raised by defendant, it may be said, on the authority of Sugden, L.C., as reported in the case of *Drew* v. *Earl of Norbury*, 3 Jo. & Lat. 267, that when a party professes to convey to a purchaser all his interest in a property, his entire right of every nature therein will pass, though he execute the conveyance in a particular capacity only.

Mrs. Barry's discharge says specifically that her mortgage is paid, and it is by law a reconveyance.

Other points were taken and argued by defendant's counsel, but the review that I hold on the question of the estoppel makes it unnecessary for me to consider them. I think the defendant is entitled to a verdict, and judgment will therefore be entered for him with costs of suit. *Judgment for defendant.*

Annotation—Discharge of mortgage as re-conveyance. **Annotation.**

The principle that a conveyance of all a man's estate and interest for value will cover every interest vested in him is important and well established.

Elphinstone on the Interpretation of Deeds, Rule 60, expresses it thus: Where a party conveys all his estate, or right, or title, or interest in property to purchaser for value, every interest vested in him will pass by the conveyance, although not vested in him in the character in which he is made a party.

"This is clear, that when a person having several estates and interests in a denomination of land, joins in conveying all his estate and interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance. It is true that in *Fausset* v. *Carpenter* (2 Dow. & Cl. 232, S.C. 5 Bl. N.R. 75), the House of Lords took a different view. At the time when that case was decided, it was thought impossible to maintain the decision, and it was a subject of consideration among the profession whether it would not be advisable to bring in a short Act of Parliament to reverse it. That case cannot operate to weaken the rule of law. Nothing could be more mischievous or contrary to law than to hold that when a party professes to convey all his estate and interest in particular lands, the operation of his conveyance should be limited to the estate which was vested in him in the character in which he purported to join in the conveyance." *Per* Lord St. Leonards, C., in *Drew* v. *Earl of Norbury*, 3 J. & L. 267, 284, 9 Ir. Eq. Rep. 71, 524.

"*Primâ facie*, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with and which he does not except. General words apt for that purpose are invariably used. *Per* Lord Cranworth, C., in *Johnson* v. *Webster*, 4 DeG. M. & G. 474, 488.

"Where a grantor possesses distinct interests in the property described and there is nothing in the deed to indicate that this entire interest was not conveyed, but on the other hand an intention to convey whatever interest he had in the property may be gathered from the instrument, it should be construed in accordance with that intention:" 13 Cyc. 656.

In the case of *Hayden* v. *Cameron*, the above rule applies, for, while the discharge of mortgage under consideration was not in terms a conveyance but a mere certificate of payment, it is provided by statute (C.S.N.B. (1903), ch. 151, sec. 58) that such a certificate "shall discharge the mortgage and revest the legal estate in the mortgagor, his heirs or assigns," and the Privy Council in a late case has lucidly expressed the effect of such a discharge of mortgage under the Ontario statute in the following words:—

"A very simple procedure for the discharge of mortgages and the revesting in the mortgagor of his former estate in the property mortgaged is provided by secs. 62 and 67 of the Registry of Deeds Act (R.S.O. 1914, ch. 124). A form of document called a discharge has merely to be filled up and authenticated in the manner prescribed. On this being duly registered the mortgage debt is discharged, and the legal estate revested in the mortgagor." *Brickles* v. *Snell*, 30 D.L.R. 31 at 37. See also *Lawlor* v. *Lawlor*, 10 Can. S.C.R. 194.

N. B.

S. C.

THE KING v. LIMERICK: Ex parte Dewar et al.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., and White and Grimmer, JJ. June 23, 1916.

CRIMINAL LAW (§ II A—31)—PRELIMINARY INQUIRY—DEFECTIVE DEPOSITIONS—STENOGRAPHER'S OATH.

The omission to swear the stenographer appointed to take the evidence on a preliminary inquiry before a magistrate, as required by sec. 25 of the Criminal Code Amendment Act, 1913, is a matter of jurisdiction and not a mere defect of form, and convictions made by the magistrate on such evidence will be quashed.

[*The King* v. *L'Heureux* (1908), 14 Can. Cr. Cas. 100; *The King* v. *Johnson*, 1 D.L.R. 548, 19 Can. Cr. Cas. 203, followed. See also *McDonald* v. *The King*, 30 D.L.R. 738.]

Statement.

FIVE convictions against Edward Dewar, four against Ernest Howes, two against William Aitken, one against Alexander Clarke, three against Alonzo Staples, one against Fred. Smith, one against Eben Staples, three against Thomas Feeney, three against James Jamieson, and one against Bert Lint, were made by the police magistrate of Fredericton for offences against the Canada Temperance Act. Rules absolute for *certiorari* to remove, and rules *nisi* to quash, the said convictions were granted on the grounds: (1) That there is no record of the evidence taken before the magistrate. (2) That the stenographer who reported the evidence was not a duly sworn official Court stenographer and had not been sworn to truly and faithfully report the evidence before acting as required by sec. 25 of the Criminal Code Amendment Act, 1913. (3) No formal conviction was drawn up at the time of making the conviction, and the minute of conviction made is insufficient to support the conviction.

R. B. Hanson shewed cause against the rule *nisi*.

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

P. J. Hughes, also supported the rule.

White, J.

WHITE, J.:—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.

The fact that in the case of Canada Temperance Act convictions *certiorari* is taken away does not affect the necessity of a proper record to support the conviction; firstly, because without such record the jurisdiction of the inferior Court to make the

conviction would not appear upon the face of the proceedings; and secondly, because the statute has expressly prescribed what record shall be kept and the mode in which the same shall be verified and authenticated in all cases of summary conviction.

In the 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. If the distinct requirement of the statute as to verifying the record can be treated as merely directory and not imperative, then I can see no reason why, upon the same or like reasoning, we would not be bound to hold that the statutory provisions requiring testimony of witnesses to be given upon oath is not likewise merely directory.

I think the convictions must be quashed.

GRIMMER, J.:—The provisions of the Summary Convictions Act are applicable to proceedings under the Canada Temperance Act, and as in this case the defendant pleaded "not guilty" to the information, the full provisions of sec. 683, Part XIV. of the Code as amended, became applicable to this case. Sec. 711 of the Code also makes the provisions of sec. 683 applicable to the taking of evidence under Part XV. except where they are varied by this part itself.

Grimmer, J.

The stenographer who took the evidence in this case was not "a duly sworn official Court stenographer," nor did she "before acting" make oath, nor was she sworn that she would "truly and faithfully report the evidence." The proceedings, however, are accompanied by an affidavit of the stenographer, and attached thereto, which states, as follows:—

(1) That I am the stenographer appointed by Walter Limerick, police magistrate in and for the city of Fredericton, to report the evidence in this case. (2) That the transcript of evidence hereto annexed, signed by the said Walter Limerick, police magistrate in and for the city of Fredericton, is a true report of the evidence taken in this case, before the said Walter Limerick, police magistrate in and for the city of Fredericton, and taken down by me, as such stenographer, as aforesaid.

This affidavit complies with sub-sec. 2 of sec. 683 as amended, and would be quite sufficient provided the stenographer had been duly sworn before acting, as required by sub-sec. 1, and the effect of the section of the Code referred to seems to me, when given a strict and impartial interpretation, to be, that as in the case of a preliminary inquiry, the justice, for the convenience of the Court, it may be for expediting the business before the Court, may

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appoint a stenographer to take the evidence in shorthand, but that stenographer must be first sworn as provided by the section, that is, as the section states, "before acting" the stenographer shall make oath that he shall truly and faithfully report the evidence. Failure in this respect, in my opinion, is not merely a matter of procedure or relating to procedure, but it is a matter of substance which goes to the jurisdiction. The language of the Code is both plain and strong, and unless in this special case, when a special provision is made for a special purpose, all the strict requirements of the statute are complied with, the justice lacks the necessary jurisdiction to make his acts legal.

It was not suggested by counsel on the argument that there was any wrong transcript of evidence in this case, or any evidence improperly taken down, but it was strongly contended that the statute, not having been complied with, there was no record of evidence at all before the magistrate upon which a legal conviction could be founded. It is all the more necessary the statute should be strictly followed in the taking of evidence by a stenographer, whereas before this provision was made, the magistrate was required to read over the evidence of a witness and procure his signature to the same, but that safeguard is removed by subsec. 2 of sec. 683, it being especially provided that, "Where evidence is so taken, it shall not be necessary that such evidence be read over to or signed by the witness." While it may not be likely, it may also readily occur, that a stenographer, either from hurry in taking what is said, or from imperfectly hearing the evidence, may report statements as evidence which may be entirely different from what was stated, and give a colouring to evidence which was foreign to the mind of the witness, and which if the system as in this case was followed, he never could have a chance to change, correct or ratify. This to a very marked degree would be guarded against if by being sworn *before acting* the ordinary stenographer was fully informed of the serious responsibility he or she was about to undertake and what depended upon a correct rendering of the evidence. The stenographer in this case made two affidavits, the first of which, read when the rule was moved, merely stated that her transcript was a true report of the evidence taken in the case, or in other words that her return is a correct report of what notes she took, but it does

not state she correctly reported the evidence. The second affidavit produced and read at the argument, under objection, was more full and explicit, but the same, not having been submitted with the return, cannot be considered now, nor in my opinion would it under any circumstances in any way affect or alter the conditions under which the evidence was taken, nor retrieve the situation. 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 objections considered in this case have not been raised heretofore in this province, but they have been raised in some other of the provinces and held to be fatal, and I concur in the judgments of the Courts that are found in *The King* v. *L'Heureux*, (1908), 14 Can. Cr. Cas. 100; and *The King* v. *Johnson*, 1 D.L.R. 548, (1912), 19 Can. Cr. Cas. 203. A number of cases were cited and relied upon as establishing that the sections of the Code referred to related only to the procedure thereunder, and did not in any way affect the jurisdiction, but I am unable to adopt that view, and find little difficulty in distinguishing in several essential particulars these cases from the present. In my opinion there is nothing in the third objection taken in this case. For the reasons given the conviction must be quashed.

By an agreement between counsel the judgment in this case applies to and covers some twenty-three other cases in which rules were granted and which are, therefore, made absolute to quash the several convictions to which they apply.

McLEOD, C.J., agreed. *Convictions quashed.*

McLeod, C.J.

PATENAUDE v. THE PAQUET CO.

QUE.
C. S.

Quebec Court of Sessions, Hon. C. Langelier, J.S.P. May 5, 1916.

1. MASTER AND SERVANT (§ III A—289)—WHETHER MASTER PENALLY LIABLE FOR SERVANT'S DEFAULT—REVENUE LAWS.

A company operating a retail store in which perfumes are sold is not liable to fine under the Special War Revenue Act 1915, for the default of its salesman to affix a stamp to a package of perfume on making a sale of same, if it has given all proper directions and facilities for carrying out the provisions of the statute; the penal liability which the statute provides is upon the "person selling" and the statute has not in this case made the master criminally responsible for the act of his servant done without his connivance or knowledge.

[*Somerset* v. *Hart*, 12 Q.B.D. 360, 53 L.J.M.C. 77, applied; and see Annotation on Master's Liability under penal laws for servant's acts, at end of this case.]

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C. S.

PATENAUDE v. THE PAQUET CO.

. INTERNAL REVENUE (§ I—3)—SALES TO "CONSUMERS"—WAR REVENUE ACT 1915—PENALTIES.

A sale made at a retail store of an article subject to stamp duties under the Special War Revenue Act, Can., 1915, secs. 14-18, is not shewn to be a sale to a "consumer" as defined by sec. 14 so as to warrant a summary conviction for neglect to affix a tax stamp to the package, if the purchase was made by a revenue officer on behalf of the Department of Inland Revenue.

Statement.

ACTION for illegally selling to a consumer a box or parcel without affixing a war stamp.

Henri Bernier, for complainant.

E. Betteau, K.C., for defendant.

Langelier, J.

LANGELIER, J.:—The defendant is sued for having illegally sold to a *consumer* a box or parcel containing a perfume as described in Part III., sub-sec. 14, of the Special War Revenue Act, 1915, that is "a box of Palmer's Toilet Powder," without having affixed upon it the stamp required by the law.

The proof of the offence has been made by Mr. Alex. LaRue, Assistant Collector of the Revenue duly appointed by Order in Council. He swore that on the 1st March last he had bought at the defendant's shop the parcel described in the complaint and now produced in court, and that the seller had not affixed the stamp required by the law.

Cross-examined by counsel for the defendant, Mr. LaRue answered as follows:—

"Q. You did not buy that box of perfume for yourself personally? A. No, sir.

"Q. Neither with the object to resell it to another person or to utilize it for your own account? A. No, sir.

"Q. You did not pay for that box with your own money?

"A. No; it was with the department's money.

"Q. You bought it solely for the department? A. Yes, sir."

The defendant brought as his witness Mr. Prosper Dubere, his inspector, who swore that as soon as the law had come into force, the president of the defendant company sent for him and gave him instructions to see to the perfumes department, and to see that stamps should be affixed upon each article sold, and he added he had obeyed that order. He saw the employees and told them: "I order you all to affix a stamp upon each bottle of perfume and upon each box of powder you will sell."

Such is the evidence.

The learned counsel for the defendant raised the two following objections:—(1) The sale has not been made to a consumer.

(2) The defendant cannot be held responsible for criminal offences committed by his servants.

Let us examine those objections.

First, that the sale was not made to a consumer.

The statute, sec. 15, says:—

"Every person selling to a consumer any bottle or package containing . . . (*b*) perfumery . . . shall at or before the time of sale affix to every such bottle or package an adhesive stamp," etc.

And sec. 14 defines what is meant by a "consumer": a consumer signifies a person who uses either in serving his own wants or in producing therefrom any other article of value.

It is clear that the sale made in this case has not been made to a "consumer" as described in the statute.

It is a penal action, and the interpretation of such a statute must be applied with strictness.

Endlich, "On Interpretation of Statutes," explains it very clearly in paragraph 345:—

"Statutes which impose pecuniary burdens are subject to the rule of strict construction. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties: . . . taxes are not imposed by implication. In a case of doubt, the construction most beneficial to the subject is to be adopted."

And in paragraph 334 the same author says:—

"But the rule of strict construction requires at least that no case shall fall within a penal statute which does not comprise 'all the elements' which, whether morally material or not, are in fact 'made to constitute the offence' as defined by the statute."

In this case one of the ingredients of the offence is the sale to a "consumer"; if it has not that character, it does not fall under the law.

I found in Endlich, above cited, a case which has a great resemblance to the present one:

"Where an Act imposed a stamp duty on newspapers, and defined a newspaper as comprising "any paper containing public news, intelligence, or occurrences . . . to be dispersed and made public," and also "any paper containing any public news, intelligence, or occurrences, published periodically or in parts

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or numbers, at intervals not exceeding twenty-six days," and not exceeding a certain size; it was held that a publication, the main object of which was to give news, but which was published at intervals of more than twenty-six days was not liable to the stamp duty as a newspaper."

. . . "Lord Ellenborough remarked that the cases to which a duty attached ought to be fairly marked out, and that a liberal construction ought to be given to words of exception confirming the operation of the duty; whilst the taxing provisions are to be construed most strongly against the Government, and in favour of the person subjected to the imposition, and not to be extended by implication beyond the clear import of the language used."

Consequently an essential element is lacking in the evidence, that is, the sale to a consumer; it is true there was a sale, but not to a consumer as described in the statute.

Secondly, that the defendant is not responsible for criminal offences committed by his servants.

There is a difference between a civil and criminal offence, (*délit*). In the latter case the master is not responsible for the acts of his servants. The rule is well expressed in Crankshaw's Magistrate's Guide, page 97:—

"The general rule of law is that a master is not criminally responsible for the acts of his servants."

"The essence of a criminal offence is, as a general principle, the evil or wrongful intent with which the act which constitutes the offence is done."

"The general principle of common law that a master is not criminally responsible for the acts of his servants applies also to statutory offences with this difference, that it is within the power of the Legislature to enact, and, in some cases, it has enacted, that a man may be convicted and punished for an act of omission, although there was no blameworthy condition of mind in him; but it is for those who assert that the Legislature has so enacted to make it out convincingly by the language of the statute."

There is no such a thing in the law I am called upon to apply. In *Somerset* v. *Hart* (1884), 12 Q.B.D. 360, 53 L.J.M.C. 77, the facts were as follows:—

An action had been taken against an hotelkeeper because he had allowed gaming in his house. The evidence shewed that a servant had tolerated it without the knowledge of his master.

The action was dismissed and the dismissal confirmed in appeal. In rendering the decision of the Court, Lord Coleridge said:—

"I fail to see how a person can be said to have a 'mens': there must be something in the nature of a connivance to make a licensed victualler responsible criminally. I quite agree that the Act must be liberally construed so as to maintain public order, and that actual knowledge is not necessary; but at the same time, something like connivance must be shewn—that is to say, that the person charged must have known what was going on if he had chosen."

No connivance was proved against the defendant here; on the contrary, it has been established that an order had been given to affix the stamps.

Furthermore, sec. 15, sub-sec. 4, uses the expression "the person selling" whose duty it is to affix a stamp, instead of saying "the merchant." Therefore it is the one who has directly made the sale who has committed the offence and who is responsible unless the statute, as in the Quebec License Law, had made the master responsible notwithstanding. Such a clause is not in the statute. *Charge dismissed.*

Annotation—Master and Servant (§ III A—289)—When master liable under penal laws for servant's acts or defaults. Annotation.

It is well settled that a master or principal may, *under certain circumstances*, be held liable criminally for an act committed by the hand of his servant or agent acting either under his direct authority or with his knowledge or consent or without such authority or knowledge or even in disobedience of orders. *R.* v. *Holbrook* (1877), L.R. 3 Q.B.D. 60, 13 Cox C.C. 650; Labatt on Master and Servant, sec. 2565. As to criminal acts declared to be offences under the Criminal Code the master will be liable as a participant if he aids or abets the servant in the commission of the offence. Cr. Code 1906, sec. 69.

In most instances, where the master is held to be responsible criminally for the wrongful conduct of his servant, it is on the theory that the act complained of is positively forbidden and therefore guilty intention is not essential to the conviction. In some cases the statute expressly makes the master responsible for the act of his servant. *Reg.* v. *King*, 20 U.C.C.P. 246.

The owner of works carried on for his benefit by his agents may be indicted for a nuisance caused by the obstructing of the navigation of a river by his agents casting rubbish in it without his knowledge and contrary to his general orders. *Reg.* v. *Stephens* (1866), L.R. 1 Q.B. 702. The fact that the directors of a company are ignorant that a nuisance is being created by the conduct of its business will not absolve it from liability although they have given a manager authority to carry it on and although his method is a departure from the directors' original plan and results in the nuisance. *Rex* v. *Medley* (1834), 6 C. & P. 292.

Annotation.

A master is not criminally liable for "knowingly" allowing liquor to be sold to a girl under fourteen years of age where the sale was made knowingly by the master's bartender but against the orders of the master and without his knowledge, actual or constructive, or the wilful connivance of his foreman who was present. *Conlon* v. *Muldowney*, [1904] 2 Irish R. 498. So, the word "knowingly" in sec. 207 of the Cri inal Code Can. 1906, dealing with the unlawful sale or possession for sale of immoral literature, makes it incumbent on the prosecution to give some evidence to prove knowledge of the contents of the book on the part of the accused. *R.* v. *Beaver*, 9 Can. Cr. Cas. 415, 9 O.L.R. 418 (and see amendments of sec. 207, passed in 1909 and 1913 respectively). See also *R.* v. *Macdonald*, 15 Can Cr. Cas. 482, 39 N.B.R. 388; *R.* v. *Graf*, 15 Can. Cr. Cas. 193, 19 O.L.R. 238; *R.* v. *Britnell*, 20 Can. Cr. Cas. 85, 4 D.L.R. 56.

A person charged with "suffering" a nuisance to arise under a Health Act must be shewn to have knowledge for which he is legally answerable of the nature of the act and of its consequences, before he can be found guilty of an offence; but the knowledge of a servant employed to do an act, and from whose act the nuisance necessarily and immediately arises, is, for the purposes of such case, the knowledge of the master who directs the act to be done. *Mowling* v. *Justices*, 17 Viet. L.R. 150.

In *Mullin* v. *Collins* (1874), L.R. 9 Q.B. 292, the defendant was prosecuted because his servant supplied a constable on duty with drink. It was held to be no defence on his part that his servant had done this without his knowledge. The section of the statute under which the prosecution was brought provided as to one class of offence against a licensing law that it must have been "knowingly" committed and as to the others, including the offence of supplying liquor to a constable on duty the word, "knowingly" did not appear in the enactment. This circumstance was viewed by the Court as indicating that the intention of the statute was to make the licensee liable for the act of his servant as regards the offence in question although the licensee himself had not knowingly committed it.

The decision in *Mullins* v. *Collins* (1874), L.R. 9 Q.B. 292, frequently quoted in support of the criminal liabliity of the master, does not extend the doctrine of liability of the master so as to include an act of the servant outside of the general scope of his authority. *Somerset* v. *Hart* (1884), 12 Q.B.D. 360, 53 L.J.M.C. 77; *Coppen* v. Moore, [1898] 2 Q.B. 306; *Watt* v. *Brown* (1896), 40 Sol. J. 575; *Hogg* v. *Davidson* (1901), 3 Sc. Sess. Cas. 5th series 49; *Police Commissioners* v. *Cartman* [1896] 1 Q.B. 655.

Sec. 17 of the Licensing Act, 1872, Eng., imposes a penalty upon a licensee who "suffers" any gaming to be carried on in his premises. To make a licensed person liable under this section, if neither personal knowledge on his part nor connivance is shown, it will be sufficient if the gaming had been allowed by the servant whom the master had left in charge of the premises, so that the servant's permission of the gaming had been an act done in the course of his employment even though contrary to his master's express orders. *Redgate* v. *Haynes*, 1 Q.B.D. 89; *Bond* v. *Evans*, 21 Q.B.D. 249. So, in *Somerset* v. *Hart*, 12 Q.B.D. 360, knowledge of a potman who was not put in charge of the licensed premises was held insufficient to make the master liable.

The doctrine of *Redgate* v. *Haynes*, 1 Q.B.D. 89, was applied in *Crabtree* v. *Hole*, 43 J.P. 799, to make the proprietor responsible for gambling which had taken place without his knowledge but which his servant, left in charge, should have discovered and prevented had he taken reasonable care.

Annotation.

The principle to be deduced seems to be that if the form of the enacting statute indicates that the master is to be held responsible without personal knowledge or connivance of the offence against a penal law, such as a licensing Act, the master will be liable if the offence be committee by a person he has left to act for him in the management of the business. *Smith* v. *Slade*, 64 J.P. 712; *Emary* v. *Nolloth*, [1903] 2 K.B. 264. *Conlon* v. *Muldowney*, [1904] 2 Irish R. 498; *McKenna* v. *Harding*, 69 J.P. 354; *Allchorn* v. *Hopkins*, 69 J.P. 355. But where there has been no delegation of the conduct or control of the business, he will not be liable in respect of an offence of that class committed without his knowledge or connivance. *Emary* v. *Nolloth*, [1903] 2 K.B. 264, 72 L.J.K.B. 620, 20 Cox C.C. 507.

In *Anglo-American Oil Co.* v. *Manning*, [1908] 1 K.B. 536, one Baldwin, a servant of the oil company, was sent out with a travelling tank of oil and with two good measures. He sold oil, however, with a fraudulent measure which had not been given him but which he used for his own profit and not for the benefit of his masters. The Court said that Baldwin's possession must be deemed to be his own possession and not the possession of his employers and set aside a conviction of the latter under the Weights and Measures Act, Imp., 1878. It was pointed out, however, that the Court was not considering the case where an employee in a shop makes an instrument fraudulent and continues to use it and that the decision was not to govern in any cases of that kind.

Under statutes for the regulation of automobiles and other motor vehicles, a provision that the owner shall be held responsible for any infraction of the speed limit upon a public highway may be so wide as to authorize a summary conviction of the owner of the motor vehicle for a speed limit offence actually committed by the garage machinist who had taken the car out of the public garage where it had been left for repairs. *R.* v. *Labbe*, 7 Can. Cr. Cas. 417.

In construing a statute creating an offence against public order and punishable as a crime there is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient until met by clear and definite enactment overriding such presumption. (*Sherras* v. *DeRutzen*, [1895] 1 Q.B. 918, 921, and *Chisholm* v. *Doulton*, 22 Q.B.D. 736, applied.) *Rex* v. *McAllister*, 22 Can. Cr. Cas. 166, 14 D.L.R. 430; and see *Patenaude* v. *Thivierge*, 30 D.L.R. 755, 26 Can. Cr. Cas. 138.

Upon a charge under the fishery regulations of having in possession sturgeon under the permitted size, the doctrine of *mens rea* was held to apply, it being said that a conviction should not be made against the master in respect of the unauthorized possession by the servant, if there is no knowledge of connivance on the master's part in regard thereto. *R.* v. *Vachon*, 3 Can. Cr. Cas. 558.

So, where a drug clerk, contrary to instructions from the proprietor and without his knowledge, sold crude opium for other than medicinal purposes, the proprietor was held not liable to be convicted of the offence under 7-8 Edw. VII. (Can.) ch. 50, sec. 1. *The King* v. *A. & N.*, 16 Can. Cr. Cas. 381.

NICHOLSON v. GREGORY.

MAN.

K.B.

Manitoba King's Bench, Macdonald, J. October 7, 1916.

LANDLORD AND TENANT (§ III D 3—110)—DISTRESS—MORATORIUM—WAR RELIEF ACT.

Distress for rent is a "proceeding" within the prohibitory provisions of the War Relief Act (Man. 5 Geo. V., ch. 88, sec. 2, as amended by 6 Geo. V., ch. 122).

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NICHOLSON v. GREGORY.

MOTION to continue an injunction granted herein restraining the defendants, their servants and agents from detaining certain goods in the statement of claim fully described, seized by the defendants for rent alleged to be due from the plaintiff Nicholson to the defendant Gregory.

H. W. Whitla, K.C., for plaintiff.

B. L. Deacon, and *A. K. Dysart*, for defendant.

Macdonald, J.

MACDONALD, J.:—The tenancy of the premises, the rent for which the said goods were seized, is admitted. The plaintiff claims the seizure to have been wrongfully and illegally made on the following grounds:—1. That at the time of the alleged wrongful taking of the said goods, the defendant Gregory had parted with the reversion in the property out of which the rent accrued, and that therefore he had no right or authority to distrain upon the said goods and chattels or any of them: 2. That the plaintiff being a resident of the Province of Manitoba duly enlisted and became mobilized as a volunteer in the forces raised by the Government of Canada in aid of His Majesty in the war which now exists between His Majesty and certain European powers, and that he is now and was at the time of the unlawful taking of the said goods sworn in as a volunteer with the rank of Lieut.-Colonel in the said forces being raised by the Government of Canada and he claims the benefit of the War Relief Act, ch. 88 of 5 Geo. V. as amended by ch. 122 of 6 Geo. V.

On the first ground there is some evidence of the defendant Gregory having parted with his reversion and thus being disentitled to distrain for the rent, but even if it could be held that he reserved the right to the rents and the power to distrain therefor, the War Relief Acts referred to (notwithstanding the hardships created) are, to my mind, a complete bar to the remedy by distress for the recovery of such rent.

Sec. 2 of ch. 88 seems to me clear and explicit:—

> During the continuance of the war it shall not be lawful for any person or corporation to bring any action or take any proceeding either in any of the civil Courts of this province or outside of such Courts.

The proceeding by distress is a proceeding outside the Courts, and as such is prohibited.

There is a sufficient case made out to entitle the plaintiff to a continuation of the injunction until the trial of the action. Costs in the cause. *Motion granted.*

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RURAL MUNICIPALITY OF MARCUS v. KILBORN.

Alberta Supreme Court, Simmons, J. October 3, 1916.

TAXES (§ I E 1—48*a*)—*Purchaser of Crown lands*—"*Occupant.*"]—Action for taxes.

George Ross, K.C., for plaintiff.

E. V. Robertson, for defendant.

SIMMONS, J.:—The plaintiff is a municipality organized under the Rural Municipality Act, ch. 3, of Alberta, 1911-12. The defendant on June 15, 1911, purchased from the Dominion Government, at an auction sale, certain lands paying in each case one-tenth of the purchase price. Since that date the defendant has made some payments on account of the interest on the unpaid balance, but has made no further payments on the purchase price.

All lands belonging to Canada are exempt from taxation. The Act (sec. 251) requires the assessor to assess the owner or occupant of the lands.

The defendant claims that as he has only paid one-tenth of the purchase price that he is liable for taxes on one-tenth only of the assessed value?

The question of liability of the purchaser or lessee under this Act and under similar legislation in Saskatchewan is fully discussed in *Vermilion Hills* v. *Smith*, 20 D.L.R. 114, 49 Can. S.C.R. 563, and the *Southern Alberta Land Co.* v. *R.M. of McLean*, 29 D.L.R. 403, 53 Can. S.C.R. 151, and I am not able to distinguish any difference in principle which is applicable to the present case. The title to the lands is still in the Crown, and the interest, if any, of the Crown is exempt, yet the purchaser entitled to possession and to complete the purchase price and take to the lands is an occupant within the meaning of the Act.

Judgment for plaintiff.

RURAL MUNICIPALITY OF MARCUS v. P. BURNS & CO.

Alberta Supreme Court, Simmons, J. October 3, 1916.

TAXES (§ III B 1—113)—*Persons in whose name property assessable* — "*Owners*" — "*Occupants*" — *Corporation and its officers.*]—Action for taxes. Dismissed.

George Ross, for plaintiff.

J. M. Carson, for defendant.

SIMMONS, J.:—The plaintiff is a municipality organized under the Rural Municipalities Act, ch. 3, Alta. 1911-12 and amend-

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ments. The defendant company is the lessee of certain lands from the Department of the Interior of Canada.

The plaintiff assessed P. Burns in respect of the said lands and claim that the defendant company is liable therefor. It is admitted that P. Burns is a large shareholder in the defendant company and president of the company. His private secretary is an officer of the defendant company and admits that he received the assessment notices. Notwithstanding this I do not think it can be seriously contended that Mr. Burns is either an "owner" or "occupant" of the lands in question as the same are occupied and used by the defendant company.

The defendant company were not assessed in respect of the said lands and are therefore not liable *for taxes* in respect of the same. *Action dismissed.*

BANK OF MONTREAL v. POPE.

Alberta Supreme Court, McCarthy, J. September 22, 1916.

BILLS AND NOTES (§ V B 3—145)—*Rights of holder for value—Consideration—Antecedent debt.*]—Action by bank on bills of exchange.

W. H. McLaws, for plaintiffs.

H. P. O. Savary, for defendants.

MCCARTHY, J.:—In this case I think the plaintiffs are entitled to judgment for the amount of their claim and costs. The action is brought to recover the amount of two bills of exchange drawn by G. M. Annable Co. Ltd., and accepted by the defendants on March 8, 1911, both being for the sum of $2,500, one being payable 3 months after date and the other 4 months after date. The action was commenced on February 1, 1915.

From the evidence given at the trial it would appear that in the month of February, 1911, the defendants entered into an agreement with G. M. Annable Lumber Co. to purchase the entire output of lumber from their mill at Winn, in the Province of British Columbia, for the season of 1911, such output being estimated to be about 7,000,000 ft.

Apparently, at the time the contract was entered into with the Annable Co., the latter were indebted to the plaintiff bank in a sum in excess of the amount sued on, and the lumber covered by the agreement had been hypothecated to the bank and the bank would not consent to the disposition of the same without

having some security for payment and it was under these circumstances that the acceptances sued on were given.

In answer to the plaintiffs' claim the defendants in effect say that they accepted the bills of exchange sued on without consideration and for the accommodation of the Annable Co. (the drawers); that no consideration was given by the bank to the Annable Co.; that the company held the bills of exchange as collateral security only for the debt of the Annable Co. or as security for payment by the Provincial Lumber Supply Co. (of which the defendants were members) to the Annable Co. for lumber ordered and afterwards supplied to the former company and that such shipments were paid by the defendants and their liability on the bills of exchange sued on discharged.

It appears from the books of the bank put in as evidence at the trial that the Annable Co. were indebted to the plaintiffs in a sum in excess of the amount sued on, and from the two drafts which were put in as exhibits it appears that the plaintiffs were payees, and that they on receipt of the drafts sued on immediately placed them to the credit of the Annable Co. and reduced the indebtedness of the latter company to that extent.

The defendants say that they were informed by the manager of the Annable Co. that in the course of the negotiations for the purchase of the lumber the manager of the plaintiff bank at Rossland agreed that the drafts should be held upon the conditions referred to, and that they were assured by the local manager of the plaintiff bank at Calgary that the local manager at Rossland would abide by any undertaking he gave in that regard. The representations of the local manager at Calgary are not pleaded in the defendants' statement of defence.

With respect to the representations made by the two local bank managers there appears to be a conflict of testimony, and since the date of the negotiations between the defendants and the local bank manager at Rossland the latter had died. There was offered as evidence a letter dated June 12, 1911, proved to have been signed by the deceased manager in answer to a letter from the Provincial Lumber Co. suggesting that the acceptances were given for accommodation only, in which he repudiates any such understanding as the defendants allege. No objection was taken to the reception of this by counsel. There is the strongest possible inference to be gathered from the admissible correspond-

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ence and the books of the bank put in at the trial that the local managers at Rossland and Calgary did not understand or treat the acceptances as having any conditions attached to them whatever.

The local manager of the plaintiffs at Calgary testified that he did not even know the state of the Annable Co.'s account at the Rossland branch of the bank and further that he was aware that the drafts had been discounted there. Under those circumstances it does not seem to me to be probable that he would interfere in the negotiations of the parties at that branch.

As far as can be gathered from the evidence the lumber supplied by the Annable Co. to the Provincial Lumber Supply Co. has been paid for in full by the acceptances of the defendants, but it is unfortunate that they did not decline to honour those drafts until the plaintiffs surrendered the drafts sued on which defendants allege they hold as collateral security only.

Vide Bills of Exchange Act, R.S.C. 1906, ch. 119, secs. 54, 55, 56, also the notes to these sections in Falconbridge on Banking and Bills of Exchange, 2nd ed., at pp. 571, 572, 573, 578 and 583.

There will therefore be judgment for the plaintiffs for the amount sued on with interest and costs. There will be a thirty days' stay. *Judgment for plaintiff.*

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BELL-IRVING v. MATTHEW.

British Columbia Supreme Court, Clement, J. October 16, 1916.

CONTRACTS (§ V C 3—402)—*Repudiation — Misrepresentations—Materiality.*]

Hogg, for plaintiff; *McDougall*, for defendant.

CLEMENT, J.:—On the day when Crossfield presented the document in question here to the defendant the position was this: there had been no agreement that defendant should, as part of the consideration for "extending the mortgage" assume personal liability for payment of the moneys thereby secured. Crossfield told defendant that the document was the ordinary extension form and the defendant being busy at the moment signed the document (in duplicate) without reading it. Both copies were taken away by Crossfield for execution of the mortgagees. Some days later the defendant received his copy and then noticed that he had been made to assume personal liability. He at once repudiated any such agreement. In my opinion, he cannot be

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held upon this document, his signature to it having been procured by an innocent misrepresentation as to its nature: *Redgrave* v. *Hurd* (1882), 51 L.J. Ch. 113. There the misrepresentation was as to the value of the thing bought; here the misrepresentation went to the very pith of the contract as embodied in the document.

In this view I need not consider the case as one of unilateral mistake; or as one in which *non est factum* could be pleaded. There was a misrepresentation—innocent, I think, although, in my opinion, the plaintiff's solicitors, in view of their client's letter of Nov. 11, 1914, should not have inserted the clause in question without inquiry of or notice to the defendant—in a vital matter and the defendant cannot be held upon a contract so obtained and by him immediately repudiated.

Action dismissed with costs.

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COLUMBIA BITULITHIC v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. October 3, 1916.

STREET RAILWAYS (§ III C—42)—*Collision—Ultimate negligence—Failure to look—Defective brakes.*]—Appeal by the defendant from the judgment of Murphy, J., dated September 16, 1915. Reversed.

McPhillips, K.C., for appellant.

D. G. Macdonell, and *J. H. Senkler*, K.C., for respondent.

MACDONALD, C.J.A.:—The following facts were found by the trial Judge. He found that the defendants were guilty of negligence in running their car at a speed of 40 miles an hour approaching a level highway crossing on a down grade of 2.4 per cent.; that plaintiffs' driver was guilty of contributory negligence in not looking out for the approaching car; that the driver could do nothing to avoid the collision after he became aware of the danger; that the brakes of the defendants' car were defective, and that with efficient brakes the car could not have been stopped in time to avoid the collision. On these findings he gave judgment for the plaintiffs, and with deference I think he was in error in doing so. He relied upon *Loach* v. *B.C. Electric R. Co.*, 23 D.L.R. 4. In my opinion, there is a very important distinction between that case and this. That decision was influenced by the fact which was there accepted as proven that had the brakes been in good order the motorman could have stopped his car and thu

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have avoided the collision after realising the danger of it. But here the Judge has found that the motorman could not do this, and I think the evidence amply bears out that finding.

There is a suggestion that with efficient brakes the motorman could have reduced the speed of his car to about 10 miles an hour at the time of impact. The Judge thought that even then the horses could not have been saved from death nor the wagon from injury.

I do not think the evidence even supports the suggestion that the speed could have been reduced to 10 miles an hour. The witness Andrews thought that such a reduction of speed might have been effected, also that with good brakes a car travelling 40 miles an hour down that grade could not be brought to a standstill in a distance of less than from 1,000 to 1,200 ft. The motorman saw the team at 400 ft. from the point of contact, and it seems to me to be absurd to say that the speed could be reduced from a rate of 40 miles an hour to 10 miles an hour while the car travelled a distance of only 400 ft., and yet a further distance of from 6-800 ft. must be covered in reducing the speed from 10 miles to a standstill.

I think the evidence of the motorman Hayes also shews that no such reduction of speed as from 40 to 10 miles an hour could have been effected within a distance of 400 ft.

It was suggested that had the brake been in good order the speed would have been checked enough to have allowed the team to get past before the car reached the crossing. A simple calculation will shew this to be erroneous. The motorman had 400 ft. in which to reduce the speed of the car. Unbraked the car would travel that distance in 7 seconds. A good brake would have delayed the car by 3 seconds. A brake of two-thirds' efficiency as this was would have delayed it by 2 seconds. The difference—1 second—is all that was lost. The horses travelling at the rate of 3 miles per hour would make 4 ft. in that time. With a good brake the car would have struck the body of the wagon instead of the front, and travelling at a speed of over 20 miles per hour the result would nevertheless have been fatal. I would allow the appeal.

MARTIN, J.A. (dissenting):—While, after reading the evidence, I agree with the trial Judge that it was impossible for the driver of the wagon to have avoided the accident after he was

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"caught" (as he aptly expresses the result of his own negligence) by the car, while his horses were partly on the track, which I think is the fair inference from all the evidence of the eye-witnesses, yet on the inferences to be drawn from facts about which there is no real dispute, I do not agree with him that the accident could still not have been avoided if the brake had been in good order. It is clear that even going at such a high rate of speed and equipped with only a defective brake, yet the horses had got so far across the track that the nigh one, nearest the car, was struck on the rump, and the front of the wagon was also struck (the motorman says, "I hit the wagon"). In such circumstances only a very few feet and a very few seconds, even 3 more, would have enabled the wagon to have got clear and if the brake had been in good order, I have no doubt upon the evidence, that the speed of the car would have been so reduced that those few feet and seconds would have been gained and the accident avoided. That is the inference I draw from the evidence of the former motorman of the car, Andrews, who says that in 1,000 to 1,200 ft. with a good brake he could stop the car, and in about 200 ft. slow it down from 40 to 10 miles an hour, but with the defective brake he could not stop within 1,400 to 1,600 ft., and, of course, a corresponding reduction in speed would follow. Hayes, the motorman at the time of the accident, says that with a proper brake the car ought to be stopped in about 900 feet, going at 35 miles per hour, and that he was running at about that rate, and that when he first saw the horses and wagon they were 400 ft. away, which is double the distance within which Andrews says the rate of speed could have been reduced to 10 miles per hour, which would be ample time for the wagon to cross the track. There is no doubt about the evidence of Andrews on this point, for he was specially questioned by the Court to remove any doubt, and I do not feel justified in disregarding his very important testimony. Such being my view of the facts there can be no doubt of the plaintiffs' right to recover on the ultimate negligence of the defendant, and the appeal should be dismissed.

MCPHILLIPS, J.A.:—I am of the same opinion as the Chief Justice. *Loach* v. *B.C. Electric R. Co.*, 23 D.L.R. 4, proceeded upon the admitted fact that if the car had been equipped with an efficient brake the accident would have been prevented, notwithstanding that the plaintiff had been guilty of contributory

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negligence. In the present case we find no such evidence, and, upon the facts, it is patent that with the most efficient brake the accident was inevitable. With regard to the speed, the appellants were operating the car over a railway subject to the Railway Act of Canada (ch. 37, R.S.C. 1906), and no evidence was adduced which would entitle it being held that there was negligence by reason of excessive speed, the point at which the accident took place was not in a thickly peopled portion of a city, town or village, in fact, not in a city, town or village, so that there was no requirement that the speed should be limited. Nor was there any evidence of non-compliance with the Railway Act or with the orders, regulations and directions issued by the Railway Committee of the Privy Council or of the Board: See *G.T.R. Co.* v. *McKay* (1904), 34 Can. S.C.R. 81, and *Andreas* v. *C.P.R. Co.*, 37 Can. S.C.R. 1; Jacobs Railway Law of Canada (2nd ed., 1911), at pp. 307, 423, 427, 428.

I would allow the appeal. *Appeal allowed.*

CAMPBELL v. ROGERS.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. October 3, 1916.

VENDOR AND PURCHASER (§ I C—10)—*Want of title—Liability of agent.*]—Appeal by the defendant from the judgment of Morrison, J., dated December 16, 1915. Reversed.

J. A. MacInnes, for appellant.

H. N. Lidster, for respondent.

MACDONALD, C.J.A., would allow the appeal.

MARTIN, J.A.:—It is objected that the plaintiff has sued the wrong party, in that the defendants were agents merely for the reputed owner, Hackney, and not principals, which fact was communicated to the plaintiff before the contract was entered into. I have carefully examined the evidence and even on the plaintiff's own shewing it could not be said that he thought he was dealing with defendants as principals; because the receipt he got from the defendant on the 5th July, 1911, shews on its face that they were acting as agents for owner, which confirms Black's statement, and the plaintiff already knew, as he admits, from Fletcher (Hackney's friend) and defendants' sub-agent, that the reputed owner for whom they purported to act was Hackney. This receipt the plaintiff admits he took with him and returned to

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defendants next year on June 7, 1912, when he made a further payment and got a receipt for all the money he had paid up to that time, and defendant Black paid the money over to Hackney, his principal, thinking his title to the land was a good one, and Hackney, on April 17, 1913, executed a conveyance of the land to Campbell, which could not be registered because Hackney had no registered title. Of course, if I were able to take the view that the defendants were acting as the plaintiff's agent the matter would assume a very different complexion, but I am unable to do so. The appeal, therefore, should be allowed.

GALLIHER, J.A.:—At the hearing of this appeal I expressed the opinion which I still adhere to, that this appeal must be allowed.

MCPHILLIPS, J.A. (dissenting):—The trial Judge has taken the view that the respondent was overreached; in fact, that fraud and concealment was practised upon the respondent. Bearing in mind the weight which should be attached to the judgment of the Judge—especially in a case of the character of the present action—I hesitate, in truth, do not feel justified in disagreeing with the judgment: *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704.

The attempt is made here in line with too many other cases of a somewhat similar character to escape liability upon the ground that the respondent has been given a conveyance with the limited covenant under the provisions of the Real Property Conveyance Act, and that it matters not if the vendor is without title. With respect I felt constrained because of binding authority to give effect to that class of defence in *Singh* v. *Mitchell*, 30 D.L.R. 719 (in which case judgment has been given this same day), a defence only too common at the present time following upon the collapse of a real estate boom.

The facts of the present case, though, materially differ, and we have the express findings of the trial Judge which should not lightly be interfered with especially when it is clear beyond question that a very old gentleman—relying upon the appellants—places his money with them and expects to receive in return therefor title to the lands for which the money was the purchase price. The transfer was carried out with Mr. Black, one of the partnership of Rogers, Black & McAlpine, real estate agents of Vancouver, the appellants, and it was simple in its nature, the appellants received from the respondent $623.50 being the full purchase price of the land in question, the appellants receiving the

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moneys as the agents of the respondent and not otherwise, and in return therefor the respondent was to be given a title to the land. The appellants were not the owners of the land nor were they even the authorized agents for the sale of the land. They presume to write out an interim receipt for a portion of the purchase price, but there is no evidence that this receipt ever came to the notice of the respondent as to its terms. Upon perusal of this interim receipt it is seen that it does not disclose the name of the owner of the land, and is stated to be subject to the owner's confirmation, and that confirmation was not proved; that a person (Hackney), admittedly without title to the land, presumes to give a conveyance proves nothing, and it shews that the respondent must be returned the money paid to the appellant. It is plain upon the evidence, that there never was any privity of contract between the respondent and Hackney who later purported to convey the land to the respondent. The conveyance made by Hackney to the respondent was an idle and useless proceeding—and this conveyance was never accepted by the respondent. Hackney admittedly having no colour of right or title of any nature or kind in the land and Black knew this although he took the acknowledgment as commissioner required under the Land Registry Act of the attorney executing the conveyance for Hackney, and he (Black) never even attempted to register the conveyance knowing that Hackney had no title to the land; Black, although present at the trial, is not called and gives no evidence. It is true his counsel produced him for cross-examination, but that was not sufficient in my opinion, as against his evidence taken upon discovery and put in by counsel for the respondent. Black does not deny the respondent's statement that he paid the money as the purchase price of the land and that title was to be given to him therefor. Black made no attempt whatever to examine into the title to the land but paid the money over to Hackney. In my opinion there was here an express contract, and the appellants were not justified in paying over the money of the respondent without obtaining that for which it was paid to them, *i.e.*, title to the land in the name of the respondent: *Boorman* v. *Brown* (1892), Ex. Ch. 3 Q.B. 511. The appellants were guilty of negligence and upon this view alone are liable to the respondent.

The appellants, in my opinion, have no answer to the action

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upon the ground that a conveyance was executed by Hackney to the respondent—a valueless and idle document. They cannot discharge a contractual obligation in any such way. The conveyance was forwarded by Black to the respondent, but on the facts was never accepted by him. When forwarded, even Black knew that it was valueless and did not grant any title in the land to the respondent.

I am not able, however, to agree with the Judge in allowing in the judgment appealed from the sum of $450, made up of taxes paid and improvements put upon the land. Had it been that the appellants were the vendors to the respondent of the land and without fault could not give title thereto such damages could not be given: *Bain* v. *Fothergill*, L.R. 7 H.L. 158, and *Ontario Asphalt Block Co.* v. *Montreuil*, 27 D.L.R. 514, 52 Can. S.C.R. 541. The appellants cannot be said to have warranted or guaranteed title in any way, but that which they were unquestionably required to do was to retain the purchase price of the land which was paid to them until title was obtained: they did not do so but, as the evidence shews, parted with the money of the respondent and endeavour to justify this by saying that the respondent contracted with Hackney, which was not the fact, and that his position is one of purchaser from Hackney and that as he has been given a conveyance from Hackney with the limited covenant that he is without a remedy although it is proved that Hackney is absolutely without title in the land. This defence the trial Judge refused to accept, as the facts fail to support it, and in this I agree.

I am not able to say that this case is free from difficulty and, were it simply a case of vendor and purchaser, then any right of action would be between the vendor and purchaser, and this appeal should succeed, but that is not this case; no privity of contract ever existed between the respondent and Hackney and the respondent cannot be relegated to his action (if any) against a person with whom he had no contractual relationship, were he driven to any such action that would be the defence, and it would assuredly succeed. It is true that Hackney would not perhaps be able to resist an action at the suit of the respondent upon the covenants in the conveyance, but such an action would be futile, as, even without title, no breach of covenant could be held to

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have occurred: *Singh* v. *Mitchell*, *supra*. *Thackeray* v. *Wood* (1864), 5 B. & S. 325.

In my opinion, the appeal should be dismissed, but the judgment should be reduced to the sum of $623.50, the amount received by the appellants from the respondent, together with the legal rate of interest thereon from the date of payment to them to judgment. *Appeal allowed.*

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DERBY v. DERBY.

Manitoba King's Bench, Mathers, C.J.K.B. April 7, 1916.

DIVORCE AND SEPARATION (§ V C—58)—*Alimony — Gross sum in lieu of periodical payments—Public policy.*]—Action for permanent alimony.

Bowles, for plaintiff; *Andrews*, K.C., for defendant.

MATHERS, C.J.K.B.:—The defendant is a railway passenger conductor and earns on an average about $170 per month. In addition he has property to the value of about $6,500. The house in which the plaintiff and her daughters reside, and in which the defendant, contrary to the plaintiff's desire, occupies a room, belongs to the plaintiff, subject to a mortgage for $5,000 to the defendant. The plaintiff owns nothing besides the house mentioned, except $1,500 remaining unpaid under an agreement of sale and a small interest with her two sisters in a small Elmwood house. I am convinced that the presence of the defendant in the plaintiff's house as a lodger is not conducive to harmony, or to the happiness of either party, and that he ought to leave and take up lodgings somewhere else.

The plaintiff has no means of paying off the mortgage held by the defendant. She is willing to accept a discharge of this mortgage in lieu of monthly alimony. Under the circumstances of this case that would be a very desirable settlement of the unfortunate difference between these parties. The defendant refuses to settle on these terms, and I have no power to compel him to do so. Neither the Ecclesiastical Court nor its successor, the Court of Divorce and Matrimonial Causes, had power to award the payment once for all of a sum in gross for alimony, notwithstanding 20 and 21 Vict. ch. 85, sec. 32: *Medley* v. *Medley*, 7 P.D. 122. That statute only authorized the security of a gross sum as a provision for future maintenance.

In *Hagarty* v. *Hagarty*, 11 Gr. 562, the Court refused to

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sanction an arrangement made between the parties for the payment by the husband to the wife of a gross sum in lieu of periodical payments as contrary to public policy.

The plaintiff's relief must, therefore, take the usual form.

Having regard to the estate of both and the earning power of the defendant, I adjudge that he pay to the plaintiff the monthly sum of $60. The time and manner of payment I leave to agreement of the parties, and if they fail to agree the matter may be again spoken to. The plaintiff is entitled to the costs of the action as between solicitor and client.

McCAIN PRODUCE CO. v. LUND.

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New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. June 23, 1916.

BILLS AND NOTES (§ I C—15)—*Consideration of accommodation note—Renewal—Liability.*]—Action tried before Carleton, J., of the Carleton County Court, without a jury, at the 1916 May session. The action was on one of several renewals of a promissory note for $100, made by the defendant in favour of the plaintiff at the request of one Rideout. At the making of the note no consideration passed between the plaintiff and the defendant nor between the defendant and Rideout, it having been made at Rideout's request for his accommodation without the knowledge of the plaintiff company. The plaintiff gave Rideout credit for the face value of the note and made him some cash advances on account thereof. The note sued on was one of several renewals of the original note. On one occasion the defendant effected the renewal and paid the interest to the plaintiff company personally. Judgment was given for the plaintiff in the Court below for the amount of the note and interest ($104.40).

From this judgment the defendant appealed on the grounds: (*a*) That the Judge of the County Court was wrong in holding that there was a consideration passing from the plaintiff to the defendant. (*b*) In applying the doctrine of estoppel so as to enable the plaintiff company to recover. (*c*) In holding that Rideout had authority from the defendant to dispose of the note.

M. L. Hayward, for defendant, appellant.

W. P. Jones, K.C., for respondent.

The judgment of the Court was delivered by

MCLEOD, C.J. (oral):—The defendant claims that he is not liable because there is no consideration moving from the plaintiff,

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the payee of the note, to the defendant, the maker. He cannot succeed on this defence. The note was given to Rideout to be used by him in the way it was used. It was given to cover an account he, Rideout, owed the plaintiff company, and to induce it to make further advances in goods or cash. The consideration the original note was given for was obtained, and the defendant renewed it on several occasions, on one occasion personally paying the interest. We think the defendant is liable and the appeal must be dismissed. *Appeal dismissed.*

FOSTER v. MACLEAN.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. April 28, 1916.

LIBEL AND SLANDER (§ III C—105)—*Conspiracy—Defences—Mitigation—Fair comment—Particulars.*]—Appeal by plaintiff from the judgment of Mulock, C.J.Ex., affirming an order of the Master in Chambers in an action for libel.

W. E. Raney, K.C., for appellant.

K. F. Mackenzie, for defendants, respondents.

RIDDELL, J.:—On the 15th January, 1916, the plaintiff, a Controller of the City of Toronto, issued a writ against W. F. and H. J. Maclean, A. E. S. Smythe, and the World Newspaper Company of Toronto Limited, endorsed "for damages for libel." On the 4th February, a statement of claim was delivered; statements of defence followed, which may for all purposes of this motion be all considered as in the same terms as that of the defendant Smythe.

The plaintiff applied to the Master in Chambers to strike out the defence and particularly the 4th paragraph and clauses (a) and (e) of the 6th paragraph; the Master refused; and an appeal was taken to the Chief Justice of the Exchequer in Chambers, who dismissed the appeal, directing, however, that particulars should be furnished of the allegation in the 4th paragraph of Smythe's statement of defence "that the plaintiff was and is not a desirable person for Controller." These particulars have been delivered; and, previously, certain particulars were delivered pursuant to demand.

Leave to appeal was given by Mr. Justice Clute—we have not the advantage of my learned brother's reasons for granting leave. The order must, of course, have been made under Rule 507 (2) (*b*); and it would have been of assistance to have had the

reasons why the learned Judge thought that "the appeal would involve matters of such importance that . . . leave to appeal should be given."

The present motion is really to strike out para. 4 and para. 6 (a) and (e) of the defence.

As to para. 4, it is admitted and it is plain that it would not be a proper plea in an action simply of libel—and the defendants contend that this is not an action simply of libel or an action of libel at all.

The plaintiff's counsel agreeing to abandon any claim for conspiracy, the inquiry into what is the cause of action alleged in the statement of claim is academic, except as affecting the costs—it seems necessary to consider the claim in that view.

The tort known as conspiracy is an agreement of two or more persons to do something toward the plaintiff either wrong in itself or by wrong means—before such an agreement becomes actionable damage must be done by some act in pursuance of the agreement. "It is the damage wrongfully done, and not the conspiracy, that is the gist of the action:" *per* Bowen, L.J., in *Mogul Steamship Co.* v. *McGregor Gow & Co.* (1889), 23 Q.B.D. 598, at p. 616, citing *Skinner* v. *Gunton* (1669), 1 Wms. Saund. 229, *Hutchins* v. *Hutchins* (1845), 7 Hill (N.Y.) 104, and Bigelow's Leading Cases on Torts, p. 207; see also Selwyn's N.P. 1006. It was on this ground that Lord O'Brien, Lord Chief Justice of Ireland, considered that a person who joined a conspiracy after all the damage had been done was not liable—"the conspiracy was, as it were, a machine set going for wrong-doing, and every person who availed himself of its machinery became liable for the damage that subsequently accrued:" *O'Keeffe* v. *Walsh*, [1903] 2 I.R. 681, at pp. 702, 703.

Our Rule 141 requires the pleading to contain a statement of the material facts upon which the party pleading relies: accordingly in an action for conspiracy it would not be sufficient to allege the wrongful agreement; the acts causing damage must also be alleged.

I confess that, had I been called upon to draft a statement of claim in conspiracy, I should have followed substantially the form here employed—allege the wrongful agreement, the acts done in pursuance of the agreement. I should probably state explicitly, as this claim does implicitly, that damage resulted to the plaintiff

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from these acts; but I do not see any other change I would have made. The form of the statement of claim is apparently taken from—at all events it is the same as—that of a statement of claim for conspiracy in Bullen and Leake's Precedents of Pleadings, 7th ed. (1915), p. 278.

Accordingly I consider that this claim is for conspiracy—and in that view it is not necessary to consider whether it is not also a claim for libel.

Paragraph 4 in effect states that the agreement, if there was any agreement, was for a rightful purpose, i.e., to prevent the election of an undesirable person to office; but that is no defence to an action of conspiracy. It is well known what is paved with good intentions. What is of importance is, whether the acts to be done were according to law; and this paragraph does not, as it seems to me, raise any such issue. It might indeed be used in minimising damages, but, if it be intended to be a plea to damages, it should so state specifically: *Dryden* v. *Smith* (1897), 17 P.R. 505; *Fulford* v. *Wallace* (1901), 1 O.L.R. 278, distinguishing *Beaton* v. *Intelligencer Printing and Publishing Co.* (1894), 22 A.R. 97.

If it be intended to make the allegations in this paragraph part of the plea of "fair comment" (*Merivale* v. *Carson* (1887), 20 Q.B.D. 275 (C.A.), and like cases), they should be pleaded properly and specifically in that way.

I think this paragraph cannot stand, and would add that I cannot see how either party can be helped or hurt by either retention or removal. I presume, however, that the time of four appellate Judges must be taken up with trivialities sometimes—"Sufferance is the badge of all our tribe."

As to the second claim on this appeal—if the action is in conspiracy and publications are laid as the overt acts causing damage, it necessarily follows that these publications are charged as being either (1) unlawful in themselves or (2) directed to an end which is unlawful.

The defendant is entitled to plead so as to answer either charge concerning these publications. An answer to the first charge is and must be a contention that the publications are not libellous—accordingly any defence to an action of libel based on these publications will be properly pleadable in an action of conspiracy. Therefore, if the paragraphs complained of could be pleaded in

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a libel action proper, they are not wrong in a conspiracy action. (I do not say that the converse is true).

As I read 6 (e) it is the ordinary defence of "fair comment"—this has recently been so fully considered in *Augustine Automatic Rotary Engine Co.* v. *Saturday Night Limited*, 30 D.L.R. 613, that it is unnecessary to go into the matter here at any length. The plea is in the precise form of that in *Peter Walker & Son Limited* v. *Hodgson*, [1909] 1 K.B. 239, see pp. 243-247: and, as is said by Vaughan Williams, L.J., on the last cited page: "This form of pleading, which I always think very indefinite and embarrassing has . . . been adopted and sanctioned ever since the decision of Mathew and Grantham, JJ., in *Penrhyn* v. "*Licensed Victuallers' Mirror*" (1890), 7 Times L.R. 1, and must now be accepted as proper pleading."

Paragraph 6 (a) is, of course, not a defence *per se*, but it contains matter of inducement setting out circumstances which, it is alleged, render comment permissible. In a defence of fair comment, to succeed, the defendant must shew that his criticism deals with such things as invite public attention: Odgers, 4th ed., pp. 186, 187, 194 *sqq*. I can see no objection to this clause.

The plaintiff is entitled to particulars under the plea of fair comment, and, if the particulars be not furnished, he may move: if the particulars are insufficient, there is an appropriate remedy.

This motion is not based upon refusal of particulars; the notice of motion before the Master in Chambers is dated the 28th February; it was served on the 1st March, and the particulars were demanded on the 8th March—what the demand was we do not know, it was not put in, and I shall not look for it.

Much argument was made upon the statements in particulars 2 "b" 2 and 2 "d" 2, that there are "other things in the knowledge of the plaintiff of which the defendant is unable to furnish further particulars at present" or the like; and, in the particulars furnished by order of the Chief Justice of the Exchequer, "The defendant reserves the right to deliver further and other particulars." What harm such assertions do and what good could be done by striking them out I do not know—the assertions do not increase the defendant's rights nor their deletion diminish them. Whether further particulars can be extracted from the plaintiff in examination for discovery we need not determine;

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and it is time enough to object to any such further particulars when they are tendered.

The ends of justice will be met and the plaintiff get his full rights if we make the order consented to on the argument, that any further particulars are to be furnished within six weeks of the issue of this judgment.

In view of the position taken by counsel for the plaintiff before us, I would order the statement of claim to be amended so as to strike out all reference to conspiracy, and make the claim a simple claim in libel.

Objection is made by the defendants that an action of libel cannot be brought now—but that is no answer; this action, as is shewn by the endorsement on the writ, was intended to be an action of libel. While an absolutely different and distinct cause of action from that mentioned in the endorsement on the writ may not be set up in the statement of claim—*United Telephone Co. Limited* v. *Tasker* (1888), 59 L.T.R. 852, and *Cave* v. *Crew* (1893), 68 L.T.R. 254, etc.—there is no reason why the very cause of action mentioned in the endorsement may not be set up at any time. This is a much stronger case than *Bugbee* v. *Clergue* (1900), 27 A.R. 96; *S.C., sub nom. Clergue* v. *Humphrey* (1900), 31 S.C.R. 66.

I confess to great sympathy with a solicitor called upon to draw a statement of defence in a libel action—in the general *debâcle* of pleadings, this remains an action in which it is not safe to treat pleadings as a mere exercise in English composition for the junior articled clerk and the typist; there is still some art in libel pleadings.

I can understand, too, the statement of Mr. Mackenzie that he was "embarrassed" in determining precisely what the claim was—the action for conspiracy is rare in our Courts (this is the first I have seen).

I would allow the defendants to amend their defence as they may be advised, knowing now, as they will, that the action is for libel and libel only. And I would give no costs of this appeal.

LENNOX, J., concurred.

MASTEN, J., agreed in the result.

MEREDITH, C.J.C.P.:—This is another of those appeals, of quite too frequent occurrence, in which matters of practice only are involved: matters which as a rule should be dealt with in

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the High Court Division in such a manner that no substantial prejudice to any party could arise; and usually are so dealt with.

The action is one for libel, and so, having regard to the law and practice particularly applicable to it, as well as by reason of its very nature, one over which the solicitors and parties concerned are naturally apt to be more than ordinarily anxious: but in most of the cases coming here I cannot but think that the party complaining is generally really more frightened than hurt.

Take this case for an instance: the defendants were ordered to give particulars in regard to some parts of their statements of defence; and have done so, took unto themselves, in words, a right to add to such particulars; but it ought to be needless to say that no effect follows such an extension of the time, which was fixed by the order of the Court, within which all their particulars should be given; and that the particulars given could not, after the lapse of the time limited by the order, be added to except by leave of the Court.

Strictly dealt with, the plaintiff was entitled to have that reservation as well as the reference to the records of the Board of Health stricken out; but, if, in truth, the defendants need further time for giving particulars, as the trial is not to be had until the autumn, there is no good reason why a month's or six weeks' further time should not be given to them; that cannot harm any one, and will prevent any feeling that any one has been unduly hurried in the conduct of the defence or prosecution of the case.

But I desire to add, so that the defendants may be under no misapprehension as to the purpose of giving further time, that it is not given to enable them in any way to seek new facts upon which to base their defence of fair comment, for fair comment can be fairly supported only upon the facts upon which the commentator wrote: time may be needed to verify them or learn whether they really did exist, for if not they cannot justify the comment or tend to do so; and I see no reason why the plaintiff should not be examined for that purpose; but I think the particulars should be first given; that is the best way of preventing, to some extent, unfair means of supporting a defence of fair comment. In this case the plaintiff was reasonably safe, because the particulars given could not be added to without the leave of the Court; and, before leave is given, care should be taken that

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nothing is unfairly added; that the defendants give sufficient reasons for not having already given them.

In some of cases coming before us, the parties seem to be oblivious to the fact that their cases must come before a trial Judge whose duty it is to take care that no inadmissible evidence is admitted, that the true issues only shall be tried, and that justice shall be done in all things; and so irregularities, or inadmissible questions on examination for discovery, ought generally to be things of no great moment; certainly not enough to justify running off to this Court about them always: though there may be cases in which it may be necessary or advisable to come here before trial; for an instance only, upon a question involving the whole conduct of the action or involving it very substantially; so that time and money would be saved by having the point determined before trial, instead of on an appeal after trial, when that appeal might lead to a new trial.

It must not be forgotten that a defence of fair comment is not a defence of justification; although, to support it, all the defamatory facts alleged in the comment must be justified, and must be sufficient to make, in the circumstances of the case, the comment "fair."

I cannot take very seriously Mr. Mackenzie's contention that this is not an action of libel, but is solely one of conspiracy; for, in the first place, what difference does it make so far as this appeal goes? Call it what you please, the 4th paragraph of the statement of defence discloses no defence to it, and at the least is useless, just as is perhaps the use of the word "conspiracy" in the statement of claim. It is much to be regretted that pleaders do not adhere to the simple and well understood forms of stating claims and defences. It ought to have been enough for the plaintiff to have alleged that the defendants jointly, and each separately, published the libel alleged; and for the defendants to have said "not guilty" and "fair comment" in the usual way. Nothing that could be given in evidence, as the pleadings stand, could have been excluded under the usual form of pleading; and I had really thought that the fashion of a few years ago, of, when in doubt, or when unable to imagine any other offence, charging or alleging conspiracy, had departed.

But why "conspiracy" only; why not libel? If the libel be not proved, what becomes of the conspiracy? It could not be

contended that any kind of a civil action remained. Take away the word "conspiracy," and the action remains as it is one of libel. If joint liability is proved, then a conspiracy, that is an agreement, between the defendants, is proved: and, if the defendants were merely alleged to have published the libel, evidence of all the circumstances under which it was published, whether inadvertently, or in pursuance of a scheme to defame the plaintiff so as to defeat his efforts to obtain a seat in a municipal council, might all be given in evidence.

And, if this is not libel, one has only to insert the word "conspiracy" in a libel action in order to get rid of all the effects of the Libel and Slander Act, including security for costs, as well as all else the special provisions of the law regarding actions for defamation of this character, including compulsory trial by jury, unless the parties otherwise agree.

The 4th paragraph of the defence and the 5th, which is dependent on it, should be struck out; as also the clauses in the particulars objected to; the parties should have leave to amend their pleadings as advised, the plaintiff within two weeks, the defendants within two weeks thereafter; and the defendants should have six weeks within which to amend their particulars as advised. No order as to costs of this needless appeal.

Judgment varied.

ATT'Y-GEN'L FOR ONTARIO v. CADWELL SAND AND GRAVEL CO.

Ontario Supreme Court, Middleton, J. April 15, 1916.

PARTIES (§ III—122)—*Intervention of Att'y-Gen'l for Dominion of Canada as defendant—Provincial action against Dominion contractor removing sand from navigable river—Rights of Province and Dominion.*]—Motion by the defendant company for an order adding the Attorney-General for the Dominion of Canada as a party defendant. Granted.

A. D. Langmuir, for defendant company.

Harcourt Ferguson, for plaintiff.

MIDDLETON, J.:—The plaintiff, as Attorney-General for the Province, sues to recover a very large sum of money, the value of sand and gravel removed by the defendant company from the bed of the River St. Clair and the bed of Lake Erie, the title to which he alleges is in the Province.

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The defendant company, it appears, is a contractor employed by the Dominion Government, and the dredging of the river and lake, it is said, was for the purpose of constructing a steamboat channel for the use of vessels navigating the Great Lakes.

The Minister of Justice has communicated with the solicitors for the defendant company, and asked that the Attorney-General for the Dominion of Canada be added as a party defendant, so that the rights of the Dominion and Province may be adjudicated upon in this action. The defendant, naturally regarding the wishes of the Government, thereupon makes this application, which is opposed by the plaintiff.

The defendant company could undoubtedly bring the Dominion before the Court by claiming indemnity or relief over; and, inasmuch as constitutional precedents are involved in the litigation, under the requirements of the statute notice would have to be given to the Minister of Justice so that he might be heard upon the trial in support of the rights of the Dominion. The Minister of Justice, however, takes the position that the Dominion ought to be formally a party to the litigation, so that his status in it for all purposes should be unquestionable.

Save in so far as it is necessary to secure this indubitable status, the question is one of form rather than of substance, for the Dominion must be before the Court; and, even with respect to the comparatively unimportant matter of costs, the Court has full jurisdiction in proper cases to direct the plaintiff to pay the costs, not only of the defendant but of the third parties.

I think the case is one which comes within the spirit and the letter of Rule 134, and that the representative of the Dominion is one "whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action;" and analogy is afforded by the Rules which allow a landlord, without leave, to appear to defend his tenant's possession (Rule 53).

The sand having been removed from the bed of the river, which the Dominion claims to be within its right, it is, I think, only fit and seemly that it should be a party to the action, to defend that which has been done through its contractor. The order is therefore made. Costs in the cause, subject to any disposition that may be made by the trial Judge. *Motion granted.*

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Ontario Supreme Court, Middleton, J. April 4, 1916.

LANDLORD AND TENANT (§ III D 3—110)—*Proceeds of distress—Priorities—Assignee for creditors—Mortgagee.*]—Motion by the defendant, the landlord, for an order for payment out of Court of the money paid in under the judgment of a Divisional Court of the Appellate Division. See *Alderson* v. *Watson* (1916), 28 D.L.R. 588, 35 O.L.R. 564.

G. T. Walsh, for the applicant.

Hughes Cleaver, for the plaintiff, the assignee for the benefit of creditors of the tenant.

J. S. Schelter, for the chattel mortgagee.

MIDDLETON, J.:—This case was before the Appellate Division, and its decision is reported in 28 D.L.R. 588. By the judgment, as formally issued, the decision of Mr. Justice Britton was affirmed, with the variation that the proceeds of the goods sold were directed to be paid into Court subject to further order. The money was paid in, and this motion is made for payment out, notice being given to the chattel mortgagee, who was not a party to the original litigation.

The lease gave the landlord the right, upon the making of an assignment, to distrain for two years' rent. The assignment was made, the distress followed, the assignee contested the validity of the distress; and it was held, as against the assignee, that the landlord can distrain only for one year's rent.

The property was subject to a chattel mortgage, which exceeded the amount realised from the sale. As against the chattel mortgagee, the landlord had a right to distrain for the whole amount claimed. It is conceded that the landlord is entitled to the first year's rent, and to the costs of the distress, and that a sum of $25 should be paid to Mr. McClenahan, who acted under an agreement in realising upon the goods. The right of the landlord to the second year's rent is now disputed. This, if allowed, will practically exhaust the fund.

In my view, the landlord is entitled out of the fund to the whole amount that he claims. The assignee was entitled to nothing, as the amount due upon the chattel mortgage exceeded the amount realised upon the goods. As against the chattel mortgagee, who alone was concerned, the landlord could assert his full claim. The limitation imposed by the statute, the Land-

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lord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38 (1), was a limitation which could only be invoked by the assignee for the purpose of protecting his own interest in the chattels distrained upon. The limitation does not in any way enure to the benefit of the chattel mortgagee, nor can the assignee, by invoking this provision, take from the chattel mortgagee that which would be his, were it not that, as against him, the right of the landlord is entitled to prevail. This, I think, has been determined conclusively by the cases relied upon by Mr. Walsh: *Railton* v. *Wood* (1890), 15 App. Cas. 363, and *Brocklehurst* v. *Lawe* (1857), 7 E. & B. 176.

The proper order will therefore be, to direct payment out of Court of the amount of the landlord's claim, including Mr. McClenahan's $25 and the costs of this motion. Any balance then remaining may well be divided between the chattel mortgagee and assignee, and be applied upon account of their costs of the motion.

McLEAN v. WILSON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. April 19, 1916.

ADVERSE POSSESSION (§ I K—55)—*Fisherman's occupation—Right of way.*]—Appeal from the judgment of MacWatt, Co.J. Affirmed.

This action was brought in the County Court of the County of Lambton, and was tried by the Senior Judge of that Court, without a jury.

The plaintiff alleged that he was the owner of lot 43 in the 9th concession of the township of Sarnia, and that the defendant had trespassed thereon and wrongfully erected thereon a house or shack for fishing purposes, a stable for his horses, and a shed for his boats, his occupation being that of a fisherman.

The defendant denied generally the allegations of the plaintiff, and said that from 1895 to 1915 he was a duly licensed fisherman. He admitted that he built a shack near the lake-shore; he said, however, that it was not upon, but in front of, the plaintiff's land. The defendant further alleged that he had had over twenty years' continuous, peaceable, and undisturbed possession of the land on which the shack was erected, and a right of way thereto from the water's edge, and for over twenty years had had a right of way from the side road ("Modeland's") to the shack. The

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defendant also said that he had taken down and removed the boat-shed and the stable referred to by the plaintiff. And, without admitting any liability, the defendant paid into Court $15 in full of any damage caused to the plaintiff by reason of the erection of any building or of any acts of trespass.

The defendant appealed from the judgment of the learned County Court Judge.

D. L. McCarthy, K.C., for appellant.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of the County Court of the County of Lambton, dated the 7th February, 1916, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him, sitting without a jury on the 19th day of the previous month of January.

The respondent brings the action to recover possession of a small piece of land bordering on Lake Huron, which land, as he alleges, forms part of lot No. 43 in the 9th concession of the township of Sarnia, of which lot he is admittedly the owner.

The appellant, by his statement of defence, besides putting in issue the respondent's title to the *locus in quo*, sets up possession of it in himself for a period sufficient under the Limitations Act to extinguish the respondent's title.

The respondent derives title to lot No. 43 under a conveyance to him from Cynthia Fuller, dated the 17th June, 1881. Cynthia Fuller derived her title from Thomas C. Street, the devisee in trust of Samuel Street, to whom this lot, with other lands, was granted by letters patent dated the 18th August, 1841.

In the letters patent the lots granted are designated by numbers and are also described by metes and bounds; and, according to the metes and bounds, lot 43 is bounded on the north by the water's edge of Lake Huron. In the subsequent conveyances, lot No. 43 is described by its number only.

The contention of the appellant is, that lot No. 43 does not extend from the north to the water's edge of Lake Huron, but is bounded on the north by a road allowance laid out in the original survey of the township on the bank of the lake; and that, if the land to the north of the road allowance passed by the letters patent to Samuel Street, it did not pass as being part of lot No.

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43; and that, inasmuch as in the subsequent conveyances what was conveyed was lot No. 43 only, the respondent has not proved title to the land which lies between the road allowance and the lake.

The first question to be determined is, whether or not this piece of land forms part of lot No. 43. If it does, the respondent's title is made out.

The original survey of the township of Sarnia was made in 1829, by a Provincial land surveyor named Roswell Mount, under instructions from the Surveyor-General, dated the 8th April, 1829.

The diagram which accompanied the instructions cannot be found; and, therefore, the result of the survey must be gathered from the instructions, the report of the surveyor, which is dated the 30th January, 1830, the plan which he returned to the Surveyor-General, and the field-notes of the survey.

Mr. McCarthy argued that these shew that the strip of land between the road allowance and the lake was not included in the 9th concession, but I do not think that that is the proper conclusion.

By his instructions the surveyor was directed, "with respect to the lots bordering on the lake-shore and on the river St. Clair," to observe "that it is required that they shall be posted on the bank with an allowance for road in front on the said bank;" and this he is directed to do "by subdividing the distance between the proof lines (excepting the intermediate side road) into eighteen equal parts, regulating their depths according to the front so as to give to each lot one hundred acres."

In his report Mr. Mount says: "With respect to the lots bordering on the lake-shore and on the river St. Clair, I have posted them on the bank with an allowance of one chain for a road in front along the said bank. This I have done by subdividing the distance between the proof lines (except the intermediate side road) into eighteen equal parts, and those between the concessions into twelve equal parts, regulating their depth according to the front so as to give each lot one hundred acres."

The field-notes shew that the road allowance followed the sinuosities of the shore of the lake, and the plan indicates that the lots in the 9th concession ran to the lake, with the road allowance marked by a red line crossing it.

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It is plain, therefore, I think, that the instructions indicate that the lots in the 9th concession were to extend to the lake. They were to be "lots bordering on the lake shore," and they are so called in the report of the surveyor. Then, as I have said, the plan shews the lots as bounded by the lake. The object of planting the posts on the bank was not to mark the northerly boundary of the lots, but to indicate the width of them.

Besides all this, if Mr. McCarthy's argument were to prevail, the strip of land between the road allowance and the water's edge of the lake would not have formed any part of the township of Sarnia, but would have been unsurveyed land.

It is manifest also that the Surveyor-General read the report and the plan as I read them.

For these reasons, I am of opinion that the respondent made out his paper title to the *locus in quo*.

I am also of opinion that the appellant failed to shew a possession of any part of the land of which possession is claimed, except that part of it which was occupied by the original shack or hut which he built, sufficient to extinguish the title of the respondent. Such use as he made of the strip of land between the road allowance and the water's edge of the lake was as a mere trespasser; and, being but a trespasser, it was necessary for him to shew pedal possession. Apart from the occupation of the site of the shack or hut, he went upon the land only for a few days in the spring or autumn, when he was engaged in fishing, and at all other times the true owner was, in the eye of the law, in possession. It is well settled that possession, in order to extinguish the title of the owner, must be actual, continuous, and visible. The appellant's possession was not of that character, and indeed was not a possession at all, but his acts were but a series of successive trespasses with long periods of time between them.

The case at bar is distinguishable from *Piper* v. *Stevenson*, 12 D.L.R. 820. In that case, the land in question had been fenced, and the plaintiff had done everything to it that an owner intending to possess and cultivate would have done. In the case at bar, the land was not enclosed with a fence, and the acts of the appellant were not such as an owner would have done, but they were done in the exercise of the right which, the appellant

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assumed, he as a fisherman possessed, to utilise the beach for the purposes incidental to the carrying on of his fishing operations.

Neither *Nattress* v. *Goodchild*, 24 O.W.R. 184, 859, 6 O.W.N. 156, 482, nor *Cowley* v. *Simpson*, 19 D.L.R. 463, helps the appellant. In the former case, the possession of the defendant was very different from that of the appellant in this case, and there was the additional fact that the defendant had excluded trespassers from the land; and in *Cowley* v. *Simpson* all that the defendant succeeded as to was the land which he had enclosed with a fence.

It was argued by Mr. McCarthy that, if the appellant had not succeeded in making out his defence under the Limitations Act, by possession for ten years, except as to the land on which the original shack stood, he had at all events established a right by prescription to an easement in the nature of a right to pass and repass to and from the shack to the lake and over the strip of land lying between the road allowance and the water's edge in order to reach the side road.

In my opinion, the learned Judge of the County Court rightly decided against this contention. The testimony of the appellant shews that there was no one way by which he came and went, but that he did so at one time by one route and at other times by other routes. The principle which is applied in determining whether a highway has been established by dedication is, I think, applicable; and the cases of *Regina* v. *Plunkett* (1862), 21 U.C.R. 536, and *Regina* v. *Ouellette* (1865), 15 U.C.C.P. 260, established that a similar user to that of the appellant is not sufficient to shew dedication.

For this reason, as well as those upon which the conclusion of the learned Judge of the County Court was based, I am of opinion that the prescriptive right claimed by the appellant was not established.

The judgment as entered does not define the part of the lot as to which the appellant succeeded. This may occasion disputes in the future; and, if the appellant desires it, there should be a reference to ascertain and fix its boundaries, unless the parties agree as to the proper description of it, and in that case the judgment may be amended by inserting in it the description.

Subject to this variation, I would affirm the judgment and dismiss the appeal with costs. *Appeal dismissed.*

REX v. SINCLAIR.

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Ontario Supreme Court, Clute, J. April 8, 1916.

CRIMINAL LAW (§ II A—30)—*Jurisdiction of Police Magistrate—Theft—Place of offence—Misappropriation of fares by railway conductor—Penalty.*]—Application on behalf of the defendant to quash a conviction for theft made against him by a Police Magistrate. Dismissed.

D. Campbell, for defendant.

J. R. Cartwright, K.C., for the Crown.

CLUTE, J.:—This is an application to quash a conviction made by George T. Denison, Esquire, Police Magistrate for the City of Toronto.

The accused is charged with having, on the 17th February, 1916, at the city of Toronto, stolen $5 of the moneys of the Grand Trunk Railway Company, within the Province of Ontario. The accused resides in the city of Toronto.

The first objection is, that the magistrate had no jurisdiction, inasmuch as it does not appear that the offence was committed within the city of Toronto.

There is no doubt that the general policy of the common law was that a person accused of an offence should be tried in the county where the offence was committed. Section 577 of the Criminal Code, however, provides that, unless otherwise specially provided in this Act, every court of criminal jurisdiction in any Province is competent to try any crime or offence within the jurisdiction of such court to try, wherever committed within the Province, if the accused is found or apprehended or is in custody within the jurisdiction of such court, etc. No doubt, the accused has the right to apply to change the venue. So far as the record here shews, the trial was proceeded with without objection; and, in my opinion, the Police Magistrate had jurisdiction, under sec. 577 of the Code, to try the case.

The second objection taken is, that what took place did not amount to theft. The facts are, as shewn in the evidence, that the accused was conductor of a train running from Stratford to Toronto, upon which three men, Saunders, Webster, and Bedbrook, were passengers. When the conductor came to Saunders for fare, Saunders handed him a $5 bill, upon which the conductor gave hat-checks to Webster and Bedbrook, and the three came to Toronto on that payment. This amount

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was not returned to the auditor of the Grand Trunk Railway Company; but, instead thereof, the return shewed that the only money received for cash fare was 15 cents on this trip, and the hat-checks were handed in to represent this amount. The conductor thus recognised this money as belonging to the company, and paid over a part of it with his returns. This is striking evidence that he received the $5 as a fare, while appropriating all but the 15 cents.

The defence relied mainly on the case of *Rex* v. *Thompson* (1911), 21 Can. Crim. Cas. 80, where the majority of the Court held that a payment made by a passenger to a railway conductor, for his own use, of a much lower sum than the regular fare, by way of bribe for not collecting the fare which it was the conductor's duty to collect for the railway company, was not money received "on terms requiring him to account" for or pay the same to the company, and would not support a charge of theft in respect of his wilful failure to turn in the amount with his returns of money and tickets to the company. Simmons, J., dissented, following the case of *Rex* v. *McLellan* (1905), 10 Can. Crim. Cas. 1, where it was held that under similar circumstances the offence was properly laid as constituting the crime of theft, and the conviction upheld (Harvey, J., dissenting). I prefer the decision in *Rex* v. *McLellan* to that in *Rex* v. *Thompson*, and I think the present case stronger against the prisoner in this, that he himself recognised the money as belonging to the company by paying in a part of it. I hold that there was evidence upon which the conviction could be properly made.

The third objection is, that there is no authority for imposing the penalty which was imposed, namely, a fine of $100. Section 773, clauses (*a*) and (*b*), of the Criminal Code, refers to theft where the amount does not exceed the sum of $10, and provides that the magistrate may hear and determine the charge in a summary way. The punishment prescribed by sec. 780 of the Code in respect of convictions under clauses (*a*) and (*b*) is imprisonment for any term not exceeding six months. By sec. 777, as amended and added to by 8 & 9 Edw. VII. ch. 9, it is declared (sub-sec. 5) that the jurisdiction of a magistrate in a city having a population of not less than 25,000 is absolute, and does not depend upon the consent of the accused, in the case of a person charged with theft. Section 1035 of the Code provides that any person con-

victed by any magistrate, under Part XVI., of an indictable offence punishable with imprisonment for five years or less, may be fined in addition to or in lieu of any punishment otherwise authorised; and sec. 1044 provides that a magistrate, under Part XVI., by whom judgment is pronounced upon the conviction of any person for an indictable offence, in addition to such sentence as may be authorised by law, may condemn the person to payment of the whole or any part of the costs. The motion to quash will be dismissed with costs. *Application dismissed.*

[An appeal from above order was quashed by a Divisional Court of the Appellate Division, November 8, 1916.]

WILLOUGHBY v. CANADIAN ORDER OF FORESTERS.

Ontario Supreme Court, Britton, J. April 5, 1916.

INSURANCE (§ VI A—245)—*Endowment certificate—Proof of age of insured—Admission—Insurance Act.*]—Action by the widow to recover $1,000 and interest upon an endowment certificate issued by the defendants to the deceased, dated November 21, 1888.

J. A. Hutcheson, K.C., for plaintiff.

W. A. Hollinrake, for defendants.

BRITTON, J.:—The plaintiff is the widow of William R. Willoughby, who died in 1915, and she brings this action against the defendants to recover $1,000 and interest upon an endowment certificate issued by the defendants to William R. Willoughby as No. 7890, dated the 21st November, 1888. William R. Willoughby became a member of the defendants' Order—Court No. 66, at Gananoque. He continued a member in good standing in the Order until his death.

In Willoughby's application he stated that his age was 33, on his then last birthday—and that is the age stated in the endowment certificate now sued upon. There is no reason to think that the age was not truly stated.

The defence at the trial, and the only defence, was that, by the terms of the application, and by the terms of the endowment certificate, the defendants are not obliged to pay unless and until the age of the plaintiff's husband is admitted or proved.

There is no suspicion of fraud in this case—no wilful misrepresentation—nothing to shew that the age was not truly stated—nothing against the standing of the insured in the Order. The plaintiff is 57 years of age—but she is not in a position to prove the age of her husband.

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The defence seems to me a purely technical one, and one that ought not to prevail in this case, unless it is one which, under the contract and statute, would clearly bar the plaintiff's recovery.

The plaintiff relies upon the Insurance Act, R.S.O. 1914, ch. 183, sec. 166, sub-secs. 7, 9, 10, and 11. Sub-section 11 makes the whole of the provisions of sec. 166 applicable not only to any future application for or contract of insurance, but also to any application theretofore taken, and to any contract of insurance theretofore made.

Sub-section 10 is as follows: "Upon failure of a corporation to comply with the provisions of sub-section 7, the corporation shall be deemed to have admitted the age mentioned in the application as the correct age."

But (by sub-sec. 9) sub-sec. 7 "shall not apply to a registered friendly society, provided that the notice mentioned therein is . . . printed in red ink in type not smaller than 10 point upon all certificates issued by the society, and upon all receipts or pass-books issued to the members."

The defendants did not comply with this requirement.

The defendants, from before 1914 until the death of Willoughby, received his monthly payments, and he handed in his pass-book and obtained from the defendants a receipt for each sum so paid and entered in the pass-book, and there was not, upon the return of the said pass-book, printed on the book or upon or attached to or accompanying the receipt, any such notice as the statute requires. The pass-book used in Willoughby's case is exhibit 4. It would appear that the defendants did not overlook, or by mere inadvertence omit to print upon the pass-book or receipts, the notice. They apparently concluded that it was not necessary in the case of past contracts, ignoring sub-sec. 11. The defendants did provide new pass-books upon which a notice, no doubt intended as a compliance with the Act, is printed—see exhibit 9—but Willoughby was not provided with one of the new issue, and no receipts with the notice were furnished to him.

My judgment is, that the defendants must be deemed to have admitted the age mentioned in the application as the correct age—pursuant to sub-sec. 10. The defendants had this application in their possession.

There will be judgment for the plaintiff for $1,000, with in-

terest at 5 per cent. per annum from the date of the issue of the writ, namely, the 19th day of November, 1915. The writ should be filed and attached to what is called the record in this case. The judgment will be with costs, payable by the defendants to the plaintiff. *Judgment for plaintiff.*

[The judgment of BRITTON, J., has since been affirmed by a Divisional Court of the Appellate Division.]

ARNOLD v. COOK.

Ontario Supreme Court, Kelly, J. April 5, 1916.

JUDGMENT (§ VII A—270)—*Nullity of improper dismissal of action—New trial—Prohibition.*]—Motion by the defendants for prohibition to the Tenth Division Court of the County of York. Refused.

G. T. Walsh, for defendants.

C. H. Porter, for plaintiff.

KELLY, J.:—The Division Court Judge, on learning of the circumstances under which the judgment was granted, very properly, as I think, treated it as a nullity and in effect set it aside. The action had been transferred from the Seventh Division Court of the County of York to the Tenth Division Court; and on the 14th May, 1915, the Clerk of the Tenth Division Court sent a notice, intended to be in compliance with sec. 79 (2) of the Division Courts Act, R.S.O. 1914, ch. 63, to the plaintiff, in which it was stated that the Court-day was the 27th May, 1915. That was sufficient notice, under that section, of the holding of the Court, had the action been put on the list for trial on that date, and not on the 20th, for which date it was actually put on the list, and on which it was called for hearing. That gave less than the six clear days' notice required by sec. 79 (2), after the Clerk had received the papers; and at the Court on the 20th, of the holding of which no notice was given to the plaintiff, the case was called, and, no one appearing, it was dismissed.

In Mr. Porter's affidavit now before me, and which is supported by the plaintiff's affidavit, he says that it was not until the 9th March of the present year that he or the plaintiff became aware of the real happening, and then he promptly took proceedings to obtain a proper trial, and to that end made appli-

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cation to the Division Court Judge. On the return of the motion, the Judge, the one who had presided at the Court on the 20th May, 1915, treated the entry of judgment on that date as a nullity.

The applicants now appeal to sec. 123 of the Division Courts Act, and contend that, the time there given for making application for a new trial having expired, the Judge had no jurisdiction to deal with the matter under that section; and that, there being no inherent jurisdiction in him to set aside the judgment—citing *Re Nilick* v. *Marks* (1900), 31 O.R. 677—the matter is at an end.

The Judge, however, proceeded quite differently, and treated what was in form an entry of judgment as a nullity, and so declared in his reasons.

Not overlooking the strictness with which the Courts have applied sec. 123, and recognising the absence of inherent jurisdiction as referred to in the case above cited, I am of opinion that the present case does not fall within that decision, or within sec. 123 of the Act, but that it comes rather within the meaning of the language used by Mr. Justice Meredith (now Chief Justice of the Common Pleas) in *Keating* v. *Graham* (1895), 26 O.R. 361, at p. 377, where, referring to the judgment then under consideration, he said: "It ought never to have been signed, and, had the officer's attention been called to the facts, there can be no doubt it never would have been signed." Similar in effect is this language used by Wills, J., in *Hammond* v. *Schofield*, [1891] 1 Q.B. 453, at p. 455: "If the judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as never having existed."

There cannot be the least doubt that in the present case, had the attention of the trial Judge been drawn to the form of the notice of hearing sent to the plaintiff—that the Court would be held on the 27th—and there being no notice of a hearing on the 20th, he would not on the 20th have given judgment by default.

The application fails; the circumstances warrant a refusal of costs to either party. *Motion dismissed.*

[The order of KELLY, J., has since been affirmed by a Divisional Court of the Appellate Division.]

Re CLARKE.

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Ontario Supreme Court, Middleton, J. April 4, 1916.

INFANTS (§ I C—10)—*Custody — Abandonment by parent precluding assertion of right—Adoption agreements—Rights of foster-parents—Compensation.*]—Motion by the father and mother of two infants for an order for their custody, they being in foster-homes. Dismissed.

A. L. Baird, K.C., for the father and mother.

H. J. Scott, K.C., for the foster-parents in each case.

MIDDLETON, J.:—Arthur Clarke, the father of the infants in question, is a young Englishman, who is now enlisted as a private soldier. Before enlisting, he worked in a factory at Port Elgin. His wife, also born in England, was, before her marriage, a factory-hand. They married on the 19th August, 1911, and these young children are the sole issue of the marriage; the elder about three years old, and the younger a year and three months.

In April, 1915, when the younger child was about four months old, the mother left her husband and children. This child was not then weaned, and the leaving of the children by the mother was, I think, nothing short of deliberate desertion. The father, left with these two children and no relatives to assist him, not knowing where his wife was, succeeded in making arrangements for the adoption of the children by the foster-parents who are respondents to this motion. In each case he seems to have fortunately secured a good home for the child, and the foster-parents have fulfilled their obligations to the children to the utmost. The children are well cared for, well fed, well clothed, and happy, and it is conceded that, so far as the children themselves are concerned, there is nothing either calling for or justifying any change in their environment.

At the time of the desertion, it is probably true that the mother was not in good health. She went to London, Ontario, stayed with a friend there for a while, then worked for this friend as a domestic to repay her; then she took employment as a nurse for a while, and again as a waitress in a restaurant; finally returning to Port Elgin, where her husband was, in August, 1915; then for the first time learning of the fate of her abandoned children. She has been permitted by the foster-parents to see the children; and ultimately, in December, she, through her solicitor,

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demanded custody of the children. In the meantime, her relations with her husband were none too pleasant. She seems to have been jealous and to have made accusations of misconduct against him; and the quarrelling, which had been frequent before the desertion, seems to have continued after her return. The wife on one occasion stabbed the husband in the course of a quarrel; and she consulted a magistrate with a view to compelling him to maintain her. The husband finally made up his mind to enlist, and it is expected that he will shortly leave for overseas.

When the wife first desired to obtain possession of the children, the husband appears to have thought that they ought to remain with the foster-parents. He has now changed his view, and sides with the wife, joining with her in the making of this application.

The father, of course, does not himself seek to have the custody of the children, but he desires now, he says, to leave them with his wife. He is assigning to her some portion of his pay, and if she is in custody of the children she will receive an additional allowance, it is said, of $10 per month for their maintenance. The parents are now living in two rooms, in a house occupied in all by five families, and this is the home to which it is proposed that these two little girls should be brought from their respective foster-homes.

The motion is really based on what is supposed to be the father's absolute right to the custody and control of his children. He executed, at the time of the adoption, two separate agreements, under seal, reciting that his wife had abandoned him and the children, leaving his home without just cause, and he relinquished his right as father to the possession of the children to the foster-parents, promising not to interfere with their possession; the foster-parents on their part covenanting for the due upbringing of the children without expense to the father.

It may be conceded that at common law such an agreement would not be binding upon the father; but this does not, I think, by any means conclude the matter.

Mr. Scott argued that our present statute respecting infants, R.S.O. 1914, ch. 153, sec. 3, is far wider than the statute 12 Car. II. ch. 24, and gives to the father the right by deed to dispose of the custody and education of his child during its minority, even

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in his lifetime; but I think I am precluded from adopting this view, persuasive as Mr. Scott's contentions are, by the fact that in *Re Hutchinson* (1912-13), 26 O.L.R. 601, 28 O.L.R. 114, Mr. Justice Hodgins and Mr. Justice Riddell have preferred another view, and I do not think it is open to me to disregard their opinion. They have traced the section in question to its origin, and it appears to them to be a mere recasting in modern language, and with some modification, of the statute of Charles, which related solely to the appointment of testamentary guardians; and the view they have taken is that the changes embodied in the section are not sufficient to confer upon the father the right to make a binding adoption agreement concerning his children.

But, although at law any deed made by the father was void, in equity a principle was established that the father might by his conduct preclude himself from asserting his natural and common law right. Instances are not wanting, even at an early period, where in Chancery the father was enjoined from asserting it, where it was detrimental to his children.

In *In re Agar-Ellis* (1883), 24 Ch.D. 317, at p. 333, Lord Justice Cotton says: "The father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have; as where a father has allowed, in consequence of money being left to a child, the child to live with a relative and be brought up in a way not suited to its former station in life or to the means of the father. There the Court says, 'You have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect;' and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting on what otherwise would be his right."

This is in entire accord with other statements, *e.g.*, that of Lord Justice James in *In re Agar-Ellis* (1878), 10 Ch.D. 49, 72: "He may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children." This principle was also affirmed in *In re Scanlan* (1888), 40 Ch.D. 200. It is not necessary, where

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the father has voluntarily parted with his children, to shew such misconduct on his part as is necessary when the application is to take the child from the parents' custody: *Regina* v. *Gyngall*, [1893] 2 Q.B. 232.

In the case in hand, the mother having abandoned her children, and the father having executed the adoption agreements in good faith, and the foster-parents having had the care of the children for a considerable period of time and having fully lived up to their part of the bargain, and not only incurred expense but having nurtured the children at a time when such care was most needed, at the request of the father, I think he is precluded from now capriciously and against the interest of the children revoking the adoption agreements he executed, and that he ought not to be permitted to resume the custody of the children merely for the purpose of handing them over to the mother. It is manifestly in the best interest of the infants that they should be left in the good homes where they now are, rather than that they should be handed over to the mother, whose prospects for the future are most uncertain and precarious.

So far as the mother is concerned, if she has any right independently of her husband, her abandonment of the children precludes her from now asserting that right.

If I had come to the opposite conclusion, and felt compelled to award the custody of the children to the parents, I should have made that order subject to the payment of a substantial sum for the expenses the foster-parents have been at.

As it is, the motion fails, and should be dismissed with costs.

Motion dismissed.

DUNN v. PHILLIPS.

Ontario Supreme Court, Kelly, J. March 28, 1916.

PLEADING (§ I N—110)—*Specially endorsed writ of summons—Statement of claim treated as amendment.*]—Appeal by the defendant from an order of a Local Judge dismissing a motion by the defendant to set aside a statement of claim delivered by the plaintiff. Affirmed.

A. E. Langman, for the defendant.

Grayson Smith, for the plaintiff.

KELLY, J.:—Rule 111 provides that where a writ is specially endorsed the endorsement may be treated as a state-

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ment of claim, and no other statement of claim shall be necessary. In the present instance, the form of writ used is that intended as a specially endorsed writ, and it gives warning to the defendant that, it being specially endorsed, he is liable to have judgment entered against him should he fail to enter an appearance and file and serve the affidavit referred to. The claim endorsed is for the recovery of possession of land. The plaintiff has held it forth as a specially endorsed writ, and for the present purpose it must be so considered. While, according to the Rule, a further statement of claim was not necessary, the plaintiff was entitled, under Rule 127, to amend the claim specially endorsed on the writ.

The statement of claim now objected to is not a mere reiteration of the claim endorsed on the writ — which was the case in *Dunn* v. *Dominion Bank* (1913), 5 O.W.N. 103—but sets forth facts and particulars—not mentioned in the endorsement on the writ—which are helpful to a proper submission and understanding of the plaintiff's claim, and as such would reasonably have been embodied in such an amendment as is permitted by Rule 127.

I see no reason why, simply because the new document is not expressed to be an amendment, it should not now be so treated. All that is wanting to put it strictly within the Rule is the addition of the word "Amended."

That it is *de facto* an amendment is apparent.

The statement of claim delivered should be treated as an amendment under Rule 127; and, to conform strictly to the Rule, it should be made to appear on its face that it is an amendment; subject to this, the appeal will be dismissed, but without costs.

Appeal dismissed.

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LE MAISTRE & BOYES v. CONVEY & SALLOWS.

Saskatchewan Supreme Court, McKay, J. September 11, 1916.

LANDLORD AND TENANT (§ II D 2—32)—*Termination of lease —Untenantable condition of premises—Lessee's covenant to repair —Erection of new buildings—Measure of damages.*]—Action for rent on a covenant in a lease.

Donald Keith, for plaintiffs.

W. W. Livingstone, for defendants.

MCKAY, J.:—The plaintiffs bring this action against the defendants on a covenant in a lease dated May 13, 1913, for

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certain land and premises in North Battleford, whereby the plaintiffs leased said premises to the defendants for one year from June 3, 1913, and defendants covenanted to pay plaintiffs $2,700 rent therefor, payable in instalments of $225 on the 3rd day of each month, beginning with June 3, 1913.

The plaintiffs admit payment of $900 for the first 4 months, and claim $1,800 as the balance due.

The undisputed facts in this case are shortly as follows:—The defendant Convey bought the furniture business of Foley & Lienweber, carried on in the leased premises, in 1908, and took a lease dated June 9, 1908, from Foley & Lienweber (the then owners) of these premises and other premises for 5 years from June 3, 1908, at a yearly rental of $720, payable in equal instalments of $60 each on the 3rd day of each and every month in each and every year during the continuance of the term. The first payment to be made on July 3, 1908.

The leased premises under this lease were lot 30 in blk. 7 and the buildings thereon situate (with the exception of the south-west 18 sq. ft., occupied as a building used for a real estate office) in North Battleford in the Province of Saskatchewan, according to a map or plan of said townsite on record in the Land Titles Office for the West Saskatchewan Land Registration District as plan No. B-1929, together with lot 1 in block 113 in the aforesaid townsite, together with all the buildings situate thereon.

There is a covenant in this lease whereby the lessee covenants that he will at all times during the continuance of the lease keep and at the termination thereof yield up the demised land in good and tenantable repair, accidents and damage to buildings from fire, storm and tempest or other casualty and reasonable wear and tear excepted.

In 1911 the defendant Sallows went into partnership with the defendant Convey in the said furniture business carried on in the leased premises.

The buildings occupied by the defendants under this lease on lot 30 were a two storey frame building, 70 x 24 ft., and another part of this building on the north side, 20 x 24 ft., only one storey high. The building rested on a surface stone foundation, except as to the west wall which went down some distance. Under the 2 storey part of this building was a cellar, frequently referred to by the witnesses as a "dug out," 20 by 35 ft., starting from the

west or rear wall of the building and extending 35 ft. towards the front or east side of the building. The entrance to this cellar was from the outside of the building at the rear, starting from the ground level, and covered with flaps or doors slanting from the building to the ground. They also occupied a warehouse, about 36 x 40 ft., situate on lot 1, blk. 113. For these buildings and the land going with them they were paying $60 per month rent.

About April, 1912, the plaintiffs bought these premises from Foley & Lienweber, and took an assignment of the lease dated June 9, 1908, and collected the rent at $60 per month from defendants Convey and Sallows under this lease through their agents, Criese & Wood, Ltd., up to June 3, 1913.

By agreement dated April 10, 1912, the defendant Convey, therein referred to as vendor, after reciting that he is the lessee of said lot 30, and that the plaintiffs are the purchasers of the same, gave permission to plaintiffs "to erect a cement or brick building on the rear of said lot, provided said building will not exceed a frontage of 15 ft, and a depth of 20 feet on 1st Avenue, and also provided that sufficient space be reserved between said building to be erected and existing store building to "allow traffic to pass through the space reserved, subject to the the approval of the vendors."

In the early part of June, 1912, and not in April, as alleged in the defence, the plaintiffs erected a cement or brick building on the site referred to in the agreement of April 10, 1912, having a frontage of 15 ft. on 1st Avenue, and a depth of 24 ft.

Prior to the flooding of the cellar in June, 1912, complained of by the defendants, this cellar was used by the defendants as a place for storing some of their goods (such as iron bedsteads, spring-mattresses, curtain poles, and baby carriages), and during this time a certain amount of water appears to have soaked or run into it, and to get rid of the water the defendants say they had a well sunk at the south-west corner of the cellar, to gather the water that got into the cellar, and by the use of a hose and pump took it out. They also dug a ditch or drain from near the entrance to the cellar running south-westerly to 1st Ave. The general slope of the land was from the north-east in a south-westerly direction, towards 1st Ave.

Some time prior to the expiration of the above lease to de-

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fendant Convey, the defendants applied to the plaintiffs for a new lease, which lease was given to them by plaintiffs for one year from June 3, 1913, and bears date May 7, 1913, and is the lease sued on herein, but it does not cover the same premises as the former lease and is at a higher rent.

The defendants also entered into a covenant to repair.

The defendants vacated the premises on Oct. 2, 1913, having paid $900 rent.

In support of the defendants' contention that the lease sued on is not a binding lease, but that it was only conditional and that they had a month to month lease, the only witness that gave evidence on this point for the defence was defendant Convey.

The evidence clearly establishes that the defendants signed the lease before the plaintiffs and that it was sent away for plaintiffs to sign, and when returned a duplicate original was delivered to defendants.

The evidence of Mr. Wood, who is an officer in the C.E.F., was taken before the local registrar at Battleford on November 17, 1914, and by consent was put in as rebuttal evidence at the trial.

Wood's evidence flatly contradicts that of defendant Convey, and denies that there was any agreement to repair or do any alterations to the premises, or that the lease was signed upon the alleged condition, but admits that Convey did say he would like to have the water pumped out of the cellar, and he told him he would write to the plaintiffs and endeavour to have them get it attended to. This conversation was shortly before the lease was signed by defendants. The correspondence produced corroborates Wood's evidence.

The lease itself is silent as to its being conditional, or that any repairs are to be done on the leased premises. It is a straight lease for one year for $2,700, payable in monthly instalments at $225 per month. Furthermore, the first cheque given by defendants in payment of rent on the lease sued on, which cheque is dated Sept. 26, 1913, is for $225 and has on the cheque the words: "Rent for store June 3rd to July 3rd, 1913." And the last cheque, dated Oct. 1, 1913, for $675, has the words on it, "Rent in full for store to Oct. 3, 1913." Defendant Convey says he gave these cheques on the long term rate because he

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expected the premises would be made good, but these cheques were given long after Wood shewed him the Boyes letter of May 19, 1913, refusing to make any expenditures in alterations.

The evidence satisfies me that it was not a conditional lease, as contended by defendants, but that it was a binding lease upon defendants for one year at $225 per month, and that defendants did not have a month to month lease at $250 per month.

2. As to the defence that the defendants vacated the premises because they became untenantable and unfit for the defendants' business, in my opinion the defendants cannot succeed on this defence, as by the lease they covenanted to keep the premises in good and tenantable repair, and the evidence shews that the water which caused the damage to the building began to come into the cellar in June, 1912, after the erection of the brick building by plaintiffs, and defendants knew this, and leased these premises May 13, 1913, with full knowledge of the condition of the building. True it is the whole damage was not then done, but they covenanted to keep the building in good and tenantable repair, and in my opinion should have done so.

Furthermore, according to the authorities the grounds defendants allege are not sufficient for vacating leased premises so as to discharge them from liability for the rent. *Hart* v. *Windsor*, 12 M. & W. 68; *Denison* v. *Nation*, 21 U.C.Q.B. 57.

3. As to the defence that plaintiffs had an opportunity to rent the premises for the unexpired period and refused to do so. The evidence does not satisfy me that they had such opportunity, and this defence also fails.

As to the counterclaim. The evidence shews that there was a certain amount of water in the cellar before the plaintiffs erected the brick building, but the defendants could keep the water down by means of the well and pump and drain above referred to, but the erection of the building in June, 1912, closed the temporary drain defendants made, and caused more water to come into the cellar, which caused damage to some of their goods stored therein, and, in my opinion, they are entitled to damages for the injury caused to these goods, but I cannot allow anything for the loss of the use of the cellar, because I hold the defendants should have taken proper steps to drain this water off after they discovered that more water would come into the cellar after the

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erection of the brick building, to the erection of which they had consented.

The evidence, however, as to the damage caused to the goods stored in the cellar is indefinite, but it satisfies me that some damage was caused.

Mr. Convey swears that at the time the cellar was first flooded, in June, 1912, the defendants had stored in the cellar iron beds, bed springs, baby carriages, curtain poles and some crockery, but the crockery was not damaged; but his evidence is not clear as to quantity or to what extent they were damaged, although he goes into a certain amount of details. Ralph Borden corroborates him as to what was stored at that time in the cellar, but he is more definite in his evidence, and he states that they usually kept 100 beds and it cost $1 each to re-enamel them, owing to damage caused by the water. That the damage to the springs was about $150, and he states that $250 would not cover the damage, but he does not say how much more would cover it. On this evidence I cannot allow more than $250 for the damages to the goods.

The result will be that the plaintiffs will be entitled to judgment with costs for $1,800, less $250, which I allow for damages to defendants' goods, and less the amount paid into Court by the defendants. The plaintiffs will be entitled to an order for the payment to them or their counsel for the amount standing in Court.

The plaintiffs will be entitled to their costs of the action except costs of the counterclaim and reply to same. The defendants will be entitled to the costs of the counterclaim. The plaintiffs will be entitled to set off so much of their taxed costs as will equal the defendants' taxed costs. *Judgment for plaintiff.*

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C. A.

BARLOW v. BREEZE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. October 3, 1916.

LANDLORD AND TENANT (§ III D 3—110)—*Distress — Invalidity of seizure and sale—Detinue.*]—Appeal by defendant from the judgment of Macdonald, J., dated November 22, 1915. Affirmed.

A. H. MacNeill, K.C., for appellant.

D. E. McTaggart, for respondent.

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MACDONALD, C.J.A.:—The trial Judge held that the plaintiff was the owner of the goods in question, and there is ample evidence to support that finding.

Assuming that he rightly held the conditional sale of these goods from her to her husband to have been no protection against the landlords, not being within the protection of the Distress Act, still the landlords could only deprive the plaintiff of the goods by a lawful distress and sale. The sale professed to have been made of them by the bailiff of the landlords was a mere pretence. Breeze was the agent of the landlords to purchase them, and the sale was in reality one by the landlords to themselves.

I agree in the result arrived at by the trial Judge, and would dismiss the appeal.

MARTIN, J.A.:—Without adopting all his reasons I think the Judge below reached the right conclusion. The covenant in Bardsley's lease providing that "if the lessee shall fix or erect on the premises any fixture or building, etc., etc.," cannot, I think, be extended to bar the plaintiff from recovering the goods and chattels in question which the defendant admits he took possession of and still owns. The principal cases on points raised respecting detinue are conveniently collected in Bullen & Leake's Precedents (1915), 293.

The appeal, I think, should be dismissed.

MCPHILLIPS, J.A.:—I agree in dismissing the appeal.

Appeal dismissed.

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Ontario Supreme Court, Latchford, J. May 29, 1916.

WILLS (§ I C—34)—REVOCATION—REVIVING BY CODICIL.

A will revoked by another will properly executed is impliedly revived by the making of codicils to the original will though no mention of the second will is made in the codicils.

[Wills Act, R.S.O. 1914, ch. 120, secs. 2, 23, 25, considered.]

Statement.

ACTION by executors to establish the last will and testament of the testator.

E. D. Armour, K.C., for the plaintiffs.

Ross Duncan, for the defendants Pae and Lennox.

W. A. J. Bell, K.C., for the defendants Henry and Coulson.

D. C. Ross, for the defendant Allen.

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Latchford, J.

LATCHFORD, J.:—The plaintiffs are the executors named in the will of James Hylands, late of Thornton, in the county of Simcoe, deceased, dated the 28th May, 1909. Four codicils were made to this will, bearing date respectively the 18th December, 1909, the 2nd September, 1910, the 24th February, 1915, and the 6th December, 1915. The testator died on the 18th January, 1916.

Probate of the will and the four codicils was applied for by the executors in the Surrogate Court of the County of Simcoe. Mrs. Pae and Mr. W. G. W. Lennox, two of the grandchildren of the deceased, filed a caveat against the granting of probate. The matter was moved up into the Supreme Court, and Mrs. Pae and Mr. Lennox, with others interested as legatees and as representing classes, were made defendants in an action brought by the executors to establish the will as affected by the codicils mentioned.

The defendants Henry and Coulson set up another will made by the deceased, dated the 29th April, 1913, and ask that this later will, as affected by the two codicils of 1915, be declared to be the last will and testament of James Hylands. They assert that the will of 1913 is not revoked, and is still in full force and effect, except in so far as it may be varied by the codicils of 1915, and pray that the Surrogate Court of the County of Simcoe be directed to grant letters probate of the will of 1913 and the subsequent codicils.

The defendants Mrs. Pae and Mrs. Allen simply ask that it be declared which will is the true last will of the deceased, and submit their rights to this Court.

Both the wills and all the codicils were duly signed and witnessed. The testator, though advanced in years, had on all six occasions full capacity to make a will.

The only question arising is, whether the will of 1909, with its codicils of 1909 and 1910—having been revoked by the will of 1913—was revived by the codicils of 1915, which confirm in express terms the earlier will, the third codicil referring to it by date, and the fourth speaking of it as "my said will and the three codicils I have made thereto," while making no mention of the later will.

Ordinarily, throughout a period of 25 or 30 years, the deceased

employed Messrs. Strathy & Esten, of Barrie, as his solicitors, and made them the depositaries of most of his mortgages and other documents. They had been calling in his investments and depositing the moneys arising therefrom to his credit in various banks. Occasionally, and more in connection with loans than otherwise, he had business relations with the legal firm of Lennox & Cowan, of the same place.

The will of 1909 was drawn in the office of Lennox & Cowan, and was duly executed in the presence of Mr. Cowan and Miss Marr, a stenographer in his office. It was left with Mr. Cowan, and placed in an envelope with an earlier will, from which the signature of the testator had been torn. In December, 1909, Hylands called on Lennox & Cowan and gave instructions for a codicil to the will. This was engrossed by Miss Marr on the reverse of the last page of the will, and properly signed and attested. The will was then returned to the custody of Lennox & Cowan.

While the will was still kept in the same office, a second codicil was added to it, in September, 1910, revoking a legacy of $500 mentioned in the eighth paragraph of the will.

At a date not stated definitely, Mr. Cowan was applied to by Hylands for the will, and handed it to the testator, retaining the former revoked will. On the 29th March, 1911, Hylands brought to Mr. Esten the will he had obtained from Mr. Cowan, and requested Mr. Esten to take care of it. Mr. Esten then placed it in the will-box in his firm's vault.

On the 26th April, 1913, Mr. Cowan, *suâ sponte*, drove out to Thornton, a distance of ten or twelve miles, to interview Mr. Hylands regarding a loan. The old gentleman was not making loans at the time—a fact which may not have been known to Mr. Cowan. On this occasion, Hylands is said to have asked Mr. Cowan if he could come out some day and draw a will. Mr. Cowan agreed to do as requested, and went out on the 29th April, taking with him a relative, a very old man, as a witness, and the will that had been revoked when the will of 1909 was made. A new will was then drafted. It is manifest that this will, like that of 1909, was based on the revoked will which Mr. Cowan had with him; in fact, the main if not the only difference between the will of 1909 and the will of 1913, so far as it affects

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legacies, is that one-third of the residuary estate devised in the former to the children of the testator's daughter, Jane Stewart, and changed by the first codicil to a gift to his said daughter and her children in equal shares, is given by the second will to Mrs. Stewart alone.

An important change is that the will of 1913 appoints Mr. Cowan solicitor of the estate.

From two o'clock in the afternoon of the 29th April until six, Mr. Cowan was, he says, working at the will. "I did not," he says, "spend five minutes in any other way." No one else was present during the four hours. Mr. Lewis was asked to absent himself, as were two young ladies who were in the house but not in the same room as the testator and Mr. Cowan.

Mr. Cowan was asked (Q. 55): "When you got instructions to draw the will, as far as you knew there was no will in existence?" He answered: "I did not know that; I knew there was no will in my office."

It is plain that Mr. Cowan was aware that the will of 1909 was elsewhere than in his office. It is not indeed improbable that he knew that it was in the office of Mr. Esten. There is not, however, any evidence to support the suggestion that Hylands was induced to make the will of 1913 for the purpose, which the will effected, of taking from a rival firm the administration of a large estate which in the nature of things was soon to fall in.

Mr. Cowan did not give his testimony before me. As he was on active service, his evidence was taken *de bene esse*. While his evidence, owing to the benefit he received under the will, must be regarded with suspicion (*Paske* v. *Ollat* (1815), 2 Phillim. 323; *Donnelly* v. *Broughton*, [1891] A.C. 435, at p. 442), and stricter proof than in ordinary cases required, I cannot but find, unless I reject Mr. Cowan's evidence, that the will of 1913 was signed by the testator when of sound and disposing mind, and was attested as prescribed by the Wills Act, 10 Edw. VII. ch. 57, now R.S.O. 1914, ch. 120. It purported to revoke all prior wills, and therefore had the effect of revoking the will of 1909, and with it the codicils of 1909 and 1910.

The testator afterwards acted as if he had absolutely forgotten that he made the will drawn by Mr. Cowan or any will subsequent to that of 1909.

In November or December, 1914, Hylands requested Mr. Esten to send him a list of the legacies contained in the will deposited with him, and to add them up. Mr. Esten accordingly made out a list from the will of 1909, as affected by the codicils, and sent it summed up to the testator.

Shortly afterwards, in February, 1915, William King, a nephew of Hylands, called on Mr. Esten and asked him to bring the will out to Thornton, which was done. On arriving at Hylands', the testator asked Mr. Esten if he had the will, and, receiving an affirmative answer, expressed a desire that it should be read over to him. King, who was in the room, started to leave, but his uncle requested him to remain. Hylands had by him at the time the list of legacies prepared from the will by Mr. Esten. The will was then read over "to near the end," and the two codicils were read. Mr. Esten remembers distinctly that he read the date of the will. Hylands then said that Mrs. Stewart had been very good to him, and that he wished to give her and her daughter Minnie (now Mrs. Allen) $10,000 more in the way of specific legacies than was given to them by the will.

The third codicil was then drawn and duly signed and witnessed. It begins: "This is a third codicil to my last will and testament which is dated the twenty-eighth day of May, 1909." It then devises and bequeathes to Mrs. Stewart and her daughter $10,000 each, in addition to any sum bequeathed to them by the said will or any codicil thereto, and ends thus: "In all other respects I confirm my said will." Hylands then asked that a new list of the legacies should be sent to him, and a statement of the mortgage moneys collected and deposited.

Mr. Esten took the will and codicils back with him to Barrie, attaching the third codicil to the will and the other codicils either at the testator's house or in the office at Barrie before the documents were placed in the will-box. A list of the legacies and a statement of the bank deposits to Hylands' credit were prepared by Mr. Esten and forwarded to the testator.

Early in December, 1915, Hylands again sent for Mr. Esten, who on the 6th went to Thornton, taking the will and codicils with him. Hylands expressed a desire to increase the gift made in the will to his son-in-law, the defendant Henry, and wished to have a conveyance made to him of certain lands. Mr. Esten

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suggested that the same result could be effected by a codicil to the will. The testator was quite satisfied that this should be done, and the fourth codicil was drafted, signed, and duly attested. The testator's capacity to make a will at the time is well established. The codicil is in the following words: "This is a fourth codicil to my will. I hereby give and bequeath the farm which I purchased from Mr. Fell to my son-in-law W. C. Henry, and in all other respects I confirm my said will and the three codicils I have made thereto."

Then follow the date, the signature of the testator, the proper attestation clause, and the signatures of the witnesses.

It will be observed that the first codicil expressly confirms the will of 1909, referring to it by date. The fourth codicil confirms the same will, although its date is not stated. The will of 1909 is the only will of the testator with "*three codicils . . . made thereto.*" No codicil was at any time made to the will of 1913.

It will also be noticed that the codicils of 1915 contain no express revocation of the will of 1913. Mr. Esten did not in fact learn of the existence of the will of 1913 until the occasion of the funeral of the deceased on the 18th or 19th January, 1916. Proofs to lead grant of probate of the will of 1909 were, as stated, filed on behalf of the executors. Mr. Cowan on his part prepared the necessary documents to obtain probate of the will of 1913; and the present suit followed.

Upon the facts as found, the sections of the Wills Act which affect the matters in issue are 23 and 25. Section 22 has no application. It does not prohibit a revocation by any presumption of intention, but only such a revocation "on the ground of an alteration in circumstances."

Section 23 provides that "no will, or any part thereof, shall be revoked otherwise than as aforesaid provided by section 21" (not applicable here) "or by another will executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing," etc.

One of the means by which a will may be revoked is by a will properly executed. As I read this section, it is in some

writing other than a will, though required to be executed in the same manner, that an *intention* to revoke must be *declared*.

By sec. 2 (*e*), the word "will" in the Act is to be taken to include a codicil. Hence, by a codicil executed as the third codicil to the will of 1909 was executed, a will may be revoked, although the codicil contains no express declaration of such an intention.

Section 25 is substantially identical with sec. 22 of the Imperial Wills Act, 1 Vict. ch. 26. It refers to revival, as sec. 23 to revocation, and provides that a revoked will shall not be revived otherwise than by re-execution or by a codicil duly executed "and shewing an intention to revive."

The decisions of the English Courts as to revocation and revival are applicable in this Province, and a few of the many cases cited upon the argument may be usefully referred to. Others will be found in Theobald, 6th ed., p. 64; Williams, 9th ed., p. 164; and Jarman, 6th ed., p. 195.

In *In the Goods of May* (1868), 1 P. & D. 581, the first will was dated the 11th January, 1860. On the 18th August, in the same year, the testator married. After the marriage and on the same day he made a new will purporting to revoke the earlier will, which had been revoked by the marriage. Later, he tore off the signature to the old will. In 1861, he made a codicil, stated to be a codicil to the will of the 11th day of January, 1860. Sir J. P. Wilde held that there was no sufficient evidence on the face of the codicil itself that the testator entertained an intention to revive the will, as it was plain that in September, 1860, when he made the codicil, he considered the will of August to be the effective record of his testamentary disposition. "In a word," he says, "the codicil read by the surrounding circumstances of the case fails to shew the necessary intention." The Court granted probate of the will of August, with the codicil of July, 1861, and a subsequent codicil as to which no question was raised.

In *In the Goods of Wilson* (1868), 1 P. & D. 582, a codicil referred to a revoked will by date, but the relation between the codicil and a later will was so clear that the Court had no hesitation in affirming that it was to the later will that the testator

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intended the codicil to apply. Hence probate was granted of the codicil and the later will.

In these and similar cases the reference by date was regarded by the Court as *falsa demonstratio*—a clear case of mistaken description.

In the present case there is no question as to the document to which the codicils of 1915 apply. The will of 1909 was before the testator when both these codicils were made. Mr. Esten, when he went out to Thornton in February, brought with him the will of 1909. Whether the testator forgot the existence of the will of 1913 or not, he manifested, I find, when the third codicil was made, an intention to regard the will of 1909 as his last will. He had by him a list of the legacies it contained. He had also by him the will itself, unmutilated in any way. The will was read to him. He desired to increase, and did by the codicil increase, one of the legacies given by the will. As was said by Lord Hannen in *McLeod* v. *McNab*, [1891] A.C. 471, at p. 476, "the word 'confirm' is an apt word, and expresses the meaning, and has the operation of the word 'revive,' which is used in the statute." (The provisions of the Nova Scotia statute in question in that case are identical with those of sec. 25 of the Ontario Act.) By confirming the will of 1909, the testator revived it and made it a new will of the date of the codicil—the last will of the testator.

The fourth codicil refers undoubtedly to the same will. No other will of the testator had three codicils. Again was the will of 1909 confirmed in terms and circumstances that preclude the possibility of any mistake in description. The two codicils of 1915 manifest, in my opinion, a clear intention on the part of the testator—and nothing more is necessary in a properly executed codicil—to revoke the intermediate will as well as to establish the earlier one.

Accordingly, there will be judgment declaring that probate should be granted—not of the will of 1913—but of the will of 1909 and its four codicils.

Costs of all parties out of the estate—those of the executors as between solicitor and client.

ROHOEL v. PHILLIPSON.

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Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Walsh, JJ.A. November 3, 1916.

1. PRINCIPAL AND AGENT (§ I—3)—REVOCATION OF AUTHORITY—NOTICE—NEGLIGENCE IN HOLDING OUT AGENCY.
A principal is not liable for purchases by the agent after revocation of his authority of which the seller was aware; the fact that the agent was in possession of forms which may lead to the belief that he was still the authorized agent is not of itself negligence of the principal.

2. APPEAL (§ VII L 3—492)—REVIEW OF FACTS—AGENCY.
An appellate Court has power to review a finding of fact as to the existence of an agency, based on a misapprehension of the evidence.
[*Western Motors* v. *Gilfoy* (Alta.), 25 D.L.R. 378, applied.].

Statement.

APPEAL by defendant from the judgment of Simmons, J., in favour of plaintiffs for $1,500, being the value of a quantity of furs purchased from them by one Clark. Reversed.

H. H. Hyndman, for appellant.

G. B. O'Connor, K.C., and *H. A. Friedman*, for respondent.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.:—Clark at one time was admittedly the defendant's agent for the purchase of furs. As such he had two transactions with the plaintiffs for large amounts 3 and 2 months respectively before that in question. In each instance a small cash payment was made by him and he gave the plaintiffs a sight draft for the balance upon the defendant upon a form specially prepared by the defendant for that purpose, and he took away with him the furs which he had purchased. Each of these drafts was promptly paid by the defendant. In April, 1915, Clark again visited the plaintiffs and made the purchase now in question in the name and ostensibly on behalf of the defendant. No money was paid this time but a sight draft drawn by Clark on the defendant for the full purchase price of $1,500 upon the same specially prepared form of the defendant was given by him to the plaintiffs in exchange for the furs which he took away with him. In fact Clark then was not the defendant's agent for the purchase of furs and he had no authority to buy or take delivery of them for him or to draw on him for their value, and the defendant never received them or any of them. Clark fraudulently put himself forward as the defendant's agent in this transaction, and having thus secured possession of the furs, retained them or disposed of them for his own benefit. As a result of his rascality, either the plaintiffs must lose the value of their furs or the defendant must pay for furs which he never got.

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The plaintiffs support their judgment on two grounds: (a) that Clark having been at one time the defendant's agent and having as such dealt with the plaintiffs to the defendant's knowledge, they were entitled to assume that he was still such agent, no notice to the contrary having been given to them and, (b) that the defendant was guilty of negligence in that he allowed Clark to retain or secure possession of his printed forms of bill of exchange, which made it possible for him to impose upon the plaintiffs as his possession of these forms and the use which he made of them led them to believe that he was still the defendant's agent.

Now there is no room for argument, nor indeed was there before us any, as to the principle of law involved in the first of these grounds. If after the dealings which had taken place between the plaintiffs and the defendant through the agency of Clark no notice of the termination of his authority was before the date of the transaction in question given to the plaintiffs, the defendant is undoubtedly liable to them for the price of those furs for they were in that event quite justified in dealing with Clark on the assumption that his authority still continued. It is a question of fact and not of law that we have to deal with in disposing of this contention, for the defendant asserts and the plaintiffs deny that such notice was given.

In the month of February, 1915, shortly after the second purchase which Clark made from the plaintiffs, and some 6 weeks before the date of the transaction in question, Kallal Rohoel, one of the plaintiffs, called at the defendant's place of business in Edmonton and had a talk with him. The defendant says that in the course of that conversation he told the plaintiff that Clark had no authority to buy any more furs from him and in this he is corroborated by two witnesses, Wool his manager, and Gerbrecht, his bookkeeper. The evidence of these three men is clear and distinct upon the point. The defendant says that the plaintiff asked him if he had accepted the draft passed on him by Clark for his February purchase, "and I told him yes, we have accepted your draft, but this will be the last draft that Clark will issue to you." He says that he followed this up with his reasons, namely, his suspicions of Clark's honesty. Then he says "when he started to go out, I said now remember Rohoel that

Clark is fired right practically from to-day and as soon as we can find out where Clark is we will wire him and call him in." And further down on the same page he says, "I said to Rohoel never accept any more drafts from him either, neither will Clark buy any more goods for me from you or any one else in future," and this story he stuck consistently to throughout his evidence. Wool says that the defendant told the plaintiff that Clark had paid him $200 too much for the fur and that he had no right to pay him any cash at all on the deal which he characterized as a crooked one "and he wouldn't see Clark buy any more fur for us." Later he said "Phillipson repeated again that Clark would not buy furs for him any more." Gerbrecht, whom the trial Judge describes "as a perfectly honest witness," says that the defendant, after complaining to the plaintiff of the high price which Clark had paid him for his furs, said:—

> Never mind, Clark will not give you any more drafts or buy from you for us, and Rohoel said Clark is a good man anyway and if you fire him you will lose a pretty good man and Phillipson then said remember what I told you, he will not buy any more furs for me from you.

This story was practically repeated on cross-examination.

Opposed to this evidence is that of the plaintiff Kallel Rohoel, and his witness, one Darwish. When called in the first instance to prove his case this plaintiff, as was natural, was not taken over this ground at all. The nearest approach in his evidence as then given to anything upon this point was his statement: "He (Phillipson) said he (Clark) gave you good prices for the fur and that's all." When called in rebuttal he said that it was not true that the defendant told him he was going to dismiss Clark. He said "he never told me anything about that at all," and when asked "on that occasion was there any such conversation had as you have heard in evidence here" he replied, "no, he never told me anything about that." The only portions of Darwish's evidence that bear upon this point are the following: He was asked if he heard a conversation that took place on the occasion referred to and he said, "I never heard anything and I first went there that morning with Rohoel and I asked Phillipson if he was going to buy and he said no, the price was too much, and I went out with Rohoel then and later on in the afternoon we came back." And then being asked "did you hear Phillipson tell Rohoel anything in connection with Clark?" he answered "No."

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It seems to me that unless there is some reason for disbelieving the defendant and his witnesses, the evidence in support of his contention is much stronger than that against it. Three men swear positively to the conversation in which this notice is said to have been given and one of the plaintiffs alone contradicts them, for Darwish's evidence at most amounts to nothing more than an assertion that he heard nothing. If there was a finding of fact on the part of the trial Judge against the defendant on this point, I would hesitate to disturb it notwithstanding my own strong opinion to the contrary. But I do not think that there is. He dealt very casually with this feature of the case for he rested his judgment, as I understand it, upon the ground of the defendant's negligence in allowing Clark to go out with the drafts. All that he says on the question I am now discussing is this:—

> After there had been two transactions of this nature, there was a conversation between the plaintiff and the defendant and while there were some things said that might indicate that the defendant did not have confidence in Clark, yet I do not think these statements were of that positive nature as to convey to the plaintiff that Clark would not at any subsequent time have the right to represent the defendant as the defendant's agent.

I regard that as a finding that the conversation which the defendant alleges and the plaintiff denies did take place. He could only have got from the evidence of the defendant and his witnesses the impression that "there were some things said that might indicate that the defendant did not have confidence in Clark for Darwish heard nothing and the only thing in the plaintiffs' evidence that could be twisted into such a suggestion is his statement that the defendant said of Clark, "he gave you good prices for the fur." My conclusion is that he accepted the evidence of the defendant and his witnesses on this point but that he misconceived its substance and effect.

In *Western Motors* v. *Gilfoy*, 25 D.L.R. 378, the Appellate Division quite properly reversed my finding of fact which was based upon a misapprehension by me of some of the evidence upon which that finding was based. I do not think that we have to go as far as that here, for I do not think we will be reversing the trial Judge's finding of fact if we hold that the notice contended for by the defendant was given. On the contrary, we will be sustaining his finding that such a conversation as the defendant alleges did take place and will be but correcting his misapprehension as to what actually occurred in the course of it.

A good deal was made in argument of the fact that Clark was not dismissed by the defendant immediately after his conversation with the plaintiff, but was retained in his employ for a month thereafter, though in a different capacity from that in which the plaintiffs had known him. The evidence which was given along this line was quite pertinent to the question and only to the question of Clark's authority to buy these goods as agent for the defendant. The trial Judge has found as a fact that he had no such authority and the evidence fully warrants that finding. There it seems to me the helpfulness to the plaintiffs of this line of evidence stops. I think that even if Clark had actually been in the defendant's service when he made this last purchase, but in a capacity which did not authorise him to make such purchase for the defendant, the plaintiffs after the notice which the defendant had given them of the withdrawal of Clark's authority to buy furs from them, would have sold to him at their own risk. *A fortiori* the mere retention of Clark in the defendant's service unknown to the plaintiffs to a date some 2 weeks before that of the transaction in question is quite insufficient in itself to bring home liability to the defendant.

In my opinion the plaintiffs before they sold those goods to Clark had express notice in clear and unequivocal language that his authority to buy for the defendant was at an end and unless he can be held liable on the other ground taken, this appeal must succeed.

I am unable to agree with the trial Judge's view of the defendant's liability because of his negligence even if I was satisfied that he was negligent. When Clark was finally dismissed he was asked for the books and drafts and other things he had used when buying for the defendant and he did hand over some of them, but no attempt seems to have been made to check them up so as to make sure that he had not retained any. The books and papers which he surrendered were put in a drawer in a desk in the defendant's office, and Clark was in this office a couple of times after he turned them in and apparently could easily have had access to them. There is nothing in the evidence to shew how he got possession of the book of drafts which enabled him to impose upon the plaintiffs, but I think it reasonably clear that he either held it out when he gave up the others or abstracted it

ALTA.

S. C.

ROHOEL v. PHILLIPSON.

Walsh, J.

from the defendant's office on one of his subsequent visits to it. And it was because "through his (the defendant's) negligence the agent was able to go out and complete these dishonest transactions," the Judge reached the conclusion that "he (the defendant) must bear the loss."

I think that the law is that such negligence to be actionable, or to raise an estoppel, must be either in or immediately connected with the transaction which is complained of. This was so decided by the House of Lords in *Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 389, a decision which has ever since been treated as establishing the proposition. See Beven on Negligence, Can. ed., p. 1342; Hals. vol. 13, p. 400, par. 564, and the cases there cited. Beck, J., took this view of the law in *Northern Bank* v. *Yuen*, 2 A.L.R. 310, at 316.

If there was negligence on the defendant's part in the matters here complained of, and I am assuming for the purpose of the argument that there was, it clearly was neither in nor immediately connected with the purchase of these furs by Clark but was quite remote from and entirely disconnected with such purchase and for this reason, in my opinion, the defendant cannot be held liable upon this ground.

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

MAN.

C. A.

The KING v. POLSKY.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 6, 1916.

1. LEVY AND SEIZURE (§ III A—40)—RESISTING EXECUTION—CRIME—JUSTIFICATION.

An assistant bailiff is a "peace officer" and "person in the lawful execution of process against goods" within the meaning of sec. 169 of the Criminal Code, and it is a crime to resist him; it is no justification that the property seized belonged to others, since the true owner could have asserted his right by interpleader.

2. LEVY AND SEIZURE (§ III A—40)—AUTHORITY OF ASSISTANT BAILIFF.

A County Court bailiff has power to appoint an assistant to act for him, and to make lawful seizure under an execution issued to the bailiff.

Statement.

RESERVED case stated by Police Magistrate.

E. A. Cohen, for Crown.

A. C. Ferguson, for accused.

The judgment of the Court was delivered by

Richards, J.A.

RICHARDS, J.A.:—We do not think the fact that the cattle were not Polsky's was any justification for resisting the seizure.

They were in his possession, and, *primâ facie*, were liable to seizure under execution against his goods. The owner could have asserted his right by interpleader. Polsky himself could have notified the party seizing that Harris was the owner, and the bailiff would then have brought about an interpleader to test the ownership.

We are further of opinion that it was not necessary for the party who seized to actually have with him, when seizing, the writ of execution. Polsky undoubtedly knew of the suit against him, and knew if he had not defended the action he had every reason to expect the issue of an execution.

If the bailiff had the right to appoint a sub-bailiff, or assistant to seize for him, the warrant was full justification to the latter to so seize.

The argument that it lay on the prosecution to shew that the execution had not been satisfied is futile. We express no opinion as to the right to forcibly resist even if the execution had been satisfied, further than to say that such right is extremely doubtful. The possession of the bailiff's warrant was, at least *primâ facie* evidence that it had not been satisfied, and no attempt was made by the defence to shew that it had been.

The only other question is whether Herbert Harrison, to whom the warrant was directed, and who made, or attempted to make, the seizure, was a person within the meaning of clauses (*a*) and (*b*) of sec. 169 of the Criminal Code, or either of them.

That section makes it a crime to resist:—(*a*) "any peace officer in the execution of his duty . . ." (*b*) "any person in the lawful execution of any process against . . . goods or in making any lawful . . . seizure."

By sec. 2, (26), "Unless the context otherwise requires, 'peace officer' includes . . . any . . . bailiff . . . or other person employed for the . . . execution of civil process."

The only other question to decide is whether a County Court bailiff can lawfully employ an assistant to make a lawful seizure under an execution issued to him (the bailiff), or, to execute civil process—which includes making such a seizure?

Counsel for the defendant argued that, there being no provision in the Act for the appointment of bailiffs other than by the Lieutenant-Governor-in-Council (sec. 29), and no express power

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being given by the Act to a bailiff to appoint a substitute to act for him, while there is, by sec. 30, such a power given to clerks to appoint deputies to do their (the clerks') work, it should be implied that the legislature intended that, except as otherwise specially provided by the Act, only bailiffs appointed under the Act . . . and no others . . . should perform any of the bailiff's duties.

An argument was also based on sec. 79, which says:—

> Except as hereinafter provided in this section the bailiffs and no other persons shall forthwith serve and execute all summonses, orders, precepts, warrants and writs delivered to them by the clerk for service or execution. . . .

We do not think there is intended any implication from secs. 29 and 30 and 79 that a bailiff cannot appoint an officer to act for him. Sec. 353 implies the contrary. It says:—

> If any bailiff *or officer of such bailiff* shall take, levy or receive any moneys, fees or charges in respect of any duty performed as such bailiff *or officer*, or in respect of the execution of any writ or process, in excess of the amount properly chargeable by him . . . the Judge may direct such bailiff *or officer* to appear before him . . .

It further provides how the Judge shall deal with the matter and refers throughout to the party to be dealt with as the "bailiff or officer."

There is no express provision in the Act for the appointment of bailiffs' officers by anyone. The only conclusion, therefore, is that the bailiff himself appoints them.

Sec. 79 was enacted for the protection of bailiffs, not to limit their powers. That, we think, appears from that part of it which permits certain parts of a bailiff's work to be done by others with his consent.

It would lead to great delays and injustice if a bailiff of such a Court as the County Court of Winnipeg were compelled to personally execute all process issued to him. We feel no doubt that he had the power to appoint Harrison.

It follows, therefore, that Harrison was a person whom, under sec. 169 of the Code, it was a crime to resist, he being (under sec. 2 (26)) a peace officer within clause (*a*) and also a person in the lawful execution of process against goods within clause (*b*).

We therefore answer questions 1 and 2 submitted by the police magistrate in the affirmative, and 3 and 4 in the negative, and confirm the conviction appealed from.

Conviction affirmed.

ANSELL v. BRADLEY.

ONT.

S. C.

Ontario Supreme Court, Middleton, J. May 16, 1916.

MORTGAGE (§ V G 2—105)—NOTICE OF SALE—SIGNATURE OF MORTGAGEE.

The absence of a mortgagee's signature to a written notice of sale served upon the mortgagor under the power of sale contained in the mortgage is fatal to the validity of any sale thereunder.

Statement.

ACTION to set aside a sale, by the defendant Bradley to the defendant Eckhardt, of land mortgaged by the plaintiff to the defendant Bradley, the sale purporting to be under the power contained in the mortgage-deed.

S. H. Bradford, K.C., for plaintiff.

T. P. Galt, K.C., for defendant Bradley.

G. H. Watson, K.C., for defendant Eckhardt.

Middleton, J.

MIDDLETON, J.:—The plaintiff seeks to set aside an attempted exercise of the power of sale contained in a mortgage.

The mortgage is made under the provisions of the Land Titles Act, and bears date the 10th March, 1914, to secure the sum of $1,000, payable six months from date, without interest. The amount actually advanced was $900, so that the mortgagor received $100 for the loan of $900 for six months; this somewhat onerous charge arising from the fact that the property hypothecated consisted of four small houses in the town of Cochrane, a town whose future was deemed so uncertain and insecure as not to render it an attractive field for the money-lender.

The mortgage contained a power of sale in the statutory form, providing that the mortgagee on default for one month may on one month's notice enter on and lease or sell the mortgaged land.

A fire occurred in a house upon some other property, in which the mortgagor resided, doing certain damage to this property. In respect of this fire $710 was received from the insurance company, and this sum was paid on account of the mortgage, leaving a balance of $290 to be paid.

In addition to this, the mortgagee claims to be entitled to $56 for insurance premiums paid.

The mortgage was not met at maturity, 10th September, 1914; and, on the 31st October, 1914, more than one month's default then existing in payment of this balance, a document was served upon the plaintiff which is relied upon as constituting a sufficient notice under the power. No attention having been paid to this, the land was offered for sale, but withdrawn for want of bidders,

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and was subsequently again offered for sale, withdrawn, and finally sold to the defendant Eckhardt for $1,900. The property is said to be worth $4,000. At that time it was assessed for $4,200, and it is now assessed for $3,800. The houses were insured by Bradley, who is also the agent for the insurance company, for $800 each, or $3,200 in all.

The only substantial question is the validity of the notice already referred to, and the only defect in that notice calling for discussion is the absence of any signature.

The extension of the short form of mortgage enables the power of sale to be exercised "after giving written notice to the said mortgagor," etc.

The notice in question commences "I hereby require payment" etc., etc., and concludes with the further notice that unless payment is made by the 16th December, 1914, "I shall sell the property comprised in the said mortgage." In the body of the notice the mortgage is sufficiently recited, the names of the mortgagor and mortgagee and the date of the registration being given; but there is nothing in the notice itself to shew that it is given by the mortgagee, nor is it addressed to the mortgagor.

A duplicate of this notice was produced, signed by the mortgagee; and, no doubt, from the form of the notice served, his signature to the copy served was contemplated. It is suggested that at the foot of the endorsement the mortgagee's name appears, and this ought to be regarded as sufficient signature. Owing to some defect in the typewriting, only some letters of the signature even there appear; but I do not think the defect in the notice can be gotten over in this way.

Inasmuch as the notice was given to the plaintiff, I do not think that the absence of an address to her is fatal: *Doe dem. Matthewson* v. *Wrightman* (1801), 4 Esp. 5.

I have, however, come to the conclusion that the absence of the signature of the mortgagee is fatal. I do not mean by this that it is essential that the signature should appear at the foot or end of the notice, but I think it is essential that the identity of the person giving the notice should in some way sufficiently appear in the notice itself, and that the notice should be a completed and not an obviously incomplete document.

What is essential to constitute a sufficient notice is discussed

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in the case of *Fenwick* v. *Whitwam* (1901), 1 O.L.R. 24, and in the British Columbia case *Lockhart* v. *Yorkshire Guarantee and Securities Corporation* (1908), 14 B.C.R. 28: and, while I am in entire sympathy with the idea that a notice should not be regarded as a nullity or be held inoperative by reason of any minor irregularities, so long as it meets substantially the purpose for which it is required, yet the object of the statute in requiring a written notice by the mortgagee is obviously not met when the document served is one which does not in any way identify itself with the mortgagee or bind him. As well might it be held that an unsigned note or an unsigned cheque should be treated as a completed instrument.

The Court in British Columbia, I think, went far indeed in allowing the unsigned notice to be supplemented by the signed letter accompanying it; but even that falls far short of giving any validity to an unsigned notice standing alone.

The Privy Council in *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365, refused to allow a letter drawing the attention of the defendants, who were entitled to notice of action, to an accident and inviting inspection, etc., to be treated as a notice of action; and there is danger where a statute or a contract requires a written notice to be given for the purpose of certainty, when the Court attempts to substitute for the clear and unambiguous notice contemplated something falling far short of it with the view of defeating what may be regarded as a technical or unmeritorious objection.

A sensible rule appears to be that laid down in *Eaton* v. *Supervisors of Manitowoc County* (1877), 42 Wis. 317, where it was held that a notice which the statute requires to be in writing is insufficient where it is not signed by the party giving the notice nor by any one for him, with the possible exception of a case in which the party giving the notice himself serves the notice; for his personal service may possibly then be regarded as sufficiently identifying him as the individual speaking by the written document. As at present advised, I would not agree with this suggested qualification, but would prefer the more clear-cut position taken in New York, where it was held in *Demelt* v. *Leonard* (1860), 19 How. Pr. 182, that an unsigned notice served was a memorandum only, and was a nullity when it was sought to be viewed as a notice.

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All this is, of course, subject to the qualification based upon the familiar cases under the Statute of Frauds, that a signature may be found in the body of the document as well as at its foot or end, and to the further qualification, established at any rate since *The Queen* v. *Justices of Kent* (1873), L.R. 8 Q.B. 305, that a signature by an agent is sufficient.

I have found one case not entirely consistent with the view which I have formed. It is the Irish case of *Carleton* v. *Herbert* (1866), 14 W.R. 772, where it was held by a majority that where a lease gave the tenant the right to terminate at a certain time upon a notice in writing of his intention, and an unsigned notice was given by the tenant, which otherwise complied with the terms of the lease, and which referred to the person who gave the notice as being the tenant of the lands described, the notice was sufficient; Fitzgerald, J., dissenting, stating that, if his brothers had not been of the contrary opinion, he "should have thought it very plain . . . that this proviso meant a notice from the tenant, by name, expressing his intention to the landlord, by name, to deliver up the premises. I do not see how such an intention . . . is to be gathered from this notice."

But even that case is not enough for the defendants here, for there the tenant was sufficiently identified with the notice given. It purported to be from "the tenant." Here the notice is not said to be given by the mortgagee.

I think the sale must be set aside, and it must be declared that the notice in question is not a sufficient notice under the power of sale contained in the mortgage. The plaintiff should have his costs, and they may well be set off against the mortgage-debt *pro tanto*. The defendant Bradley should pay his co-defendant his costs of the action, and refund the sale deposit.

Annotation.

Annotation—Power of sale in statutory form of mortgage.

Clause 14, of the Statutory form of Mortgages (R.S.O. 1914, ch. 117) conferring the power of sale and providing for application of moneys is one which varies much from the modern approved forms. It conflicts apparently as regards right to possession with clauses 7 and 17. It does not extend to breach of covenants as do those clauses. The power is given to the personal, as well as the real, representatives, although by the Devolution of Estates Act, R.S.O. c. 119, s. 7, it is enacted that in the interpretation of any Act, or any instrument to which a deceased person was a party, his personal representatives, while the estate remains in them, shall be deemed his heirs, unless a contrary intention appears. And though the administrator might sell under the power while the estate is vested in him, yet if it should shift

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into the heirs, the administrator might still sell. It should not, however, be dependent on notice, but the provision as to notice should be by a covenant by the mortgagee that notice shall be given; and the purchaser should be expressly relieved from any necessity as to seeing that notice was given. There is no power to the mortgagee to buy in an auction and re-sell without being responsible for loss or deficiency on re-sale; or to rescind or vary any contract of sale that may have been entered into; or to sell under special conditions of sale (though the latter may be permissible when the conditions are not of a depreciatory character). The application of insurance moneys is provided for. The surplus of sale moneys is to be held in trust to pay to the mortgagor. There is no clause relieving a purchaser from seeing that default was made, or notice given, or otherwise as to the validity of the sale; the importance and benefit of which to the mortgagee, and even to the mortgagor, will be presently alluded to. The provision that the giving of the power of sale shall not prejudice the right to foreclose is unnecessary, as it is an independent contractual right.

For the transfer of the legal estate of the mortgagee at law no power of sale is requisite, and the assignee or vendee will take subject to such rights as may be subsisting in the mortgagor, or those who claim under him, of possession, redemption, or otherwise; in other words, the mortgagee may always assign the mortgage debt and convey the land; and thus a sale and conveyance of the estate by the mortgagee to a vendee, though made professedly as in exercise of a power of sale in the mortgage, is valid to pass the legal estate of the mortgagee, even though no power of sale existed, or were improperly exercised, and when the mortgagor's right to possession is gone, the vendee can maintain ejectment; he occupies, in fact, the position of assignee of the mortgage, see *Nesbitt* v. *Rice*, 14 C.P. 409. The chief object of the power is to enable the mortgagee or other party claiming through him to sell and convey the land free from the right of redemption of the mortgagor, and of all claiming through him subsequent to the mortgage, whether by express charge or by execution, or otherwise, and thus avoid the time and expense of proceedings required to foreclose or sell under the order of the Court.

The power of sale is now commonly resorted to, and although at first sight its insertion may appear prejudicial to the interests of the mortgagor, yet in truth it is not so, if it is only to be exercised on reasonable notice after default and the sale take place at public auction. The absence of such a power may be very prejudicial to the interests of both mortgagor and mortgagee, where the equity of redemption becomes incumbered by executions or otherwise, as on a suit of foreclosure or sale the incumbrancers have to be made parties, sometimes at great expense. As regards any objections on the ground of possibility of improper exercise of the power by an individual, which could not happen on sale under direction of the Court, a Court of equity will closely scrutinize the mortgagee's conduct, and, if improper, afford relief.

The word "assigns," as referable to the mortgagee, should never be omitted, for in its absence it has been said that an assignee of the mortgage could not exercise the power of sale, Davidson Conv., 3 ed., vol. 2, 621; *Bradford* v. *Belfield*, 2 Sim. 264, and it may be doubtful whether a devisee could, *Cooke* v. *Crawford*, 13 Sim. 91; *Wilson* v. *Bennett*, 5 DeG. & Sm. 475; *Stevens* v. *Austen*, 7 Jur. N.S. 873; *Macdonald* v. *Walker*, 14 Beav. 556; see also *Ridout* v. *Howland*, 10 Gr. 547.

Annotation.

The power in the statutory form is made conditional on notice being given. It is preferable that notice should be provided for by a separate covenant by the mortgagee not to sell till after the specified notice, *Forster* v. *Hoggard*, 15 Q.B. 155. But where the statutory form is used the mortgagee cannot sell without notice. As it has been held that the statutory form cannot be modified by changing the provision for notice to one without notice, *Re Gilchrist & Island*, 11 Ont. R. 537; *Clark* v. *Harvey*, 16 Ont. R. 159. See also R.S.O. c. 112, s. 27, it is incumbent on the conveyancer to make an additional stipulation that after default for a longer period than that mentioned in the power, the mortgagee may sell without notice.

As regards the clause or covenant providing that notice be given before sale under the power, if assigns are to receive notice, ample scope should be given as to the mode of giving it, and it might be provided that the notice need not be personal, but may be left on the premises, and need not be addressed to any person by name or designation, or may be sent by post addressed to the party at the post office next his residence. Where the power required the notice to be served on the mortgagor, "his heirs, executors, or administrators;" it was held that a notice given after a mortgagor's death should have been served upon both the heir and administrator, *Bartlett* v. *Jull*, 28 Gr. 142. And where the notice is to be served on the mortgagor, his heirs or assigns, and the mortgagor has made a second mortgage, the notice must be served upon both the mortgagor and his assign, the second mortgagee, *Hoole* v. *Smith*, 17 Ch. D. 434. This may be provided against by stipulating that the notice may be served on all the persons named, "or some or one of them," *Bartlett* v. *Jull*, *supra*.

Although personal service on the mortgagor is requisite, yet, where a notice of sale was served on an agent of the mortgagor who subsequently transmitted it to the mortgagor, who received it in time, it was held to be sufficient, *Fenwick* v. *Whitwam*, 1 O.L.R. 24.

It is most inadvisable to omit a separate power for sale without notice; because if the mortgagor should die intestate and no letters of administration should be applied for the mortgagee cannot proceed as there is no one upon whom notice could be served.

An execution creditor whose writ is in the sheriff's hands at the time of giving the notice of sale has been said to be an "assign" entitled to notice, *Re Abbott & Metcalfe*, 20 O.R. 299, although the interest of the mortgagor is such that it could not be sold under the writ, *Glover* v. *Southern Loan Co.*, 1 O.L.R. 590. But see *Ashburton (Lord)* v. *Norton*, [1914] 2 Ch. 211.

It is important, also, to provide that any sale purporting to be made by the mortgagee shall be valid as regards the purchaser in all events of impropriety in the sale, leaving the former personally liable for improper conduct, if any; and that the purchaser shall not be bound to enquire as to whether notice has been given, or default made, or otherwise as to the validity of the sale. In the absence of such a clause the mortgagee selling may sometimes have difficulty in enforcing the sale against an unwilling purchaser, see *Hobson* v. *Bell*, 2 Beav. 17; *Ford* v. *Heely*, 3 Jur. N.S. 1116; *Forster* v. *Hoggart*, 15 Q.B. 155; *Dicker* v. *Angerstein*, 3 Ch.D. 600. But such a clause will not protect a purchaser who has express notice that the notice of sale stipulated for has not been given, *Parkinson* v. *Hanbury*, 2 D.J. & S. at p. 452; *Selwyn* v. *Garfit*, 38 Ch.D. 273.

Where the mortgagee proceeds under the statutory power given by the

Annotation.

Mortgage Act, R.S.O. ch. 112, sec. 19, and has made a conveyance to the purchaser, the latter's title cannot be impeached on the ground that no case had arisen for exercising the power of sale, or that the power had been improperly or irregularly exercised, or that notice had not been given, but the person damnified is to have his remedy against the person exercising the power, R.S.O. ch. 112, sec. 22.

The power usually authorizes a sale by private contract or at public auction, for cash or on credit, in one parcel or in lots, from time to time, under any special conditions of sale as to title or otherwise, with power at any sale at auction to buy in and re-sell, without being responsible for any loss or diminution of price occasioned thereby, and to rescind or vary any contract of sale that may have been entered into, *Dudley* v. *Simpson*, 2 Ch. App. 102.

On any sale under the power, the vendor must be careful so to act that the interests of the mortgagor be not prejudiced by any negligence or misconduct. The duty of a mortgagee on a sale by him resembles that of a trustee for sale, *Richmond* v. *Evans*, 8 Gr. 508; *Latch* v. *Furlong*, 12 Gr. 306, though he is not a trustee but has a beneficial interest in realizing so as to recover his money, see *Kennedy* v. *DeTrafford*, [1897] A.C. 180, as to his duties. A greater latitude may be allowed to a mortgagee than to a bare trustee not interested in the proceeds, and the Court might restrain a sale by a trustee under circumstances in which they would not restrain a mortgagee, (as to cases wherein the Court declined to interfere: *Matthie* v. *Edwards*, 11 Jur. 761; *Kershaw* v. *Kalow*, 1 Jur. N.S. 974; see also *Falkner* v. *Equitable Society*, 4 Drew. 352. It is more advisable, of course, in order to avoid any ground of complaint of insufficiency of price or of unfair sale, that the property should be sold at public auction, instead of by private contract, even though the power authorize the latter. In one case where the mortgagee expressed a desire to get his debt only, and made no effort to sell, and never having advertised, sold at private sale at a great undervalue, the sale was set aside, though it did not appear that the purchaser was aware of the negligence of the mortgagee, *Latch* v. *Furlong*, 12 Gr. 303. Due notice by advertisement of the intended sale should be given, and perhaps as to this the practice which governs on sales by the direction of the Court would be the safest guide. Unnecessary and too stringent conditions of sale as to title and production of title deeds or otherwise should be avoided as likely to prejudice the sale; and if in this or other respects the conduct of the mortgagee be improper, not only will he be held responsible, but under circumstances the sale may be set aside, *Richmond* v. *Evans*, 8 Gr. 508; *Jenkins* v. *Jones*, 2 L.T.N.S. 128; *Latch* v. *Furlong*, 12 Gr. 303; *McAlpine* v. *Young*, 2 Ch. Ch. 171. As to depreciatory conditions, see *Falkner* v. *Equitable Rev. Society*, 4 Drew. at p. 355; but the circumstances must be very strong to induce the Court to set aside a sale as against a purchaser acting *bonâ fide*, and if the sale were set aside as against such purchaser, he might be allowed for his improvements, *Carroll* v. *Robertson*, 15 Gr. 173.

A mortgagee cannot purchase at a sale under his power, and, notwithstanding any such purchase, he will still continue mortgagee, and liable to redemption. His duty as vendor is to obtain as much as possible for the property, his interest as purchaser is the reverse of this, viz., that the property shall sell for as low a price as possible. Courts of equity forbid a man placing himself in this position, wherein his interest may conflict with his duty.

Annotation. Neither can an agent of the mortgagee buy for him, nor his solicitor's clerk. *Ellis* v. *Dellabough*, 15 Gr. 583; *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Howard* v. *Harding*, 18 Gr. 181, nor his solicitor, either for himself or the mortgagee, *Downs* v. *Grazebrook*, 3 Mer. 200; *Whitcomb* v. *Minchin*, 5 Madd. 91. Nor can the secretary or manager of a company (mortgagees) buy at a sale by the company, *Martinson* v. *Clowes*, 21 Ch.D. 857. But a second mortgagee buying on a sale by the first mortgagee, under a power of sale in his mortgage, takes the estate as any stranger, free from the equity of redemption, *Shaw* v. *Bunny*, 2 D.J. & S. 468; *Parkinson* v. *Hanbury*, 2 D.J. & S. 450; *Watkins* v. *McKellar*, 7 Gr. 584; *Brown* v. *Woodhouse*, 14 Gr. 684. And if the mortgage of the second mortgagee be *in trust* for sale on default, instead of with the usual power of sale, so that the mortgagee stands more in the position of a trustee, it is said, *Kirkwood* v. *Thompson*, 2 D.J. & S. 613; but see *Parkinson* v. *Hanbury*, 2 D.J. & S. 450, even then he can purchase from a prior mortgagee.

Whoever is entitled to the right to redeem is the person who is entitled to the residue of the property left unsold after satisfaction of the mortgage debt, and the surplus proceeds if all be sold. Before the Devolution of Estates Act, if the mortgagor of a freehold did not intend this, but intended a conversion in the event of a sale, and that the proceeds shall go as personal estate, then that should have been clearly expressed; for when there was a mere power and not an absolute trust for sale, and a sale took place *after* the death of the mortgagor, the surplus proceeds went to the heir, even though the trust of them should have been declared in favour of the personal representatives, *Wright* v. *Rose*, 2 Sim. & Stu. 323; *Bourne* v. *Bourne*, 2 Ha. 35. But since that Act, if the sale be made before the land shifts unto the heirs the surplus must go to the personal representative. But if the sale takes place after the land vests in the heirs, the former law will prevail. On a badly drawn mortgage, by inattention to the above, the mortgagee may frequently be misled into payment to the wrong party. Where a sale is had in the lifetime of the mortgagor, the surplus proceeds will go to personal representatives on his death before payment. The general principle is, that the property or its proceeds will, where there is a mere power of sale, go to real or personal representatives, according to the state in which it was on the death of the mortgagor.

The mortgagee, in distributing the surplus purchase-money, is under an obligation to see that it is properly applied, and that collateral securities held by subsequent incumbrancers are saved for those entitled to them. *Glover* v. *Southern Loan Co.*, 1 O.L.R. 59; so held by the majority of the Court.

The effect of giving notice of exercising the power of sale is to stay all proceedings for the time (if any) mentioned in the notice for payment, even the proceedings under the notice itself, R.S.O. ch. 112, sec. 29. The original statute providing for this, declared that no further proceedings "at law or in equity" should be taken, and no suit or action should be brought, the purpose being to prevent the making of unnecessary costs. After the Judicature Act was passed, and the distinction between Courts of law and equity was abolished, the words, "at law or in equity," were dropped out of the Act in the next revision of the statutes. The Act in that condition simply declares that no further proceedings and no action shall be taken, after a notice given, until the expiration of the time mentioned in the notice. Hence

Annotation.

it was held that further proceedings for sale under the power itself were included in the enactment, and notice to sell has therefore the effect of staying proceedings to sell, *Smith* v. *Brown*, 20 O.R. 165; *Lyon* v. *Ryerson*, 17 P.R. (Ont.) 516. It is not necessary to demand the money in a notice of sale, or to fix or mention any time in the notice for doing anything required to be done, although the amounts claimed for principal, interest and costs, respectively, must be stated in the notice, R.S.O. ch. 112, sec. 28. But if any time is mentioned, it should be forthwith, in order to prevent the notice from operating as a stay. The enactment in question authorizes an application to the Court for leave to bring an action, notwithstanding the stay, and the motion may be made *ex parte*, and is never refused when the desire is to recover possession in anticipation of being obliged to deliver the land to a purchaser. But this section does not apply to proceedings to stay waste or other injury to the mortgaged property. The notice operates as a stay, whether the action is commenced before or after the notice is given, *Perry* v. *Perry*, 10 P.R. (Ont.) 275; *Lyon* v. *Ryerson*, 19 P.R. (Ont.) 516.

Where a deed is absolute in form, but is, in reality, a security for money lent, no power of sale is implied in it, and the grantee cannot sell without the concurrence of the *cestui que trust*, *Hetherington* v. *Sinclair*, 34 O.L.R. 61; 23 D.L.R. 630.

Re ESTATE OF MAUDE MASON.

B. C.

S. C.

British Columbia Supreme Court, Macdonald, J. October 5, 1916.

DESCENT AND DISTRIBUTION (§ I A—3)—HOMICIDE—INSANITY.

The principle that no one can profit by his own wrong or criminal act does not apply so as to prevent an insane person who commits homicide, or her heirs, from taking an inheritance, under the provisions of the Inheritance Act (R.S.B.C. 1911 ch. 108) from the person killed.

[*Cleaver* v. *Mutual Reserve Fund Life Ass.* (*Maybrick* case), [1892] 1 Q.B. 147; *Crippen's* case, [1911] P. 108, referred to.]

Statement.

ACTION under the Inheritance Act (R.S.B.C. 1911, ch. 108) and Administration Act (*Ib.* ch. 4).

Macdonald, J.

MACDONALD, J.:—C. D. Mason was drowned at Robert's Creek, B.C., June 19, 1915. He died intestate leaving a widow and an infant daughter. Jennie Mason, the widow, while temporarily insane, killed the daughter, Maude Mason, and then committed suicide. The question that has been submitted for me for advice, is as to the disposition that should be made by the official administrator of the estate, to which Maude Mason became entitled, upon the death of her father. She would, under the Inheritance Act, R.S.B.C., 1911, ch. 108, receive all the real estate, subject to a one-third interest in favour of her mother for life. As to the personal estate she would, pursuant to the Administration Act, R.S.B.C. 1911, ch. 4, sec. 95, receive two-thirds thereof and one-third would go to the widow. All the real and personal estate to which the infant Maude Mason thus

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became entitled would, under ordinary circumstances, upon her death become vested in the mother. It is contended, however, that she could not inherit any of such property through having killed her daughter. If this contention prevailed, then such estate would pass to his sisters, Maude Mason and Margaret Mary Mason. If, however, the act of Jennie Mason in killing her daughter did not prevent her from becoming entitled to such estate, then such estate would pass to her mother, Mrs. Jane Bampton, and her two brothers and sisters. The sole ground upon which counsel relies, in support of the contention that the mother could not under the circumstances inherit from the daughter, is that "no one can profit by his own wrong or get a benefit by his criminal act."

To the contrary, it was submitted that this principle did not apply, where property became vested in a party, even though guilty of a wrongful act, where such vesting was not by virtue of a will but by the operation of the statutes. It was stated that there was no decision, exactly in point, and that all cases bearing upon the question arose through a beneficiary under a will, who had murdered the testator, seeking to derive some benefit from the will. In support of this argument I am referred to Cyc., vol. 14, p. 61, and cases there cited. I cannot see why a distinction should be drawn. It suggests itself, that if the principle were not applied, that a son, having a knowledge of the Inheritance Act, and knowing that he would inherit under such Act, might deliberately bring about the death of his father and then successfully contest any proceedings as to his right to the property inherited. He would thus reap a benefit from his felonious act and profit by his own wrong. In the view, however, that I take of the matter on another branch it is not necessary for me to come to a definite conclusion on this point.

If Jennie Mason committed a crime in killing her daughter, I am of opinion that any estate, to which the daughter had become entitled on the death of her father, would not vest in the mother. The matter was fully discussed in *Cleaver* v. *Mutual Reserve Fund Life Ass.*, [1892], 1 Q.B. 147, where it was held that Florence Maybrick, having been found guilty of the murder of her husband, James Maybrick, was disqualified from asserting any interest in the insurance upon her husband's life—Fry, L.J., at p. 156, refers to the principle of public policy.

This case is referred to and followed in *Lundy* v. *Lundy*, 24 Can. S.C.R. 650, where it was decided that the devisee could not take under the will of the testator, whose death had been caused by the criminal and felonious act of the devisee himself, and that in applying the rule there is no distinction between a death caused by murder and one caused by manslaughter. The judgment in *Hall* v. *Knight*, [1914] P. 1, is to the same effect. It follows and approves of the authority of *Cleaver* v. *Mutual Reserve Fund Life Ass., supra*. Cozens-Hardy, M.R., there cites *Re Crippen*, [1911] P. 108.

The turning point, however, to my mind in this matter is whether the killing by Jennie Mason of her infant daughter was a crime. In the submission of facts, it was stated that at the time "she was temporarily insane." It was agreed in the course of the argument that I should interpret these words as meaning, that her mind was in such a state that she could not distinguish between right and wrong. And if she had remained alive and been prosecuted, it could have been successfully contended on her behalf that her mind was diseased to such an extent as to render her incapable of appreciating the nature and quality of her act and of knowing that such act was wrong. If such a state of facts are admitted to have existed then under the provisions of the Criminal Code she was excused and could not be convicted of an offence. She was not guilty of a crime. In that event, in my opinion, she would inherit all the estate of her daughter. The result is that upon the death of the mother intestate, such estate became vested in her mother, two brothers and two sisters.

I think that all costs should, under the circumstances, be payable out of the estate. *Judgment accordingly.*

DORAN v. McKINNON.

Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. June 24, 1916.

CONTRACTS (§ I E 5—95)—STATUTE OF FRAUDS—MEMORANDUM—PAROL EVIDENCE.

Parol evidence is admissible to explain the terms of a telegram in order to connect it with other writings as a sufficient memorandum in writing under the Statute of Frauds.

[*McKinnon* v. *Doran*, 26 D.L.R. 488, 35 O.L.R. 349, affirming by divided Court, 25 D.L.R. 787, 34 O.L.R. 403, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 26 D.L.R. 488, 35 O.L.R. 349, affirming

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Davies, J.

by an equal division of opinion the judgment at the trial, 25 D.L.R. 787, 34 O.L.R. 403, in favour of the plaintiff. Affirmed.

Rowell, K.C., and *J. E. Lawson*, for appellant.

J. B. Clarke, K.C., for respondents.

DAVIES, J.:—I have had no difficulty in agreeing with the finding of fact of the trial Judge, approved of by the Appellate Division, that the appellant defendant is liable on his contract to purchase the Alberta bonds (so-called) in dispute.

I am also satisfied that, whether or not the alleged misrepresentation on the seller's part, as to the bonds not having before been offered for sale in New York, was such a misrepresentation as would have availed defendant to repudiate his contract, had he elected to do so in proper time, he, with full knowledge of the facts, elected not to repudiate, but to approbate. He cannot now be heard at this stage of the game to change his mind, more especially as the point was not pressed at the trial, where it should have been fought out had the defendant desired to take advantage of it.

I have had, however, great difficulty in reaching a conclusion, the contract being one within the Statute of Frauds, whether there is sufficient written evidence to satisfy that statute.

Apart from authority, I should have been inclined to think the evidence insufficient, and, although a careful reading of the many authorities *pro* and *con* has not entirely removed my doubts, I think the weight of the authority is to the effect that parol evidence may be given to connect two documents together which do not expressly refer to each other, but which connection and reference is a matter of fair and reasonable inference.

In this way two documents may make a contract within the statute. Such evidence may not be resorted to for the purpose of shewing what the terms of the contract are, but only in order to shew what the writing is which is referred to.

In *Ridgway* v. *Wharton*, 3 DeG. M. & G. 677, at 693 (43 E.R. 266 at 272-3), Lord Cranworth, when sitting alone as Lord Chancellor and over-ruling the decision of the Vice-Chancellor, is reported as saying:—

> Even though the terms had in fact been previously reduced into writing, the statute is not complied with unless the whole contract is either embodied in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it *contained in the signed paper.*

Afterwards, when the case came before the House of Lords on appeal, he, after two arguments, changed his mind on the point of the admissibility of parol evidence to identify the writing or document to be read into or connected with the one signed by the party sought to be charged, and is reported in 6 House of Lords Cases, at p. 257, as saying, after referring to his change of opinion:—

> The authorities lead to this conclusion that if there is an agreement to do something, not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, *parol evidence may be admitted to shew what the writing is*, so that the two, taken together, may constitute a binding agreement within the Statute of Frauds.

In that case "instructions" were referred to which might have been either by parol or in writing, but it was held that it might be shewn by parol evidence that instructions had been given in writing, and that there had been no other instructions than the written document which had been produced.

The case of *Ridgway* v. *Wharton*, *supra*, was followed by *Baumann* v. *James*, 3 Ch. App. 508, an action brought by a tenant against his landlord for specific performance of an agreement to grant a lease. The landlord had written a letter promising the tenant a lease for fourteen years "*at the rent and terms agreed upon*," to which the tenant wrote back an unqualified acceptance.

The Court of Appeal held, on the authority of *Ridgway* v. *Wharton*, *supra*, and other cases, that parol evidence was admissible to connect a report, made by a surveyor, previously recommending the granting a lease for fourteen years at a given rent, that it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the Statute of Frauds.

The cases of *Taylor* v. *Smith*, [1893] 2 Q.B. 65, *Potter* v. *Peters*, 72 L.T. 624, and others upon which Mr. Rowell naturally relied to support his contention are difficult to reconcile with the decisions above referred to, but the case of *Long* v. *Millar*, 4 C.P.D. 450, is in line with them. In the latter case the purchaser signed a memorandum to purchase three lots of land, 40 feet frontage on Pickford St., Hammersmith, for £310, and agreed to pay deposit in part payment of £31 and pay the balance and complete on October 1. The vendor (defendant) signed a receipt for the £31 "deposit on the purchase of three plots of land, Hammersmith."

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Both documents were signed at the same time, and the Court held that they could be connected by parol evidence, and that, together, they formed a sufficient contract to satisfy the Statute of Frauds.

And in *Wylson* v. *Dunn*, 34 Ch. D. 569, Kekewich, J., in 1887, at p. 575, says:—"Therefore the reference may be a matter of fair and reasonable inference, . . . but there need not be an express reference from one letter to the other."

The writer of the article on "Contract," in Art. 761, in the 7th volume of Halsbury's Laws of England, has collected all the authorities on both sides of the question in a note to that article, page 369 of that volume.

Now, in the case before us we have the defendant's telegram of June 3, to his associate in New York, Daude, as follows:—

> The Alberta Bonds which you have particulars of, no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once.
> Rush charge. (Sgd.) J. J. DORAN.

The question is, can the identity of the bonds and the meaning of the words, "our terms," be fixed by prior letter or documents signed by the defendant? I am of the opinion that, under the authorities, they can, and that parol evidence was properly received to prove the existence and identity of the documents shewing what these terms were, and that they had been stated by defendant over his own signature, and that there were no other terms than those stated and to which the telegram applied.

Once the principle I have accepted is applied to the facts of the case, no room for doubt can exist as to the identity of the Alberta bonds or the meaning of the words "our terms," or as to the statute having been complied with.

The appeal, therefore, fails and must be dismissed with costs.

Idington, J.

IDINGTON, J.:—The telegram of June 3, 1914, from appellant to his friend and agent, Daude, seems to dispose of the appellant's pretension that he was only an agent of respondents, and opens the way to find in the rest of the correspondence evidence to satisfy the Statute of Frauds, assuming the contract falls within the requirements of that statute.

I think that with no other oral evidence than such as permitted in such cases to enable one to understand what the parties were about, there is enough in the correspondence to demon-

strate therefrom a contract evidenced in writing to comply with the statute.

As to the alleged misrepresentation, I do not think even if a possible defence that the appellant can maintain it in face of the fact that after full knowledge of its alleged effect he continued instead of repudiating to act as he did.

I think the damages are more questionable, but I am unable to say, as matter of law, that the loss to respondents was less than the trial Judge has assessed.

The appeal should be dismissed with costs.

DUFF, J. (dissenting):—I would allow this appeal. Duff, J.

ANGLIN, J.:—In view of the explicit finding of the trial Judge that the plaintiffs and their witnesses are to be credited rather than the defendant and his witness Daude, it is quite impossible to reverse the holding, concurred in by all the appellate Judges, that the defendant contracted to purchase the bonds in question as a principal. Anglin, J.

I am also satisfied, for the reasons assigned by Riddell, J., that if there was a misrepresentation as to prior negotiations in New York in regard to these bonds, the defendant, with full knowledge, elected not to exercise any right to rescind to which such misrepresentation might have given rise. The evidence shews that he knew of the prior attempted sale to Harris, Forbes & Co. (of which he complains) before June 17. He did not then repudiate the purchase. On the contrary, in answer to a telegram of the plaintiffs of June 26:—"When will you take delivery Albertas? Expect hear from you twenty-fourth." Doran wired on the 28th:—

> Delay greatly your fault. Doing best settle matter fast as possible. Impossible settle by twenty-fourth. Will close deal as soon as possible. Expect have situation settled by Friday. Claftin's failure hurt market. Money situation very bad. If necessary hold bonds subject to prior sale by you.

Subsequent letters and telegrams from the defendant and Daude put in evidence shew that they considered the contract with the plaintiffs in existence at least down to July 25. The first suggestion of repudiation comes from Daude on August 13, after the plaintiffs had sent further communications pressing for payment.

The only question requiring further consideration is the defence raised by the fourth section of the Statute of Frauds,

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which admittedly applies to the transaction. *Driver* v. *Broad*, [1893] 1 Q.B. 539, 744.

On June 3, the defendant, telegraphed to his representative, or partner, Daude . . .

This telegram puts beyond controversy the fact that the defendant purchased the Alberta bonds. It is conceded that the identity of these bonds has been fully established by prior letters signed by the defendant, which also state the names of the vendors, the price, and an arrangement as to commission and place of payment and delivery. The only objection taken to the sufficiency of the telegram of June 3 as a memorandum to satisfy the Statute of Frauds is that the phrase, "our terms," might refer to some terms arranged over the telephone on the previous day other than and in addition to those set forth in the plaintiffs' original circular offering the bonds for sale, which admittedly formed the basis of negotiations, and is referred to as such in Doran's letter to Daude of May 26, repeating some of the particulars, and the subsequent correspondence. A slight reduction of the quantity of the bonds as stated in Doran's letter of the 26th, the plaintiffs' assent to the commission for which the defendant stipulated, and the place of payment and delivery are set forth in a telegram from Doran to Daude of May 29. There is no suggestion in the evidence that there were any other "terms" of the sale. The phrase, "our terms," in the telegram of June 3, is certainly ambiguous, but, upon the authority of such cases as *Baumann* v. *James*, 3 Ch. App. 508, *Cave* v. *Hastings*, 7 Q.B.D. 125, and *Ridgway* v. *Wharton*, 6 H.L. Cas. 238, I have no doubt that parol evidence was properly received to shew that terms had been stated by the defendant in writing over his own signature, that there had been no other terms than those so stated, and that it was to the terms so stated that the telegram referred. That evidence has been given and is conclusive.

On June 16 the defendant wired to Doran as follows:—

> Alberta Bonds must be paid for to-day. McKinnon's statement shews them worth $227,085.98, less our commission, $2,500.00, or $224,585.98 to them. Answer at once.

This telegram clearly refers to and implies a recognition of a statement of McKinnon & Co. Such a statement had been sent to the defendant on the previous day, accompanied by an intimation that the plaintiffs were ready to make delivery, and

understood that the defendants would take it on the following day. The statement was in the form of an account, and gave full particulars of the purchase. On the authorities above cited, to which may be added *Long* v. *Millar*, 4 C.P.D. 450, I have no doubt that the statement referred to in Doran's telegram to Daude may be identified by parol evidence. I think that Doran's telegram of the 16th, with McKinnon's statement of the 15th, contains a sufficient memorandum to meet the requirements of the statute. It, at all events, supplies any possible deficiency in the earlier documents.

No ground has been shewn for a reduction in the damages awarded. The plaintiffs disposed of the bonds with reasonable promptitude, and they made every reasonable effort to obtain the highest possible price for them in order to protect themselves as well as the defendant. There is no evidence that they did not get the full market value or as high a price as could be obtained at any time after the defendant had repudiated his contract.

I would dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—It is established by the oral evidence given that all those documents have reference to the alleged sale of those Alberta bonds. Those letters and documents, according to my opinion, constitute a memorandum sufficient to satisfy the Statute of Frauds.

The correspondence between Doran and Daude is admissible as evidence of the contract of sale. Any note or letter written by a purchaser to a third person containing directions to carry the agreement into execution may be sufficient memorandum to meet the requirements of the statute. *Seagood* v. *Meale*, Prec. Ch. 561, in 1721; *Welford* v. *Beazely*, 3 Atk. 503, in 1747; *Gibson* v. *Holland*, L.R. 1 C.P. 1, in 1865; Sugden, Law of Vendors and Purchasers, 14th ed., p. 139; Agnew, Statute of Frauds, p. 244.

We have in the present case the circular containing the offer of sale of those bonds. We have also the letter of Doran to Daude of May 26, stating all the conditions at which sale could be made. It is pretty evident, however, that the allowance of $1,150 was not considered attractive enough. They asked a sum of $2,500. The matter of that further reduction was discussed by Doran and McKinnon, and at last the latter yielded, since, on June 3, Doran informs his agent or associate, Daude,

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that McKinnon agreed "to our terms." We see also that that telegram was sent the day after McKinnon wrote a lengthy letter giving all the conditions of the sale. Later on, in the middle of June, Doran is seen urging upon his New York friend to close and send the money.

There is no doubt that McKinnon's letter of June 2 was binding on them; then the subsequent note in writing, signed by Doran, is sufficient to bind them. Parol evidence could be adduced to shew that those documents referred the one to the other, and that the contract described by McKinnon is the same as the one accepted by Doran.

It is a pretty well-settled rule that when one document refers to another, the two may be read together so as to constitute a complete memorandum. The same rule applies if the documents can be connected together by reasonable inference, although there is no express reference from one document to the other. Hals. vol. 7, No. 761.

On that question of reference I will quote also the following decisions in support of the respondents' contentions: *Dobell* v. *Hutchinson*, 3 A. & E. 355, in 1835; *Ridgway* v. *Wharton*, 6 H.L. Cas. 238, in 1856; *Baumann* v. *James*, 3 Ch. App. 508, in 1868; *Long* v. *Millar*, 4 C.P.D. 450, in 1879; *Cave* v. *Hastings*, 1881, 7 Q.B.D. 125. In so far as I have been able to find, these decisions have never been overruled, and are accepted as the settled law of the land. The appellant relied mostly on: *Pierce* v. *Corf*, 29 L.T. 919, in 1874; *Taylor* v. *Smith*, [1893] 2 Q.B. 65, in 1892; *Potter* v. *Peters*, 72 L.T. 624, in 1895.

In those three cases the documents contain no reference to one another, and could not be connected by reasonable inference from the circumstances of the case. They have never been considered, however, as over-ruling the decision rendered by the House of Lords in the case of *Ridgway* v. *Wharton*, *supra*.

The case of *Potter* v. *Peters*, *supra*, was decided by Kekewich, J., in 1895, the same Judge who, in 1887, rendered judgment in the case of *Wylson* v. *Dunn*, 34 Ch. D. 569, where a letter, not referring expressly to a former one, contained the declaration that he was willing to take half an acre of the land "as agreed upon," was held, however, as containing a sufficient reference to form a valid contract within the Statute of Frauds.

In *Taylor* v. *Smith*, [1893] 2 Q.B. 65, an invoice of the goods was sent by the plaintiffs to the defendant, and the carrier also sent an advice note to inform him of the arrival of the goods. That advice note specified the quantity of goods, but did not state their price nor refer to the invoice or any other document. The defendant, after inspection, wrote on the advice note: "Rejected; not according to representation." It was held that there was not a sufficient note of the bargain as required by the Statute of Frauds.

No reference was made by the Judges who decided *Taylor* v. *Smith*, [1893] 2 Q.B. 65, to *Ridgway* v. *Wharton*, *supra*. One of the Judges has referred, however, to the case of *Long* v. *Millar*, 4 C.P.D. 450, which I have quoted above, and said the case of *Taylor* v. *Smith*, [1893] 2 Q.B. 65, wanted the main element to be found in the *Millar* case, viz., the existence in a document signed by the defendant of words referring to a contract of purchase.

I have, then, come to the conclusion that the appellant, in the present case, fails, and that his appeal should be dismissed with costs. *Appeal dismissed.*

Re NEWCOMBE v. EVANS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. June 9, 1916.

COURTS (§ II C—195)—SURROGATE—REMOVAL OF CAUSE—JUSISDICTIONAL AMOUNT.

The amount fixed by statute (R.S.O. 1914, ch. 62, sec. 33) as the inferior limit for the removal of a testamentary cause from a Surrogate Court into the Supreme Court of Ontario, does not only include the value of property in Ontario, but of all property of the deceased, wherever situate, which may be affected by the result of the action.

Statement.

APPEAL from the judgment of Latchford, J., dismissing an application, under sec. 33 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, for the removal into the Supreme Court of Ontario of a testamentary cause in the Surrogate Court of the County of Essex. Reversed.

A. W. Langmuir and *A. H. Foster*, for appellant.

H. S. White, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—No good reason has been given for the plaintiff's persistent opposition to the defendant's efforts to have this case removed from the Surrogate Court of the County of Essex into the Supreme Court of the Province, under sec. 33 of the Surrogate Courts Act.

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The proceedings in the Surrogate Court were begun by the plaintiff for the purpose of obtaining probate of the paper writing in question as the last will of her husband, who died recently.

The paper writing purports to be the last will of the husband and to give to the plaintiff absolutely all the property of which he died possessed, and to make her sole executrix of the will.

The property of which he died possessed is worth about $30,000, comprising $450 in "vehicles and equipment;" $500 "money in bank;" $45 "money in bank in Ontario;" and $60 "wearing apparel and personal effects in Ontario:" all the rest of the estate being lands in the State of Massachusetts: the only part of the estate in Ontario being the $105 worth expressly stated, in the application for probate, as above, to be in Ontario.

The defendant is a sister of the deceased, and opposes the propounded will on the grounds of mental incapacity of the deceased, and want of knowledge and approval of the contents of the will by him; and it is stated in the affidavit of the plaintiff to lead grant of probate, as well as by the defendant, that, when the will was made, the deceased's property was in the hands of a "conservator," because of the deceased's incapacity, from some cause, to manage it.

So that a very real question as to the validity of the will is involved in this case, a question upon which the right to about $30,000 worth of property depends: and so obviously, under ordinary circumstances, a case for a superior, not an inferior, Court.

And, besides that, the case is one which, no matter what the result of this appeal might be, the defendant could bring into the Supreme Court, under its statute-conferred jurisdiction "to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not."

But it is contended, and the Judge of first instance has favoured that contention, that the case does not come within the provisions of sec. 33 of the Surrogate Courts Act, because that section permits a removal of the cause only when the property of the deceased exceeds $2,000 in value; and that that means property in Ontario only.

The words of the statute are not, however, "property in Ontario," but are merely "the property of the deceased;" and there

is no good reason for such a qualification of them; though necessarily the property must be property that may be in some way affected by the result of the litigation; if it may be so affected, then its value, wheresoever it may be, should be counted.

Without evidence to the contrary, I should have held that all of the deceased's property might directly, or indirectly, be affected by an adjudication in this cause for or against the validity of the will—especially as to any rights of the parties to the cause: and a reference to any of the standard law books published in the United States of America gives more than merely support to that view; they shew an effect greater than those familiar with the laws of England chiefly might have expected: see, for instance, Encyclopædia of Pleading and Practice, vol. 10, pp. 1066, 1069.

And as to the law of the State of Massachusetts, it was said by Shaw, C.J., in delivering the judgment of the Supreme Judicial Court of the State, in the case of *Crippen* v. *Dexter* (1859), 13 Gray 330, 331: "It has long since been determined, as the law of this commonwealth, that one probate of a will only shall be allowed or admitted, as well in its operation upon devises of real estate, as on bequests of personal. In this last respect, it varies from the rule of the common law, which makes a marked distinction between a will of real, and one of personal estate. The importance of making proof of a will, once for all, and for all purposes, must be obvious. It determines the *status*, if it may be so called, the condition of a deceased person's estate. It must be settled as an estate testate or intestate. The establishment of the one necessarily excludes the other."

He then refers to the fact that with regard to devises of real estate the law of England is different from that of the State of Massachusetts; and, after referring to statutes of the State as to the effect of probate granted in another State, adds these words, among many other expressed in this important judgment (p. 332): "This statute does not in terms apply to a will made and proved in another state or country; but with other acts of legislation, it tends to confirm a general course of policy, to consider one effectual probate of a will, whether in our own or in a foreign state, according to the laws of such state, as conclusive and effectual, to all purposes." And to the same effect is the earlier case, in the same Court, of *Parker* v. *Parker* (1853), 11 Cush. 519.

I do not read this decision, of course, for the purpose of proving

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what the law of Massachusetts is; that, it need hardly be said, is still treated as a question of fact: but, in the absence of evidence—if there had been no affidavits—it might have been assumed that the law of Massachusetts is like that of this Province as to the effect of proof of a will upon the title to lands: and it is always some satisfaction to find, even from books which may not be evidence, that that which would have been assumed really is so, whether strictly proved or not.

If this were not so, it would be extremely unlikely that the plaintiff would insist on going to a trial of the question of the validity or invalidity of the will here, where there is only $45 in the bank, and old clothing valued at $60 to be administered; or indeed have sought probate here even under the "Estates of Small Value" provisions of the Surrogate Courts Act—see sec. 73.

Instead of in any way restricting the application so as to affect only the property, said to be of insignificant value, in Ontario, the plaintiff has set out in all her proceedings all the property of which the deceased died possessed, and in these contentious proceedings is seeking to establish a will which gives it all to her. Her pleadings are as broad as they can be.

And any question, of even a technical character, as to the effect of the litigation here upon the property in the State of Massachusetts, is set at rest, as far as this application goes, by affidavits of a Massachusetts attorney-at-law, one of which was filed upon the application in the High Court Division, and the other on this appeal: affidavits to which no answer has been made, proving the law of Massachusetts to be as I have already stated *primâ facie* it should have been taken to be in so far as it accords with the law of this Province.

Without these affidavits, without proof to the contrary of that which they prove, I would have had no hesitation in making the order sought, and which now must go, removing the cause into the Supreme Court of this Province, under the provision of sec. 33 of the Surrogate Courts Act.

Under all the circumstances, the costs here and below may be costs in the cause.

The appeal is allowed accordingly.

* Riddell, J.

RIDDELL, J.:—The deceased J. A. Newcombe, domiciled in Ontario, died having made what is claimed to be his last will

and testament. Upon probate being applied for in the Surrogate Court of the County of Essex, it was made to appear that he had within Ontario $105.25, but in Massachusetts $900 in personal property and about $24,000 in real property.

His sister, the appellant here, opposed the grant of probate: and there is no pretence that there is not a real dispute, "a fair case of difficulty." Under these circumstances, the rule is, that "the case should be removed if the amount of the estate brings the case within the statute:" *Re Pattison* v. *Elliott*, 3 O.W.N. 1327; sec. 33 (3) of the statute, R.S.O. 1914, ch. 62, fixes the inferior limit thus, "unless the property of the deceased exceeds $2,000 in value."

I agree that property which can in no wise be affected by the will is not to be considered in determining the amount of "the property of the deceased" under this sub-section.

The affidavit before Mr. Justice Latchford was imperfect in not setting out definitely the result in Massachusetts of a grant of probate in Ontario; and, accordingly, my learned brother dismissed the application.

Upon argument of the appeal, we allowed a further affidavit to be put in, which heals the defect.

An attorney-at-law of Massachusetts, of many years' experience, swears that "where probate of the will of a deceased person has been granted by the proper Court in the country in which the deceased person was domiciled at the time of his death, and application is subsequently made for probate thereof in the State of Massachusetts, it is not then open to any one desiring to oppose the granting of probate in the said State of Massachusetts, to contest the will, as, under the law of the State of Massachusetts, if the person has not contested the grant of probate in the country of the domicile of the deceased person, or has contested the grant of probate in the said country unsuccessfully, then, in either event, he or she is precluded from contesting the grant in the State of Massachusetts upon any ground whatever."

Such being the fact, the property in Massachusetts will be affected by probate in Ontario, and should be considered in determining the value of the property of the deceased.

If I followed the strict rule as to costs, I should allow the appeal without costs, and direct the removal into the Supreme

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Court with costs in the cause as of a simple motion; but, under the circumstances of the case, costs here and below may be in the cause.

LENNOX and MASTEN, JJ., concurred. *Appeal allowed.*

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New Brunswick Supreme Court, McLeod, C.J., White and Grimmer, JJ. June 28, 1916.

1. MORTGAGE (§ I B—7)—QUIT-CLAIM DEED AS—DISCHARGE—TENDER.
A quit-claim deed given as security for a debt, together with a written memorandum providing for the surrender of the deed when the indebtedness is satisfied, must be read together, and operate as a mortgage which is discharged by subsequent tender of the amount of the indebtedness. The tender of such amount according to statement furnished by the creditor is sufficient, notwithstanding it subsequently turns out that the statement was for less than the amount actually due.

2. CONTRACTS (§ II D 2—175)—TIMBER AGREEMENT—QUANTITY—OTHER CONTRACTS.
An agreement to furnish a quantity of lumber during a logging season, and "all logs cut to apply to the contract," creates an obligation to deliver the specified quantity; but logs cut for another person cannot be claimed.

Statement.

APPEAL from the judgment of McKeown, J. Affirmed.

The judgment appealed from was as follows:—

This suit was commenced by a writ of replevin issued on February 4, 1915, under which certain logs cut by the defendant were seized by the high sheriff of Victoria county and delivered to plaintiff. The lumber was cut upon lot No. 50, range 1, in the Blue Bell Tract, in the parish of Gordon, Victoria county. On June 25, 1909, defendant applied to the government for this lot, and by notice published in the "Royal Gazette," April 26, 1911, it appears that his application was approved. From the evidence it is shewn that defendant had built a house upon said lot and made his home thereon, and had complied with the regulations of the Crown Land Department in that regard. On August 7, 1914, the parties to this suit made an agreement in writing, whereby defendant was to cut from said lot, and deliver to plaintiff, 100,000 or more superficial ft. of lumber during the logging season of 1914-1915, on the terms fully set out in said agreement, which contains several clauses applicable to the different disputes which subsequently developed, and which clauses will be fully set out in considering the issue to which they are pertinent. In addition to the memorandum of agreement above referred to, plaintiff put in evidence three other written contracts similar in effect, though varying in detail.

covering like agreements made between him and defendant for the logging seasons of 1911-1912, 1912-1913 and 1913-1914. Plaintiff likewise put in evidence a certified copy of a quit claim deed of said lot No. 50, dated August 19, 1912, made and executed by defendant to him, McLaughlin, and duly acknowledged, the original of which deed was certified by the Deputy Minister of Lands and Mines to be on file in the Crown Land office of the province. At the time said quit claim deed was executed plaintiff gave to defendant the following paper writing:—

I promise to recall the quit claim deed given this nineteenth day of August, 1912, in time for Earlin M. Tompkins to get his deed or grant from the government, providing satisfactory arrangements are made at the time required to cover indebtedness—namely Earlin M. Tompkins to hand deed over to me as security. J. D. MCLAUGHLIN, J. F. JOHNSTON.

The defendant proceeded to fulfil his part of the contract by employing certain workmen to get out the lumber called for, the operation being entrusted to a Mr. Elliott. On January 9, 1915, Elliott and his workmen were stopped by plaintiff, who afterwards, by writ of replevin, seized certain logs cut elsewhere upon the lot by Tompkins himself, and declared the contract to be at an end, forbade defendant's workmen to cut any more trees, and sent to defendant and his foreman the following notices:—

To Earlin M. Tompkins, Esq.,

The conditions of your contract to cut lumber for J. D. McLaughlin on lot No. 50, range 1, Blue Bell Tract, having been broken by you in several particulars, and the operation having been taken over by Mr. McLaughlin, as provided by the terms of the contract, he has instructed me to notify you, and you are hereby notified, that should you in any way interfere with any woodsmen he may engage to carry on the said operation, or with any work being carried on by any such woodsmen on said lot, or with any logs or lumber hereafter to be cut by any such woodsmen on said lot or already cut on said lot by you or your workmen, proceedings will be taken against you to the full extent of the law.

Dated at Perth, N.B., January 22, 1915. C. H. ELLIOTT.

Mr. Charles Elliott, THREE BROOKS, Jan. 9th, 1915.

I wish you to stop cutting at once on lot No. 50, range 1, as I don't know you at all in this transaction.

Countersigned J. BOYNTON. J. D. MCLAUGHLIN.

No further attempt was made by defendant to continue the operation, neither did the plaintiff take any steps in that direction.

The contract covers 3 typewritten pages. It is a general form of logging contract used by plaintiff in his agreements with different operators and filled in to suit each individual bargain.

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It does not seem necessary to set it out *in extenso* but, in discussing the issues raised, I will quote in full the different sections under which disputes have arisen. The notice first above quoted was given by virtue of the following section of the contract:—

It is agreed by the party of the first part (Tompkins) that if at any time during the logging season the work does not appear to be progressing satisfactorily as the party of the second part (McLaughlin) would like it to progress, and upon receiving 48 hours' notice from the party of the second part, will hand over the entire operations to him to complete or to do as he sees fit.

While the expression "the work does not appear to be progressing satisfactorily as the party of the second part would like it to progress" is very broad and gives the party of the second part great scope for interference, yet the right given under the section is limited to reasons connected with the work's progress, and I think it is not open to arbitrary exercise, and cannot be acted upon unless the work can reasonably be considered as being done improperly or too slowly; and I may as well say, *in limine*, that as far as concerns the rapidity of the operation, the progress of the work gave ample prospect and promise of its fulfilment before the end of the season. While criticism was passed upon defendant's alleged tardiness in making a start, yet, in justifying the course he took, plaintiff did not lean heavily upon that circumstance, nor upon any slowness in proceeding. Nevertheless, some attention was given to it, and I think it is right for me to say that, in my view, plaintiff's action in closing down on the operation was not justified by any slowness, either in starting the work or in carrying it on. While it is impossible in any case to say with absolute certainty what would have happened if something else had not intervened, yet to me it is abundantly clear that defendant had not forfeited his right to proceed under the contract by any slowness on his part, or on the part of his workmen. The work was commenced on or about December 15, 1914, and plaintiff intervened to stop t on or about the ninth day of the following month, and between those dates over 40,000 ft. of lumber had been cut and yarded under the contract. Elliott, defendant's foreman, says he would have got the other 60,000 in about 3 weeks, as the preliminary work of roadmaking, etc., had all been done, and, indeed, plaintiff himself admitted in cross-examination that it would have been completed all right.

It was also put forward by Mr. Carter, K.C., plaintiff's

counsel, that Tompkins had no right to sublet the contract, but that he (defendant) was under obligation to do the work personally, and the moment he passed it over to another it was open to plaintiff to exercise his right to treat the contract as at an end. Inasmuch as details of the arrangement between Tompkins and Elliott are not clearly set out in the evidence, I am not at all sure that what took place between them was indeed a subletting in the sense contended for by Mr. Carter; although, in answer to him, defendant made use of the word "sublet" as applied to the transaction; yet, even so, I am unable to acquiesce in the argument that subletting a contract of this nature operates as a breach of it. This agreement to get out logs is not a contract involving in any particu ar extent, if at all, the personality of the operator, nor is it one in which any individual skill or aptitude is a determining feature. No doubt there are contracts of such a nature that the party who binds himself to a performance cannot pass his duties over to another, and any such action on his part gives to the other party thereto a right to refuse such substituted performance. It is sufficient for the purpose of this case to say that, in my opinion, this contract is not of that kind. Its very nature presupposes that it will be done largely by others, for it is out of the question to imagine that defendant individually can cut all this lumber himself. There is nothing in the contract itself to bind defendant to a personal performance of his obligations.

But I think I am right in saying that neither the substituted performance, nor any slowness in carrying out the work, was the actual reason of plaintiff's intervention. It appears that on December 19, 1914, and while the operation in question was progressing, defendant entered into another contract with Donald Fraser to procure for him from the same lot some 50,000 superficial ft. of lumber, wholly outside the operation for plaintiff. Now plaintiff contends that under his quit claim deed, he owns the land, or at least he owns whatever rights defendant had in it, and consequently defendant had no right to sell any lumber from it; and plaintiff further claims a right to all logs cut by defendant by virtue of a certain clause in the contract which reads as follows:

"All logs cut by himself or that he may have cut for him—to apply to this contract." Plaintiff therefore claims the logs in two ways. First, he says, in effect, "As against the defendant I

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am the absolute owner of the land, and of everything on it, and defendant has no right to dispose of any lumber from it," and secondly, he says, "Even if I don't so own the land, yet, under the contract, I am entitled to everything you (defendant) cut."

Before discussing these contentions in detail, another circumstance must be noticed. After defendant's operation was stopped, and before the writ of replevin was issued, defendant sought out plaintiff to find out what the trouble was, and had a conversation with him about it. This took place on January 12, 1915, the third day after defendant's workmen were stopped.

I took evidence with a view to arriving at the exact amount then due and owing from defendant to plaintiff, and will give my conclusions as to the state of the account a little later on, but whether the $526.42 was in fact the proper amount, or not, I do not think for the purpose of a tender plaintiff can dispute its correctness. From the facts disclosed by the evidence it is apparent that the rejection of the sum tendered was not based upon any suggested deficiency in amount. Mr. McLaughlin's statement is clear and easily understood. He apparently thought that it would be more profitable for him to have the logs and that he was not bound to take the money. When it is remembered that he held defendant's property only as security for advances, and that, apart from defendant's indebtedness to him, he (plaintiff) had no rights whatever in it, I think it will be clear that plaintiff attached much more importance to his holding the quit claim deed than he was justified in doing. I think the deed and accompanying document must be read together, and that in substance they amount to a mortgage; and I further think that when a mortgage is paid or the full amount thereof tendered, the mortgagee's rights of property thereunder are extinguished; and, as to the sufficiency of the amount tendered by defendant, it seems to me that when a creditor, under the circumstances here disclosed, apprises his debtor of the amount due from him, the tender of such amount is sufficient for all the purposes for which a tender is made. In the case of *Nixon* v. *Currey* (1908), 4 N.B. Eq. 153, Barker, C.J., had occasion to take an account between the parties to that suit, and in discussing the matter he made reference to the duty of a grantee who had taken a conveyance, absolute on its face, but which was really given by way of security for certain moneys owed to him by the grantor. His

remarks, at p. 158, upon the duty of a creditor who holds a security such as is held by plaintiff in this case, seem to me so just and equitable, if I may venture without presumption to say so, that I have no hesitation in adopting them as a guidance to me in this inquiry. I think it was McLaughlin's duty to tell defendant how much he, defendant, owed him, and having named the amount, I think a tender of such sum if properly made is effective.

As before remarked, plaintiff bases his right to replevy on a twofold claim, the one arising from his alleged ownership of the land by virtue of the quit claim deed, and the other from his right under the contract to take over the operation when things were not progressing satisfactorily to him.

With reference to the first ground, Carter claimed that defendant was absolutely estopped from setting up any claim whatever to the property, because he had given the quit claim deed to plaintiff, and that he could not be heard to deny his grant. It is clear that the deed was simply given as a security for defendant's indebtedness, and I so find as a fact. The consideration is expressed to be $300 which was to cover future advances. No money passed at the time of its execution, but, on the contrary, plaintiff, the grantee, then gave defendant, the grantor, the paper writing above set out. Assuming, for the sake of argument, that nothing at all was due from defendant to plaintiff, could it be contended that plaintiff would have any right to interfere with the property by virtue of the quit claim deed? It seems to me clear that he would not, and if that be so, I think when sufficient tender of defendant's indebtedness is made, it must operate to extinguish plaintiff's property rights in this case. Under the head of "mortgages," Am. & Eng. Encyc. of Law, 2nd ed., vol. 20, p. 1062, it is stated thus: "It is well settled that an unconditional tender on the day when the debt secured by the mortgage is due, called the law day, discharges the lien of the mortgage." In my view there was no condition at all attached to the tender in this case. Defendant's statement to McLaughlin that he wanted a receipt for the money and to withdraw his quit claim was not put forward in any way as a condition of the payment or offer. It was simply the statement of a business man who undoubtedly was entitled to such receipt and to a reconveyance of his property by a creditor upon the extinguishment of his claim.

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I think plaintiff is not entitled to recover upon the first ground of his claim, because upon the tender being made his rights of interference with the property pledged came to an end, and I think further that such tender would have the effect, under the circumstances, of putting an end to any rights plaintiff might otherwise have to interfere under any other clause of the contract. But there are questions of fact involved, concerning which I think I should express an opinion, so that in case I err in my view with respect to the tender, the matter may be adjusted on the facts as found.

As before remarked I do not think that McLaughlin's stopping the work was attributable to any dissatisfaction as to its progress.

Referring now to plaintiff's right to all the logs cut on the land, based upon his contractural rights under the clause, "all logs cut by himself (defendant), or that he may have cut for him, to apply to this contract," while I am not free from doubt, I think it proper to interpret this clause as having regard to the fulfilment of defendant's contract to cut and deliver 100,000 or more superficial feet. It was open to defendant to give plaintiff more if he, defendant, wanted to, but he was not compelled to do so. There is nothing in the contract especially prohibiting defendant from cutting for others, unless these words import such prohibition, and, in my opinion, the clause can be given fair and reasonable construction as ensuring to plaintiff the 100,000 feet, by whomsoever cut, but it is an inapt expression to take away defendant's right to do business with anybody else, after fulfilling all claim plaintiff had upon him. The clause was interlined in the contract by McLaughlin or his agent, and there is no context by which its import can be settled. It is certainly open to the meaning defendant puts upon it. Defendant claims he never understood the clause to limit his right to cut for other people after he had fulfilled his contract with plaintiff, and he says as he cut the logs for Fraser he gave instructions to his men not to mark them as they would have to be applied to the McLaughlin contract in case Elliott failed to get the 100,000 ft. for plaintiff. It seems to me that defendant acted openly and fairly in his dealings. His supply bill and cash procured from plaintiff against the operation was less in amount than $130, and the value of the 40,000 ft. of logs in the woods would be, I think, double that amount.

The whole contract, including the clause in question, was drawn by plaintiff, and defendant is entitled to his construction of any ambiguous clause, provided it will fairly bear the meaning he ascribes to it. I am not wholly free from doubt, but I incline to the belief that defendant's construction is not an unreasonable one. I am convinced that defendant honestly so interpreted it and for the purposes of this case I adopt it.

In addition to his claim for possession and ownership of these logs cut by defendant under the Fraser contract, plaintiff also asks for damages upon other grounds. If I am right in the view I hold with reference to the tender and the consequences which, to my mind, result from its non-acceptance, and also as to the plaintiff's rights under the contract, there can be no damages assessed to the plaintiff on these additional claims, because all the alleged grievances and loss flowed from the replevy and the stoppage of the work. Nevertheless, I am of the opinion that it would be better to make an assessment, or a finding, upon each claim on the basis that plaintiff is correct in his views; so that the matter may be capable for adjustment from that standpoint.*

In my view defendant is entitled to damages which I assess at $718, from this must be deducted $534.22, which I find to be defendant's indebtedness to the plaintiff, and I direct a verdict and judgment against the plaintiff for the difference between these amounts, viz., for the sum of $183.78.

I further think, and find, that the defendant is entitled to succeed in his claim for a reconveyance of the land held by the plaintiff as security for defendant's indebtedness to him, and I therefore order and direct that upon a proper conveyance thereof being submitted to the plaintiff, he do release and reconvey to the defendant all his (plaintiff's) interest in and to lot No. 50, range 1, Blue Bell Tract, now held by the plaintiff as security for defendant's past indebtedness to him. The defendant is entitled to his costs of suit.

From this judgment the plaintiff appealed, asking that the verdict for the defendant be set aside and a verdict be entered

*NOTE:—His Honor proceeded to find and assess the amount due the plaintiff on each of his claims on the basis that he is correct in his views, but as the judgment both as to the tender and as to the plaintiff's rights under the contract is affirmed on appeal this part of the judgment is not material to this report and is omitted.—REPORTER.

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for the plaintiff or failing that, that a new trial be ordered, on the grounds: That His Honour was in error in holding:—That there was no breach of contract by the defendant; that the property in the logs was in the defendant; that the defendant's right to cut logs on lot 50 was not limited to the right to cut for the plaintiff; that the defendant is entitled to a reconveyance.

T. J. Carter, K.C., for plaintiff, appellant.

W. P. Jones, K.C., *contra*.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J.:—The trial Judge found that at the time the work was stopped there was every reasonable prospect of the contract being completed by Elliott and that the closing down of the operation was not justified by any slowness either in starting the work or in carrying it on, and that the plaintiff had not forfeited his right to proceed under the contract by any delay on his part. With this finding I agree, it being based upon the quantity of lumber—some 42,000 ft. being cut and marked between December 15 and January 9—and upon the statement of the defendant's foreman that he would have got the other 60,000 ft. in about 3 weeks. Before stopping the work it does not appear that any request was made by the plaintiff to the defendant under the terms of the contract to deliver this operation over to him within 48 hours, the only notice given or served being that to Elliott to stop the work. The work having been stopped, the defendant sought out the plaintiff for the reason, and was informed the fact was he was cutting logs for third parties, and that he, the plaintiff, was going with his teams to take the lumber at $2.50 per thousand to cover the defendant's indebtedness to him. The defendant thereupon proposed to pay the amount he owed the plaintiff, who agreed to accept the same. A statement was prepared for the defendant by the plaintiff's bookkeeper, showing the amount alleged to be due, and a cheque for that amount was tendered to the plaintiff's bookkeeper and refused by him. Subsequently the defendant procured the cash and made a tender thereof to the plaintiff personally, and also to the bookkeeper. Acceptance was refused, the plaintiff saying that he would accept lumber at $2.50 per thousand to cover the amount of defendant's indebtedness. Having refused to accept the payment of his debt, the plaintiff next issued a writ of replevin under which he seized and took possession of the 34,000 ft.

of lumber the defendant had cut for Donald Fraser, having already got delivery of the 42,000 ft. cut by Elliott. The Judge also found on the facts that the quit claim deed and writing accompanying it must be taken together, and as such they constituted in substance a mortgage upon the land, and that when the amount of the indebtedness for which the deed was security was tendered the plaintiff and refused, his rights as mortgagee became and were extinguished, and that while the sum tendered did not entirely agree with the sum afterwards found due the plaintiff from the defendant, yet the plaintiff, having prepared the statement of the amount due him from the defendant, and delivered it to him, the tender of the amount claimed was sufficient for all the purposes for which a tender is made. See *Nixon* v. *Currey* (1908), 4 N.B. Eq. 153. The Judge also found the plaintiff was not entitled to recover by virtue of any claim against the logs arising from the alleged ownership of the land under the quit claim deed, nor from his rights under the contract to take over the operation by reason of its progress not being satisfactory. He has, in his judgment, very fully taken up and considered all the points raised upon the trial, even to the taking of an account between the parties; and having had the opportunity of reading the judgment, and having considered the evidence given on the trial, and heard the argument of counsel, I fully agree therewith and approve thereof, and concur in all the findings contained therein whereby he settles and adjusts the accounts outstanding between the parties, including the indebtedness of the defendant to the plaintiff, and finds a verdict and orders judgment for the defendant for the sum of $183.78, and directs upon a proper conveyance being submitted to the plaintiff to release and reconvey to the defendant his interest in the said lot No. 50, range 1, Blue Bell Tract, held by him as security for the defendant's indebtedness, and the same must be confirmed, and the appeal dismissed with costs.

During the argument of the appeal it appeared to me as if the parties to this suit had united their efforts in an attempt to violate the law and the regulations governing the Blue Bell Tract by cutting and removing the growing timber before the grant had been obtained, and that it might be necessary for the Court to intervene and see that the rights of the Crown were duly protected, but an examination of the record shews that the

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transfer of the land was placed on file in the Crown Land Office, thereby giving notice to the head thereof that some unusual transaction was taking place in respect to the lot which might at least require investigation, and having had the notice and being apparently satisfied, I do not now feel the Court should intervene to protect the rights of the Crown when it could very readily have been done by the department in charge, it having full control of the tract. *Appeal dismissed.*

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Re HULBERT & MAYER.

Alberta Supreme Court, Walsh, J. November 3, 1916.

LANDLORD AND TENANT (§ III B 3—110)—DISTRESS—MORATORIUM—VOLUNTEER AND RESERVISTS RELIEF ACT—CORPORATION.

The Volunteers and Reservists Relief Act (Alta.) applies to a distress under a lease created before the passing of the Act although possession was taken afterwards; but the protection afforded by the statute does not extend to a distress against the goods of a corporation of which the volunteer is the principal shareholder.

APPLICATION under the Volunteers and Reservists Relief Act for leave to proceed with a distress.

A. H. Gibson, for landlord; *G. Winkler*, for tenant.

Walsh, J.

WALSH, J.:—This is about as flagrantly dishonest an attempt to crawl in under the provisions of the much abused Volunteers and Reservists Relief Act as can well be imagined.

The applicant Hulbert made a ground lease of certain premises to the tenant Mayer on July 15, 1915, under which $375 became due for rent on July 1, 1916. He also agreed to pay the taxes on the property, his share of which for the year 1915 is $1,100.53. He has paid neither rent nor taxes. In October, 1915, he was instrumental in the incorporation of the Jasper Clothing Co., Ltd., and he is the largest shareholder in that company of which he appears to be the manager. Immediately after its incorporation he transferred to it all of the stock-in-trade of the business carried on by him in the store on the demised premises and that company has ever since been and now is carrying on its business in that store. In October, 1916, the landlord took in distress a quantity of goods in this store. Upon his application under the Act respecting extra-judicial and other seizures for leave to sell the goods so taken in distress he was met with the objection that the tenant is now a volunteer in the military forces of His Majesty. This appears to be the fact. He is now a full-fledged soldier and is known as No. 01676, A Company, No. 1 platoon of the 101st

Batt. and he drills regularly twice a week. So it is undoubted that he is as immune for the present from his liabilities contracted before April 19 last as if he was in the trenches in France, even though as the fact is his battalion is a militia corps and not an overseas unit.

The Master at Edmonton to whom the application was made refused it and the landlord renews it before me as I think he had a right to do. The point principally argued before me was whether or not this obligation of the tenant was created or arose before the passing of the Volunteers and Reservists Relief Act, for it is only to a debt, liability, or obligation incurred before that date that the Act applies. The Master held that this liability was created before the passing of the Act and I think that he was right. The liability was created by the lease which was made before the passing of the Act and so the liability was incurred before then, too. It does not matter, it seems to me, that payment of the liability so incurred was not to be made until a date subsequent to the passing of the Act. It is the date of the incurring of the liability and not of its maturity that governs. I cannot yield to Mr. Gibson's argument that the tenant's liability arose only because of his possession of the premises which was carried up to a date beyond that upon which the statute was enacted. His liability does not depend upon his possession at all. He would be just as liable for the rent if he had never taken possession unless, of course, his failure to do so was due to the wrongful conduct of the landlord. If that is all there is in the case the landlord's application must fail. But I do not think that it is.

Upon the tenant's own showing the goods distrained upon are not his at all, but are those of the Jasper Clothing Co. The landlord claims the right to distrain upon them because the company's title to them is derived by purchase from the tenant, and it is not entitled to the benefit of the restriction imposed by law upon the landlord's right to distrain for rent on the goods of any person except the tenant. Sec. 4, ch. 34, Con. Ord. To refuse the landlord's application therefore will not give the tenant any relief at all. He can go forth regularly to his bi-weekly drill unoppressed by the fear that while he is away his goods may be sold to pay his honest debts. It is his company that will in that event be relieved for then its goods will not be sold. But it is neither a volunteer nor a reservist nor the wife nor a dependent

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member of his family, nor can it become any one of these and so it cannot claim the benefit of this legislation which is intended only for the relief of these classes. Whilst he and his wife and any dependent member of his family are within the Act, his clothing company is not, and so I cannot extend to it the benevolent provisions of this statute. I do not think a distress upon his company's goods can be considered the taking of a proceeding against him and so this application cannot be defeated under the Act.

No notice of this application has been given to the company as such. Sec. 4, ch. 4, statutes 1907, provides that the order may be made *ex parte* or on notice. The principal shareholder of the company in the person of the tenant was before me by his solicitor on the hearing of it, and if there was any reason on the merits why the order should not go, I doubtless would have heard of it. No argument on that score was addressed to me and I see therefore no good reason why the company should have further notice of it. The order may go as asked.

In making the order, however, I wish to be clearly understood as in no sense passing upon the regularity of the distress proceedings to this date. Something was said in argument before me as to the correctness of some of the steps taken by the landlord. I have not the material before me not have I the time or inclination to discuss these questions now. The landlord will, therefore, proceed at his own peril with the sale which I now permit him to hold, for nothing in my order shall be deemed a confirmation of any of his proceedings or a recognition of their correctness.

Application granted.

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K. B.

VERONNEAU v. THE KING.

Quebec, King's Bench, Sir Horace Archambeault, C.J., and Lavergne, Cross, Carroll and Pelletier, JJ. March 6, 1916.

1. GRAND JURY (§ IV—27)—BIAS—DISQUALIFICATION OF GRAND JUROR—NON-PARTICIPATION IN PROCEEDINGS.

It is not a ground for quashing an indictment that the complainant in the proceedings before the magistrate upon which the indictment was based was summoned and sworn as a grand juror and was present in the jury box when the indictment was presented, if in fact he took no part in the deliberations on the bill.

[*R.* v. *Hayes* (No. 2), 9 Can. Cr. Cas. 101, 11 B.C.R. 4, referred to.]

2. INDICTMENT (§ IV—75)—QUASHING—COMPLAINANT SUMMONED ON GRAND JURY.

On a motion to quash an indictment on the ground that the complainant was a member of the grand jury, the Court may take evidence to prove that the grand jury which found the bill of indictment did not

include the complainant and that the latter took no part in the deliberation thereon, and thus negative any presumption of bias.

3. INDICTMENT (§ II F—57)—AMENDMENT BY COURT—CHANGING DATE OF ALLEGED OFFENCE.
Where the particular offence laid in the indictment is not of the class as to which a change of date would be tantamount to charging a different offence, the Court may order an amendment of the date of the offence to conform to the evidence even after the close of the evidence.
[*R.* v. *Lacelle*, 10 Can. Cr. Cas. 229, 11 O.L.R. 74, distinguished.]

4. GRAND JURY (§ IV—28)—BIAS—IMPROPER COMMUNICATION TO JURORS.
Proof that an improper communication reflecting on the accused had been made to the grand jurors who returned the bill of indictment would not be a ground for quashing the indictment.

Statement.

MOTION to quash an indictment of the Grand Jury for the district of St. Francis in a case of perjury, and on questions reserved by the Judge who presided at the trial, for the opinion and decision of the Court of Appeal. On the stated case, the Court of King's Bench, at Montreal, dismissed the motion and affirmed the verdict by the following judgment:—

"It is, by the Court now here considered, in answer to the first question, that the fact of Denis S. Bachand having been sworn as a grand juror did not render invalid or illegal the indictment found, seeing that it appears from the stated case that the said Bachand did not take part in the consideration of the bill of indictment, and that the motion to quash the indictment was rightly rejected; and, in answer to the second question, that there is no error in the judgment which permitted the amendment, therein mentioned, to be made;

"And it is accordingly adjudged that the verdict and conviction be affirmed and the appeal dismissed; and it is ordered that an entry hereof be made in the record in this Court, in the Crown side thereof, in the district of St. Francis.

"The Honourable Justices Carroll and Pelletier dissenting as respects the answer to the first question."

C. C. Cabana, for appellant.

Jacob Nicol, K.C., for the Crown.

The opinion of the majority of the Court was delivered by

Cross, J.

CROSS, J.:—The appellant (Moïse Véronneau) was found guilty in the Crown side of this Court in the district of St. Francis, in October, 1915, by verdict of a jury, on a charge of having committed perjury.

He appeals against the verdict, firstly, on the ground that the indictment should have been quashed because of bias on the part of one of the grand jurors who found the indictment; and,

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secondly, on the ground that the trial Judge allowed an amendment to be made to the indictment of such a nature as was not permissible in law and allowed it to be made at too late a stage of the trial.

The learned Judge who presided at the trial has stated a case for our opinion on these points, and it appears from the statement that the charge against the appellant was laid by one Denis S. Bachand, and that it was set forth in it that the alleged perjury had been committed at a preliminary inquiry held by the District Magistrate into a charge made by the appellant against Bachand of having attempted to murder him (Véronneau).

It also appears that Bachand was one of the grand jurors to whom the bills of indictment were submitted at the October term.

A true bill for perjury having been returned, and Bachand being one of the jurors present at the return, the appellant, before pleading, moved to quash the indictment on the ground that Bachand was one of the grand jurors who had found the indictment, and had said to Brault, another juror (who had repeated them at the sitting of the jurors), the words: "C'est de valeur ce procès-là, mais au point où on est rendu là, il va falloir que moi ou Véronneau parte de Coaticook."

It further appears from the stated case that Bachand did not take part in the deliberations of the grand jury on the case against the appellant; that the words above quoted were uttered to Brault and by him repeated to the other jurors, but that it was not shewn that these words influenced the jurors or affected their decision. The motion to quash was dismissed.

It further appears that, upon the trial being proceeded with, there was a variance between the charge as laid and the evidence, in that the perjury was charged to have been committed on October 30, 1914, whereas the appellants' deposition, taken before the magistrate and tendered in evidence at the jury trial, purported to have been taken on October 13, 1914. The appellant objected to production of the deposition as not being relevant to the charge, but the objection was overruled and the deposition was read.

After all the evidence had been taken, counsel for the appellant submitted that the evidence related to testimony given on October 13, and that there was no evidence to support a charge of perjury committed on October 30.

Thereupon the prosecutor moved to amend by substituting the word "thirteenth" for the word "thirtieth" wherever the latter appeared in the indictment.

The amendment was allowed, and, upon being asked if he desired a postponement, counsel for the appellant declined to say anything. Counsel for the appellant and for the prosecutor then addressed the jury, and, after a summing-up by the Judge, a verdict of guilty was found.

The questions to be decided are as follows:—

1. Did the fact of Denis S. Bachand being a grand juror affect the legal constitution of the grand jury, and could the grand jury lawfully find the indictment, Bachand not having taken part in the consideration of this bill? Was the judgment dismissing the motion to quash right?

2. Was there error in the judgment permitting the amendment?

1. The motion to quash:—

Though it is definitely stated in the question that Bachand took no part in the consideration of the bill against the appellant, counsel for the appellant take the ground that, inasmuch as Bachand was sworn as a grand juror and was in the box with the others when this indictment was returned, he must be taken to have joined in finding the indictment, and that the Court could not receive evidence, as it did, to prove that he did not take part.

I take it that an indictment found by grand jurors, one or more of whom was disqualified, is bad and may be set aside on motion to quash. Authorities both in common law and statute may be found collected in the notes appended to the report of *R.* v. *Hayes*, 9 Can. Cr. Cas. 121 *et seq.*; Bowen-Rowland's Criminal Proceedings on Indictment and Information (2nd ed.), pp. 166 & 167.

I also consider that, if there was error in receiving evidence on the point whether or not Bachand took part (otherwise than as a witness) in the proceedings on the bill against the appellants, the stated case sufficiently raises the question to call for an expression of our opinion upon it.

It is true that it was held in *R.* v. *Hayes*, 9 Can. Cr. Cas. 101, 11 B.C.R. 4, that the objection to an individual grand juror

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to the effect that he was disqualified because of interest in the subject matter of the prosecution, is not an objection to the "constitution" of the grand jury which must be raised by motion to quash. The reasoning of the majority of the learned Judges who decided that case goes so far as to indicate the conclusion that the relation in which the juror objected to stands towards the accused party is irrelevant, and that, no matter what may be the bias or adverse interest of the former against the latter, the accused party has no remedy at all and not merely no remedy by motion to quash under sec. 899. It is true that much has been said in support of that opinion. In early times grand jurors were persons supposed to have first-hand knowledge about those who should be indicted. Emphasis is laid upon the inconvenience of permitting inquiry into objections to individual grand jurors: Thompson and Merriam, Juries, Nos. 514, 517, and 520.

In accordance with that view, counsel for the Crown in this case have argued that the indictment would have been validly found, even if Bachand had participated as a juror in finding it.

I would venture to say, with all deference, not only that the accused party has a remedy by motion to quash in such a case, but also that bias on the part of a grand juror is a matter affecting the "constitution" of the grand jury which, under sec. 899 (formerly sec. 656), opens the proceeding by motion to quash.

No doubt the grand jury sworn at the October term in the district of St. Francis was a fully and properly constituted grand jury and that Bachand was competent to be a grand juror. But, at the same time, I would say that that grand jury, sitting with Bachand as one of its members, was not properly constituted to inquire into the bill against the appellant, because of disqualification of Bachand on account of the existence of the feud between him and the appellant.

According to the view taken in *R.* v. *Hayes*, 9 Can. Cr. Cas. 101, 11 B.C.R. 4, any defect which there could be in the constitution of the grand jury would be one which would necessarily render all its proceedings void. I consider that Parliament, in enacting sec. 899, attached a wider meaning to the word "constitution," seeing that it gave the remedy only where the accused could shew prejudice. It did not intend to put life into the proceedings of an incompetent body, by requiring that prejudice

must be shewn before such legally non-existent proceedings could be quashed.

It is the almost every day language of experienced Judges, in cases where magistrates have had a bias or disqualifying interest, but have been members of a bench, to say that the Court was improperly "constituted." Illustrations may be found in *R.* v. *Hertfordshire JJ.* (1845), 6 Q.B. 753, and in the other cases cited in the notes in Archbold, Quarter Sessions (6th ed.), p. 52.

It is, besides, a most common expression to speak of a Court as being "constituted" in a particular way when what is intended to be referred to is the *personnel* of the particular Judges or magistrates who happen to be sitting. Bachand's bias would consequently have vitiated a finding to which he had been a party as juror. See decisions cited in Am. Eng. Enc. of Law, Jury and Jury Trial (2nd ed.), pp. 1255, 1268; and I would say that it affected the constitution of the jury within the meaning of sec. 899. But I would go farther and say that, even if the objection to Bachand did not touch the constitution of jury, it nevertheless was one which could be made by motion to quash. That could be done even when pleas in abatement or in temporary bar were in use: Short and Mellor, Crown Practice (2nd ed.,), p. 140; Archbold (23rd ed.), p. 122; Thompson and Merriam, Juries (1882), No. 543.

We are thus brought to consider whether proof was legally received of the fact that Bachand did not participate in finding this indictment, for I take it that, if such proof was inadmissible, Bachand must be taken to have been one of the jurors who did find the bill.

It is familiar law that affidavits of jurors as to the reasons or matters which actuated or influenced them are not admissible. It is said, respecting jurors, in Taylor, Evidence, No. 943, that, with an exception there referred to, "they are not permitted to disclose what number of jurors were present when a case was brought before them, or the number or names of the jurors who agreed or refused to find the bill of indictment."

It is also laid down that (Archbold, p. 103, citing *R.* v. *Marsh*, 6 A. & E. 236) "evidence by grand jurors as to what passed in the grand jury room will not be received."

It is apparent that these propositions do not cover the ques-

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tion whether or not proof can be made that a person, sworn as a grand juror and present at the return of a bill into Court, did not in fact take part in finding the particular indictment. One can understand that a juror should not make an affidavit that he or another juror agreed to or dissented from a particular finding. On the other hand, it is to be observed that grand jurors are not bound by rules of evidence. They form a secret tribunal. In the Judge's charge to them, they are often, if not generally, told that they need not be unanimous, though at least seven of them must concur in order that an indictment may be found. Minutes of their proceedings are unnecessary, and, in practice, in this province, are not taken. There is nothing to shew whether the finding is unanimous or merely that of a majority. That being so, I take it that the appellant cannot take the ground that the return of the findings constitutes a record which would be controverted by proof tending to shew that Bachand did not participate in the proceedings in a particular case. While the proceedings are going on, individual jurors may absent themselves and may even not be present when the return is made.

"When one or more bills have been so indorsed, the foreman, accompanied by some of the grand jurors, returns into Court with the bills that have been found or ignored and delivers them to the Clerk of the Court:" Laws of England, Criminal Law and Procedure, No. 671.

I consider that proof could be made upon the question whether Bachand acted as a grand juror upon the bill against the appellant: *R.* v. *Inhabitants of Upton St. Leonards*, 10 Q.B. 827; *Ex parte Morris*, 72 J.P. 5; *R.* v. *Hancox*, 29 T.L.R. 331; *R.* v. *Crippen*, 27 T.L.R. 69. That being so, we are to take the finding of the learned Judge upon the proof as having established that Bachand did not participate and that the appellant's contention, so far, fails.

But it is said for the appellant that Bachand's animosity was disclosed in his statement to the juror Brault and was communicated to the body of grand jurors.

I consider that that does not establish a ground to have the indictment quashed. Grand jurors do not try any one. They hear only one side. They are a jury of presentment; not a trial jury. I consider it to be still accurate to say that they are not

bound by rules of law respecting evidence and that they can make a finding upon their own knowledge and may take into account any outside knowledge they may have: *R.* v. *Bullard*, 12 Cox 353; *R.* v. *Gerrans*, 13 Cox 158.

I, therefore, consider that the first question should be answered adversely to the appellant, but I would put my answer on the point of an improper communication having been made to the grand jury, upon a different footing, namely, that, having regard to the functions of the grand jury, proof that such a statement had been made or communicated to the jurors would not be a ground for quashing an indictment: Thompson and Merriam, Juries, Nos. 571 and 574. The learned trial Judge has found that the communication did not affect the decision of the grand jury, but that is a thing about which there cannot be certainty, and I would not base a decision upon it.

2. Effect of allowance of the amendment.

The appellant's argument is, in substance, that, as the case stood at the close of the hearing of witnesses, the charge as laid was not proved, the evidence actually given having related to an incident other than that mentioned in the indictment. The argument has been amplified by referring to the fact that the appellant was never charged with having committed perjury on the thirteenth of October and that such an offence was not mentioned in the commitment or any charge of it passed upon by the grand jury.

The wording of the indictment is set out at length in the stated case. It gives a carefully drawn assignment of the alleged perjury. The particular assertions are set out and the truth of each of them is negatived. No room for doubt is left as to the identity of the incident or "transaction," as it is customary to call it.

The objection consists in that the perjury is charged to have been committed on the "thirtieth" day of October, whereas the proof established that the oath was taken and the statements made on the thirteenth of October. It is to be observed that that proof was made by production and putting in evidence of a written document, namely, the deposition of the appellant taken before the magistrate.

There is a general rule to the effect that the prosecutor must prove the charge as laid. Because that is a rule, it often becomes necessary to amend where there is a variance between the charge

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as laid and what is established in evidence. Hence the rule of sec. 889 (formerly 723).

The series of enactments which are now represented by sec. 889 are enumerated by one of the learned Judges who decided *R.* v. *Lacelle*, 10 Can. Cr. Cas. 229, at p. 233, 11 O.L.R. 74, where it is added: "The provision is substantially the same throughout; the chief difference being that before the Code the enactments specified that the variance referred to was stated to be as to names, dates, places, or other matters or circumstances mentioned in the indictment;" and, later on, the learned Judge, after having pointed out that the date is a thing which may be amended in case of variance, added:—

"The date can, however, be only amended when the act or transaction which forms the foundation for the charge is the same, and a mistake was made in the information, evidence or indictment as to the true date of the occurrence."

The learned Judge appropriately quoted the test propounded by Mr. Greaves in his notes (p. 6) thus:—

"The proper mode to consider the questions is this: the grand jury have had evidence of one transaction upon which they found the bill: the case before the petit jury ought to be confined to the same transaction, but, if it is, it may turn out that, either through insufficient investigation or otherwise, the grand jury have been in error as to some particular or other, and upon the trial the error is discovered. Now, this is just the case to which the clause applies."

It may be appropriate to point out that, apart from the effect of Code enactments, the general rule was that the date assigned as that of commission of the offence need not be the one actually proved. Thus, in Archbold, Criminal Pleading & Ev. (23rd ed.), p. 297:—

"The day and year on which the facts are stated in the indictment or other pleading to have occurred are not in general material; and the facts may be proved to have occurred upon other day previous to the preferring of the indictment."

In Roscoe, Criminal Ev. (13th ed.), p. 73:—

"But the statement of them (*i.e.*, time, place, value, etc.) in no way restricts the proof which may be given under the indictment."

See, to the same effect, Taylor on Evidence, No. 283 (4), note 5.

So far, there would be no necessity to amend at all. But at common law there were certain exceptions, and, as pointed out in Archbold (pp. 297-298):—

"If any material time stated in the pleading is to be proved by matter of record, it should be correctly stated. Any variance between the time so stated, and that appearing from the deed or record when produced, will be fatal unless amended."

The effect of that exception to the rule, if it could be considered applicable under operation of our Code, would merely be to establish that it was necessary that the amendment should be made.

The appellant has not succeeded in establishing his contention that in this case time was "of the essence" of the offence. That contention was sought to be advanced in *R.* v. *Ingham*, 5 Best and Smith 255, where, in a case of manslaughter, it was argued that time was of the essence because it had to be proved that the death must have ensued within the year and day; but the contention had to be abandoned.

It might happen, as it did in the opinion of the learned Judges who decided *R.* v. *Lacelle*, *supra*, that by reason of a legal characteristic of the particular offence (*e.g.*, seduction) an amendment to change the date would be tantamount to charging a different offence. But that is not the case here.

Finally, it is to be observed that our law (Cr. Code, sec. 889, clause 2) is to the effect that if there is in the indictment "an omission to state or a defective statement of anything requisite to constitute the offence . . . but that the matter is proved by the evidence, the Court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary."

Upon the main ground of the second question, the appellant therefore also fails. He has further contended that it was too late to permit the amendment after the close of the taking of the evidence. On this point also the weight of authority is against the appellant. The rule would appear to be that the amendments ought to be made before the defendant's counsel address

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the jury: Archbold, p. 296; *R.* v. *Rymes*, 3 C. & K. 326; *R.* v. *Frost*, Dears. 474; though it is sometimes said that an amendment may be made at any time before the case goes to the jury: Bowen-Rowlands, Criminal Proc. (2nd ed.), p. 245, Rule 263; or, even at any time before verdict: Russell on Crimes (Can. ed.), p. 1979.

Upon the whole, the first question should be answered by saying that the summoning of Bachand as a grand juror did not affect the legality of the constitution of the grand jury and that the indictment could legally be found, Bachand taking no part as a juror in respect of it.

The second question should be answered in the affirmative.

The verdict should be affirmed.

Carroll, J.
Pelletier, J.

CARROLL and PELLETIER, JJ., dissented. *Conviction affirmed.*

[Affirmed on appeal to Supreme Court of Canada. Reported in full later.]

SASK.
S. C.

PROBY v. ERRATT CO. Ltd.

Saskatchewan Supreme Court, Elwood, J. September 23, 1916.

1. EXECUTION (§ II—20)—DISCOVERY IN AID—GROUNDS—NULLA BONA—VALIDITY OF ORDERS.

Unless it is affirmatively shewn that an *ex parte* order for examination in aid of execution was an abuse of the process of the Court, the order should not be set aside merely on the ground that the material upon which it was granted does not disclose that execution was issued or that the sheriff had made a return *nulla bona* or was prepared to do so.

2. DISCOVERY AND INSPECTION (§ I—1)—SUBPŒNA TO COMPEL ATTENDANCE.

Under the Sask. practice rules (r. 503), before the person to be examined can be required to attend he must be served with a subpœna; not having been thus served he cannot be committed for a failure to attend.

Statement.

APPEAL from the order of the Local Master at Moose Jaw refusing to set aside his *ex parte* order herein for the examination of one Cook in aid of execution. Affirmed.

Elwood, J.

ELWOOD, J.:—The ground of the application is that the material upon which the order for execution was granted was insufficient in that it does not disclose that execution had been issued or that the sheriff had made a return of *nulla bona* or was prepared to do so, or that there was no necessity for examining the said Cook. In the cases of *Ontario Bank* v. *Trowern*, 13 P.R. (Ont.) 422, and *Carscaden* v. *Zimmerman*, 9 Man. L.R. 102, it was held that there should be evidence that execution had been issued and had been returned *nu la bona*. In *Grant* v. *Cook*, 17 P.R. (Ont.), 352, the Divisional Court of Ontario held that the plaintiff was *primâ facie* entitled to issue an appointment for the

examination of his judgment debtor and that it was for the latter to shew affirmatively that the issue of such appointment was an abuse of the process of the Court. It will be noted that our r. 501 provides that when a judgment or order is for recovery of money the party entitled to enforce it may apply to a Court or a Judge *ex parte* for an order. It seems to me that what is laid down in *Grant* v. *Cook*, *supra*, is the proper practice to follow and that unless on an application to set aside the order it is affirmatively shewn that the order was an abuse of the process of the Court the order should not be set aside merely on the ground that the material upon which the order was granted does not disclose that execution was issued or that the sheriff had made a return of *nulla bona* or was prepared to do so. I am of the opinion that the Local Master should not have made the order he did as to costs but this is a matter in which only the defendant is interested, and as this application is not made on behalf of the defendant I am of the opinion that I cannot vary the order on this application. The result will be that the application on behalf of Cook will be dismissed with costs.

There was a further application on behalf of the plaintiff to commit Cook for failing to attend for examination pursuant to the order and the appointment issued thereon. It was contended on behalf of Cook that as he was not served with a subpœna he was not liable to attend. Our rule 503 is as follows:—

> Any person liable to be examined under any of the preceding rules of this order shall be entitled to the like conduct money and payment for expenses, and loss of time as upon attendance at a trial in Court, and may be compelled to attend and testify and to produce books and documents in the same manner and subject to the same rules of examination and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined as in the case of a witness on a trial. C.O. (1898), ch. 21, r. 382.

This rule does not appear in the English rules and apparently under the English rules all that is necessary is service of the order and appointment. It seems to me that if it was intended that the person to be examined should attend merely upon service of the order and appointment it would not have been necessary to include in r. 503 the words "and may be compelled to attend and testify and to produce books and documents in the same manner . . . as in the case of a witness on a trial."

I am of the opinion that the intention of the above rule is

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Elwood, J.

that before the person to be examined is required to attend he must be served with a subpœna. Having therefore reached that conclusion the application must be dismissed with costs to be paid by plaintiff to the said Cook. One set of costs will be set off against the other and the one in whose favour the balance is will be entitled to execution. *Appeal dismissed.*

MAN.

C. A.

ERICKSON v. TRADERS' BUILDING ASSOC. LTD.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 11, 1916.

LANDLORD AND TENANT (§III C 2—65)—LIABILITY TO TENANT'S EMPLOYEES —ICY ENTRANCE—CONDITION OF DOORS.

A landlord is not liable to an employee of a tenant of rooms in a building for injuries sustained in consequence of the jamming of an outdoor at the entrance to the building by ice on the approach thereto, of which landlord had no knowledge; an unwieldy door, otherwise properly constructed, is not a defect.

[*Erickson* v. *Traders' Building*, 26 D.L.R. 221, affirmed.]

Statement.

APPEAL by plaintiff from the judgment of Curran, J., 26 D.L.R. 221. Affirmed.

W. H. Trueman, for appellant.

C. P. Wilson, K.C., *J. A. Machray*, K.C., and *B. C. Parker*, for respondent.

Richards, J.A.

RICHARDS, J.A.:—Unless the changing of the door (which opened inward, when the plaintiff's employers became tenants of the defendants) to make it open outward, altered the position from a legal point of view, the case of *Dobson* v. *Horsley*, [1915] 1 K.B. 634, is an authority that the plaintiff cannot recover, as there was certainly nothing in the nature of a trap about the door itself.

It is argued that the combination of the door, with the ice on the entrance pavement, made a trap. To that view I cannot accede. There is no evidence that the ice was there for any definite time before the plaintiff was injured.

If the defendants were bound to anticipate and guard against climatic conditions outside of the door, they would be obliged to have the entrance constantly watched, from before business hours till the last person left at night, no matter how late.

If the door had been placed at the street line, there would probably be greater danger of slipping on the sidewalk when entering than there was as a result of the door being set in a few feet from that line. And yet there is no doubt that in such case the defendants would not be responsible for the non-removal of the ice.

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The changing of the door to open outward, instead of inward, was made, not capriciously, but because of its being required by the city by-law, to open outward. It needs no explanation to shew that the change was a great safeguard against possible injury from the inward opening door jamming, in case of a rush caused by an alarm of fire, and was a proper change.

But I do not think defendants are called upon to invoke the law of landlord and tenant, as laid down in *Dobson* v. *Horsley*, *supra*. If the plaintiff had been invited to enter the building for business purposes, and if she were not in any way affected by the law of landlord and tenant, I cannot see that she would have a right of action. Her injury was the result of climatic conditions against which the defendants, at the utmost, were not bound to keep a constant guard, and if they might, in case of knowledge that there was ice at the entrance, have been liable, as to which I express no opinion, there was no evidence of such knowledge.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—This is an action of damages for injuries sustained by the plaintiff while entering one of the outer doors of the defendant's building, commonly known as "The Grain Exchange." The action was tried before Curran, J., and a jury. The trial Judge submitted questions to the jury and on receiving the answers to these questions he entered a verdict for the defendants. The learned Judge has delivered a written judgment setting out the facts of importance and giving a very full discussion of the leading decisions affecting the lega aspect of the case. The Grain Exchange is a large building in which there are many tenants to whom offices have been let by the defendants. The plaintiff was employed as a stenographer by one of the tenants in the building. The entrances, hallways and stairways remain in the control of the defendants and are used by the tenants to obtain access to their offices. On February 24, 1915, the plaintiff, while on her way to her work and while attempting to enter the building by one of the outer doors and while in the act of opening the door, slipped on some thin ice that had formed on the pavement outside the door, fell and broke her leg. The pavement on which the ice had formed was part of the defendant's premises. It lay between the sidewalk and the entrance doorways and was exposed to the outer air. At this point there were two sets of

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double doorways in a recess or alcove in the building. At the time of the accident only one pair of doors, the most westerly one, was in use, the others being kept locked during the cold weather. One of this pair of doors had been fastened so that only one was available. The doors were fitted with an automatic closing device; they were heavy; they opened outwards, and the door in question required something of a pull to overcome the pressure of the spring. In attempting to open it the plaintiff slipped on the ice, fell and received the injury. The ice on which the plaintiff fell was thin, a quarter of an inch or less in thickness. The pavement was always slippery and snow was very frequently carried upon it by the feet of persons entering from the street.

In the statement of claim the plaintiff alleges that the defendant had allowed snow, water and ice to accumulate at the entrance, that it was negligent in failing to provide doors that could be reasonably opened by a person of ordinary strength, that the door was out of repair and dangerous, and that the pavement was slippery even if there was no accumulation of snow or ice upon it. She alleges that the dangerous, unsafe, and unfit condition of the door and entrance was in the nature of a trap and that the defendant, while it knew or ought to have known thereof, negligently invited the plaintiff and others to use the same.

The following are the questions left to the jury by the Court, with their answers thereto:—

1. Was the plaintiff injured through any defect in the means of entrance to its building on Lombard Street, provided by the defendants for the use of persons lawfully using such building?

A.: Yes. 2. If so,—(a). In what did such defects consist?

Answer: The door was heavy and unwieldy with a stiff spring. The right-hand door (2) was fastened closed forcing one entering the building to use the left (1) or awkward door. There was ice on the floor outside the doors.

(b) Was it due to any negligence on the part of the defendant?

A.: Yes. (c) If so, in what did such negligence consist?

Answer: In not having the doors working more easily. In having the right-hand door, No. 2, fastened closed. In allowing the ice to remain there uncovered.

3. If such defect existed, was it known to the plaintiff prior to the accident, and was it also known to the defendants?

Answer: The plaintiff knew the doors were heavy and unwieldy, and that the right-hand door (2) was closed, but did not know of the ice.

The defendants knew the right-hand door was closed, but it has not been shewn they knew the door (1) was not working easily, or that there was ice on the floor.

4. If such defect existed, and it was known to the plaintiff prior to the accident, was it one which the plaintiff ought reasonably to have anticipated, and could, by the exercise of reasonable and ordinary care, have guarded against?

Answer: These defects, excepting the ice, were known to the plaintiff, and she exercised reasonable and ordinary care.

5. Was the plaintiff guilty of contributory negligence? Answer: No. 6. If so, in what did this contributory negligence consist? A.: None.

7. Whose negligence really caused the accident? Answer: The negligence of defendant company, The Traders Building Association, Limited.

8. At what sum do you assess the plaintiff's damages? Answer: Damages, $5,482.

The defects in the means of entrance as found by the jury are given in the answer to the second question. There is, first, the condition of the door, and, secondly, the ice on the pavement outside the doors. It is important to ascertain in the first place the status of the plaintiff and consequently the duty owed by the defendants to her. Plaintiff's counsel contended that she was an invitee to the premises and therefore in the position of a customer in a shop. See *Indermaur* v. *Dames*, L.R. 1 C.P. 274, at 288.

The defendant, who remained in possession of the entrances and passages of the building, did not invite the plaintiff to these premises either expressly or impliedly. She used them under the easement or permission conferred upon her employer, as one of the tenants in the building. There is a very considerable difference between the duty owed by the occupier of premises towards his invitee and that due to his lessee in respect to a passageway to the premises which the landlord retains in his possession and over which he merely gives a right of way to the tenant. The duty to an invitee on the premises is stated by Willes, J., in the same case.

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Even if we give the plaintiff the status of an invitee entering upon the premises, she must in order to succeed establish two facts; first, that she used reasonable care and, secondly, that the defendant knew or ought to have known the unusual danger. The jury has found that the plaintiff was not guilty of contributory negligence or knew of the ice upon the floor, but they find that she knew the doors were heavy and unwieldy. On the other hand, the jury finds that it was not shown that the defendant knew the door was not working easily, or that there was ice on the floor. The plaintiff has therefore failed to prove that the defendant knew or ought to have known of the dangers which the plaintiff claims were, either singly or conjunctively, the cause of her injury. The other fact found by the jury, that the right-hand door was closed, that is, fastened, could not of itself be regarded as a defect and could only become wrongful if it was shewn that defendant had locked the door and forced the persons entering the building to use a doorway which it knew to be dangerous.

Where the lessee merely has the use of entrances, passageways and stairways, the possession and control of which remain in the landlord, the rights of the tenant, his family, guests, customers, etc., seem to be placed on a somewhat different basis. A landlord may let premises in a dangerous state and the tenant or his customers or guests have no action against the landlord if injury is sustained thereby. See *Robbins* v. *Jones*, 15 C.B. (N.S.) 221, and *Cavalier* v. *Pope*, [1906] A.C. 428. But the landlord letting premises with access to them over passages or stairways retained in his control is bound not to create a trap or a concealed danger. A stairway, for example, must afford a reasonably safe means of access. A balustrade must be sufficient to bear reasonable pressure. This, I think, is the effect of *Miller* v. *Hancock*, [1893] 2 Q.B. 177, as interpreted by *Huggett* v. *Miers*, [1908] 2 K.B. 278; *Lucy* v. *Bawden*, [1914] 2 K.B. 318; and *Dobson* v. *Horsley*, [1915] 1 K.B. 634.

In *Hart* v. *Rogers*, [1916] 1 K.B. 646, Scrutton, J., held that where an upper flat had been let to a tenant the landlord was liable for damage caused by defects in the roof. He held that the duty to repair was absolute. He does not refer to *Dobson* v. *Horsley*, *supra*, and as that was a decision of the Court of Appeal it must be accepted by this Court in preference to the decision of

a single Judge, where there is any difference in principle between them.

What, then, was the trap or concealed danger in connection with this entrance which the defendant permitted to exist? The above cases refer to something *in the structure of the premises* which is unsafe and which creates the hidden danger. The state of the entrance is the only part of the structure of the building to which the jury refers in its answers to the questions. The jury finds that the door was heavy and unwieldy with a stiff spring. But this condition was well known to the plaintiff prior to the accident. Of itself, the condition of the door is not a danger. It is merely an inconvenience at the most. Taking the condition of the door by itself the plaintiff cannot shew a trap or concealed danger so as to bring it within the principle laid down in *Miller* v. *Hancock*, and the cases above cited.

Eleven days before the accident a change had been made in the doors by which they opened outwardly instead of inwardly. This was done in pursuance of a by-law of the city of Winnipeg. I cannot see that this made any difference in the relations between the defendant and its tenants. The plaintiff and her employer knew of the change. The structure of the doors and the entrance was not rendered less safe than it was before. The evidence shews that although the doors had been used millions of times no accident had previously occurred.

On the morning of the accident there was ice on the street. The plaintiff knew that the pavement in front of the door was slippery and she should have known that, as it was exposed to the weather, there might be ice or snow upon it. If she had looked she could have discovered the ice and guarded herself against the accident. But apart from this, there was no evidence of negligence or breach of duty on the part of the defendant in failing to keep the approach to the entrance doors free of snow or ice. Knowledge in defendant of the existence of the ice was not shewn. The climate of this city in the month of February is such that it would be impossible to maintain the approach to a building always free of snow or ice. The entrance doors in question face to the south. Snow may fall upon the pavement or be carried there by the feet of persons entering the building and may thaw and freeze there within a short time. In *Lumley* v. *Backus Manufacturing*

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Co., 73 Fed. Rep. 767, the Circuit Court of Appeals for New York points out that on a day when it is thawing and freezing it would be impossible to keep the sidewalk and the approaches to a building at all times free of ice, without remaining continuously on the watch; "and certainly" the Court adds, "no such obligation rests upon the householder, whatever may be his obligations when some dangerous obstruction has continued long enough to charge him with notice of its existence." In the present case the jury negatives knowledge by the defendant of the ice upon the pavement in front of the door.

In *Watkins* v. *Goodall*, 138 Mass. 533, the Supreme Judicial Court of Massachusetts held that where a landlord of a block of tenements had let to different tenants with a right in common over an uncovered piazza extending the whole length of the building, his duty to repair did not include the removal of snow or ice which might accumulate in the passageway, and render the use of it difficult or dangerous. In giving the judgment of the Court, Allen, J., said: "He (the landlord) is liable for obstructions negligently caused by him, but not for not removing obstructions arising from natural causes, or the acts of other persons, and not constituting a defect in the passageway itself."

In *Woods* v. *Naumkeag Steam Cotton Co.*, 134 Mass. 357, the same Court held that there was no duty on the part of a landlord to remove from the steps used in common by the tenants of a tenement house the ice and snow which naturally accumulated thereon.

Counsel for the plaintiff urged that the condition of the door, it being heavy and hard to open, combined with the existence of ice on the pavement, conjunctively produced a dangerous situation for which the defendant was responsible and which actually caused the accident. But if there is no legal responsibility on the part of the defendant in respect of either of these conditions, the combination of the two cannot create a liability.

I do not think it is necessary to consider the evidence given as to the plaintiff's state of health at and before the time of the accident. It may have contributed to the accident, but I think that the whole question of the defendant's liability turns upon the points I have discussed. If the defendant was guilty of an act of negligence or breach of duty causing the accident and in-

volving legal responsibility, the plaintiff's physical weakness would afford no answer to the action.

I think the appeal must be dismissed.

CAMERON, J.A.:—The facts in this case, where the plaintiff was an employee of the tenants of the defendant corporation, bring it within the law relating to landlord and tenant, and as stated by Buckley, L.J., in *Dobson* v. *Horsley*, [1915] 1 K.B. 634. In *Hart* v. *Rogers*, [1916] 1 K.B. 646, Scrutton, J., held that, as between landlord and tenant, when the former had retained part of the premises in his possession and control, there was on his part an absolute duty to keep that part in repair. His judgment is based largely upon the view he took of Bowen, L.J.'s judgment in *Miller* v. *Hancock*, [1893] 2 Q.B. 177.

Judgment in *Dobson* v. *Horsley*, was given October 14, 1914, but was not reported until 1 K.B. 1915. *Hart* v. *Rogers* was tried November 30 and decided December 3, 1915, but in the report of the case no reference to *Dobson* v. *Horsley* appears. It may well be a question whether the facts on which the judgment in *Hart* v. *Rogers* was founded would justify the application of that judgment to this case, where the circumstances differ. In any event it is obvious that we must consider the judgment of the Court of Appeal authoritative and binding on us in respect to the questions raised on this appeal.

The jury found that the defect or defects, owing to which the plaintiff was injured, consisted in the following:—"Door was heavy and unwieldy, with stiff spring. The right hand door was fastened and closed, forcing one entering the building to use the left or awkward door. There was ice on the floor outside the door."

As to knowledge by the parties of these facts, the jury found "the plaintiff knew doors were heavy and unwieldy, and that the right hand door was fastened and closed, but did not know of the ice. The defendants knew right hand door was closed, but it has not been shewn that they knew the door was not working easily or that there was ice on the floor."

Counsel for the plaintiff admitted on the argument before us that the condition of the door and the fact of the presence of the ice must be taken together as contributing to bring about the accident and if that were not established, plaintiff was not entitled to succeed.

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Cameron, J.A.

With reference to the condition of the door, it would seem inevitable that the plaintiff must fail in view of the law above stated, unless there is something in the facts of this case to distinguish it from those of *Dobson* v. *Horsley*, *supra*. This distinction counsel for the plaintiff sought to draw from the fact that the structure of the door in question had been altered and was not what it was when the original demise to the lessees, the plaintiff's employers, was made.

It appears that the door, which previously had opened inwards, had, some 11 days before the accident, been changed in accordance with a by-law of the city of Winnipeg, and made to open outwards, and it is on this circumstance that it is sought to found the distinction. But the door itself was not changed. It continued to be the same door, working in the same manner, except that it opened inwards instead of outwards. Moreover, it must be taken as established that the change was made with the acquiescence and consent of all parties interested and the original contract of lease must be regarded as having had the change thus embodied in it. From this point of view, which I think is correct, there is no substance in the distinction sought to be made. So that the case remains one in which the tenant takes the premises as they are and assumes the risk of using this particular approach in the form in which it is provided. That the defendants undertook to take care of the entrance of the building and did actually take such care, thereby fulfilling an implied obligation, seems to me of no moment.

Upon this branch of the case, therefore, I think the plaintiff must fail. The jury has found that the accident was due to the causes or defects mentioned, operating not disjunctively but in conjunction, and, as I have stated, plaintiff's counsel took no other ground.

If, therefore, in point of law one of those alleged defects can give rise to no cause of action, the whole of the plaintiff's right of action must, it seems to me, disappear. For, to hold otherwise would be to vary the finding of the jury.

With reference to the ice formed outside of the door, what was the duty of the defendants? The doors were within a large arch, with a wide passage leading up to them. In the climatic conditions of this country it would be natural to expect to find

ice formed or snow collected within this archway in the winter. When these are present they tend to make the footing more or less insecure, as everyone knows. Whatever risk there might be in using the access or entrance was incidental to the plan of construction of the building as it was at the time of the demise, and there was no obligation on the part of the defendants to alter it. The tenant took the building as it was constructed, with all the incidents usually and naturally attaching thereto and attendant thereon; "accepts the risk," as Lord Buckley says, and there is therefore no liability on the part of the landlord.

I might refer to some authorities shewing the views of the United States Courts on the subject.

According to the weight of authority, there is no duty on the part of a landlord to a tenant to remove from the roof, steps or sidewalk the ice which naturally accumulates there and he is not liable for injuries caused thereby. 24 Cyc., 1118.

The defendant, having let to different tenants the five tenements with a common passageway, was bound to keep the passageway in repair. *Looney* v. *McLean*, 129 Mass. 33. But the duty to repair did not include the removal of snow or ice which accumulate on the passageway, and render the use of it difficult or dangerous. *Woods* v. *Naumkeag Cotton Co.*, 134 Mass. 357. This is from the judgment of Allen, J., for the Supreme Court of Massachusetts, which included at the time Oliver Wendell Holmes, J., later of the Supreme Court of the United States.

The landlord (continued Mr. Justice Allen) is not liable for obstructions arising from natural causes, or the acts of other persons, and not constituting a defect in the passageway itself. He would be liable for negligently leaving a coal scuttle in a dangerous position, but not for not removing one so placed by another person.

In *Valin* v. *Jewell*, L.R.A. 1915 B. 324, 88 Conn. 151, the ice that caused the accident in question was formed in front of the house from water dripping from the roof. The Court, eliminating the feature of the case that the icy spot causing the accident was not on the premises, held that the character and method of construction of the building were apparent, what it would do in intercepting, accumulating or diverting rain or snow was obvious and that there was no lack of repair, no secret infirmity, no change of character or condition during the tenancy and no warranty or special obligations to alter the usual obligations of parties to a tenancy, and that the plaintiff was not entitled to recover.

In my opinion the judgment appealed from should be affirmed.

HOWELL, C.J.M. and HAGGART, J.A. concurred in dismissing the appeal. *Appeal dismissed.*

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KIDD v. NATIONAL RAILWAY ASSOC.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. June 9, 1916.

JUDGMENT (§ I G—55)—CORRECTION—MISTAKE.

Although a formal judgment in an action has been issued and an appeal therefrom dismissed, the trial Judge is nevertheless not *functus officio*, so as to prevent his entertaining an application to correct a "slip" or "mistake" in the judgment as entered, so as to conform with the judgment as pronounced by him.

[*Prevost* v. *Bedard*, 24 D.L.R. 862, 51 Can. S.C.R. 629; *Pearson* v. *Calder*, 30 D.L.R. 424, 36 O.L.R. 458, referred to.]

Statement.

MOTION by the defendants to amend an order of a Divisional Court of the Appellate Division, pronounced on the 5th November, 1914, dismissing, by consent of all parties, the defendants' appeal from the judgment of HODGINS, J.A., of the 10th July, 1914, noted in 6 O.W.N. 710.

The object of the motion was to procure an amendment of the judgment of HODGINS, J.A., as drawn up and issued, by striking out the word "higher" in reference to the rate of commission ordered to be paid to the plaintiff. The word "higher" was not in the judgment as pronounced.

On the 11th December, 1914, the defendants moved before HODGINS, J.A., to have that word struck out. The motion was refused; and the order refusing it was not appealed from. On the 11th April, 1915, an application to amend the judgment was dismissed by MIDDLETON, J., without prejudice to an application to a Divisional Court.

The defendants asked to have the consent order amended by adding a clause correcting the judgment by striking out "higher," and asked, also, for leave to appeal from the orders of HODGINS, J.A., and MIDDLETON, J., refusing to amend.

R. McKay, K.C., and *R. D. Moorhead*, for defendants.

I. F. Hellmuth, K.C., and *J. H. Cooke*, for plaintiff.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The single question now involved in this application is: whether there is any power anywhere to consider now whether the formal judgment signed in this action on the 25th November, 1914, is or is not substantially the judgment pronounced in it after the trial of it.

For the applicants it is contended that it is not, and that such want of conformity means a loss of a good many thousands of dollars to them.

By the judgment in question, a reference was directed for the

purpose of ascertaining how much is due from the defendants separately to the plaintiff for commissions upon the sales, made by him, of shares in the capital stock of the defendants; and, in regard to the applicants, the formal judgment directs that such commission shall be computed at the rate of twelve per cent., "or at such higher rate as" the applicants "may have paid to other similar agents similarly employed."

It is this provision of the judgment, respecting a higher rate, that the applicants especially object to: and there is nothing in the trial Judge's reasons for his judgment, or in the minute of the judgment endorsed upon the record, which seems to support it. In his reasons for the judgment pronounced the learned Judge said only that "the plaintiff is entitled to commissions at twelve per cent. or such rate as has been paid since" the 24th December, 1912, by the applicants.

Unless, therefore, there be some very good reason why the trial Judge may not now settle the question, as he might have done upon a motion to vary the minutes, the practice of the Courts is a reproach rather than a credit to them, in that respect.

But it is said that, if the facts are as the applicants contend, yet insuperable obstacles now prevent justice being done as it was really decreed; that the trial Judge is *functus officio*; that minutes of the judgment had been duly settled in the presence of the solicitors for all parties upon which the final judgment was signed; that the applicants appealed against the judgment pronounced at the trial and afterwards consented to a dismissal of the appeal, which was dismissed accordingly; and that nearly two years have elapsed since the signing of the judgment: but neither party has prosecuted the reference, nor has anything been done or left undone in the two years, or more accurately stated twenty-two months, to alter the position of the parties, substantially, in this respect: the appeal raised no such question as that involved in this application: it was launched some time before the form of judgment was settled: if such question had been involved in the appeal, the Court should have sent the parties to the trial Judge to have it settled by him, and the slip or mistake of solicitor or counsel in itself is no ground for a denial of justice. The parties really are as they were.

Nor can I think the trial Judge *functus officio;* the Court always

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has power to correct such slips or mistakes; and in such a case as this the trial Judge is the most competent Judge to do it: *Prevost* v. *Bedard*, 24 D.L.R. 862, 51 S.C.R. 629; *Oxley* v. *Link*, [1914] 2 K.B. 734; and *Pearson* v. *Calder* (1916), 30 D.L.R. 424, 36 O.L.R. 458.

The question is one of terms only; and, as the payment of all costs lost through the slip of the applicants' solicitor, will leave the plaintiff as well off as if the application to the trial Judge had been made before the signing of the judgment, justice requires, and no harm is done, by a consideration now of the question whether the formal order, by slip or mistake, is not what it should have been.

The trial Judge should entertain the application of these applicants to correct the slip or slips alleged; and should, in all substantial respects, make the formal judgment to accord with that which he pronounced, if it do not now so conform, upon payment of the costs which I have mentioned: and an order may go accordingly, the plaintiff having consented to this application being treated also as an appeal from the refusal of the trial Judge to entertain such a motion.

If there should be any such variation in the judgment, that is, any substantial variation, the right to appeal against the judgment will run from the time the change is made, and, in order to prevent any discussion over the point in the future, the order to be made on this application may be made subject to that term.

Masten, J.

MASTEN, J.:—This is a motion made on behalf of the defendants the National Railway Association Limited, through their liquidator, having as its object the amending of the formal judgment pronounced in this action dated the 10th July, 1914, so as to make it conform to what was actually decided by the trial Judge, Mr. Justice Hodgins. In so stating the object of the motion, I omit reference to its technical form. In his reasons for judgment the trial Judge found that the plaintiff is entitled, as against the defendants the National Railway Association, to certain commissions for the sale of shares in that company; the words used by the trial Judge being as follows: "After the 24th December, 1912, the plaintiff is entitled to commission at twelve per cent., or such rate as has been paid since then by the defendants the National Railway Association to other similar agents, if any were employed."

The endorsement upon the record contains the following direction: "Judgment for the plaintiff, referring it to the Master in Ordinary to take an account against the National Underwriters Limited of the commissions on the sale of stock owned or controlled by that company in the National Railway Association, on the basis declared in written reasons for judgment, and as against the National Railway Association for an account of the commissions on the sale of their stock from and after the 24th December, 1912, on the basis declared in written reasons for judgment, and declaring the plaintiff entitled to such commissions on these respective bases herein."

By para. 3 of the formal judgment issued in pursuance of the foregoing, it is provided as follows: "This Court doth further declare that the plaintiff was agent of the defendant National Railway Association Limited, from the 24th day of December, 1912, and as such is entitled to recover from the said National Railway Association Limited a commission of twelve per cent. or at such higher rate as the defendant National Railway Association Limited may have paid to other similar agents similarly employed."

An appeal was taken by the defendants the National Railway Association Limited against the judgment pronounced by the trial Judge. The notice of appeal is dated the 15th day of September, 1914; and that appeal was, on the consent of the appellants' counsel, given in open Court, dismissed wishout costs on the 5th November, 1914. Subsequently, the solicitor for the defendants observed for the first time the variance now complained of; and on the 11th December, 1914, applied to Mr. Justice Hodgins in respect thereto. He was of the opinion that, as the defendants had appealed from the judgment on other grounds, he ought not then to interfere with the formal judgment.

On the 11th April, 1916, a further application was made to Mr. Justice Middleton, in Chambers, for the like purpose, and the motion was dismissed "without prejudice to any application that may be made to the Appellate Division of this Court," on the ground, as I understand it, that the only Court that could deal effectively with the application was the Court of Appeal.

On the hearing of the motion before us, counsel for the respondent agreed that this Court might completely and finally deal with

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Masten, J.

the question, not merely by way of appeal from the decisions on previous applications, but also substantively, without waiving, however, the objections that there was no jurisdiction in any Court to amend the judgment at this stage, and that if there was jurisdiction it ought not to be exercised in the circumstances here shewn.

I am of opinion that it has been clearly shewn that the formal judgment does not accord with that which the trial Judge intended to decide, and did decide. That being so, the next inquiry is, whether the rights of either of the parties to this proceeding have been altered so that they cannot be restored to their original position, or whether the rights of third parties have intervened, based upon the existence of this judgment and ignorance of any circumstances which would tend to shew that it was erroneous. See the remarks of Lord Herschell in *Hatton* v. *Harris*, [1892] A.C. 547, at p. 558.

No facts have been put before the Court in the present case which would justify the Court in refusing to correct the error on this footing; and I am, therefore, of opinion, having regard more particularly to the cases of *Hatton* v. *Harris* (*supra*), *Prevost* v. *Bedard*, 24 D. L. R. 862, 51 S.C.R. 629, and the cases there referred to, that the jurisdiction ought to be exercised and the formal judgment amended so as to conform to what was actually decided.

With respect to the form in which the application should be made, I would have been of opinion that it should have been made to a single Judge of the High Court, who, under the terms of the Judicature Act and the Rules, is entitled to exercise the jurisdiction of the Court, and I would have thought that the view expressed by Duff, J., in his dissenting judgment in *Prevost* v. *Bedard* was the correct view, and that an appellate tribunal had no jurisdiction to deal with the matter when the appeal before it was concluded, its jurisdiction being appellate only. That view, however, was not maintained in the Supreme Court, which entertained jurisdiction to deal with the question. Nothing, however, appears in that case, either expressly or impliedly, to negative the fact that there is jurisdiction in a Judge of the High Court, under the powers conferred by Rules 521, 522, or to negative the exercise by a single Judge of the inherent jurisdiction

of the Court to make its formal decree agree with that which has been decided.

The case clearly differs from an application to rescind a judgment given by consent, on the basis that the consent was given in error. No jurisdiction, in the present circumstances, would exist to entertain such an application. These cases rest upon an altogether different basis and upon an altogether different principle. I refer as examples particularly to *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673, and to *Attorney-General* v. *Tomline* (1877), 7 Ch. D. 388. With the principles set out in those cases I entirely agree, but it seems to me that they have nothing to do with this case, which is clearly an application to make the formal judgment conform with that which was actually decided. The fact that an appeal was taken and dismissed does not alter the character of the application here before the Court.

To alter the substance of the judgment as pronounced by the Court, whether on account of mistake in consent or otherwise, is one thing. To alter the form of the judgment so as to make it conform to the decision of the Court is another. The first is to relieve one party from a consent given under a misapprehension. The second is to effectuate the intention of the Court. By their appeal the defendant company sought to establish that in the judgment of the trial Judge manifest error had intervened. By consent that appeal was dismissed and his decision affirmed. But such dismissal ought not, I think, to be construed into an abandonment of the right to have that which was actually decided, correctly stated in the formal judgment.

I concur in the judgment proposed by my Lord the Chief Justice.

LENNOX, J.:—I agree in the result. Lennox, J.

RIDDELL, J. (dissenting):—The plaintiff, by writ tested the 26th May, 1913, sued the defendants for commission on sale of stock. The action was tried before Mr. Justice Hodgins, and that learned Judge, on the 10th July, 1914, endorsed the record: "Judgment for the plaintiff, referring it to the Master in Ordinary to take an account against the National Underwriters Limited of the commissions on the sale of stock owned or controlled by that company in the National Railway Association, on the basis declared in written reasons for judgment, and as against the National Riddell, J.

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Railway Association for an account of the commissions on the sale of their stock from and after the 24th December, 1912, on the basis declared in written reasons for judgment, and declaring the plaintiff entitled to such commissions on these respective bases;" adding a provision for costs. A note of the reasons for judgment will be found in 6 O.W.N. 710-11.

The formal judgment was drawn up by the defendants. It provided for commission from the Underwriters A 1 20 per cent. prior to the 24th December, 1912, and after that date against the other defendants at "12 per cent. or at such higher rate as the defendant National Railway Association may have paid to other similar agents similarly employed." It will be observed that in the written reasons for judgment the word "higher" does not appear.

An appeal was taken from this judgment on several grounds: one of them being that it was "contrary to law and evidence and the weight of evidence." Upon this coming on for hearing, counsel for both parties agreed to the appeal being dismissed without costs.

The solicitor for the defendants then discovered the word "higher" in the formal judgment, and on the 11th December, 1914, moved before Mr. Justice Hodgins to have that word struck out. The motion was refused. No appeal was taken from the refusal, no application was made to the Appellate Division, but the defendants' solicitor, after vain attempts to have the plaintiff's solicitor consent to amend the judgment, went into the Master's office, proceeded with the reference, took evidence, etc., and the case is now standing for judgment.

An application, made on the 11th April, 1915, to amend the judgment, was dismissed by Mr. Justice Middleton, and no appeal has been taken from that dismissal. It was without prejudice to any application that might be made to the Appellate Division.

The defendants the National Railway Association have set up in an affidavit by their solicitor that at 12 per cent. the plaintiff may possibly get $25,275 commission, while at the rate they paid another agent he would get a much smaller amount; and they now apply for an order amending the consent order dismissing their appeal by striking out the word "higher" and, if

necessary, for an order granting leave to appeal from the order of Mr. Justice Middleton and also from the order of Mr. Justice Hodgins.

In respect of the last two motions, I think with my brethren Hodgins and Middleton that they had no power to amend the judgment, and that nothing could be done for the defendants until the judgment on consent of the Appellate Division should be got out of the way.

This application then, in my view, is an application to amend or modify the consent judgment.

The case obviously does not come within Rule 521, nor, as I think, under Rule 522; and, if any Rule apply, it must be Rule 523. I assume, with some doubt, that, if what is alleged to be a mistake in a judgment appealed from is not discovered till after the appeal has been disposed of, this will be "matter . . . subsequently discovered," within the meaning of Rule 523.

A consent judgment can, no doubt, be got rid of on the same grounds as the consent agreement upon which it is based: *Great North-West Central R.W. Co.* v. *Charlebois*, [1899] A.C. 114, see p. 124; *Huddersfield Banking Co. Limited* v. *Henry Lister & Son Limited*, [1895] 2 Ch. 273, at p. 276. There is no sanctity about such a judgment, if there be any about any judgment, although of course a consent judgment has the same effect as any other judgment: *In re South American and Mexican Co.*, [1895] 1 Ch. 37. But it cannot be set aside except on grounds sufficient to invalidate the agreement itself. No case, I think, can be found where a consent judgment formally passed and entered has been set aside except on grounds which would invalidate the agreement itself, and there is express authority: *Attorney-General* v. *Tomline*, 7 Ch. D. 388, at p. 389, *per* Fry, J.: "When a consent order has been drawn up, passed, and entered, it is not competent to this Court to vary that order, except for reasons which would enable the Court to set aside an agreement." This has never been questioned, much less overruled. In other cases the language employed is in the positive and not the negative form.

Wilding v. *Sanderson*, [1897] 2 Ch. 534, at p. 544, *per* Byrne, J.: "A consent order may be set aside upon any of the grounds upon which an agreement can be set aside." *Huddersfield Banking Co. Limited* v. *Henry Lister & Son Limited*, [1895] 2 Ch. at

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p. 280, *per* Lindley, L.J.: "A consent order can be impeached . . . upon any grounds which invalidate the agreement it expresses in a more formal way than usual" (citing with approval *Attorney-General* v. *Tomline*). Lopes, L.J., at p. 283: "The law seems to be that a consent order may be set aside for the same reasons as those on which an agreement may be set aside." And he cites with approval *Attorney-General* v. *Tomline*, as well as *Davenport* v. *Stafford* (1845), 8 Beav. 503 (of no importance on this inquiry).

The agreement upon which the consent proceeded was this: the defendants agreed that the judgment appealed from should stand, on condition that the plaintiff should waive his chances of getting the costs of the appeal; and, unless that agreement can be got rid of, I do not see why that judgment must not stand.

A mere allegation that the consent was given inadvertently is of no avail: *Davis* v. *Davis*, 13 Ch. D. 861; there must be fraud (which is not here alleged) or mistake. The mistake must be mutual, or, if on one side only, must have been induced by what the other side did: *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *May* v. *Platt*, [1900] 1 Ch. 616; *Angel* v. *Jay*, [1911] 1 K.B. 666.

The mistake was not mutual: Mr. Hellmuth, the counsel for the plaintiff, whose word we accept without affidavit (following the usual practice both here and in England) repudiates any such idea; and if, for any reason, this judgment should be set aside, insists on his right to appeal from the judgment we may substitute for it. Nothing done by the plaintiff induced the mistake, if there was one. Mr. McKay, whose word we also accept, I do not understand to go so far as to say that, had he known of the presence of the word "higher" in the judgment, he would not have consented to the dismissal of the appeal. Nothing of the kind appears on affidavit; the case made being that a junior of Mr. McKay's settled the judgment (there is no pretence that he did not know all about the judgment, it was stated and not denied that he drew it up). Mr. McKay "never noticed the mistake that had been made in the formal judgment," but there is no affidavit that it was by mistake or influenced by mistake that the agreement was made that the appeal should be dismissed.

The case is in some respects not unlike *In re West Devon Great Consols Mine*, 38 Ch. D. 51. In a winding-up proceeding, the

Vice-Warden admitted certain claims, counsel for certain opposing contributories agreed that if their costs were paid he would not appeal. They then subsequently set up that this consent was given by mistake, the Vice-Warden having, they asserted, misstated the effect of a certain resolution, and they desired to be relieved from their agreement not to appeal. Cotton, L.J., said (p. 55): "The appellants had had full opportunity of becoming acquainted with the terms of the resolution, and cannot set up the case that they did not know them, as establishing a title to relief on the ground of mistake." Lindley and Bowen, L.JJ., agreed, as they did in another statement of Cotton, L.J. (p. 55): "The counsel in fact says: 'The Judge has given a decision adverse to my client, and in consideration of his receiving his costs I undertake that he shall not appeal against it.' That is a compromise." I think the agreement not to press an appeal on condition of not being asked for costs is as much a compromise as an agreement not to appeal at all on condition of receiving costs. No authority need be cited for the proposition that the Court will not, except in extreme cases, set aside a compromise. The text-books have many of them, and most are referred to in *Huddersfield Banking Co. Limited* v. *Henry Lister & Son Limited*, [1895] 2 Ch. 273, in argument or judgment.

Moreover, all that is known now in respect of the contents of the judgment was known a year and a half ago. The defendants proceeded with the reference, evidence has been taken before the Master, on the judgment as it stands. This is acquiescence in the judgment to some extent; and, while not conclusive against the application, it is not to be overlooked. If it be a matter of discretion, I should not exercise discretion in favour of the application; and there is, I think, no right to the order.

I would dismiss the application with costs. *Motion granted.*

MACDONALD BROS. v. GODSON.

British Columbia Court of Appeal, Macdonald, C.J.A., and Galliher and McPhillips, JJ.A. October 3, 1916.

CORPORATIONS AND COMPANIES (§IV G 3—120)—SALARY OF DIRECTOR—BONUS—SECRET PROFITS—KNOWLEDGE OF RESOLUTION.

Where the articles of incorporation of a company authorize payment for services rendered to the company by directors as well as others, a bonus and salary voted to a director for services rendered, at a meeting of the company at which the shareholders were all present, by the majority of shareholders, are acts *intra vires*, and cannot subsequently be recovered back by the company or the majority of shareholders.

B. C.

C. A.

MACDONALD BROS. v. GODSON.

Macdonald, C.J.A.

APPEAL by the plaintiff from the judgment of Morrison, J., of December 7, 1915. Affirmed.

S. S. Taylor, K.C., for appellant; *D. G. Macdonell*, for respondent.

MACDONALD, C.J.A.:—The plaintiffs, an incorporated company, seek to recover from a former member and director of that company, C. A. Godson, the following sums of money: $13,095.48, referred to in evidence as the "bonus;" $3,000 referred to as "salary;" $4,068 referred to as "secret profits;" and $125 the value of one share in the company's capital. These claims are made against Godson alone with the exception of that for the recovery of "secret profits," which is made against both defendants.

As regards the bonus, the facts are that A. J. Macdonald and Godson, at the time the bonus came in question, were the holders in equal parts of all the shares in the capital of the plaintiff company, the name of which at that time was the Macdonald-Godson Co. Ltd. One share was nominally held by the company's secretary, Breeze, and one by the company's solicitor, D. G. Macdonell, to qualify them for office in the company.

At a meeting of directors held on November 4, 1912, at which there were present, according to the minutes of the meeting, all the persons above named, the following resolution was adopted:—

> Moved by A. J. Macdonald, seconded by D. G. Macdonell, that whereas the company has required financial assistance to a large extent and whereas C. A. Godson had provided the said financial assistance by arrangement with the Dominion Bank, that for such services in connection with the said financial arrangements the sum of $13,095.48 be paid to C. A. Godson for the same.

A. J. Macdonald therein named, who is the beneficial plaintiff in this action, denies that he was present at that meeting, or had any knowledge of the said resolution. He admits that Godson told him at some time or other that he (Godson) was going to claim a bonus for his services, but the effect of his evidence is that he was opposed to giving a bonus, and that he heard nothing of it afterwards.

Godson and Breeze, on the other hand, say that A. J. Macdonald was present at the meeting in question, and that the minute above recited is a true record.

Mr. Winter, the company's auditor, also says that A. J. Macdonald on one occasion discussed the bonus in his presence, and was at least aware that it had been granted. The Judge

has chosen to accept the evidence of Godson and his witnesses. On the conflicting evidence his decision would be influenced by his impressions respecting the credibility of the witnesses. In the circumstances I am quite unable to say that he came to a wrong conclusion.

The Judge also found in defendant's favour on the question of the salary on like conflicting evidence. There was no resolution authorising the payment of the salary to Godson, but he swears that A. J. Macdonald agreed to his receiving $250 per month for the year 1913, which makes up the item of $3,000. This is also corroborated by the evidence of Breeze. Again, I find myself unable to say that the Judge was wrong in the conclusion of fact to which he came on this item.

It was argued that the granting of the bonus and the salary was *ultra vires* of the company. I do not think so. Both the bonus and the salary were payments for services alleged to have been performed by Godson to the company. The articles make provision for payment for services rendered to the company by directors as well as by others. It is unnecessary to consider the regularity of the proceedings leading up to the giving of the bonus and the fixing of the salary. Being *intra vires* of the company they were consented to by every shareholder and are therefore not assailable.

With regard to the claim for the recovery of the alleged secret profits, I find again that there is clear conflict of evidence. Witnesses for the plaintiff say that the defendant company (Robertson-Godson & Co.) were authorised to purchase steel plates required in the plaintiff company's business. Defendant Godson held a controlling interest in the Robertson-Godson Co., and is alleged by plaintiff to have agreed that the Robertson-Godson Co. should make no profit in connection with the purchase of these plates, but should act as gratuitous agent, whereas it is alleged by plaintiffs that defendants made a profit and the item under consideration is the item sought to be recovered as such profit.

Godson denies emphatically that any such arrangement was made, but admitted that the Robertson-Godson Co. made a profit in the purchase of the steel plates. If they were entitled to make it, no question arises as to its being a legitimate profit. Some evidence given on discovery by Breeze is relied upon by

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plaintiff's counsel as corroborating the plaintiff's account of this transaction, but Breeze's evidence is hearsay in part, and is conjecture in part, based upon his knowledge of the entries in Robertson & Godson's books, he being manager of that company. He disclaims any personal knowledge of the bargain whatever. But even if his evidence can be held to strengthen the plaintiffs' case, there is positive denial by Godson, who was the person alleged to have made the arrangement, that any such arrangement existed. Now, if the trial Judge believed Godson, as he must have done, I do not think, on the principles which govern Courts of Appeal, I could interfere with his conclusion in favour of the defendants. I do not say even that I should have come to a different conclusion untrammelled by his finding.

The item of $125, the value of one of the shares in the company's capital, is too trivial to require much attention. It never would have been put forward by itself. It is so trivial that it was evidently considered of so little importance by counsel that the facts in respect of it were not clearly brought out. The suggestion is that Godson purchased this one share from Laughnan, to whom it had been given to qualify him for office in the company, and that he caused it to be paid for out of the company's funds instead of his own. The evidence does not satisfactorily shew this allegation to be true.

For the reasons above stated, I think the appeal must be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I am unable to say that the trial Judge was wrong in his findings of fact though there are circumstances in the case that leave my mind far from being free from doubt.

The appeal will be dismissed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I am of the same opinion as the Chief Justice. Counsel for the appellant greatly relied upon *Menier* v. *Hooper's Telegraph Works* (1874), 43 L.J. Ch. 330, as being a decision which in principle demonstrated that the bonus could not be supported, *i.e.*, a bonus to one of the directors, that the analogy was complete, but with deference that decision went wholly upon the ground, that it was not permissible for the majority of the shareholders to deal with the assets of the company for their own benefit to the exclusion of the minority—in the present case it must be held that all the shareholders approved of the paying of

the bonus. Then with respect to the salary and the claimed secret profits which the Robertson-Godson Co. obtained, and that Mr. Godson was interested and yet voted in respect to all these matters, it would seem to me upon the facts that all that was done is well supported by *Burland* v. *Earle*, [1902] A.C. 83, 71 L.J.P.C.,1.

Proceeding from the premise in the present case—that all the shareholders or that the majority of the shareholders approved of the payment of the bonus and salary—I refer to *Normandy* v. *Ind. Coope & Co.*, [1906] 1 Ch. 84, 77 L.J. Ch. 82, at 89-90.

The action here is the action of the company, but that gives no greater rights than if brought by a shareholder on behalf of himself and all the others—acts cannot be complained of if done with the approval of the majority of the shareholders or acts which are possible of being confirmed by the majority and are duly confirmed.

The present action, as the evidence shews, is really the action of A. J. Macdonald, who holds or controls if not all practically all the shares of the appellant company, and the attempt is at this late date to open matters that were dealt with at directors' meetings covered by auditors' reports and approved at general meetings and after a settlement was come to between Macdonald and Godson founded upon the statement of February 17, 1914, shewing the affairs of the company as they stood on February 17, 1914, following upon which Godson sold 473 shares held by him in the Macdonald-Godson Co. Limited (the name of the company was subsequenly changed to Macdonald Bros. Engineering Works Limited) to Macdonald, the agreement between Macdonald and Godson of date April 18, 1914, reciting in part "made on the basis that there has been no material change in the financial position of the company since the statement of February 17, 1914," the bonus and salary were matters which had been approved and Macdonald was a party to their approval long anterior to this transfer of interest of Godson to Macdonald; *Whitwam* v. *Watkin* (1898), 78 L.T. 188.

Upon the whole case I am not of the opinion that the judgment of the trial Judge should be disturbed.

I would dismiss the appeal. *Appeal dismissed.*

MAN.

K. B.

PEDERSON v. PATERSON.

Manitoba King's Bench, Macdonald, J. October 28, 1916.

AUTOMOBILES (§III B—225)—FRIGHT TO HORSE BY WRECKED CAR—UNLICENSED DRIVER.

The leaving of a wrecked motor car on the side of the road is not necessarily negligence, nor does it amount to an unreasonable user of the highway, entitling the owner of a runaway horse, frightened by the wreck, to damages. Neither is the owner liable by reason that at the time the motor was wrecked it was being driven by an unlicensed driver.

Statement. ACTION to recover damages for injuries sustained by plaintiff's wife, owing to his horse having taken fright and shied at the defendant's motor car, and becoming unmanageable, ran away, overturning the carriage and throwing his wife out, causing the injuries.

Kilgour, K.C., for plaintiff; *Symington*, K.C., for defendant.

Macdonald, J. MACDONALD, J.:—The defendant was owner of a motor car, and on the evening of 1st, or early morning of 2nd July, 1916, his three sons were driving it from the town of Boissevain toward their home, a few miles from the town. When driving along a newly graded road, they turned to the left to avoid the rough condition of the new grade, when the car skidded into a ditch, and stalled. They tried to get it out, but the more they tried, the deeper the wheels sunk into the mud, and the engine was not sufficiently powerful to pull the motor car out. One of the sons walked back to the town with the object of getting a team of horses from the livery stable to pull the motor out of the ditch. While he was away the two brothers were making an examination of the position of the motor, and considering what was necessary to be done to get it out. In their examination one of the sons lighted a match and was examining the car when it caught fire. They tried to put the fire out, but could not, and the car became a wreck, and its motive power destroyed. One of them then followed the son who had gone to the village for help, and found him at the livery stable, having tried unsuccessfully to get help. He was then advised of the accident, and they both went back to the destroyed motor, where they remained until about 3 o'clock in the morning of Sunday, July 2. They then went home, leaving the remains of their motor in the ditch, on the side of the road. They awakened their father at 5 o'clock the same morning, and advised him of what had happened. They then repaired to the scene of the accident, and examined the situation, decided on

what was required for the removal of the car, and at 7 o'clock on the following morning, they brought what remained of the motor car home.

But on the Sunday morning, before the removal of the motor car, the plaintiff, who is a dairyman, and his wife were driving along the road in their milk cart, being the road to their pasture, where their milch cows were kept, and when within 300 or 400 feet of it, they saw the motor car, but did not at first notice that it was wrecked. Their horse was walking along quietly, and they continued along the road until within about three rods of the motor, when their horse suddenly reared and jumped to one side, throwing the plaintiff on to the ground, and losing control of the reins. The horse ran on, and again took a sudden turn, and his wife was thrown out, breaking her leg in the fall. She was immediately placed under medical care, and was taken to the hospital at Brandon, where she died on July 8, six days after the accident. For this the plaintiff seeks damages, charging the defendant with negligence as an unreasonable user of the highway, and an unauthorised obstruction thereof.

It is urged on behalf of the plaintiff, that as the driver of the motor car at the time it was driven into the ditch, where it stalled, was unlicensed, the motor car was an outlaw, and, therefore, the owner liable for any damage arising through it being there, irrespective of negligence, and the case of *Contant* v. *Pigott*, 15 D.L.R. 358, is cited as an authority. In that case the plaintiff was an outlaw, and it was held that before he could maintain an action he must himself be within the law, and not being so, he could not recover, but neither could the defendant recover against the outlaw for damages he had sustained through the negligence of the outlaw, because he was himself guilty of negligence contributing to the damage.

Before the plaintiff can recover he must bring negligence home to the defendant. Negligence is the foundation of his action.

Supposing the statement of claim simply stated that the motor was unlicensed, and the plaintiff's horse took fright, causing the damage, would that be sufficient allegation of fact to found a statement of claim good in law? I think not. It must go further and state there was negligence on the part of the defendant, and

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in what particular. His having no license had nothing to do with the accident, although it might debar him from an action in his own right for damages to himself or the car while in charge of it, on the ground that he had no legal status.

It is contended that leaving the motor on the side of the road was in itself such negligence as entitles the plaintiff to succeed, and *McIntyre* v. *Coote*, 19 O.L.R. 9, cited as an authority. In that case the defendant left the motor car, bright red in color, with fittings and lamp of brass, on the side of the road at the foot of a hill, at which the plaintiff's horse took fright, wheeled and upset the carriage, causing the damage complained of. There are features connected with that case which do not obtain in the case under consideration. There, the motor was a live car, and could readily have been driven to a place where such an accident could not have happened. The striking colour of the car, and leaving it at the foot of a hill, the width of the highway, and the unlikelihood of the presence of a motor car being left unattended in such a locality, were all features of the case for consideration of the jury. The real question to be decided here is, was the defendant guilty of negligence in the improper use of the road, for it is clear, by the authorities, that "if there be an act done upon the highway, which is not a part of the reasonable use of it, and which has an effect of endangering its use to others, and damage results from such act in the course of a lawful use of the highway, an action will lie for such damage."

The defendant, to my mind, under all the circumstances in this case, acted as any reasonable man would have acted, and in my opinion has not been guilty of negligence. *Action dismissed.*

Note.

Ed. Note.—Anything which essentially interferes with the enjoyment of life and property is a "nuisance"; 29 Cyc. 1152. When it affects the rights enjoyed by citizens, as obstruction of a highway, it is a "public nuisance." An individual who suffers pecuniary damage as a direct consequence of such obstruction may maintain an action as for a private nuisance. 10 Cyc. of Eng. 81. "The question of negligence is not involved in an action for a nuisance," 29 Cyc. 1155. "If there be an act done upon a part of the highway which is not a reasonable user of it, and which has the effect of endangering its use to others, and damage results from such to one in the course of a lawful user of the highway, an action will lie for such damage." *Harris* v. *Mobbs*, 3 Ex. D. 268.

In *Wilkins* v. *Day*, 12 Q.B.D. 110, plaintiff's pony shied at the shafts of a roller slightly projecting from the side of a road, over the metalled part of the road; plaintiff's wife was thrown out and killed; plaintiff was held entitled to recover.

Note.

"The law of negligence is brought into intimate association with the law of nuisance. So far as nuisance is caused by imperfect action, or omission to act, where the action of a prudent man, according to the circumstances, is demanded, it may be proceeded against indifferently as a negligent act or a nuisance. Cases which involve infringements of public rights are more usually proceeded against as nuisances than for negligence. Beven on Negligence, Can. ed., 386.

The cases cited above (*Harris* v. *Mobbs* and *Wilkins* v. *Day*), were for nuisances. The form of action given in Bullen & Leake's Precedents, for an obstruction of a highway resulting in private damage, is for a nuisance.

In *Pederson* v. *Paterson* (above) the real point at issue was this, was the obstruction which the burned car caused to the highway a reasonable user thereof. It was of no importance, therefore, how the car got into the ditch, or that the driver was unlicensed, for the car in the roadway was clearly the proximate cause of the runaway horse. As to that the motto *res ipsa loquitur* seems undoubtedly applicable.

Was it a reasonable user of the highway to leave the burned car in the side of the road, unguarded and uncovered, after seven o'clock on Sunday morning. The result proves that it was calculated to frighten a horse, not shown to be other than normal. It is not said that any attempt was made to move the car from the roadway after the defendant was shewn its position. Surely the onus at least was on him to shew that he had done all that was reasonably possible to avoid danger to travellers. It does not appear that he thought of that obligation.

The trial Judge said "negligence is the foundation of the action. Before the plaintiff can recover he must bring that home to the defendant." Is not that misplacing the burden of proof? But even so, upon the ground *res ipsa loquitur*, was not the defendant bound to prove that leaving his car in such a position and condition was not negligence; should he not have been called upon to prove that the car could not have been moved on Sunday morning, or that it could not have been rendered less likely to frighten horses? On this ground of negligence, the ditching of the car and even the burning of the car—both of which caused the condition which frightened the horse—were *primâ facie* proof of negligence; prudent people do not inspect wrecked cars with lighted matches. It is on this point that the fact that the car was not driven by a licensed person may be of some evidentiary value.

ROURKE v. HALFORD.

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S. C.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee and Hodgins, JJ.A. May 5, 1916.

INCOMPETENT PERSONS (§ VI—30)—LUNATIC DISCHARGED FROM ASYLUM—RIGHTS AND LIABILITIES OF COMMITTEE—GIFTS.

So long as the order declaring a person a lunatic stands unrevoked and his committee undischarged, that person, though discharged from the insane asylum, is not legally capable of dealing with his estate; gifts of money made by the committee upon the orders of such person may be recovered back and can be followed into lands purchased therewith.

[The Lunacy Act, R.S.O. 1914, ch. 68, considered.]

Statement.

APPEAL by defendant from the judgment of Lennox, J., without a jury, at Sandwich. Varied.

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S. C.

ROURKE v. HALFORD.

Garrow, J.A.

M. K. Cowan, K.C., for defendants J. R. Rourke and Mary McBride, appellants.

J. H. Rodd, for the defendant Christine Halford, appellant.

F. D. Davis, for the plaintiffs, respondents.

GARROW, J.A.:—James Rourke and Dennis M. Rourke were brothers. James was a bachelor, and Dennis was married, and James resided with Dennis for many years, first at the residence of the latter in the township of Maidstone, and afterwards at his residence in the city of Windsor, in the county of Essex, to which Dennis, with his family, had removed. After the removal, James developed symptoms of lunacy, with the result that he was admitted to the Asylum for the Insane at the city of London, Ontario, where he remained for some time, and Dennis was duly appointed by the Court to be the committee of his person and estate.

The date of the order declaring James a lunatic is the 16th June, 1908. On the 1st March, 1910, an order was made for the discharge of James from the asylum, and he was accordingly discharged. He did not, however, return to his former home with Dennis, but remained in the city of London, and resided at the House of Providence there, where he died on the 11th November, 1913. The order of the 16th June, 1908, declaring him to be a lunatic, was never superseded, and Dennis continued to act as committee until his own death on the 4th July, 1913.

In the month of April, 1911, Dennis handed over to the defendant James Raymond Rourke the sum of $2,450 out of moneys belonging to James in his hands as committee, and, in the following month of September, a further sum of $2,500 to the defendant Mary McBride, also out of the moneys of James in his hands as committee. The defendants James Raymond Rourke and Mary McBride are brother and sister and both children of Dennis. The only authority which it is claimed that Dennis had for making these payments, consisted in each case of a written order said to have been signed by James while residing at the House of Providence in London, directing the payments to be made by Dennis. The alleged object of the payment to the defendant James Raymond Rourke was to enable him to purchase a house at the city of Windsor, which afterwards was carried out, and the conveyance taken in his name. And the object of the payment

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to the defendant Mary McBride was to enable her to purchase a house at the town of Gravenhurst, which was done, and the conveyance in like manner was taken in her name.

And this action was brought by the executors of James for the purpose of having such payments disallowed, and the money recovered for the estate of James.

The grounds upon which recovery is sought are two: (1) that James, while the order declaring him a lunatic remained unrevoked and in force and the committee undischarged, was in law incapable of so dealing with his estate; and (2) that, in any event and apart from the order declaring him to be a lunatic, James was, when the alleged gifts were made, of unsound mind.

Lennox, J., proceeding apparently upon the second ground, found in favour of the plaintiffs. The following extract shews in brief the general view of the learned Judge: "There was no evidence to satisfy me that as a matter of fact James Rourke was of sound mind or capable of dealing with his property or moneys at the time of the alleged gifts or either of them, or at any time subsequent to June, 1908. The defendants have failed to prove recovery in the legal sense, though it is possible that his condition improved in some respects."

In the argument before us it was contended by the learned counsel for the defendants that the first objection was invalid, and that the case upon which it was based, *In re Walker*, [1905] 1 Ch. 160, in which it was held in the Court of Appeal that a lunatic so found could not, even in a lucid interval, execute a valid deed by way of gift, was not intended to lay down a general rule and had no application to the facts of this case. Lennox, J., although he refers in his judgment to the objection, does not express a decided opinion upon it.

The law upon the subject was apparently examined with much care and particularity in *In re Walker*, which did not apparently turn upon any peculiarity in the facts, distinguishing it from this; and the conclusion reached, as expressed in the judgment, that the deed was null and void, is quite broad enough to cover, and does, I think, cover, such a case as this.

The objection, however, has, I think, a double aspect. It offers what is strictly a legal objection, which goes to the root of the matter, and it also has an important bearing upon the other

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objection, for under that objection the inquiry into the question of fact necessarily begins with the highly important circumstance that, before these gifts were made, the deceased had been declared by the Court to be a lunatic, and that when they were made the order was still unrevoked, and his estate in the hands of the committee appointed by the Court. Nor is the effect materially modified or minimised by the circumstance of the lunatic's discharge from the asylum, for all that that amounts to, as explained by Dr. Robinson, the superintendent, is, that the asylum officials then regarded him as having so far improved that he was considered to be harmless and that he might safely be restored to his friends.

Agreeing as I do with the conclusion of Lennox, J., upon the question of fact, I am afraid I can add but little to what he has already said upon that subject.

As to the important feature of the occasion on which the written orders were obtained, no one was present but the deceased and the beneficiaries, and there is no evidence but theirs as to what actually took place. True, Sister Scholastic, who was called, deposed that the deceased after the interviews told her in each case what he had done. To that extent then it may be assumed to have been established that he had intellect and memory, but it does not carry one very far, having regard to all the circumstances. The same Sister also gave evidence that the deceased talked rationally, so far as she observed. And the Mother Superior, Mother Angela, gave similar evidence. But neither had had any opportunity of testing his business capacity.

There is perhaps a little more in the evidence of Mr. Murphy, a barrister and solicitor who was called in to prepare a power of attorney for the deceased in the summer of 1913. Mr. Murphy, however, when he saw him, was unaware that the deceased had been a lunatic. What he saw, as described, was an old man in bed who was able to talk with apparent intelligence about his property and to express the wish that his agent, Mr. Halford, might have the widest powers of management. He also spoke to Mr. Murphy of changing his will, but in the end decided not to do so. Mr. Murphy said: "I thought the man was eccentric, but I don't think I knew at that time he had ever been in the asylum. There was no indication that he should be in an asylum from what I observed of him. He seemed to be pretty keen on

money matters and knew his business pretty well." And Dr. Mugan's evidence, although in a negative form, is practically to the same effect. He said: "I have no cause or no reason to say that he was not in a mental condition to do business. My observation did not point to anything to indicate that he was not, or that he was, an insane man." Dr. Mugan had occasionally seen the deceased in the House of Providence, of which Dr. Mugan was a physician, but he, like the others, had had no opportunity of testing his business capacity. Dr. Robinson, the superintendent of the asylum, who was also called, did not assist the case of the defendants.

The theory of the defendants is, that there had been a complete recovery, and that the revocation of the order declaring the deceased a lunatic was practically a matter of form. That theory would have had more support if James had returned to his former home with Dennis and had resumed the personal management of his estate. They knew, or at least Dennis knew, that it was necessary, if James had really recovered, to have the order revoked, for he had discussed the matter with Mr. Cleary, his solicitor. But, it is said, he declined to make the application on the ground of expense. It is a pity, in view of what followed, that Mr. Cleary did not, as he had the opportunity of doing, advise against the irregularity, and indeed illegality, of what was proposed, when he drew for Dennis the order for the first gift, the one to the defendant James Raymond Rourke. His excuse is, that, as it left his hands, there was in it the alternative of a loan (afterwards struck out) instead of a gift; but the excuse is, I think, very weak. He might, in any event, at least have recommended that independent advice should be supplied or at least tendered to James, and that the transaction, so irregular and so dangerous, legally, should be carried out in every respect in the strictest and most careful manner, so as to be able to shew, if required, that the deceased fully understood what he was doing, and that the act was indeed his own deliberate act.

Mr. Cleary does not seem to have been consulted in the case of the second gift, that is, the one to the defendant Mary McBride. There is, however, otherwise no substantial difference in their circumstances between them, and what I have said as to the one applies also to the other.

The money in each case seems to have gone into land which

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still stands in the names of the defendants James Raymond Rourke and Mary McBride. No relief by way of following the money is apparently asked on the record. If it had been, I think the plaintiffs would have been entitled to do so, and to have the liens realised, if necessary, by sale under the direction of the Court.

For some unexplained reason, no disposition seems to have been made at the trial of the claim to indemnity made in the pleadings and urged before us by the defendant Christine Halford as executrix of Dennis against her co-defendants. She is, I think, entitled to such indemnity without costs, although not, I think, to the lien to which, in my opinion, the plaintiffs were entitled: see *Moxham* v. *Grant*, [1900] 1 Q.B. 88; and the formal judgment should be amended accordingly.

I would otherwise dismiss the appeal with costs.

Maclaren, J.A.
Magee, J.A.

MACLAREN and MAGEE, JJ.A., concurred.

Hodgins, J.A.

HODGINS, J.A.:—I agree with the learned trial Judge that the evidence falls short of establishing that James Rourke had regained a normal and sane condition when he signed the papers relied on to authenticate the transactions complained of. But, as these documents were to be acted on immediately, and were to affect and did affect his property, I am unable to see how the mental state of James Rourke is material to the issue raised. He had been declared a lunatic by an order made under the Lunacy Act on the 16th June, 1908. The effect of it was to create a disability which could not be disregarded while the order stood unreversed. It did not divest the lunatic of his property, but it did disable him from controlling or dealing with it. He was as incompetent to manage it or to part with it as if he had been born an idiot. The theory of the law is, that the Crown may intervene for the benefit of a person of unsound mind, and care for his person and estate. An order of Court is the mode employed to carry this into effect, as is declared by sec. 3 of R.S.O. 1914, ch. 68. Every precaution is taken before the order is made; it may be appealed from, and may be superseded if the lunatic regains his reason. But, while the order is in force, it is final (sec. 7, sub-sec. 8); and, as to the custody of the estate of the lunatic, it is effective upon the completion of the committee's security. The committee must manage the estate,

under and subject to the discretion of the Court, for the benefit of the lunatic or of his family, and the statute makes special and detailed provision for its due management. The committee can only act on behalf of the lunatic upon the order of the Court.

It is inconceivable, having regard to the terms of the Lunacy Act, that the lunatic may himself deal with or in respect of his estate, either with or without the assent of his committee, while it is in the hands of the Court. The whole scope of the Act is directed to vesting "all the powers, jurisdiction and authority of His Majesty" in the Court, and providing for the exercise of control by the Court, its instrument being a committee, who acts only upon the order of that Court.

If, as was argued, the lunatic may initiate and complete transactions, whose validity is to depend upon his mental state when they are done, then the Crown would be compelled, in every such case, to enter into litigation with the lunatic or those who have thus acquired ostensible interests in his estate in order to assert its authority.

Such a state of affairs would be intolerable, and it is, in my judgment, impossible in face of the statute.

It was attempted, on the argument, to distinguish *In re Walker*, [1905] 1 Ch. 160, on the ground that in that case the lunatic was alive, and that here the lunatic was dead. But, as the impeached transactions took place during his lifetime and were then consummated, to the detriment of the lunatic's estate, they directly affected the control of the estate, which was then vested in the Crown. The decision in *In re Walker* is based upon the principle that there cannot, after an order is made declaring lunacy, be a dual control, and that the Court will not, except in the way provided in the statute for superseding the order, inquire into the lunatic's state of mind, which is finally fixed while the order stands.

Hence it follows that the investigation which took place at the trial in this case was incompetent and should not have been entered upon.

For these reasons, I would dismiss the appeal. There is no good reason why an indemnity order should not now be made, as indicated by my brother Garrow.

Judgment varied.

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PACIFIC COAST COAL MINES v. ARBUTHNOT.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. October 3, 1916.

CORPORATIONS AND COMPANIES (§ IV G I—105)—PARLIAMENTARY IRREGULARITIES—RESOLUTION—DEFECTIVE NOTICE—RATIFICATION.

After a resolution for the issue of debentures has been ratified by the acquiescence of the proper number of shareholders, and acted upon, it cannot be attacked on the ground of insufficiency of the notice of the meeting.

Statement. APPEAL by the defendants from the judgment of Clement, J. Reversed.

Bodwell, K.C., and *E. P. Davis*, K.C., for appellants.

W. J. Taylor, K.C., for respondents.

Macdonald, C.J.A. MACDONALD, C.J.A.:—The agreement (of February 11, 1911), was the outcome of disputes between a group of shareholders of the plaintiff company designated below the Victoria group, and a rival group of shareholders designated the New York group. These designations are not quite accurate, but enough so for the purposes of this judgment. The Victoria group was in control of the board of management and the other faction was striving to get control. After negotiations extending over a period of 2 months, the agreement was come to, the important terms of which are that the principal members of the Victoria group should surrender to the company their share holdings of a value of upwards of $800,000, and receive in return therefor debentures of the company thereafter to be issued.

It was further agreed that the authorized capital of the company should be reduced by the cancellation of the surrendered shares together with some unallotted shares, amounting in all to $1,000,000 and that a debenture issue aggregating one and a-half million dollars should be made.

There was also an article in the agreement releasing the retiring members from any claims by the company against them for anything theretofore done, as promotors or directors.

The parties to the agreement were the company of the one part and the surrendering members of the other part.

To insure the legality of the transaction, the promoters of it (both groups) procured the passage of an Act of the Provincial Legislature, ch. 72 of the Acts of 1911, authorising the company to reduce its capital in the manner above set out, and to issue the debentures, the latter subject to the approval of the shareholders, and it finally enacted as follows:—

3. The said agreement and all the terms thereof are hereby validated, ratified, and confirmed, subject to the same being adopted by a resolution passed by 75% of the shareholders of the company present personally or by proxy at any meeting of the shareholders of the said company called for that purpose, and for the purpose of authorizing the issue of the said debentures after February 14, 1911, and upon a copy of the said resolution being filed with the registrar of joint stock companies at Victoria, B.C.

There is nothing in the objection that the notice convening the meeting was bad because it was given prior to the passing of the special Act above referred to. That meeting was called under powers which the company possessed apart from the special Act—powers taken by its memorandum and articles of association. I am of opinion too that the adoption of the agreement by a majority of 75% of the members present at the meeting, in person or by proxy, was all that was required—that a majority of 75% of the whole body of shareholders was not called for. Whether those present comprised 75% of all the shareholders is not quite cleared up by the evidence, but in view of my construction of the language used in the special Act I need not pursue that question.

Now the defence (if any), in the proceedings leading up to the adoption of the resolutions passed at the meeting called for the purpose of obtaining the approval of the members as required by the special Act, was the insufficiency of the information given to the shareholders by the notice. The notice described the parties to the agreement; t recited its date; that it was deposited with the registrar of joint stock companies at Victoria, and could be seen at the meeting, and gave notice that resolutions would be passed reducing the capital as above mentioned, and authorising the said issue of debentures, and the adoption of the agreement. There can be no suggestion of fraud in connection with this meeting, nor in the manner in which it was convened. There is not to my mind the slightest indication of intentional concealment of facts. The meeting was attended by the principal shareholders, either in person or by proxy, and these represented 97% of the company's capital.

The resolutions were passed unanimously, and the business of the company has ever since been carried on on the new basis established by those resolutions.

The retiring members duly surrendered their shares, the company's capital was reduced, the debentures were issued and

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disposed of in accordance with the resolutions, and some of them are now held by strangers.

The New York group took over the business of the company thereafter on the new basis.

Four annual meetings of the company have since been held at which the members largely attended in person or by proxy.

At one of them—that of 1913—all the shares were represented except 31—out of a total of more than 12,000.

This action was authorized by resolution carried by the votes of those controlling the shares of the New York group: in other words, the New York group having obtained control of the company, having conducted its affairs for 4 years, now seek in the name of the company to have what they themselves were party to set aside and rescinded. The carrying out of the agreement without its adoption by the shareholders was *ultra vires* of the directors—not of the company. What was irregularly done could be ratified and adopted by the shareholders. The contention of the respondents is that what was done could be ratified only in the manner specified in the special Act, *i.e.*, by a resolution having the support of a majority of 75% of the shareholders.

That was the view taken by the Judge, and as I am impelled to differ from him, I shall state briefly my reasons for so doing.

In the first place, I will assume for the moment that the resolutions were of no effect by reason of the insufficiency of the notice. On that assumption the directors carried into effect the agreement of February 11, 1911, without authority. It is conceded that the company could have formally ratified and adopted what the directors did had they chosen to do so. That being so, I am of opinion that the adoption by acquiescence of all the shareholders would be just as effectual as a formal reduction to bind the company, and that such adoption would be just as much a bar to this action as a formal one would have been if given.

To prove ratification of a contract it is necessary to shew that the shareholders knew what the contract was, and that they have in some way recognized it as binding: Lindley on Companies, 6th ed., 234. These conditions are I think fulfilled in this case.

At the general meeting of the company held in August, 1911, the chairman read a statement which in my opinion sufficiently disclosed the terms of the agreement and what had been done

under it up to that time. Copies of this statement were sent to all the shareholders. Each year thereafter, up to and including 1915, annual general meetings of the company were held of which all shareholders were duly notified in accordance with the regulations of the company, and while shareholders largely attended these meetings, either in person or by proxy, no objections to the transactions were raised by any of them. Shareholders who took any interest at all in the affairs of the company must have known of its re-organization in 1911, the change of management and retirement of the old directors, the reduction of the company's capital, and the debenture indebtedness; but they were silent for 4 years, during which period the business of the company, which was a large one, was carried on, and during which great changes were made in the company's properties and affairs which cannot now be unmade. A stronger case of ratification by acquiescence it would be difficult to imagine.

Again, there is another view which I think I am entitled to take on the question of ratification by acquiescence. A meeting was in fact held and the resolutions were passed by the specified majority. The notice convening it alone is alleged to have been defective. If so, it contravened what appears to me to be a directory clause in the articles, and the shareholders had notice of that defect which was patent on the face of the notice. They must be presumed to have had knowledge of the company's regulations and of the law. Having that knowledge, they have made no complaint in respect of the resolutions as passed. In these circumstances a Court of equity should not, I think, rescind the agreement and declare what has been done on the faith of these resolutions invalid.

In what I have said I do not wish to be understood as having formed an opinion on the question whether the notice did or did not sufficiently specify the purposes of the meeting; I have assumed in respondent's favour that it did not. The question of the sufficiency of a notice of this kind is one of fact, as Kekewich, J., said in *Normandy* v. *Ind, Coope & Co.*, [1908] 1 Ch. 84, 77 L.J. Ch. 82, which must be governed by the circumstances of the particular case.

The appeal should be allowed and the action dismissed.

MARTIN, J.A.:—There are several points of importance raised in this appeal but the first and special one is that raised

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respecting the regularity of the meeting authorised by the special Act, ch. 72 of 1911, and if the provisions of that Act have been complied with then the action fails and this appeal must be allowed. The point is not free from that difficulty which so often arises in the construction of private Acts of Parliament, but as the proceedings taken under that Act are of no general importance and will form no precedent I shall content myself by saying that in my opinion its requirements were complied with, there being more than seventy-five per cent. of the shareholders personally present and the meeting was in all other respects regularly held. Much was said regarding the alleged insufficiency of the notice but I am of opinion, viewing it in the light of all the unusual circumstances, that, as the Master of the Rolls said in *Baillie* v. *Oriental Telephone, etc., Co.*, [1915] 1 Ch. 503, "substantially put the shareholders in the position to know what they were voting about."

Being of this opinion it would be unprofitable to discuss the other points and it follows that the appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—I agree in the conclusion of the Chief Justice. *Appeal allowed.*

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Re CUTTER.

Ontario Supreme Court, Boyd, C. April 27, 1916.

1. WILLS (§ III G 2—125)—LIFE ESTATE—REMAINDER OVER—"REVERT."
Where a testator leaves all the residue of his estate to a named person, and then says that on the decease of such person "the unused or unexpended balance shall revert," an apparently absolute gift is cut down to a life estate; if the life tenant be one for whose maintenance the testator was evidently providing, the whole residue may be employed for that purpose, in specie, and if necessary the capital may be encroached upon.

2. WILLS (§ III G 4—138)—CONDITION IN RESTRAINT OF MARRIAGE—MIXED ESTATE.
A provision that "in the event of the marriage of my sister all the residue bequeathed to her shall go to the Odd Fellows Home," is a condition in general restraint of marriage and void; the rule applies to mixed funds and to real and personal estate given together.

Statement.

MOTION by executors and trustees for an order declaring the true construction of a will in regard to certain questions arising upon the gifts, devises, and bequests therein.

The following questions were submitted by the applicants:—

(1) The testator in his will states: "To my sister Rose A. Cutter I leave all the residue of my estate. On the decease of my sister Rose A. Cutter the unused or unexpended balance shall

revert to the Odd Fellows Home of Toronto." Having regard to what follows the above quotation, should or should not the word "revert" be taken as used by the testator not in its literal sense, but introduced by mistake or ignorance as to the meaning of the same, and, in place of the word "revert," words such as "shall go to" or "I devise and bequeath to" the Odd Fellows Home of Toronto, Ontario, be substituted therefor?

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(2) Having regard to the last mentioned quotation from the will, which states that "the unused or unexpended balance shall *revert* to the Odd Fellows Home of Toronto," if it be held that the word "revert" should be rejected and other words substituted shewing a devise and bequest to the Odd Fellows Home, has the said Rose A. Cutter any power to mortgage, sell, or convey the real estate left by the testator, free from the control of the executors and trustees, or of the residuary devisee and legatee, the Odd Fellows Home of Toronto?

(3) Following the last mentioned devise and bequest, the will reads: "In the event of the marriage of my sister Rose, all the residue hereinbefore bequeathed to her shall go to the Odd Fellows Home of Toronto, Ontario." As this is a mixed fund—(1) Are the executors and trustees bound to transfer to the said Rose A. Cutter, absolutely, all the residue and remainder of the personal property of the testator, forthwith after the payment of all just debts, funeral and testamentary expenses of the deceased, and expenses of the administration of the estate of the testator that may come to their hands? Or (2) must they hold the real and personal property in their possession until the death or marriage of the said Rose A. Cutter, whichever may first happen, for the purpose of distribution of the "unused or unexpended balance" of the estate, and does the word "balance" apply to the real property as well as the personal property left by the deceased?

(4) If the said Rose A. Cutter is entitled to the residue of the personal property, to what extent?

R. G. Smythe, for the applicants.

D. Inglis Grant, for Rose A. Cutter.

O. L. Lewis, K.C., for the Odd Fellows Home.

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BOYD, C.:—The testator, Colonel Cutter, had a fixed place of abode in Ontario, at Toronto, where, I suppose, he made the estate which he left in his will, which is all in this Province.

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He died while on a visit to his sister at Mishawaka, in the State of Indiana, U.S., where she, his chief beneficiary, is resident. The will is dated the 15th April, 1915, and his death was on the 3rd October, 1915, while he was yet in Indiana. He left no wife or children.

One reading the will as a whole cannot fail to see that he set great store by his connection with the Odd Fellows association, in which he was insured for $1,000. The whole estate is given to trustees for the different legatees. He gives his Odd Fellows jewels to a Toronto Lodge, and his Masonic jewels, cloak, and charm, to one named; and he desires his sister Rose to repay the Toronto Lodge all sick benefits the Lodge has paid to him, in case she feels able to do so. He is solicitous also for the well-being of his sister, and the clause which occasions the difficulty in this will relates to her in the following terms: "To my sister Rose A. Cutter I leave all the residue of my estate. On the decease of my sister Rose A. Cutter the unused or unexpended balance shall revert to the Odd Fellows Home of Toronto, Ontario. In the event of the marriage of my sister Rose all the residue hereinbefore bequeathed to her shall go to the Odd Fellows Home of Toronto, Ontario."

His estate was made up of debentures aggregating about $4,500; cash in banks and in savings accounts in all about $10,000; furniture, pictures, and jewellery, estimated at about $700; the life policy already mentioned of $1,000; and a parcel of land in Toronto, valued at $4,000: total, about $19,000. No estimate is given of debts, etc., to be first paid; but the pecuniary legacies will reduce the money by $1,300.

Apart from the interpretation of other wills and decisions thereon, the testator's intention appears to be to benefit both his sister and the Odd Fellows Home. He is minded to benefit her so long as she keeps her name and unwedded state; but the husband she chooses (if she does marry) must be one who can keep her, and not one who will depend on her means, derived from the testator.

The last sentence of this clause under consideration throws some light on the first part of it. He says, if the sister marries, "*all the residue hereinbefore bequeathed to her* shall go to the Odd Fellows Home." This contemplates a substantial residue, dim-

inished, it may be, by her using and spending, but not exhausted. This last part, using the words "*shall go to,*" throws that same meaning to the word earlier used, "revert" to the Odd Fellows Home. The first part is the difficult one, and I confess that I have not found the solution an easy one, and it may well be that other judicial minds might come to a different conclusion.

My first impression on the argument was, that these first words gave her an absolute estate; but Mr. Lewis's vigorous argument induced consideration. I think that in an earlier state of the law it would have been held that the gift was of the whole residue and that the direction as to the unused and unexpended balance was an expression of intention which would fail of effect on account of its uncertainties: see *per* Sir W. Grant in *Bull* v. *Kingston* (1816), 1 Mer. 314. The earlier view would be, that in seeking to deal with "the balance"—i.e., so much of his estate as remained after its diminution by means of his sister's user and expenditure during her life—that sister, to whom he had given an absolute interest, would retain it. He first gives an absolute interest in his residuary estate, and then cuts it down or seeks to do so by a gift over of what is not spent by his sister during her life. On this reading of the will, the gift over would be void and inoperative, on the double ground of uncertainty and repugnancy.

But there is a later trend of decision, making for supporting such testamentary dispositions, though there are still many fluctuating opinions and divergent decisions in cases hardly distinguishable in language from each other. And all the Judges justify themselves on the ground that they are seeking to carry out the expressed or fairly inferential intentions of the testator. No doubt, the intention of the testator is the key to unlock difficulties, unless he has so expressed himself that to give effect to his words would violate a rule of law. Rules of construction may be modified so as to give effect to the real meaning and purpose of the testator.

The antinomy of judicial decision is well and briefly summarised in the last (1910) edition of Jarman, vol. 2, p. 1208: "In several cases a gift to A., with a direction that at A.'s death 'the residue' or 'whatever remains' of the property shall go to B., has been held to give A. a life interest only, while in other cases

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somewhat similar words have been held to give A. an absolute interest, or a life interest with a power of appointment or disposition." He cites cases of which among the first and perhaps the leading case is by Knight Bruce, V.-C., in 1849, *Constable* v. *Bull*, 3 DeG. & S. 411. In that case the testator directed his debts, etc., to be paid, and gave all his estate to his wife and at the decease of his wife whatever remained of his estate was to be equally divided between persons named. The Vice-Chancellor said: "The gift to the wife is universal in the first instance, and then follow the ulterior gifts, with the words, 'whatever remains of.' The only question seems to be, whether these three words have the effect of preventing the gift to the widow from being construed as a gift of a life interest; for, without these words, the subsequent bequests would have the effect of so reducing the interest given to the widow. There are several meanings capable of being rationally attributed to these words, which would be inconsistent with the construction giving to the widow the power of disposing of the property; and, as at present advised, I think that the other legatees have a substantial interest, and that such of them as survived the widow are entitled." On the last day of the Term, His Honour said that he remained of the opinion he had given; and a decree was made for administration.

The decision was followed in 1879 by Hall, V.-C., in *Bibbens* v. *Potter*, 10 Ch. D. 733, 735, and by Kay, J., in *Re Sheldon and Kemble* (1885), 53 L.T.R. 527, in which the language is similar to that of the will in hand. See *In the Estate of Lupton*, [1905] P. 321.

A strong decision in the Irish Court of *Philson* v. *Stevenson*, decided in 1903, is notable because the Judge below declined to follow *Constable* v. *Bull*, and was reversed by the Court of Appeal —FitzGibbon, Walker, and Holmes, L.JJ. The testator gave all he possessed to his wife, and at her death £50 to be paid his sister, and "if any balance" to go to his brother. Porter, M.R., held that the widow had an absolute estate, and held the subsequent provision inconsistent with such estate: *Philson* v. *Stevenson*, 37 Ir. L.T.R. 104—the appeal at p. 225. The Judge in Chief followed *Constable* v. *Bull*, and said: "The fair construction of this will is that the testator intended his wife to take and enjoy his property. That when she died £50" (of the testator's money)

"should go to his sister, and *the rest*" (i.e., "the balance" of his assets after paying the £50) "to his brother." Walker, L.J., said that the respondent's construction would create a repugnancy, and this construction will not be given unless the Court is coerced to do so, and there was a plain construction of that will which did not create a repugnancy; and Holmes, L.J., concurred.

A like variation in a similar case is found in our Courts, but not so markedly expressed as in the Irish case cited. I refer to *Roman Catholic Episcopal Corporation of Toronto* v. *O'Connor* (1907), 14 O.L.R. 666: the words were: "I give . . . all my estate to my sister . . . and after the death of my said sister, I desire the remainder of my estate, if any, to be equally divided," etc. Mabee, J., held that the sister took the whole absolutely; in the Divisional Court, without deciding definitely, the Court found difficulty in following the learned Judge, and were not satisfied that the words could be successfully distinguished from those in the wills in such cases as, among others, *Constable* v. *Bull*, 3 De G. & S. 411.

The like diversity of opinion has extended to the Courts of Australasia: compare *In re Carless* (1911), 11 St. R.N.S.W. 388, in which Simpson, C.J. in Eq., adheres to and follows *Constable* v. *Bull;* and a later decision, in 1913, of A'Beckett, J., in *Wright* v. *Wright*, [1913] Vict. L.R. 358, in which he speaks of *Constable* v. *Bull* as an unsatisfactory decision, and, managing to distinguish it, gives it the go-by.

I think the weight of authority and the manifest intention of the testator to benefit the Odd Fellows, as well as his sister, lead to the conclusion that the apparently absolute gift should be cut down to a life estate.

There is, of course, the other contingency, of her marriage, to be taken into account, whereby the testator intends that her life estate may be curtailed and go over, upon her marriage, to the Odd Fellows. The validity of this condition was not discussed before me, but the point was taken and cases handed in to shew that it is void. So it appears to me, as at present advised.

In *Lloyd* v. *Lloyd* (1852), 2 Sim. N.S. 255, 263, Kindersley, V.-C., said: "And with regard either to his wife or to any other woman, a testator may make a gift so long as she shall remain single; but if he first gives a life estate to a single woman, a

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stranger to him, and then annexes a condition that in case she marries at all, it shall go over, that, being in general restraint of marriage, is not a good condition." This rule applies to mixed funds: *Bellairs* v. *Bellairs* (1874), L.R. 18 Eq. 510, 516; and to real and personal estate given together: *Duddy* v. *Gresham* (1878), 2 L.R. Ir. 442, *per* Christian, L.J., at p. 465. The view of Christian, L.J., was accepted and followed by Byrne, J., in *In re Pettifer*, [1900] W.N. 182.

This case exemplifies the different operation of rules of construction and rules of law. By the former, the Court is able to give effect to the intention of the testator and avoid repugnancy by making all the parts as far as possible effective; by the latter the rule of law displaces the clear intention of the testator where directions are given which would involve a condition in general restraint of marriage (with a gift over), which has been long regarded as a violation of public policy, and as such is avoided and frustrated by the law. This term of forfeiture must be, therefore, taken out of the will, and it leaves the sister, as I conceive, with an estate for life. See *Re Coward* (1887), 57 L.T.R. 285, 287, 291; *Allen* v. *Jackson* (1875), 1 Ch. D. 399.

There is no difficulty in the import of the direction that on the death of the sister the "balance shall *revert* to the Odd Fellows." "Revert" is a flexible term, and in wills frequently takes colour and import from the context. In *Jardine* v. *Wilson* (1872), 32 U.C.R. 498, 502, it was taken to mean "follow." As used in the will under discussion in *O'Mahoney* v. *Burdett* (1874), L.R. 7 H.L. 388, 393, and in the phrase that if the niece should die unmarried the £1,000 should "*revert* to the nephew," it was taken to indicate that the legacy was to come back or come away from the niece after she had the enjoyment of it. The same word was so read (quoting *O'Mahoney* v. *Burdett*) by Strong, C.J., in *Cowan* v. *Allen* (1896), 26 S.C.R. 292, and he said (p. 312) that it certainly implied a gift over. One of its dictionary meanings is "turn back," and that fits in very well here—"the balance shall turn back to the Odd Fellows."

Holding then that the testator gave a life estate in all his property to his sister, he would appreciate the mixed nature of his property, and that she was likely to live out of the jurisdiction of Ontario. He meant her to be well provided for out of the

estate up to the date of her marriage (if she married) and, if she did not marry, till the time of her death.

The trustees desire direction as to how they shall deal with the estate in view of the life-tenant being non-resident.

There is no small difficulty in seeking to get some definite rule from the cases on the extent of the claims of the life-tenant who has special claims of near relationship on the testator. This sister, said to be about 54 years of age, is, as I understand, his only relation—the only one, at all events, whom he has recognised in the disposal of his estate. The authorities were pretty well explored in *Re Johnson* (1912), 8 D.L.R. 746, and stress was there laid on the opinion expressed by James, L.J., in *In re Thomson's Estate* (1880), 14 Ch. D. 263. He thought that the widow took an estate for life with full power of enjoying the property in specie so that if there was ready money it need not be invested, but she might spend it, and she might use the furniture and enjoy the leaseholds in specie.

I incline to think that the language of this will would justify a little more liberality, which the charitable institution getting what is left should not complain about. He gives her all the residue of his estate and at her death *the unused or unexpended balance* to go over. He contemplates that she shall use and shall expend what is bestowed: to what extent? I think the whole residue may be employed so far as required for her comfortable maintenance suitable to her state in life. In other words, if necessary the capital may and should be encroached upon for the purpose of her proper maintenance, but for no other purposes.

I may refer to *Re Fox* (1890), 62 L.T.R. 762, not cited in *Re Johnson*, 8 D.L.R. 746, and also to *In re Ryder*, [1914] 1 Ch. 865, in which *In re Thomson's Estate* is commented on.

I have no doubt that the sister is entitled in specie to the money and other articles *quæ ipso usu consumuntur:* see *In re Tuck* (1905), 10 O.L.R. 309, 311, 312.

As to the insurance, if that goes to the trustees under the trusts of the will, I think it should be regarded as money. She will be entitled as of course to the corpus from the debentures and the usufruct of the land.

If any difficulty arises, there will be a reference to ascertain to what she is entitled as a yearly allowance for maintenance, payable monthly or quarterly as she may wish.

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But I trust this may be avoided. The charitable beneficiaries, through their counsel, manifested a liberal attitude towards the sister; and I hope an amicable arrangement will be arrived at by which she will be satisfied and amounts fixed which may be presently paid to her and to the charity. The costs of all parties out of the estate.

Annotation.

Annotation—Estates for life.

Before the enactments presently referred to, words of limitation were necessary in a will to pass the fee. But the intention to pass the fee might appear from other clear expressions of the will. Thus, a devise to J. D. "for his children" passed a life estate only. *Hamilton* v. *Dennis*, 12 Gr. 325.

After devises in tail to children, and a residuary devise of all property "not herein mentioned," there followed a devise of lands specifically to J. K. and J. S., without words of inheritance. Held, that J. K. and J. S. took estates for life only, and that the reversion passed to the residuary devisees. *Doe dem. Ford* v. *Bell*, 6 U.C.Q.B. 527.

A devise of all the lands that might belong to the testator at the time of his death did not indicate an intention to pass the fee. Nor did a devise to J., provided that if he died before the testator, then to B., give J. more than a life estate on his surviving the testator. *Doe dem. Paddock* v. *Green*, 7 N.B.R. 314.

A reference to "estate" might have indicated that the fee passed; but it must clearly have referred to the testator's interest in the land, and have been directly connected with the devise in question. So, on a devise to a widow of the income of "all my real estate" during her life, and after her death the same lands to go to children to be divided equally amongst them, it was held that even if the word "estate," as used in the devise to the widow, were sufficient to indicate an intention to pass the fee, the word had no relation to the devise to the children, and that they took life estates only. *Doe dem. Whitney* v. *Stanton*, 7 N.B.R. 632.

But a charge imposed upon a devisee of land gave him the fee, no words of limitation being used. *Chisholm* v. *Macdonnell*, 7 N.B.R. 137.

In Ontario, after March 6, 1834, on a devise of lands, "it shall be considered that the devisor intended to devise all such estate as she was seised of in the same land, whether in fee simple or otherwise, unless it appears upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise." R.S.O. 1914 ch. 120, sec. 4.

And by the Wills Act, "where any real estate is devised to any person without any words of limitation, such devise shall [subject to the *Devolution of Estates Act*], be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will." R.S.O. ch. 120, sec. 31.

In British Columbia the same enactment except the words in brackets, is in force. R.S.B.C. ch. 241, sec. 25.

In Manitoba, on and after May 30, 1882; in New Brunswick, on and after January 1, 1839; and in Nova Scotia, on and after October 30, 1840, the same enactment, except the words in brackets came into force.

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Since these enactments, restrictive words are necessary in order to cut down an indefinite devise to a life estate.

"My wife shall be allowed to live on the said property during the term of her natural life," gives a life estate. *Fulton* v. *Cummings*, 34 U.C.Q.B. 331.

A similar devise to a daughter as long as she remained unmarried gives an estate during the residence on the land unmarried. *Judge* v. *Splann*, 22 O.R. 409.

A devise to A. in fee, subject to the condition that daughters should "have at all times a privilege of living on the homestead and of being maintained out of the proceeds of the said estate during their natural lives," gives a life estate to the daughters. *Bartels* v. *Bartels*, 42 U.C.Q.B. 22.

A devise in fee, with a direction that the testator's daughters and their mother should have "a lien on said lands for a home during their natural lives" gives a life estate to the daughters. *Scouler* v. *Scouler*, 8 C.P. 9.

A devise to a widow of "her life in the said lot" gives her a life estate. *Smith* v. *Smith*, 18 O.R. 205.

A devise to children, "reserving to my wife, as long as she remains my widow, the revenues and incomes therefrom," gives an estate to the widow *durante viduitate*. *King* v. *Murray*, 22 N.B.R. 382.

A devise to a wife "to be at her will and disposal during her natural life," with a devise over, gives a life estate only to the wife. *Doe dem. Keller* v. *Collins*, 7 U.C.R. 519.

But a devise to a wife for life, with a general power of disposal by will, gives a fee simple. *Re Bethune*, 7 O.L.R. 417.

Semble, that a devise to H. for her own use, with power to sell or dispose of the same as she may see fit, followed by a devise that after her death "the remainder of my estate, if any, be equally divided between, etc.," gives A., a life estate only. *Roman Catholic Episcopal Corpn.* v. *O'Connor*, 14 O.L.R. 666.

A vested remainder in fee, after a life estate with power of sale in the life tenant, is not affected if the power is not exercised. *Doe dem. Savoy* v. *McEachren*, 26 N.B.R. 391.

As to whether a devise for life, with a power of appointment amongst sons of the devisee creates a power or a trust, *quære*. *McMaster* v. *Morrison*, 14 Gr. 138; *Pettypiece* v. *Turley*, 13 O.L.R. 1.

A devise to D. for life, "and to her children, if any, at her death, if no children," then over, gives a life estate to D., with remainder to children. *Grant* v. *Fuller*, 33 Can. S.C.R. 34; *Young* v. *Denike*, 2 O.L.R. 723; *Sweet* v. *Platt*, 12 O.R. 229.

A devise to A. "and his heirs and executors forever," proviso, "that he neither mortgage nor sell the place, but that it shall be to his children after his decease," was said to indicate an intention that A. should not have such an interest as would enable him to defeat his children, and therefore that he took an estate for life only, remainder to his children. *Dickson* v. *Dickson*, 6 O.R. 278. *Sed quære*, an estate in fee having been given by technical words.

A devise to a widow for life, followed by a devise of "everything real and personal within and without, and it is hereby understood that the property above described shall be under the control of my said wife. After the decease of my wife . . . to my nephew and his heirs," gives a life estate to the widow; the estate not being enlarged by the expression "everything

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real and personal," because the remainder was clearly given to the nephew. *Clow* v. *Clow*, 4 O.R. 355.

A devise to a widow for life, remainder to two sons "during the full term of their natural lives . . . and if either . . . should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share . . . and after the decease of both of my said sons" sale and division of the proceeds amongst their heirs "then surviving." Held, a life estate for the joint lives of the two sons, remainder in fee to the persons answering the description of the heirs of the two sons at the death of the survivor of them. *Haight* v. *Dangerfield*, 5 O.L.R. 274.

A devise to a husband and wife "and to their children and children's children forever . . . " provided that the husband and wife should not be at liberty to convey, "as it is my will that the same may be entailed for the benefit of their children," gives a life estate to the husband and wife. The explanation that the "children" were to have a fee tail indicates that the words "children and children's children" are not words of limitation of the estate of the husband and wife. *Peterborough R. E. Co.* v. *Patterson*, 15 A.R. (Ont.) 571.

A devise to A. for life and at his decease to the "second male heir of him and his present wife and his heirs male forever, and in default of a second male heir to the eldest surviving female heir or child and her male heirs forever" gives A. an estate for life, remainder to a daughter (there being only one son) in fee tail male. *Re Brown & Slater*, 5 O.L.R. 386.

A devise to S. H. G. of "the use of my farm . . . also to his lawful children, and in case of his death without children, then to . . . daughters and their heirs-forever," gives S. H. G. a life estate only. S. H. G. having the use, it was held that the children (of whom the only one at the date of the will was *en ventre*) could not share with him; nor could that child exclude after-born children who might be alive at the death of S. H. G. In order, therefore, to give both S. H. G. and all his children an interest, it was held that S. H. G. took a life estate, remainder to his children living at his death; and in default of such children, then over. *Gourley* v. *Gilbert*, 12 N.B.R. 80.

A devise to G. for life and if he marries to his wife for life, and on the death of both to his children and their heirs, gives G. a life estate, remainder to his wife for life, remainder in fee to children. *Re Sharon & Stuart*, 12 O.L.R. 605.

A devise of all real and personal property to the testator's widow, followed by a declaration that "my wish and desire is that she divide" in certain proportions amongst the testator's children, held to give a life estate to the widow, in order to prevent a complete exclusion of the widow who was evidently intended to be benefitted. *Wilson* v. *Graham*, 12 O.R. 469.

Similarly, a devise to A. generally, with a restraint on alienation and against waste, followed by a disposition amongst his children after his death, according to the discretion of the executors of the testator, gives A. a life estate only. *McPhail* v. *McIntosh*, 14 O.R. 312.

So, also, a devise on trust for sale, and to invest the proceeds for maintenance of the devisee and her children, and till sale to take the rents and profits for the life of the devisee, gives an estate for life only with a power of sale. *Re O'Sullivan*, 5 N.S.R. 549.

A devise of the "possession, use, and occupation" of land and all the rents and profits of all the estate to a widow "for the support of herself and

children," with a proviso that if the rents and profits are not sufficient resort may be had to principal, and a direction that what remains at the death of the widow shall go to the children, gives a life estate to the widow. *Knapp* v. *King*, 15 N.B.R. 309. **Annotation.**

Where, after a direction to convert, the testator bequeathed a portion of the proceeds to M. S., with a proviso that M. S.'s interest should not be transferable or transferred to any other person, but might be inherited by her children, and in case M. S. died without legitimate issue, then, that her interest should "revert back" to other legatees, it was held that M. S. took a life estate only. *Jeffrey* v. *Scott*, 27 Gr. 314.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November, 6, 1916.

INFANTS (§ I D 2—25)—REPUDIATION OF PURCHASE—BENEFITS.

An infant on attaining majority has the right to repudiate a contract for the purchase of personal property of which he had not taken possession, and to recover the payments made by him thereon, not having received any benefit under the contract.

APPEAL by plaintiff from a judgment dismissing the action. Reversed. Statement.

H. McK. McConnell, for appellant.

A. W. Bowen, and *B. C. Parker*, for respondent.

The judgment of the Court was delivered by

RICHARDS, J.A.:—On October 19, defendant owed plaintiff $90. The plaintiff, who was then nearly 20 years of age, agreed to buy from the defendant, for $510, two horses and some other chattels, all of which I shall refer to as "the chattels." Richards, J.A.

The defendant was to retain the $90 that he owed the plaintiff, and the plaintiff paid him by the cheque of one Skinner, $100. Both sums were to be applied on the $510, and it was agreed that the plaintiff should enter the defendant's service and work for him for a year.

For such work the defendant was to allow the plaintiff $270. This $270, less any advances in respect of it, that defendant might make to plaintiff during the year, was to be applied, at the end of the year, on the price of the chattels and the defendant was then to deliver the chattels to the plaintiff, and to trust him to pay the balance then still unpaid on the $510. Till the end of the year the defendant was to retain the chattels.

It is not definitely stated whether the plaintiff, or the defendant, was to be the owner of the chattels till the end of the year. But the facts seem to shew that the property in them was to remain in the defendant.

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The plaintiff entered the defendant's service, as agreed, and worked for him till January 22, 1915, when he decided to leave.

On February 10, 1915, the plaintiff and defendant agreed in writing as follows:—

Memorandum of agreement *re* wages and sale of horses, etc., between R. J. Longhurst and Joseph Nicklin both of Morden. Nicklin hired with Longhurst for a year from October 19, 1914, for $270 for one year and worked till Jan. 22, 1915, from which time he decided to quit. At the time of hiring Longhurst sold Nicklin a team of horses, Sam and Cap, waggon and harness, neckyoke, whippletrees and gravel box for $510 on which Nicklin paid $190 and the wages $270 for the year less advances thereon was to be applied on the price of the team and other chattels which were to be kept by Longhurst till the year was up. It is now arranged that Nicklin is to quit. Longhurst is to get another man in his place, and he will pay any difference between what he has to pay such man and $261.50 (that is $270 less $8.50 paid Nicklin) after taking into account the time he is without a man. Nicklin at the end of the year will pay for the team, etc., and will get the same. If Longhurst has to pay more than $261.50 for a man to complete the year, Nicklin is to pay Longhurst such excess.

It seems to have been assumed by both parties after the end of the year that the whole of the $261.50 mentioned above had been necessarily used in paying someone to work for defendant, in plaintiff's stead, for the balance of the year.

On November 29, 1915, plaintiff came of age, and on February 21, 1916, he sent to defendant (who received it two days later) the following letter.

Take notice that having attained the age of twenty-one years I hereby withdraw from the purchase of horses Sam and Cap and other articles and desire payment of the amount coming to me, as follows:—Wages earned, $90; money collected by you from Skinner's cheque, $100; three months' wages, $60 = $250; plus interest, 8% for 2 years, $40 = $290. And take notice that unless the same is settled within 4 days at the law office of H. McK. McConnell that the matter will be at once placed in suit. JOE NICKLIN.

On February 29, 1916, the plaintiff sued defendant, in the County Court of Morden, for the $290.

The trial Judge considered himself bound by *Re Taylor, ex parte Burrows*, 8 De G. M. & G. 254; *Wilson* v. *Kearse* (1800), 2 Peake 196, and *Holmes* v. *Blogg* (1818), 8 Taunt. 508, and dismissed the action.

It is pointed out in the case of *Corpe* v. *Overton* (1833), 10 Bing. 252; *Everett* v. *Wilkins*, 29 L.T.N.S. 846, and *Hamilton* v. *Vaughan Sherrin &c. Co.*, [1894] 3 Ch. 589, which cases I shall later refer to, that the reason the infant could not recover in *Holmes* v. *Blogg*, *supra*, was that he had received a part of the consideration and

could not put the defendant back in the position he was in before the contract was made.

Ex parte Taylor, supra, is distinguishable for the same reason, as stated in *Hamilton* v. *Vaughan-Sherrin*. It was cited in the argument in *Everett* v. *Wilkins*, though not referred to in the reasons for judgment. So we should, I think, consider that the Court there thought it had turned on the same point as *Holmes* v. *Blogg*. Knight Bruce, L.J., in his judgment in *Ex parte Taylor* says that the contract had during the minority "been in part performed on each side."

Wilson v. *Kearse*, 2 Peake 196, also was cited in *Everett* v. *Wilkins*, but not referred to in the judgment; and, as the Court held the contrary of that decision, they evidently thought it not good law as stated in the report in 2 Peake.

Sec. 3 of the Infants Act of Manitoba enables an infant, over 16, who has no parent or legal guardian, or who does not reside with his parent or guardian, to agree to perform service, and says, "he shall be liable upon the same and shall have the benefit thereof, as if he had been of legal age."

Whether that section would affect the present case, but for the agreement of February 10, 1915, need not be considered, as, by that agreement, the defendant released the plaintiff from the contract. Its effect was, I think, to place the parties in the same position as if the plaintiff had paid the $190 on the price of the chattels and had been given time to pay the balance.

In *Corpe* v. *Overton*, *supra*, the plaintiff, a minor, agreed, in writing, to enter into partnership with the defendant at a future date and to pay £1,000 for a share of defendant's business. He paid £100 as a deposit. Nothing further was done till the plaintiff, when he came of age, rescinded the contract. In an action to recover the £100 he was held by Tindal, C.J., and Gaselee, Bosanquet and Alderson, JJ., entitled to a return of that sum, despite the fact that the agreement provided that, in case of default on his part, it should be forfeited to the defendant.

In *Everett* v. *Wilkins*, *supra*, the plaintiff agreed in writing with the defendant, a licensed victualler, to buy an interest in defendant's business, the consideration of over £2,000 to be paid in instalments, and the plaintiff not to participate in the profits till the whole consideration should be paid.

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As soon as the first instalment (£200) should be paid the plaintiff and his wife were to board and lodge with the defendant and assist in the business, and to pay for such board and lodging, but not to participate in profits till the whole consideration should be paid.

The plaintiff shortly thereafter paid £600 on the consideration and he and his wife then began to board and lodge with the defendant. They continued to do so until the plaintiff became dissatisfied, rescinded the agreement and, with his wife, left the house. He had received no part of the profits.

It was held by Kelly, C.B., and Pigott, Cleasby and Amphlett, BB., that the plaintiff could recover the £600, less what he owed for board and lodging.

The Court held that the arrangement to board and lodge, and to pay therefor, was a collateral agreement, and that there had been a total failure of consideration in the main agreement.

That case goes further than it is necessary to go in the one at bar, to hold plaintiff entitled to recover.

In *Hamilton* v. *Vaughan-Sherrin &c. Co., supra*, the plaintiff, a minor, applied for, and was allotted, shares in the company. She paid the instalment due on allotment, but received no benefits. Six weeks later she repudiated, and asked for repayment. In a winding up of the company she was held entitled to prove for the amount she had paid.

In the case at bar the plaintiff derived no benefit whatever from the contract. It is said that he twice used the horses, to draw a load of wood. That cannot be attributed, in my opinion, to the contract. He was working for the defendant, and, no doubt, was loaned the horses.

In the view I take of the case it is not necessary to consider whether, or not, the contract was an improvident one, though it might be strongly argued that it was, as the horses might die before the end of the year of service, or be seized on any execution that might issue against the defendant, in whom the title remained. As to the $60 claimed for the 3 months' work, I can not hold the plaintiff entitled. He did get a consideration for not receiving that sum, by the release in the agreement of February 10, 1915.

Under the circumstances, I do not think the delay in giving notice of repudiation, after plaintiff came of age, was such as to

disentitle him to succeed, especially as such delay caused no loss to the defendant.

With deference, I think the plaintiff is entitled to the $100 paid, and to the $90 which he had earned before the contract was made. The plaintiff should not, in my opinion, recover any sum for interest.

I would allow the appeal with costs, set aside the judgment entered in the County Court, and enter judgment there for the plaintiff, for $190, with costs.

Haggart, J.A.

HAGGART, J.A.:—It is not necessary for the disposal of this case to consider what took place prior to February 10, 1915, because the memorandum bearing that date signed by the plaintiff and defendant and witnessed by Mr. McLeod was the consummation of the negotiations and dealings of the parties in connection with the matters in issue, and from the contents of that document we must ascertain the respective contractual rights and obligations of the parties. Therein is stated, the amount of money paid by the plaintiff $190, the time served under the hiring, the arrangement as to the plaintiff quitting the work, and the defendant getting a substitute, the allowances to be made, and further that at the end of the year the plaintiff was to pay for the team and get the same.

The foregoing is the substance of the contract which the plaintiff claims to have repudiated.

I think the letter of February 21, 1916, sent by the plaintiff to the defendant is a sufficient repudiation. This letter the defendant acknowledges to have received on the 22nd. This is 3 months after the plaintiff's attaining his majority, a reasonable time. If the letter was not a sufficient disaffirmance certainly the bringing of this action on February 29, 1916, would be.

This was not a contract for necessaries, nor, in my opinion, was it for the benefit of the infant.

There was no ratification or affirmance of this contract on his arriving at full age by writing, words or acts, but, on the contrary, it was expressly rescinded and disaffirmed.

The defendant knew or should have known that the arrangement could at most be a voidable contract. The defendant has had the use of the horses as well as of the $190.

MAN.

C. A.

The appeal should be allowed and judgment entered for the plaintiff for $190. *Appeal allowed.*

NICKLIN v. LONGHURST.

Ed. Note.—MONEY PAID UNDER CONTRACT—EXECUTORY AND EXECUTED.

"Where an infant has paid money under a contract for which the consideration remains executory, upon avoiding the contract he may recover the money, as upon an entire failure of consideration. Thus an infant having signed an agreement to purchase a share of a business under which he paid down part of the purchase-money as a deposit, to be forfeited on breach of the agreement, was held entitled, on coming of age, having then taken no benefit under the agreement, to repudiate it altogether, and to recover the deposit, in an action for money received for his use. (*Corpe* v. *Overton*, 10 Bing. 252, 3 L.J.C.P. 24; *Hamilton* v. *Vaughan-Sherrin Co.* [1894] 3 Ch. 589, 63 L.J. Ch. 795). . . But after receiving the consideration in part, though he may avoid the contract, he cannot recover money paid under it, because the failure of consideration is not complete. Thus an infant who paid a premium for a lease, which he enjoyed during minority, but avoided after coming of age, though he thereby discharged himself of the rents and covenants, could not recover the premium, because he had partially enjoyed the consideration. (*Holmes* v. *Blogg*, 8 Taunt. 508). And an infant who has paid a premium for admission into a partnership and has acted as partner and received a share of the profits, cannot recover back the premium. (Ex. p. Taylor, 8 DeG. M. & G. 254, 25 L.J.Bk. 35). So, an infant who buys things which are not necessaries, cannot recover back money paid for what he has consumed or used, although the contract is absolutely void by the Infants Relief Act, 1874. (*Valentini* v. *Canali*, 59 L.J.Q.B. 74)."

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WILLOUGHBY v. CANADIAN ORDER OF FORESTERS.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren, Magee and Hodgins, JJ.A. May 29, 1916.

INSURANCE (§ VI C 2—360)—PROOF OF AGE—ADMISSION IN CERTIFICATE.

The admission of age of the insured in the endowment certificate issued by a fraternal society dispenses with the necessity for further proof of age, having regard to the contract and the society's constitution.

[Insurance Act, R.S.O. 1914, ch. 183, secs. 7-11, 166, as amended by 6 Geo. V. ch. 36, considered; *Willoughby* v. *Can. Order of Foresters*, 31 D.L.R. 267, 36 O.L.R. 507, affirmed.]

Statement.

APPEAL by the defendants from the judgment of BRITTON, J., 31 D.L.R. 267, 36 O.L.R. 507. Affirmed.

W. A. Hollinrake, K.C., for appellants.

J. A. Hutcheson, K.C., for plaintiff.

Magee, J.A.

MAGEE, J.A.:—By his application of the 7th March, 1888, to the defendants for a certificate of membership, the plaintiff's husband promised to conform to and obey the laws, rules, and regulations of the Order, then in force or thereafter enacted, or submit to the penalties therein contained. The certificate, issued to him eight months later, on the 21st November, under the defendants' seal and the signatures of the High Chief Ranger

and High Secretary, states that it is subject to the constitution and to such by-laws "as are now in force and to such amendments or additions as may hereafter be adopted by the Order or Court of which the insured is a member." The certificate further certified "that Brother William R. Willoughby, who was regularly admitted a member of Court Thousand Islands, No. 66, located at Gananoque, on the 19th day of March, A.D. 1888, at the age of 33 years, has this day been duly registered as a member of the Canadian Order of Foresters, and as such is entitled to all the rights and privileges of membership in the Order; and, further, the person or persons whose name or names are hereinafter written are, within thirty days after satisfactory proof of the death of the said brother, entitled to the sum of $1,000 from the endowment fund of the Order: Provided always, that the brother above mentioned shall, at the time of his death, be a member in good standing, and shall have in all things complied with the constitution, rules, and regulations of the Order and the subordinate Court of which he may be a member, and the questions in his medical examination papers have truthfully and correctly been answered. . . . This certificate is designated as payable to my wife."

In his application he stated that he was born in the county of Leeds, in Ontario, on the 22nd April, 1854, and that he was 33 years old last birthday. In his medical examination statement, endorsed thereon, he certified that his age last birthday was 33, and that he had two brothers living "ages 30-40" and two sisters living "ages 36-38." In the application he had directed the "endowment" to be payable to his daughter.

There is no explanation of the delay from March to November in the issue of the certificate, nor of the change from the daughter to the wife. At the foot of the certificate are printed the words, "I accept this certificate upon the terms and conditions herein specified," and this is signed and sealed by Willoughby, and dated the 1st February, 1892. On the face of the certificate it is an admission that on the 19th March, 1888, he was of the age of 33 years. The Thousand Islands Court being at Gananoque, in the county of Leeds, where he was born, it may well be that local information had been submitted or obtained, or his own precise statement as a member of a local family may have been

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accepted as satisfactory, before this admission was made. Evidently something not before this Court had taken place to cause the delay and the change in the beneficiary, and, it may be, to cause the issue of a certificate with this admission. No form of certificate of membership is prescribed by the constitution or by-laws or rules. It does not appear that this is not a special form of certificate used for cases where satisfactory proof of age has been offered. It would be a singular form to use where proofs of age were yet required. Although it mentions proofs of death, it contains not a word about proof of age being necessary.

The constitution as amended in 1915, a month before his death, a copy of which has been put in, is said to be the same in effect as that in force previously as to age. By sec. 53, the monthly assessments payable were to be determined by the age at the date of admission to the Order, and the rates for those between the ages of 30 and 35 for $1,000 were 70 cents per month, while for those between the ages of 35 and 40 they were 85 cents per month. Under sec. 59, every applicant for beneficiary membership must furnish satisfactory proof of age, or satisfactory proof of age must be furnished, before any claim for insurance will be recognised or paid. This does not say "every member," but "every applicant." Therefore, it would seem that the production in some cases of proof before admission to membership or the issue of a certificate was contemplated, and such may have taken place here. It cannot be intended that, if the society has already admitted the age, it must be proved over again. When the member is not here to speak for himself, and his version of the facts cannot be obtained, it would not be reasonable or just to say that, holding a certificate making such an admission, he could be expected to pay any attention to notices, addressed to members in general, warning them to submit proofs and have their ages admitted. He may well have rested upon the admission which he had, and considered that such notices did not affect him.

The defendants have not attempted to prove that the statement of age was wrong. They had before them the answers already referred to as to the ages of the two brothers and the two sisters. The plaintiff's son gave evidence that one of these brothers, younger than the plaintiff's husband, is living, apparently not far from Gananoque, and he—the son—thought there was

"a year difference between them." The defendants, instead of asking whether this was the older or the younger of the two brothers, or trying to satisfy themselves or the Court that there was something wrong, have chosen to rest upon the strict necessity of proof of age after the member's death.

Section 87 of the constitution provides that, where a mistake is made in the statement of the age without any intention to deceive, the beneficiaries shall not be entitled to more than a proportional amount in the ratio of the premium paid and the proper premium for the true age. Section 166 of the Ontario Insurance Act, 1912 (now R.S.O. 1914, ch. 183, sec. 166, and dating back to the 14th April, 1892, 55 Viet. ch. 39, sec. 34), provides that where the age is material and is given erroneously, but in good faith and without intention to deceive, the contract is not avoided, but only a somewhat similar proportion shall be recoverable. There is here no suggestion of intention to deceive; and so, even if the deceased were shewn to have been born as early as the 8th March, 1853, instead of the 22nd April, 1854, it would not affect the amount payable. In any case the plaintiff would be entitled to seventy eighty-fifths or thereabouts of the $1,000. Section 173 of the Insurance Act provides that, where the amount payable is in dispute, it shall *primâ facie* be the maximum stated or indicated in the contract.

In view of the admission of age in the certificate, no further proof of age would, on the evidence, be, in my opinion, necessary. The plaintiff was made beneficiary by her husband on the 17th April, 1913, instead of the former beneficiary, his first wife. She should, therefore, recover the full amount with costs, and the appeal should be dismissed with costs.

This admission in the certificate, however, was not referred to on the argument here, nor apparently at the trial; and, if the decision here were to rest solely upon that ground, it would be proper that counsel should be heard as to it more particularly, as it may be that this is the general form used by the defendants.

If this is not the proper construction of the certificate, then the question arises whether the judgment appealed from was not warranted under sec. 166 of the Ontario Insurance Act.

The Ontario Insurance Act of 1912 was passed on the 16th April, 1912. Section 166, as already referred to, provided for the

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payment of a proportional sum in case of error in statement of age, and the first five sub-sections dealt with that subject. The sixth or last sub-section declared that the whole section should apply, not only to future applications and contracts, but also to any theretofore made. In 1913, by 3 & 4 Geo. V. ch. 35, sec. 8, which came into force on the 1st July, 1913, this section, 166, was amended by adding four new sub-sections 7, 8, 9, and 10. These, being made a part of the section, would come within the wording of sub-sec. 6, which made the whole section applicable to pre-existing contracts.

Sub-section 7 required every registered insurance corporation (which, under sec. 2 of the Act of 1912, would include these defendants) to "send to every person with whom a contract is made, within one month thereafter, a printed notice . . . and annually thereafter until proof of age is admitted, stating that the age of the insured is material to the contract, and evidence that the age stated in the application is the true age of the insured will be required before the policy is paid. This notice shall also be printed in red ink in type not smaller than 10 point upon all notices to the insured and upon all receipts for premuims." Sub-section 8 declared that sub-sec. 7 should not apply to a contract under the industrial plan. Sub-section 9 declared that sub-sec. 7 should not apply to a registered friendly society (such as these defendants), "provided that the notice mentioned therein is published on the first page of the official newspaper or journal of the society, in each issue thereof, and printed in red ink . . . upon all certificates issued by the society, and upon all receipts or pass-books issued to the members." Sub-section 10 enacted that, upon failure of a corporation (which would include the defendants) to comply with the provisions of sub-sec. 7, the corporation should be deemed to have admitted the age mentioned in the application as the correct age.

On the revision of the statutes (R.S.O. 1914, ch. 183, sec. 166), sub-sec. 1 was divided into two, so that sub-sec. 6 would have been sub-sec. 7, but it was placed after sub-secs. 7, 8, 9, and 10, and became sub-sec. 11 of sec. 166.

The first question arising upon this enactment is the meaning of sub-sec. 9. Did it take registered friendly societies wholly out of the operation of sub-sec. 7 (as was done with industrial plan

contracts by sub-sec. 8), and make a new enactment for them alone, or did it only relieve them from sub-sec. 7 on condition that they did something else? Considering the differences in general practical working between friendly societies and ordinary life insurance companies, one would be quite prepared to find the former, that is, a requirement adapted to their mode of working. Then, too, the general statement that sub-sec. 7 shall not apply to these societies would lead one to expect, not merely that it would not apply in any particular case, but that it would not apply at all, and that some other general requirement follows. Undoubtedly, also, the words "provided that" are often used without the intention of creating a condition, and merely as introducing a new subject, and, if they had here begun a new sentence, there would be strong reason so to interpret them. In that case, however, one would expect that the words would be such as, "Provided that by such societies the notice mentioned therein shall be published" etc., "and printed" etc., instead of "is published . . . and printed." But, in view of the use of the latter tense and the continuation of the clause in the same sentence, with the exempting words preceding, the proper construction, I think, is, that the exemption is not a general one, but one for each case, just as sub-sec. 7 itself applies only to each case, and that in each particular case the condition is attached to the exemption, and this more especially from the fact that sub-sec. 10 makes no provision for the consequences of non-compliance with sub-sec. 9, which would be as proper and necessary as with regard to sub-sec. 7. That being so, the society is relieved from sub-sec. 7 only by complying with sub-sec. 9. If it does comply, that is sufficient; but, if it does not, then it is not relieved from sub-sec. 7; and, if it has failed to observe its provisions, sub-sec. 10 operates to say that it has admitted the age. I am, therefore, of opinion that it was necessary for the defendants to comply with either sub-sec. 7 or sub-sec. 9, to avoid the admission.

The defendants have, ever since the 1st July, 1913, properly published the notice in their official paper. They did not print it on the certificate issued in 1888; but I would not construe the sub-section as requiring that to be done upon certificates theretofore issued, which would have to be recalled from all parts of the country, and probably of the Empire, and from other countries. A pass-book or marked receipt-book had been given to

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Willoughby, in which his monthly payments were credited as made by or for him, and initialled by the financial secretary of the local Court at Gananoque. This was used in place of issuing separate receipts, and this practice was, no doubt, in view of the Legislature. This book begins in January, 1907, and contains entries of monthly payments up till his death, with the officer's initials, and the officer speaking of the book says: "That passed between him and me each payment." The book has on it a printed notice: "Members when paying assessments should not fail to bring their receipt-books." It appears from the evidence of the High Secretary of the defendants that these books are not sent from their head office to the members, but the books are supplied to the local Courts in quantities, apparently like stationery, as they order them, and they "issue them to the insured," and it is optional with the local Courts to order pass-books or receipts. In these circumstances, it cannot, I think, be said that the books are "issued" at the head office. They are issued by the defendants through their local officer at Gananoque. If issued by the head office to each member, the head office would never again have an opportunity of printing anything on them, and could not be said ever to re-issue them, as the books never come to that office. But, inasmuch as the issue of receipts or pass-books is left to the local officer, and every monthly receipt would have to bear the printed notice, there would be no difficulty in affixing or stamping on each pass-book the requisite notice, or issuing a new book at any time when the pass-book is brought in for the purpose, or to have another payment entered.

Looking at the object of the section, I think the proper construction is, that neither the Order nor the local Court was bound to call in outstanding pass-books to put the printing on them; but that, when brought in and delivered out again with a fresh receipt therein, they should be considered as again "issued," and the local officer who was entrusted with the original issue should have been required to have the notice put on them, and it is no greater hardship upon the defendants to have to entrust this to him than to entrust to him the issue of the proper form of receipts each month. The Legislature evidently intended constant reminders to the members. I am, therefore, of opinion that, in not printing the notice in this pass-book when reissued to the

deceased, after the 1st July, 1913, the defendants failed to comply with sub-sec. 9.

Then did the defendants comply with sub-sec. 7? That sub-section requires the insuring body to send a notice to "every person with whom a contract is made, within one month thereafter, . . . and annually thereafter." "Thereafter" must mean after the making of the contract. As regards pre-existing contracts, the notice could not be sent within a month, nor, if made two or more years previously, could it be sent annually. This left room for the argument that the annual notice was only necessary in the case of contracts made after the 1st July, 1913. But, inasmuch as the provision was inserted in a section which was expressly made applicable to pre-existing contracts, the reasonable interpretation, in my opinion, is, that the annual notice was requisite after the 1st July, 1913, in the case of past as well as future contracts. It is admitted that none was sent. However, the sub-section also requires the notice to be put on all receipts for premiums. A receipt is not the less a receipt because it is in a book. If it is in a book, the society, under sub-sec. 9, need only have it printed once thereon, not on each receipt entered therein—but on receipt or book it must be. There were twenty-five receipts entered in this book after the 1st July, 1913, and no notice was put therein. The defendants did, therefore, in my opinion, fail to comply with sub-sec. 7 in both respects, and, under sub-sec. 10, must be taken to have admitted the age, 33, to be correct, and the judgment founded on that statutory admission was right.

But, since the judgment, the Legislature have, on the 27th April, 1916, passed the Ontario Insurance Amendment Act, 1916, sec. 4 of which repeals sub-sec. 11 of sec. 166, and substitutes a new sub-sec. 11, whereby only sub-secs. 1 to 6 (those enacted in 1912) are made applicable to both past and future contracts, and declares that "this section shall be deemed to have been in force on and from the 16th day of April, 1912, but nothing in this section shall affect the disposition of any costs in any action now pending or heretofore determined, but such costs shall be awarded and shall be payable as if this section had not been passed." This would seem to imply that the Legislature intended to interfere even with actions "determined" before the Act was passed, except as to costs. If it had the

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drastic effect in this case of depriving the plaintiff of her judgment, after her contest with the society, it would be matter for regret. Fortunately, as I think, it has no such result, whatever may have been the intentions of those who procured its passage.

As I read it, the effect of the change is merely to make sub-sec. 11 apply only to sub-secs. 1 to 6, instead of sub-secs. 1 to 10. Thereby it releases sub-secs. 7, 8, 9, and 10 from the retrospective effect which sub-sec. 11 expressly gave originally to sub-secs. 1 to 5 in the Act of 1912, and it leaves sub-secs. 7 to 10 as free as if in a separate section, or as if in the Act of 1913 they had not been added to sec. 166. What then is the effect?

There is no more reason why members admitted or persons insured after the 1st July, 1913, should thereafter have constant reminders to prove their age, than why earlier members or insured persons should be so reminded. The previous sub-sections allowing the proportional sum in case of error apply expressly to all. All equally needed the protection of both sorts. When, therefore, sub-sec. 7 requires that every corporation shall send the warning printed upon "all notices to the insured and upon all receipts for premiums," I see no ground for believing that it was intended to apply, or should be construed as applying, only to future policies or contracts. The words "the insured" are used frequently in the Act, and have not necessarily to be connected with the word "person" in the earlier part of the sub-section, limited, if it is, by the word "thereafter" to persons insured in the future. So likewise in sub-sec. 9, even if the printing upon certificates issued were, as I think it would be, limited to those issued after the 1st July, 1913, I do not see any reason for considering that the holders of such certificates are alone "the members" to whom any receipts or pass-books given must have the printed notice.

It is, I think, a reasonable view to take of the amendment of 1916, that the Legislature wished only to relieve the societies from having any doubt that they were not bound to call in old certificates and pass-books from all parts, for the purpose of inserting the printed notice therein.

I am, therefore, of opinion that, upon both grounds, the plaintiff's action was not premature, and the judgment should stand for the full amount insured, with interest, and the appeal be dismissed with costs.

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Hodgins, J.A.

MACLAREN, J.A.:—I agree in the result of the judgment of my brother Magee.

HODGINS, J.A.:—The argument at the trial and before us turned upon the provisions of sub-secs. 7, 9, 10, and 11 of sec. 166, Ontario Insurance Act. The latter sub-section was, after the trial, repealed at the last session of the Legislature (6 Geo. V. ch. 36), and the repeal is stated to take effect from the 16th day of April, 1912. The repealing section is as follows:—

"4.—(1) Sub-section 11 of section 166 of the Ontario Insurance Act is repealed and the following substituted therefor:—

"(11) Sub-sections 1 to 6 of this section shall apply not only to any future application for, or contract of, insurance, but also to any application heretofore taken and to any contract heretofore made.

"(2) This section shall be deemed to have been in force on and from the 16th day of April, 1912, but nothing in this section shall affect the disposition of any costs in any action now pending or heretofore determined, but such costs shall be awarded and shall be payable as if this section had not been passed."

This legislation seems rather reactionary, as the policy of the Legislature in enacting sub-secs. 7, 9, and 10 was evidently to put the onus on insurance companies, and require them to admit the age after the death of the insured, if they had not brought notice home to him in his lifetime that he must actually prove it.

The amendment has this further, and, I should think, unintended, effect. Sub-section 11 appears first as so numbered in the Revision of 1914, but is identical in words with sub-sec. 6 of the statute of 1912. When numbered 11, it applied to all the ten preceding sub-sections. Not having been sub-sec. 11 until 1914, its repeal as of the 16th April, 1912, when it was sec. 6 in the Insurance Act of 1912, must mean that sub-secs. 1 to 6 had from 1912 till 1916 no retrospective effect, as the section which had made sub-secs. 1 to 16 apply to all insurance contracts since 1900, was not then in force.

However this may be, the repeal must, I think, from the peculiar wording in which it is couched, be taken to indicate that it was the intention of the Legislature to allow sub-secs. 7, 9, and 10 to operate without any express direction such as applied to sub-secs. 1 to 6.

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If it were necessary to construe these sub-sections, I would not be oppressed with the difficulty and expense of complying with them suggested by counsel for the appellants. It would not cost a great deal nor take much time to supply and use a rubber stamp when money was paid. And, if the certificates were refused when asked for, the beneficiary would find it hard to rely on non-compliance with that provision. The pass-book is produced every month, and stamping it is sufficient, if the receipt is given by an entry in it.

The repeal of sub-sec. 11, however, takes all the plausibility out of such an argument, and leaves this insurance company in the position of using as a defence a bogey which does not exist.

But I am relieved from considering this question by the view I take of the situation of the parties.

The appellants in the certificate sued on state that the deceased, who had been "regularly admitted a member of Court Thousand Islands . . . on the 19th day of March, 1888, *at the age of* 33, has this day been duly registered as a member of the Canadian Order of Foresters."

The constitution of the Order provides an alternative as to proving age, i.e., either the applicant must furnish satisfactory proof of age, or it must be furnished before a claim is paid.

The birthday and the place of birth were mentioned in the application; the insured certified them to be correctly stated, and the Chairman of the Medical Board and the High Secretary thereafter respectively recommended and issued the beneficiary certificate in the form in which it now appears.

I think the age has been agreed to, as the contract recites and certifies it, and it is not a large assumption that proof satisfactory to the Order was given by the applicant before a certificate in that form could issue. If not, it would have been easy to insert in the certificate "subject to proof of age." If the application is part of the contract as against the insured, it must also be part of it as against the insurer, unless he proves that it is incorrect.

Besides this, under clause 57 of the constitution, the only proof required before the beneficiary becomes entitled to the money is that the member was in good standing. This, under sec. 89 of the Insurance Act, enables the beneficiary to recover without further proof.

Apart from this, the case stands in this position. The learned

trial Judge has found good faith and that there is no reason to think that the age was not truly stated. No mistake has been established. If sec. 166 (1) is not applicable, having been originally passed after the insurance was effected, then clause 87 of the defendants' constitution has in terms enacted practically the same thing, and it is part of the insurance contract.

The contract, and clause 59 of the constitution, only require proof of death and that the insured was then in good standing. Can it be open to a corporation, under these circumstances, without proving either mistake or fraud in regard to age, to refuse payment of the claim, or is it not bound, under clause 87, to shew that there was an initial error? I think the latter is the correct view of the appellants' duty, if they wish to escape payment or to reduce the amount payable. To hold otherwise would be to put upon the beneficiary a heavier burden than the contract warrants and to give the appellants the same relief as if they had alleged and proved mistake or fraud.

It is to be observed that the defence pleaded in this case is only effective for delay (see sec. 165, sub-sec. 4), as it does not charge error, mistake, or fraud.

I would affirm the judgment and dismiss the appeal with costs.

Garrow, J.A.

GARROW, J.A.:—Sub-section 11, formerly sub-sec. 6, provides that "this section shall apply not only to any future application for, or contract of insurance, but also to any application heretofore taken and to any contract heretofore made."

How sub-sec. 11 became transposed is not apparent. But that it was done in error, as the learned counsel for the defendants contends, is, I think, apparent from the fact that in the recent session of the Legislature (1916) a further amendment was made, practically restoring it to its former position, and declaring that the sub-section as so amended shall be deemed to have been in force on and from the 16th day of April, 1912, except as to the costs of any pending action.

The amendment made in 1916 was not before Britton, J., when he delivered judgment, indeed had not then apparently been even finally passed. The reference to the costs of pending proceedings, and the fact that the statute is in form, at least in part, declaratory, justifies, I think, the contention of counsel for the defendants that the Legislature intended it to apply to pending

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actions such as this. See *Attorney-General* v. *Marquis of Hertford* (1849), 3 Ex. 670; *Attorney-General* v. *Theobald* (1890), 24 Q.B.D. 557. And the more so that the amendment, if it affects the case at all—which may, I think, be considered as at least doubtful—does not take away the plaintiff's cause of action, but merely affects or can affect the mode in which the claim must be proved.

I do not, however, personally regard the question of the application or non-application of the amendment to the case before us as absolutely vital. More, I think, depends upon the proper construction and application of sub-secs. 7, 9, and 10, which would, I think, be practically the same whether they preceded or followed the former sub-sec. 11.

It is perfectly clear, I think, from its language, that sub-sec. 7 was intended to be applicable only to contracts entered into after it became the law. The direction is to send the first notice within one month after entering into the contract—an impossibility in the case of contracts like the present, made years before. That is also the notice which is to continue to be sent annually thereafter, and which is to be printed in red ink. And, if that is the proper construction of sub-sec. 7, there is nothing in sub-sec. 9 upon which to contend successfully for a different conclusion as to the class of contracts there intended.

The sub-section begins: "Sub-section 7 shall not apply . . . *provided*," which is the equivalent of "if;" in other words, the registered friendly society is given the choice of complying with sub-sec. 7 or of giving the notice in the official newspaper or journal, if any, of the society, and printing it in red ink upon all certificates issued by the society and upon all receipts or pass-books issued to its members.

If a society has no official newspaper or journal, it would obviously have no choice, but would be obliged to conform to sub-sec. 7.

Then the language of the sub-section itself leads to the same conclusion. The direction is, in addition to publishing in the newspaper or journal, if any, to print the notice prescribed in sub-sec. 7, in red ink, upon all certificates, and upon all receipts or pass-books issued to the members; which could only reasonably, in my opinion, mean certificates, receipts, or pass-books not already issued.

The evidence shews that the only pass-book ever issued to the

deceased is the one produced, before referred to, issued in the year 1888; and the only evidence of r[illegible]ipts issued to him after sub-sec. 7 became the law, is the entries made in the pass-book.

As I have indicated, my opinion is, that, by the language of the sub-sections in question (7 and 9), the reference is only to insurances effected after the date of the amendment made by their introduction in 1913. But, even if this view is erroneous, I should still be of the opinion that the defendants are in this instance unaffected, because they were under no duty, in any view of the statute, to call in and re-issue, with notices printed in red ink, certificates and pass-books already issued. I also think that the entries in the pass-book are not "receipts" within the meaning of that word as used in sub-sec. 9. The defendants are under no obligation to use pass-books at all. They may use "receipts" only—the case provided for in sub-sec. 7.

The language of sub-sec. 9 is not "receipts *and* pass-books," but "receipts *or* pass-books," whichever is used. "Pass-book" means something more than the cover and the printed and ruled paper. To say that each trifling entry therein is a "receipt" within the meaning of the sub-section, and so requiring a notice to be printed on it in red ink in type of not less than 10 point, etc., sounds very much to me like talking nonsense.

I see no alternative but to *allow* the appeal. This will not prevent the plaintiff from supplying the best proof she can of her late husband's age, and bringing another action if the defendants still refuse to pay, which is, I think, very improbable.

It may be that the defendants will be, as I hope they will, generous enough to renew the offer made at the trial to pay the claim without costs—an offer which, I think unwisely, the plaintiff refused.

The appeal should be allowed, but, under the circumstances, without costs. *Appeal dismissed;* GARROW, J.A., *dissenting.*

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Yukon Territorial Court, Macaulay, J. September 6, 1916.

HIGHWAYS (§ IV B—161)—OBSTRUCTIONS—DREDGING OPERATIONS—POWER OF COMMISSIONER OF YUKON TERRITORY.

The powers conferred upon the Commissioner of the Yukon in Council by the Yukon Territory Act of laying out, building or closing up any public road or highway within the Territory, do not extend so as to enable the Commissioner-in-Council to permit a mining company to dredge up and destroy, during its operations, any such public road or highway, by legislative enactment or otherwise, and the mining company is liable

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in damages to an owner of land adjoining the highway for injuries caused to his land by such wrongful dredging up and destroying of the highway, and for trespass upon his land occasioned thereby.

Statement.

ACTION for damages alleged to be suffered by the plaintiff to his property and to his hotel business by reason of the alleged unlawful acts of the defendant company under the management and direction of the defendant Boyle, in the summer of 1913, in digging up and destroying by the process of dredging a section of Bonanza road, thereby destroying communication of the plaintiff with the Bonanza Creek; and also dredging and destroying a portion of Hunker road; and in the course of such dredging tearing off the front platform of the plaintiff's house and dredging a portion of the lot occupied by the plaintiff and enclosed by him, and taking down and destroying the plaintiff's fence.

F. T. Congdon, K.C., for plaintiff; *C. W. C. Tabor*, for defendants.

Macaulay, J.

MACAULAY, J.:—Counsel for defendants contended that the permission applied for to destroy the said roads, in the correspondence between the defendant company and the Commissioner of the Yukon Territory entitled the defendant company to dredge and destroy the said roads, and that the said defendant company was within its rights in so doing, and therefore not accountable to the plaintiff.

He referred to the North West Territory Act, C.O. N.W.T. (1898), brought into force in this territory by sec. 9, ch. 6, of the Yukon Territory Act, Statutes of Can., 1898, sec. 108 and subsecs. (2) (21); referred also to sec. 6 of ch. 15 of the Statutes of Canada, 1892, and argued that if Lieutenant-Governor and Assembly, referred to in said sec. 6, were referred to in this territory it would be referred to as "Commissioner" and not as "Commissioner-in-Council." He further argued that if sec. 9 of the said Yukon Territory Act brought that Act into force in this territory, then the Commissioner of the Yukon Territory, and not the Commissioner in Council of the territory had the right to close roads. I am unable to place this construction on the said statutes.

As I interpret said sec. 6 of ch. 15, Statutes of Canada, 1892, it means that the Lieutenant-Governor and Assembly of the North West Territories required the consent of the Governor-in-Council of Canada before it could close up any road which had

been transferred to the territories, or vary its direction, implying that before it took such action it required legislative authority for so doing. *O'Brien* v. *Allen*, 30 Can. S.C.R. 340.

It has never been doubted that the right of building highways, and of operating them, whether under the direct authority of the government or by means of individuals, companies, or municipalities, is wholly within the purview of the provincial legislatures, and it follows that whether they be free public highways or subject to a toll authorized by legislative enactment, they are, nevertheless, within the provincial power.

Sec. 2 (*b*) of the Yukon Placer Mining Act, ch. 64 R.S.C., 1906, states that: "'Commissioner,' 'Council' and 'Commissioner in Council' respectively have the same meaning as they have in the Yukon Act."

Sec. 2 (2) in my opinion clearly refers to the right to lay out roads as against owners of mineral claims, but not as against owners of the fee, as in such cases compensation is provided for by statutory authority.

I am clearly of opinion, after carefully considering the statutes and authorities above cited, that the power to lay out any public roads and the power to close up any public roads in the Yukon Territory was conferred on the Commissioner-in-Council of the Yukon Territory and was a legislative power so conferred, and that the law in this respect has not since been altered; that the Commissioner of the Yukon Territory had or possessed no power to permit the defendant company to dredge up and destroy the public roads in question in this action, as contended by counsel for defendant company, and that the act of the said defendant company in so dredging up and destroying the said roads was a wrongful and unlawful act, and it has not been attempted to be shewn that the said defendant company applied for or obtained any authority from the Commissioner-in-Council of the Yukon Territory to so dredge or destroy the said public roads.

Sec. 17 of the Placer Mining Act, ch. 64, R.S.C. 1906, defines the kind of lands that may be located for mining purposes in the Yukon Territory, and excepts lands occupied by a building, or within the curtilage of a dwelling house.

The evidence in regard to the cabin which was situated upon the Hunker side of this lot in 1899 is not explicit enough as to its

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exact location or otherwise as would warrant the Court in finding that the said lands were excepted from location under the provisions of said sec. 17 of said Placer Mining Act, or under the provisions of sec. 8 of the Placer Mining Regulations of 1899 which were in force at the time of the staking of the said mining claims.

Counsel for the plaintiff objected that the bonds (under sec. 18 of the Placer Mining Act) did not bear the corporate seal of the said companies; that no powers of attorney had been produced to shew that said Boyle possessed the powers from said companies or either of them to enter into bonds on behalf of them, or either of them, and objected to the said bonds being received in evidence. Thereupon the counsel for defendants asked to withdraw the said bonds from the evidence, and they were accordingly withdrawn.

Even if the said bonds had been a sufficient compliance with the provisions of said sec. 18 of said Placer Mining Act, the evidence shews that no compensation has been offered or made to the plaintiff by the defendant company for any loss or damage suffered by the plaintiff by reason of the defendant company dredging and mining the said lands so occupied by the said plaintiff, and, in my opinion, the plaintiff is entitled, under the provisions of said sec. 18 of said Act to compensation for any damages suffered by him by reason of the said defendant company dredging and mining any portion of the said lands so occupied by him, if such were so damaged or mined.

I was dealing with an entirely different class of case in *Smith* v. *Yukon Gold*, 19 W.L.R. 8, 68, from the case before me now, and the decision rendered in that case in no way conflicts in my opinion with the view I have taken, in the present case, in regard to the meaning of said sec. 18 of said Placer Mining Act, which provides for the steps that must be taken by the owner of the mineral rights where the ownership of the minerals is separated from the ownership of the surface, or the surface is lawfully occupied by another before he commences his mining operations on the said lands.

Even if adequate security had been given by the defendant company under the provisions of said sec. 18 of said Act, for the mining of the lands so owned or occupied by the said plaintiff, such security in no manner gave any license, right or permission

to the defendant company to dredge and destroy the said public roads, and would not relieve the said defendants from any damages to which the plaintiff might be entitled for the unlawful destruction of the said public roads, and the trespasses thereby committed against him and his property.

Elliott on Roads and Streets, 519, 658; 16 Hals.' Laws of England, p. 69, 83; *Seguin* v. *Hawkesbury*, 11 D.L.R. 843; *Rose* v. *Groves*, 5 Man. & G. 613; *Greasley* v. *Codling*, 2 Bing. 263; *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369; *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486.

I was also referred by counsel for plaintiff to *Beckett* v. *Midland R. Co.*, L.R. 3 C.P. 82; *Chamberlain* v. *West of London & Crystal Palace R. Co.*, 32 L.J. Q.B. 173. And by counsel for defendants, to *Ricket* v. *Metropolitan R. Co.*, L.R. 2 H.L. 175; *The King* v. *McArthur*, 34 Can. S.C.R. 570.

All these English cases were brought under the provisions of the Lands Clauses Consolidation Act, 1845, and the Railway Clauses Consolidation Act, 1845, or under both. All of these cases are considered by Lord Selborne, L.C., in *Caledonian R. Co.*, v. *Walker's Trustees* (1882), 7 App. Cas., 259.

I may add that the same view of *Ricket's* case, L.R. 2 H.L. 175, was afterwards taken by Willes and Byles, JJ., in the case of *Becket*, L.R. 3 C.P. 82.

In all these cases the obstructions were authorized under the provisions of the above mentioned Acts of Parliament which provided for compensation in respect to injury to the property itself, and made no provision for compensation for injury for any particular use to which the property might from time to time be put.

Also in *The King* v. *McArthur*, 34 Can. S.C.R. 570, the obstructions were authorized under the provisions of an Act of Parliament.

In the case before me there was no legislative authority authorizing the defendants to dredge and destroy the said highways. The destruction of the same by the said defendants was without any legislative authority as I have already found, and was wrongful and unlawful, and by reason thereof the plaintiff according to the evidence has suffered special damage, both to his business and to his property, as distinguished from the loss

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or damage suffered by the public generally; and comes within the line of authorities cited where the actions were brought under the common law, such as *Rose* v. *Groves*, 5 Man. & G. 613; *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486; *Greasley* v. *Codling*, 2 Bing. 263, and others, cited above, and in my opinion the plaintiff is entitled to maintain his action, and is entitled to compensation for the loss and damage so suffered.

In my opinion the injuries suffered by the plaintiff were caused by the wrongful acts of the defendant company in dredging and destroying the said public roads and the trespasses committed upon the plaintiff's property were committed in the course of such operations.

The defendant company dredged and destroyed the said highways, and the defendant Boyle, according to the evidence, aided and abetted the defendant company in the said wrongful and unlawful acts, and is a joint tort feasor, and, in consequence, liable in damages for any injuries so suffered by the plaintiff. See Pollock on Torts, 6th ed., 74, 76, 194; also *Barker* v. *Braham*, 3 W. Bl. 866, 96 E.R. 510.

The evidence shews that since the commission of the said acts the said premises has lost all its value, as it now has no value as hotel premises.

I am of opinion that for such loss and damage, and for the trespasses committed by the defendants the plaintiff is entitled to $3,000, at which sum I assess the said damages, with costs of this action. *Judgment for plaintiff.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. May 23, 1916.

1. MECHANICS' LIENS (§ V—34)—SCHOOL BUILDINGS.

Public school buildings and the lands upon which they are erected are subject to the provisions of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 2.

[Public School Act, R.S.O. 1914, ch. 266, secs. 55, 73, considered; *Hazel* v. *Lund* (B.C.), 25 D.L.R. 204; *Connely* v. *Havelock School Trustees* (N.B.), 9 D.L.R. 875, followed.]

2. MECHANICS' LIENS (§ VIII—66)—TIME OF REGISTRATION—ADDITIONAL WORK.

The time for registration limited by the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 22, does not begin to run until after the completion of additional work necessary for the full performance of the contract.

[*Anderson* v. *Fort William*, 25 D.L.R. 319; *Kalbfleisch* v. *Hurley*, 25 D.L.R. 469, followed.]

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APPEAL by the defendant assignee for the benefit of creditors of the defendants (contractors), and cross-appeal by the plaintiffs from the judgment of the Local Judge at Welland in actions to enforce mechanics' liens against lands upon which a school-building had been erected. Varied.

R. McKay, K.C., for the appellant Mortimer.

A. C. Kingstone, for the plaintiff Benson.

V. H. Hattin, for the A. B. Ormsby Co. respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—In the opening of this appeal, I was under the impression that the case was one of two independent contractors, the one having maintained his lien under the Mechanics and Wage-Earners Lien Act, and the other, although he had lost his lien, appealing against a judgment, in favour of the one who had maintained his, and appealing upon the one ground that such land as the land in question cannot be subject to any such lien; and so appealing although the land-owners make no such objection, nor any other objection, to the judgment appealed against; and, under that impression, I challenged the appellant's right to appeal: but such is not the case: the appellant's assignors were the contractors with the land-owners, the respondents were their sub-contractors, and the appellant is an assignee of the contractors, for the benefit of their creditors, and, as such, is a party to this action; and has a right of appeal, no matter what stand the land-owners may have taken, or may take, on the question whether or not the enactment in question is applicable to their land, land which is held by them, as public school trustees, for public school purposes only. The effect of the lien is to give the respondents, practically, a charge upon money due from the land-owners to the appellant, and so give them priority over other creditors of his assignor, which they should not have if the land cannot be charged with any such lien. The land-owners have really no interest in the controversy: they owe so much money to the contractors, apparently more than enough to pay all existing liens, and so are substantially unconcerned in the question to whom it should go, being able and quite ready to pay.

Then, having such right of appeal, the one ground urged in support of it is: that land held as the land in question is, by public school trustees for public school purposes, is not within the provisions of the Mechanics and Wage-Earners Lien Act.

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But why should it not be? From the standpoint of the mechanic and wage-earner there can be no reason why it should not be: nor can any very substantial reason be advanced against it in the public interests. Greater reason, from that standpoint, could be advanced against the protection, which the enactment affords, being given in regard to land plainly within its provisions.

It is made very plain in the Act that it was not meant to be applicable to private property only; nor to such property only as is exigible under ordinary writs of execution. Its wide character is indicated by the words "shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished," contained in sec. 2(*c*): and in the exception, to that wide scope, contained in sec. 3, in these words: "Nothing in this Act shall extend to any public street or highway, or to any work or improvement done or caused to be done by a municipal corporation thereon."

Is there greater reason for excluding public school houses, than for excluding court houses, gaols, hospitals, churches, and railway stations?

But, having expressed my opinion on this very question some years ago, in the case of *General Contracting Co.* v. *City of Ottawa*, 1 O.W.N. 911, 16 O.W.R. 479, there is no excuse for saying more now upon the subject, than this: that all the later cases in the other Provinces hold public schools to be within such an enactment. The appeal must be dismissed.

There is also a cross-appeal.

The appellants in it were, at the trial of the action, held to have lost their lien by failing to register it within the time-limit of the enactment.

This appeal is opposed by the assignee of the contractors only; and his right to oppose it is equal to his before mentioned right to appeal against the successful lien-holders: and, in addition to the ground upon which these appellants failed at the trial, he urges the point made in his appeal against the respondents in it—that the land is not subject to the provisions of the Act in question; but that point fails, for the reasons I have given.

So the only question is: whether the registration of the lien was too late.

The contract was to supply doors for the school in question: and they were supplied in August: and so if time—thirty days—ran from the day of the delivery of the doors by these sub-contractors to the contractor or from the day when they were placed in the building, the lien is lost: but towards the end of the year the architect of the building insisted upon some changes being made in them to comply with his requirements, and eventually they made them, these changes being made early in the month of January following: and, if that circumstance gives a new starting-point, or be considered the starting-point, from which the 30 days are to be counted, then, admittedly, the lien was registered in time, and effect should have been given to it, instead of dismissing the claim made upon it, as the Local Judge did.

The provisions of the Act applicable to the case are contained in the following words of sec. 22 (2): "A claim for lien for materials may be registered before or during the furnishing or placing thereof, or within thirty days after the furnishing or placing of the last material so furnished or placed:" and in sec. 16, which protects the sub-contractor until the material is placed in the building: this provision having evidently been made, in the year 1910, for the purpose of settling a point much discussed in the recent case of *Kalbfleisch* v. *Hurley* (1915), 25 D.L.R. 469, 34 O.L.R. 268, and some of the cases referred to in it.

The question when the time began to run, or, perhaps better stated, when it finally ran out, must be mainly a question of fact: and the most material facts of this case are: that the contract for the furnishing of the doors in question is in writing, dated the 21st July, 1915; and under it the sub-contractors were to deliver to the contractors "soon" the fourteen doors in question, the dimensions of which are set out in the writing, "with frames and trim, no glass," free on board at Niagara Falls, for $350; and the sub-contractors were to have $60 more if they "erected" the doors, the contractors furnishing the "hardware." A plan of the doors, shewing details of construction, was prepared by the sub-contractors and sent by them to the contractors, and was received by the contractors, approved by them, and by them returned so approved to the sub-contractors, with a letter giving "the measurements for the openings;" the doors were made accordingly, and they and the frames and trim were delivered to the contractors, "free on board at Niagara Falls," in the latter part of

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the month of August; and were accepted by them, and by them, soon after, were placed in the building, they having rejected the offer of the sub-contractors to do that work also for the additional $60: and all this was done in due course without any kind of objection being made to, or fault found with, the work of the sub-contractors: and so it must have appeared to both contractors and sub-contractors that the time within which a lien, for this material, should be registered, began to run then: the exact time has not been stated, but the doors must have been in place, completed, some time in the month of September.

If the case stood thus, there could be no doubt that the lien was lost; that the thirty days expired in October at the latest: the lien was not registered until the following month of January: and that would be so even if the doors had not been made according to the contract in some particulars, for, the purchasers having accepted and used them, an action would lie for the price, which could be recovered, less a proper reduction for the defect.

But, in the month of October, some time after the doors had been placed in the building, and left there as completing the contractors' contract in that respect, objection was made to four of them, that the windows in them were not large enough. The objection came from the architect, under a clause in the contract of the contractors with the owners, that the work should be subject to the approval of the architect. To this objection the sub-contractors, who were demanding payment of the $350, answered that they had sent details to the contractors and they had "O.K.'d" them: and the architect's reply was: that his office was the proper place to have had them "O.K.'d:" a proper reply if he had been dealing with the contractors; but he was not, he was writing to sub-contractors, over whom he had no control except through the contractors. But, eventually, the contractors taking the ground too that the sub-contractors should have obtained the approval of the architect, work was done, early in January, upon the four doors, to the satisfaction of the architect, by the sub-contractors, as part of their obligation under the written contract; for which they have not charged nor sought to charge anything beyond the contract price: and immediately after this work was done, and done without removing the doors from the building, the lien in question was registered.

Although it seems to me that the architect was wrong in his contention, and that the persons alone answerable for the neglect to get his approval regarding the doors were the contractors, and although I entertain the strongest suspicion that the architect's contention was acceded to mainly to retrieve the right of lien which they had lost by neglecting to register a lien in October, there was the concurrence of contractors, and sub-contractors, and owners, through the architect, in treating the sub-contract as incomplete and in having it completed early in the month of January; a course which, it seems to me, other creditors of the contractors could not prevent and cannot successfully contend is not binding upon them: and it may be added that the assignee of the contractors is also secretary of the School Board, owners of the building, and, as such secretary, took part in the demand upon the sub-contractors regarding the four doors objected to, and was assignee, for the benefit of creditors of the contractors, in January, when the work in question was done.

This conclusion I reach without, I hope, taking too narrow a view of the case, without having my mind too much centred upon protection of contractors and sub-contractors whose money, work, and goods are added to the land which they desire to hold as security for their outlay upon it. It is quite too narrow a view of a case, such as this, to say, as is said in some of the text-books, "Give the lien because it cannot harm the owner, he has to pay only that which he contracted to pay;" a saying well enough in theory, but very far astray in actual experience, as nearly all the cases upon the subject prove: when the Courts differ, as they sometimes do, as to the meaning and effect of the Act, should we assume that no owner can or need make a mistake; or shut our eyes to the fact that circumstances sometimes compel an owner to pay more than the Act protects him in paying—that or have the contract abandoned to his great inconvenience and greater loss? And this is but a beginning of a statement of the difficulties, worries, and dangers of an owner in dealing, as he may be obliged to deal, with questions of lien or no lien, conflicts between contractors and sub-contractors even to the third and fourth degree: and, quite apart from the owner and his statutory protection, the rights of common creditors, and judgment, execution, attachment, and receiving order, creditors, as well as assignees, who have no protection provided by the Act for them, are entitled to

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as much consideration as those of any one else: and much care should be taken that sympathy for the "mechanic and wage-earner," and the "it does not hurt the owner anyway" feeling, do not rob them of their rights behind their backs. We shall do best if we give to the plain words of the Act their plain meaning always.

Not without some hesitation, I am of opinion that the Local Judge erred as to the claim in question in this appeal, and would allow it, with the usual consequences.

Lennox, J.

LENNOX, J.:—Sec. 8 (1) provides that the lien shall attach upon the estate or interest of the owner in the property mentioned in sec. 6. Clause (*c*) of sec. 2 defines "owner" as including a body corporate or politic, a municipal corporation, and a railway company. It will be surprising, and I think unfortunate, if this section has to be construed as contended for by Mr. McKay; but I can find nothing in the language of the section, or in the object or scope of the Act, or in any of the cases referred to, to justify any such construction. *General Contracting Co.* v. *City of Ottawa*, 1 O.W.N. 911, 16 O.W.R. 479, does not help much either way, but, as far as it goes, supports the existence of the right of lien.

Clauses (*d*), (*e*), (*r*), and (*u*) of sec. 73 and sec. 55 of the Public Schools Act, R.S.O. 1914, ch. 266, are relied on. Section 73 imposes upon the School Board the duty and obligation of providing for public school education generally, including proper and adequate accommodation for all children of school age within the school section; and it is not to be readily presumed that the Legislature intended that school houses were to be built, but that the contractors, mechanics, material-men, and wage-earners, were to be left unpaid. It is said that school property cannot be sold under an execution. I need not pause to determine whether this is the law or not; if it is, it is an argument against the probability that the Legislature intended to exempt school properties from the beneficent provisions of the Lien Act. The parallel difficulty about municipal properties may have been the reason for making the Act applicable to "a municipal corporation." The reference to sec. 55, if I may say so with respect, indicates the poverty of available argument in support of the defendant's appeal; it is of course hardly necessary to say that Mr. McKay made the best that could be made of a difficult situation.

It was decided in *Scott* v. *Burgess and Bathurst Union School Trustees* (1859), 19 U.C.R. 28, that the land there in question could not be sold under an execution. The land there was a gift, and the conveyance was expressly for school purposes, and the land was to revert to the donor in case it ceased to be so used. The judgment of the Court, however, was not based only or even mainly upon this circumstance. The plaintiff's judgment was for a debt directly contracted by the trustees as such; and, as was pointed out, there was ample provision in the school law for raising the money for its payment by assessment, as there still is; and, in case of wilful neglect of the trustees to exercise their powers, they became personally liable upon their contract.

But the Mechanics and Wage-Earners Lien Act is a special provision intended, amongst other things, to secure payment to wage-earners and others who have no direct contract with the trustees, and should receive such fair and liberal construction as will give effect to its obvious intent.

In *Connely* v. *Havelock School Trustees*, a decision of the Supreme Court of New Brunswick, 9 D.L.R. 875, Chief Justice Barker said: "The answer set up by the school trustees is that they, as well as their property, are exempt from the operation of the Lien Act, not by express words, but as a legal result of their holding and using the property as trustees for the benefit of the public, without profit to themselves, and as a part of a general public educational system for the Province, in effect carried on as a department of the Provincial Government. The Lien Act certainly does not bind the Crown. . . . The Mechanics Lien Act was passed in the interest of workmen and contractors so as to afford them some security by way of a lien on the buildings which had been created by their labour. If the principle is worth anything, it is equally valuable in the case of a school building paid for by an assessment of the inhabitants of a school district as in the case of an individual taxpayer erecting a building for his private purposes." The judgment of a County Court Judge allowing a lien was sustained by the full Court.

It is much easier to conclude that there is a lien upon school property in Ontario. "Owner," by sec. 2 (*c*) of R.S.O. 1914, ch. 140, "shall extend to any person, body corporate or politic, including a municipal corporation." In the Revised Statutes of

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New Brunswick, 1903, ch. 147, as pointed out in the judgment quoted, there is nothing in "express words"—a corporation is not mentioned.

King v. *Alford*, 9 O.R. 643, and *Breeze* v. *Midland R.W. Co.* (1879), 26 Gr. 225, were both decided before the amendment of the statute, and are clear authorities to shew that, in the absence of express and unequivocal language, a part of a railway, upon which work has been executed, could not be taken as included in the provisions of the Mechanics Lien Act then in force. In 1907, when *Crawford* v. *Tilden*, 14 O.L.R. 572, was decided, the Mechanics and Wage-Earners Lien Act in force was R.S.O. 1897, ch. 153, and, by sec. 2 (3), "owner" expressly extended to and included a railway company, but the railway in question was a Dominion railway, and in the terms of the British North America Act declared to be "a work for the general advantage of Canada;" and the decision was, that the Ontario Legislature had no jurisdiction over it.

I have not found any assistance from a perusal of English rating cases such as *Mersey Docks Trustees* v. *Cameron*, 11 H.L.C. 443, and *London County Council* v. *Churchwardens of Erith*, [1893] A.C. 562, as to the construction of our Lien Act. The principle of these cases is brought down pretty well to date by the judgment of the House of Lords in *Liverpool Corporation* v. *Chorley Union Assessment Committee*, [1913] A.C. 197.

The word "owner" in the British Columbia Act includes any person having a legal or equitable interest in the land, and is not expressly made to include a corporation, as in our Act. "Person," however, includes "a body corporate." In *Hazel* v. *Lund*, a British Columbia case, decided by the Court of Appeal, 25 D.L.R. 204, it was held that the Act applies to school property; and so the Manitoba Act, in *Moore* v. *Protestant School District of Bradley*, 5 Man. L.R. 49.

I need not pursue this matter further. If the provisions of a statute are fairly capable of two interpretations, an interpretation which will work for justice rather than one which will bring about an injustice is to be adopted. Here, however, the respondents are not driven to depend upon this argument. Upon the ordinary and obvious meaning of the language of the statute, school properties are subject to the lien as declared by the trial Judge. This appeal should be dismissed with costs.

The A. B. Ormsby Company appeal from the judgment of the Local Judge declaring that they are not entitled to a lien upon the school property, and directing that their claim for lien, registered under sec. 17 of the Act, be discharged. The facts are very simple and are not in dispute. The contractors, Smith & Son, entered into a contract with the appellants to furnish 14 doors for the school-house, of specified outside dimensions, with glass panels, and to be of a character satisfactory to Mr. Porter, the architect of the building, for the sum of $350. The doors were delivered to Smith & Son on the 27th August, 1915. Until the 6th October, the appellant company presumed that the doors were satisfactory. They were then notified that the architect objected that the glass panels were not large enough and would not admit sufficient light. Payment was refused, and negotiations ensued. The company offered to alter the doors in several ways—one offer was to substitute prismatic glass—but the architect rejected all of these proposals. Matters continued in this state until January, 1916. On the 6th January, the company received a letter of complaint from the trustees, and an arrangement was thereupon come to with the architect that the company would alter some of the doors by substituting larger sash and increasing the lighting area; and this work was completed to the satisfaction of the architect on the 8th January. Smith & Son made an assignment on the 3rd January, and there was then considerable work to be done under the main contract, which, I understand, was subsequently done by the trustees and charged to the contractors. It is not suggested, and could not be successfully contended, that the alterations made by the company in January were not made in *bonâ fide* compliance with the terms of their contract to furnish doors satisfactory to the architect, and by reason of what he insisted upon having done. It was an entire contract, at a fixed price.

It is admitted that if January is to be regarded as the date when the work was completed the claim for lien was registered in time. I think the company are clearly entitled to a lien upon the land in question. The time limited by the Act does not begin to run until there has been such performance of the contract as would enable the contractor to maintain an action for the full amount agreed to be paid: *Day* v. *Crown Grain Co.*, 39 S.C.R. 258; *Crown Grain Co. Limited* v. *Day*, [1908] A.C. 504. The work in January

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was proportionately important, but it is not essential that it should be: *Hurst* v. *Morris*, 32 O.L.R. 346. Down to October, the company thought the work was satisfactory, and the matter was in negotiation until January: *Anderson* v. *Fort William Commercial Chambers Limited*, 25 D.L.R. 319, 34 O.L.R. 567.

This appeal should be allowed with costs.

Masten, J. MASTEN, J., agreed with the judgment of LENNOX, J.

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

Appeal dismissed; cross-appeal allowed.

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C. A.

HOLLAND v. RUMELY PRODUCTS CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 6, 1916.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT.

Injury to the eye of an employee caused by work on the door of a warehouse arises "out of and in the course of employment," within the meaning of the Workmen's Compensation Act (Man.), even though the work be in the nature of an improvement or alteration the employee was not ordered to do and which was performed outside the building in which the employee usually worked, if done for the purpose of expediting some work within the scope of the employee's duties.

2. APPEAL (§ I A—5)—JUDGMENTS UNDER WORKMEN'S COMPENSATION ACT.

Any decision or order of a Judge under the Workmen's Compensation Act (Man.), based on an erroneous conclusion from the evidence, is appealable to the Court of Appeal.

Statement. APPEAL from a decision of the County Court Judge under the Workmen's Compensation Act, R.S.M. 1913, ch. 209. Reversed.

T. J. Murray, for appellant; *H. V. Hudson*, for respondent.

The judgment of the Court was delivered by

Perdue, J.A. PERDUE, J.A.:—The plaintiff was employed at the warehouse of the defendants "as a handy man." Amongst other things he was doing odd jobs of carpenter work. The warehouse had 12 or 14 large doors which were in use for the entrance or exit of large machines. The doors, as I understand, did not swing on hinges but were hung so that they slid along the side of the building. They were often difficult to open or close so that a bar was sometimes used to pry them along into place. The foreman had often told the applicant to close the doors and the applicant had done so as part of his duties. He kept a bar and pick for this purpose. The doors had to be closed in the cold weather so as to retain the heat in the building. On March 14, about 5 o'clock in the afternoon, the applicant saw two of the workmen trying to close one of the doors and he went to assist them. He

says "I thought it was a good scheme to get a block and nail it on the door." The object of this was to get the bar behind the block and pry the door ahead. He got a block and proceeded to nail it to the door, the other men waiting until this was done. While he was nailing the block he stood on the outside of the door. The doors were sheeted over with iron. Two or three spikes had been driven and while the plaintiff was in the act of driving another he was struck violently by something which cut and injured his eye. He did not see what it was that struck him but one of the men who was standing near saw the spike fly and immediately saw that Holland was injured. The trial Judge finds that it may be inferred that the eye was hit by the spike.

No objection was taken by counsel for the appellant company as to the right of the applicant to appeal from the Judge's decision in this case. But as the question has suggested itself to the Court, it is well to examine somewhat closely the right of appeal granted by the statute. Sec. 4 of schedule 2 to the Act was taken from and contains the essential provisions of the corresponding clause in the English Act. See Workmen's Compensation Act, 1906 (Imp.), schedule 2, sec. 4. By both Acts an appeal lies to the Court of Appeal from the decision of the Judge on a question of law submitted to him by an arbitrator, or on a question of law when he himself acts as arbitrator under the Act, *or where he gives any decision or makes any order under the Act*. The words in italics are new and are not contained in the Act of 1897.

The English decisions indicate that an appeal will not be entertained merely on a question of fact or upon the weight of evidence: *Wilmerson* v. *Lynn and Hamburg S. Co.*, [1913] 3 K.B. 931; *Marriott* v. *Brett*, 5 B.W.C.C. 145; *Sneddon* v. *Greenfield Coal Co.*, [1910] S.C. 362. But if there was evidence and the Judge held there was none, his decision is appealable: *O'Brien* v. *Star Line Ltd.*, [1908] S.C. 1258; *McNicholas* v. *Dawson*, [1899] 1 Q.B. 773. Also, where the Judge draws from ascertained or admitted facts a wrong conclusion in point of law, his decision is open to review: *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K.B. 539; *Roper* v. *Greenwood*, 83 L.T. 471; *Coe* v. *Fife Coal Co.*, [1909] S.C. 393; *Jackson* v. *General Steam Fishing Co.*, [1909] A.C. 523.

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In a memorandum of his finding the trial Judge said: "From the evidence it might be inferred that the eye was hit by a spike." He then goes on to shew that it was impossible that the accident was caused by the only other means suggested by the defence. I take the above to be a finding that the injury in question was in fact caused by the spike flying, when the applicant hit it with the hammer, and striking his eye. This conclusion is the obvious one to be drawn from the evidence and I take it that the Judge intended to state it as a finding of fact made upon the evidence.

The Judge found that because the applicant was standing outside the door of the warehouse when the accident occurred, the applicant had undertaken duties outside the area limited and could not claim the benefits of the Act. With great respect, I think this view is erroneous. If it was within the course of his employment to do something to the door it makes no difference whether he did the work standing inside or outside of the building.

The Judge finds that there was nothing in the evidence "from which it might be inferred that he (the applicant) had reasonable grounds for thinking that it was his duty to do that in which he was engaged at the time of the accident." He also finds that the accident did not arise out of and in the course of the employment. The facts stated in the evidence are uncontradicted and the several witnesses corroborate one another. It is shewn that it was part of the duties of the applicant to close the doors and that he kept a pick and bar for use in prying the doors shut. Immediately prior to the accident he saw two of his fellow employees trying to shut the door in question and he came to their assistance. He then tells what followed. He says: "I gave him (one of the other workmen) the bar and I thought it was a good scheme to get a block and nail it on the door. I nailed a hard block down here to get the bar behind it and pry that door ahead." The accident occurred while he was driving a nail into the block. I think that the clear inference to be drawn from the evidence is that the applicant honestly believed that the nailing of the block to the door would expedite the work of closing the door not only on that occasion but whenever it might at other times be necessary to open or close it. He believed that he was acting in his master's interest in doing what he did.

In *Moore* v. *Manchester Liners*, [1910] A.C. 498, Lord Lore-

burn, L.C., thus states the rule to be applied in ascertaining whether the accident arose in the course of the employment:—

> And so, to sum it up, I think an accident befalls a man "in the course of" his employment, if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.

In *Baird & Co.* v. *Robson* (1914), 51 Sc. L.R. 747, a drawer at a mine lowered the loaded hutches in order to make room for his hutch. It was not his duty to do so, but he followed a general practice in doing it and he did it to avoid considerable delay. In doing this he was injured. It was held that the accident arose out of and in the course of his employment.

In *Goslan* v. *Gillies*, [1907] S.C. 68, a weighing clerk helped some workmen to carry a heavy frame to the weighing machine, though it was not a part of his duty to do so, and he was fatally injured. It was held that the accident arose in the course of his employment.

In *Harrison* v. *Whitaker Bros.*, 16 T.L.R. 108, a boy, employed to grease truck wheels, thought the points were against an approaching train, tried to open them, and was injured. Held, that he was acting in the course of his employment.

Blair & Co. v. *Chilton*, 84 L.J.K.B. 1147, was a case in which a workman was employed to turn a wheel in a rolling machine. To do this he had to stand on a platform. It was against express orders to sit while at this work, as it was dangerous. On the day of the accident he was sitting on the guard of the machine to rest himself. He knew it was forbidden to work at the wheel while sitting down, and only did so when the foreman was not looking. His foot was caught in the roller and permanently injured. It was held both in the Court of appeal and in the House of Lords that the accident arose out of and in the course of the employment.

In *Harding* v. *Brynddu Colliery Co.*, [1911] 2 K.B. 747, a collier was employed to drill a hole into a stall below to let out an accumulation of gas. The entrance to the stall from below had been blocked up to shew that it was unsafe. In breach of an express order by the overlooker, the collier entered the stall from below to ascertain the direction of his drill and was suffocated by the gas. It was held that the dependents of the deceased were entitled to compensation. Cozens-Hardy, M.R., said: "The real

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difficulty in this case is, was the sphere of employment so limited and defined as to exclude the 'top hole' (the stall), or was the man's entrance into the 'top hole' merely an act honestly done in furtherance of the object which he was instructed to effect, namely, to tap the gas by means of a drill hole? In my opinion the latter is the true view."

This last decision is one of peculiar importance in considering the present case. There the workman acted in direct opposition to his orders, but he was doing something which he honestly believed would expedite the work he was ordered to do. In the case at bar there is no pretence that the applicant committed any breach of his instructions. On the contrary, while assisting in the performance of what was a part of his duties, he honestly believed that to nail the block on the door and to use it in connection with the bar would greatly facilitate the operation and would be in the interests of his employer.

In my opinion the accident arose out of and in the course of the applicant's employment and he is therefore entitled to compensation.

The Judge states that there is not the requisite evidence to fix the amount of the compensation. This is a matter that can be rectified by calling further evidence. Following the course adopted in *Fenton* v. *Thorley*, [1903] A.C. 443, I would order that the award of the County Court Judge be reversed with costs here and below, declare that the appellant is entitled to compensation, and direct that the cause be remitted to the County Court Judge to ascertain the amount of compensation to which the appellant is entitled.

Cameron, J.A.

CAMERON, J.A.:—It has been frequently stated that men's minds are bound to differ in applying the facts as they exist in different cases to the wording of sec. 5 of the Workmen's Compensation Act. There must be in the mind of the arbitrator a standard according to which he fixes the meaning of the words: "Personal injury by accident, arising out of and in the course of the employment." If the arbitrator has adopted an incorrect or inadequate standard to which he applies the facts found by him, then a question of law obviously arises, which renders his decision subject to appeal. In this case before us it does seem to me that the County Court Judge has placed altogether too

narrow a construction on the words. For my own part, I can reach no other conclusion than that the facts of the case bring it clearly within the wording of the section, and entitle the applicant to compensation. For the purpose of fixing that compensation, the matter should be referred back to the County Court Judge.

Appeal allowed.

BAREHAM v. THE KING.

Quebec King's Bench, Sir Horace Archambeault, C.J., and Trenholme, Cross, Carroll and Pelletier, JJ. April 28, 1916.

1. GAMING (§ I—6)—WHAT IS A "GAMBLING MACHINE."

The term "gambling, wagering or betting machine" as used in Cr. Code, sec. 235 sub-sec. (*b*) (Code Amendment of 1913) is not restricted by its context to apparatus for the recording of bets or wagers or pool selling; any "gambling machine" is within the prohibition of sub-sec. (*b*) as enacted by 3 Geo. V., Can., ch. 13, sec. 13, and this will include an automatic gum vending machine so contrived as to entice patrons to gamble by holding out the chance of getting, along with the gum for a five cent coin, something worth much more under a process of chance drawing.

2. GAMING (§ I—6)—GAMBLING FEATURE IN AUTOMATIC VENDING MACHINE.

Where an automatic gum vending machine is worked so as to give the customer along with a package of chewing gum a blank or a varying number of disks or trade-checks available for being re-played into the machine, and the manifest object is to induce people to gamble by enticing them with the chance of getting something of much larger value than the coin deposited by repeated operations of the machine, it is none the less a gambling machine because each operation of it causes to be displayed the chance result which will follow the next deposit of either coin or disk.

[*R.* v. *O'Meara*, 25 Can. Cr. Cas. 16, 25 D.L.R. 503, 34 O.L.R. 467, referred to; see also *R.* v. *Stubbs* (No. 1) 24 Can. Cr. Cas. 60, 21 D.L.R. 541, and *R.* v. *Stubbs* (No. 2) 24 Can. Cr. Cas. 303, 25 D.L.R. 424.]

Statement.

CROWN case reserved by a Judge of Sessions upon a conviction of appellant under Cr. Code, sec. 235 (amendments of 1910 and 1913), for allowing to be kept on his premises two gambling machines.

R. T. Stackhouse, for the appellant.

J. C. Walsh, K.C., for the Crown.

THE appeal was dismissed, the opinion of the Court being delivered by

Cross, J.

CROSS, J.:—The appellant has cited to us a number of definitions of gambling and his main argument, in substance, is that the machines in question, two slot gum-selling machines, are not gambling machines, because the patron or customer is shewn, by a visible registry in them, what he is to get for his money before he puts it into the slot, so that he is not taking a chance of getting something or nothing or much or little when he pays.

He has also pointed out that the enactment which he has been

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charged with violating treats of betting and betting machines and has argued that, upon a proper construction of that enactment the words, "any gambling, wagering or betting machine or device" are restricted, upon the principle of *noscitur a sociis* to apparatus for the recording of bets or wagers or pool selling.

It is appropriate at the outset to observe the exact purport of the enactment, so that we may see clearly what it constitutes an offence.

Section 235 of the Code made provisions respecting "betting and pool-selling" and, in clause (*a*), made it an offence to use premises for the recording of bets or selling pools. Clause (*b*) made it an offence to keep any device or apparatus for recording bets or selling pools.

By the amending Act of 1910, 9-10 Ed. VII., Can., ch. 10, sec. 3, these two clauses were left unchanged, but others were added directly against the business of betting and the advertising or offering of information respecting bets, pools, races and sports.

Later, by 3 Geo. V. (1913), ch. 13, sec. 13, clause (*b*) was replaced and made to read:

> "(*b*) Imports, makes, buys, sells, rents, leases, hires or keeps, exhibits, employs or knowingly allows to be kept, exhibited or employed in any part of any premises under his control any device or apparatus for the purpose of recording any bet or wager or selling any pool, or any gambling, wagering or betting machine or device."

The change consists in the addition of the words "or any gambling, wagering or betting machine or device."

Though it is true that the sub-secs. of sec. 235 all relate to betting and pool-selling, I consider that these words are not to be read in the restricted sense contended for by counsel for the appellant.

The words must be given their natural meaning and one of the things clearly included and legislated against is any gambling machine.

The question, therefore, comes to be simply whether or not the machines described in the stated case have been rightly held to be gambling machines, the argument for the appellant turning not upon the point whether the operation was one of chance on the one hand or involved exercise of skill on the other, but

upon the contention that the operation was a pre-ascertainable certainty and not one in which there was anything left to chance.

The machines and the working of them are well described in the stated case.

One of them has the name "Target Practice." The patron inserts a United States five-cent coin in a slot. The stated case mentions that: "La machine porte a sa face l'indication de ce que gagnera le joueur, selon l'endroit où arrêtera la pièce qu'il lancé au moyen du levier."

If the coin drops into one of the receptacles numbered 1, 2 or 5, the patron receives 25 cts., or $1, as the event may be. Other receptacles are marked "G" and if the coin falls into one of those instead of into No. 1, 2 or 5, the patron receives a package of chewing gum.

The other machine is called "Watling's Cupid." There is a slot into which a five cent Canadian coin may be put, and another into which may be put either a United States five cent coin or a disc on which is printed the words, "For 5 cts. you get a package of gum and the number of premium checks indicated below."

That always happens, and, so far, counsel can say that the element of chance is absent.

But if the patron proceeds to insert a disc or token and operate another lever, he gets no gum and he may get nothing or he may get discs or tokens worth five cents each in trade and varying in number according to a combination of colours which will appear in two apertures in the machine. The colours are painted on circular plates which are made to revolve inside the machine by action of the lever, and when they stop revolving, the colours are those visible in the apertures. A printed notice gives the numbers of tokens according to shew of colours.

There are twenty divisions on each plate and the divisions vary in colour.

It is manifestly a matter of pure chance how many checks the patron will draw out, or if he will draw out any.

Counsel for the appellant were understood to argue that because there was certainty and no chance about what be obtained by the first operation of putting in the five cent coin and pulling the lever, that operation in some way dominated the whole routine, and there was no gambling. That, however, is fallacious

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reasoning. The second operation cannot be ignored in that way and it is an operation upon chances. The manifest object is to entice patrons with the bait of getting something for nothing and the chance that that something may be worth far more than the five cents paid in; in other words, to induce people to gamble.

This view appears to have been taken in *The King* v. *O'Meara*, 25 Can. Cr. Cas. 16, 25 D.L.R. 503, 34 O.L.R. 467.

The same conclusion follows with, if possible, still more certainty as regards the first machine, namely, the "Target Practice."

The question reserved should, therefore, be answered adversely to the appellant. *Appeal dismissed*

Formal Judgment—

The formal judgment was entered as follows—"Having heard the said Alfred Bareham by his counsel, upon the merits of the question reserved by the judge of Sessions of Montreal, for the opinion and decision of this Court, to wit:—

> "Was there any evidence submitted at the trial of this cause to shew that the use of the machines hereinbefore described constituted a game of chance, or a mixed game of chance or skill, or was a gambling machine and that the use of the said machine constituted an indictable offence within the meaning or scope and intent of the Criminal Code?"

"Having read and considered the case stated by the Judge of Sessions upon the said question;

"Having also heard what was said by counsel appearing on behalf of the prosecutor and upon the whole deliberated;

"It is, by the Court of Our Sovereign the King now here, considered that there was evidence upon which the Judge of Sessions could find and conclude that the said machines were gambling machines and that the use thereof constituted an indictable offence within the meaning of sec. 235 of the Criminal Code, as amended by the Acts 9-10 Edward VII. (1910), ch. 10, sec. 3, and 3-4 Geo. V. (1913), ch. 13, sec. 13;

"And it is, in consequence, adjudged that the conviction be affirmed and the same is affirmed with costs, and it is ordered that an entry hereof be made of record in the said Court of Sessions."

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. June 9, 1916.

INSURANCE (§ VI B 3—275)—ON ANIMALS—COMMENCEMENT OF LIABILITY —DISEASE CONTRACTED BEFORE.

An application for insurance is not an offer, but a request; the policy is an offer and its acceptance completes the contract; unless otherwise stipulated, it usually comes into force on the acceptance of the policy and the payment of the premium; under such a contract, where it was provided that insurance on a horse should apply in case of death from disease originating after commencement of liability, no insurance was payable when the horse died after the liability commenced of a disease which originated previously to the acceptance of the policy but subsequently to the application, no protection note having been taken.

Statement.

APPEAL by the defendants from the judgment of Latchford, J. Reversed.

Oscar H. King, for appellants.

Sir George C. Gibbons, K.C., for respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The plaintiff seems to find it difficult to understand why she should not have had insurance from the time she sought it, or at least from an earlier day than that twice stated in, and once more upon, her "proposal" for the insurance in question; and, perhaps, that is quite natural, because in the more common applications for insurance, mainly fire insurance, the insurance generally does begin immediately and is evidenced by an interim receipt.

But the plaintiff did not ask for, or obtain, interim insurance, as her application shews she might have procured, evidenced by what is called a "protection note." By what is called a proposal for insurance, in which she is several times called, and to which she signed her name as, "proposer," she made application for and obtained the policy of insurance upon which this action is brought.

That proposal contains, over the signature of the plaintiff, the words: "The company's liability commences after payment of the premium and receipt of policy or protection note by the insured;" and the contract of the defendants, contained in the policy upon which this action is based, is: "that if after receipt hereof and payment by the insured to the company of the undernoted premium for an insurance up to noon on the day of the expiry of this policy, any animal described in the schedule below shall during that period die from any accident or disease hereby insured against as after mentioned, occurring or contracted after the commencement of the company's liability hereunder, and

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otherwise defined in the aforesaid proposal, the company shall be liable to pay to the insured . . . " as thereinafter, in the policy, is provided.

In the proposal the plaintiff agreed that her declarations therein contained should be the basis of the contract between her and the defendants, "subject to the conditions of the policy;" and that agreement is recited in the policy.

The animal insured was an entire horse, intended to be employed in the service of about 100 mares, in three or four townships, during a season beginning on the 1st May and ending on the 1st August.

The proposal is dated the 29th May, and the policy the 7th June, 1915. The policy was delivered to and received by the plaintiff early in the afternoon of the 8th June, and the premium was paid apparently about an hour afterwards; the horse died soon after that payment, probably an hour; and died from an ailment, said to have been pneumonia, of which he was so sick in the morning of that day that two veterinary surgeons had attended him.

In these circumstances, the plaintiff contends that she is entitled to be paid, under the terms of the policy, for the loss of the horse; a contention which seems to me to be based a good deal upon a confusion of the commencement of the company's liability under the policy with some contended-for retrospective effect arising after "the commencement of the company's liability under the policy."

It is quite true that the defendants might, by the policy, have contracted to pay for the loss of the animal at any time before or after the policy came into effect; but no reasonable person would suggest that they did; nor would he suggest that they would contract to pay for the death of a horse that was fatally stricken by disease, whether known or unknown to the insured, when the policy came into effect.

Insurance companies do not, in such cases as this, examine the animal insured; instead of that, they guard against insuring dying, or diseased, horses—that is, diseased horses which may die during the currency of the policy, of the disease existing when the insurance becomes an effective contract—by explicitly providing that they shall not be liable for the loss of any animal

dying from any disease except a disease contracted after the commencement of their liability.

Lack of honesty, or mistake, on the part of the insured, is thus pretty effectually guarded against. The insured knows from the proposal signed by him that the company's liability commences only "after payment of the premium and receipt of the policy . . . by the insured;" and by the policy that no liability is incurred except in respect of disease "contracted after commencement of the company's liability." Reading these two provisions together, I fail to see how the plaintiff can reasonably contend that she has a good cause of action against the defendants; even if she were not confronted with lack of good faith in taking the policy and speedily afterward paying the premium without informing the defendants of the changed conditions. No one could expect to get insurance upon the horse in question in the condition he was known to be in when the premium was paid—within an hour or so of his death.

The trial Judge found in favour of the plaintiff in this way: he first considered the policy one for three months ending at noon on the 7th September, 1915, and so beginning at noon on the 7th June; all of this being based upon a marginal note made by the defendants' local agent, in the plaintiff's proposal, in which the word and figure "3 mos.," after the printed word "Term." appear; although there is nothing in, or on, the policy upon the subject except the filling in upon a form in it, under the words "date of expiry," the words "7th September, 1915," and the provision which I have read for insurance "up to noon on the day of the date of the expiry of this policy." From that he then took the long step of concluding that the policy gave retroactive effect in regard to anything happening after noon on the 7th day of June, that is to say, that the policy really came into effect as life insurance of the horse at that time, notwithstanding the provision that the company's liability did not begin till the insured had received her policy and paid her premium; the provision contained in the policy as to the commencement of liability; and the further provision, also on the face of the policy, under the heading "Definition of Tables and Risks Covered," in these words, "Stallions against death or disease during currency of policy." It could hardly be said that the policy was current

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before it came into existence as a binding contract between the parties; if it were, it would bring about this absurd result, that the defendants must pay though the horse had died before the policy came into force, that is, that the defendants insured the plaintiff against the death of a horse already dead, and all this merely because there is some evidence that originally the local agent, of whose authority in that respect there is no evidence, put in the margin of the proposal the figure and the abbreviated word I have read. And, notwithstanding that, if the judgment in appeal be right the same result would follow if the plaintiff had not received the policy nor paid the premium for days or weeks after the 7th June, 1915; and though the insured is required to give notice directly to the company—not to an agent—of illness of the insured animal within 24 hours, and immediately call in a veterinary surgeon, of all of which without the policy the insured would know nothing, and would need to do though the policy might never come into force by delivery and payment of premium

But it seems to me to be quite too plain for serious argument to the contrary that, where the parties have agreed, as they have in this case, that "the company's liability commences after payment of the premium and receipt of policy or protection note by the insured," and that the company shall be liable only in case of death from disease contracted "after the commencement of the company's liability," there cannot be liability for death from disease contracted before the company's liability so began.

The appeal must be allowed; and the action dismissed.

Riddell, J.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Latchford, and (in my opinion) it turns on a neat point of law.

The facts of the case are few and are set out with accuracy and sufficient detail in my learned brother's reasons for judgment.

In the view I take of the case, there is no need of considering the application of the statute law or anything other than what appears in black and white on the face of the documents.

What is insured is "any animal . . . (which) shall during that period die from any . . . disease . . . contracted after the commencement of the company's liability hereunder," "that period" being "up to noon on the date of expiry of this

policy," and the "date of expiry" being stated as "7th September, 1915."

The animal contracted the fatal disease after the policy was signed for the company at its office in Montreal, but before delivery to the plaintiff, and there was no previous payment of premium, interim receipt, etc., to affect the question.

What seems to me the fallacy which runs through the contention of Sir George Gibbons is the hypothesis that the plaintiff by her application offered a contract to the defendants, which was accepted by the defendants by their writing and signing a policy of insurance—therefore the contract was formed and the company's liability commenced with the signing of the policy.

That is not the legal position. The application is not an offer but a request to the company to offer a policy. The company may decline altogether or may accede to the request. If they so accede, they write a policy and tender it to the proposed assured as the contract they are willing to enter into. If the assured accept the policy tendered, then and only then the contract is complete, and that is the "commencement of the company's liability" (the premiums being paid or other arrangements satisfactory to the company being made). "Then, and then only, was the contract formed. Then only was the respondent insured. All that had passed previously was preliminary:" *per* Taschereau, J., in *Provident Savings Life Assurance Society of New York* v. *Mowat*, 32 S.C.R. 147, 156. See *per* Lord Esher, M.R., in *Canning* v. *Farquhar* (1886), 16 Q.B.D. 727, at pp. 730, 731; May on Insurance, 4th ed., para. 43 H. There are cases where the mere dispatch by mail of the policy may be considered delivery, e.g., in *North American Life Assurance Co.* v. *Elson*, 33 S.C.R. 383. The application provided for a policy issued in the company's usual form, and the premium was paid in advance. Nothing of the kind appears here; the applicant calls herself "the proposer," no form of policy is specified, but she agrees that her statements are to be "the basis of the contract between" her and the defendants; no premium is paid.

It is to my mind plain that, when the agent tendered the policy to the plaintiff, she might have refused it and could not have been compelled to pay anything; and it is equally clear that the defendants could not have been obliged, in equity or otherwise, to deliver the policy.

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SHARKEY v. YORKSHIRE INSURANCE CO.

I do not at all dispute the proposition that the wording of a contract may give it, as between the parties, any effect (not illegal), retroactive or otherwise; but here there is nothing but the precise words we are interpreting, and their meaning is not obscure.

Riddell, J.

Had the policy been expressed to be a three months' policy with the date of expiry the 7th September, a very strong argument could have been made that *ex necessitate* the beginning was the 7th June; but that is not the case.

I think then that the liability of the company did not begin (if at all) till after the fatal disease had been contracted.

Moreover, the material alteration in the subject of insurance known to the plaintiff is fatal to her claim: May, para. 43 G.; *Canning* v. *Farquhar*, 16 Q.B.D. 727.

I would allow the appeal with costs here and below.

Lennox, J.

LENNOX, J.:—I agree that the plaintiff cannot recover. There was, in my opinion, a completed contract when the plaintiff accepted the policy, but she accepted in the terms therein set out, and these terms preclude her from recovering in respect of a disease contracted before the time of acceptance—the commencement of the company's liability.

Masten, J.

MASTEN, J.:—I agree in the view just expressed by my brother, basing my conclusion exclusively on the interpretation of the words of the policy, which, I think, attached.

Appeal allowed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. October 3, 1916.

TRIAL (§ V A—271)—SPECIAL AND GENERAL VERDICT—FRAUD.

Where in an action on a promissory note, tried before a jury, the defendant raises the issue that he was induced to sign the note and a renewal thereof by fraud and misrepresentation, and the Judge submits questions to the jury to be answered, the fact that the jury gave a general verdict for the defendant, and then proceeded to answer some but not all of the questions submitted, will not invalidate the verdict, provided none of the answers given were repugnant to the general result, and there was evidence to amply support it.

[*Shearer* v. *Canadian Collieries*, 16 D.L.R. 541, 19 B.C.R. 277; *Rayfield* v. *B.C. Electric*, 15 B.C.R. 361; *Waterous Engine Works* v. *Keller*, 1 D.L.R. 880, 4 A.L.R. 77, applied; *Balfour* v. *Toronto R. Co.*, 5 O.L.R. 735, 32 Can. S.C.R. 239, considered.]

Statement.

APPEAL by defendant from judgment of Morrison, J. Reversed.

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BANK OF TORONTO v. HARRELL.

Macdonald, C.J.A.

A. H. MacNeill, K.C., for appellant.

Bird, for respondent.

MACDONALD, C.J.A.:—The plaintiff sues as holder of a promissory note made by defendant in favour of the Rex Amusement Co. originally for $10,000. The defendant says he was induced to make the note by the fraud of the plaintiff's manager, Vanstone, and the secretary of the said Rex Amusement Co., Wilkie. The transaction was really a loan by defendant to the Amusement Co. He was secured against the liability upon the note by a chattel mortgage on the personal effects of the Amusement Co.

The alleged fraud consisted in this: Vanstone and Wilkie represented that the proceeds of the note should be used to pay off the company's liabilities, including liens on the mortgaged chattels; whereas Vanstone, at the time these representations were made, intended to use the proceeds for another purpose, which other application of the moneys he afterwards made, and left the liens unsatisfied.

The jury found this issue in defendant's favour. After discovering the fraud, the plaintiff renewed the note for a balance then unpaid.

It may be here stated that the Amusement Co. had made payments from time to time on their original note. The defendant had paid nothing, as it appears to have been expected that the Amusement Co. would continue to make payments to the bank and discharge the note in full.

The plaintiff's contention was that this renewal was a waiver of the fraud, and an election not to dispute his liability on that ground. On this count the pleadings are not very satisfactory, but the case went to the jury on the facts in evidence, and no point has been made before us in argument that the evidence was not kept strictly within the pleadings.

The defendant's answer, at the trial, to the contention that the renewal was an election to overlook fraud practised on him was that he signed the renewal note on the terms with Vanstone that he would not be called upon to pay the note. The jury were asked the question:—

> After Harrell became aware that such fraudulent misrepresentations had been made, was he induced to renew the note by any promises in reference to his liability made by Vanstone with the intention that Harrell should act on them? A. Yes.

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They were asked to give details of such promises and their answer was:—

By taking Harrell's evidence here and the straightforward manner in which it was given and the architect's statement that Vanstone said to him that he (Vanstone) would take care of Harrell's loan and would see that he (Harrell) was looked after. That he had taken care of Harrell so far and would still do so.

And, in another answer, the jury s id that the defendant relied on those promises. They said also that the promises were fraudulent, but not intentionally so. They also found a general verdict.

Some other questions were submitted, not important, in my view of the case, except, perhaps, Q. 3 (*a*), which was: "Did Harrell sign the note relying on such representations?"—that is to say, the representations which the jury held to be fraudulent. This question was not answered.

The jury were allowed to hand their verdict to the sheriff, and were not present when it was received in Court. I am inclined to think their failure to answer this question was an oversight. To be consistent with the other answers and their general verdict, they must have answered this question in the affirmative, and, if anything turns upon it, I have no hesitation in inferring that fact from the evidence, as I am permitted to do under O. 57, r. 4, of our Rules of Court.

The question is thus narrowed down to the effect which ought to be given to the verdict as a whole. The jury were entitled to find a general verdict and to leave the questions unanswered if they chose to do so. They chose to answer the questions except one, and find a general verdict besides.

The Judge, after consideration, entered judgment for the plaintiff. He said:—"In my opinion, the specific facts found by them (the jury) makes such a verdict (the general one) impossible in law." He seems to have founded his judgment on the answer of the jury that the promises made on the renewal of the note were fraudulent, but not intentionally so. I think he was right in considering that that answer negatived fraud. The position then is this—a promissory note found to have been obtained through the fraud of Vanstone, the plaintiff's manager, discovery of the fraud by the defendant, a conference between him and Vanstone, at which Vanstone *bonâ fide* promised that he "would take care of Harrell's loan," namely, the note, by which promise

defendant was induced to renew it, and finally action brought by the party who had made that promise.

Now, I am not much concerned with the inherent probability or improbability of the defendant's story about this promise. The jury have taken care of that on evidence which supports their finding. They have not defined what Vanstone meant by "taking care of the loan," but I see no difficulty in that. It obviously could mean only one thing—the defendant would not be called upon to pay the note. The plaintiff's interest was to keep the transaction, including the chattel mortgage, undisturbed by any action defendant might take after discovery of the fraud which had been practised upon him, trusting to the Amusement Co., the primary debtor, to eventually discharge the indebtedness. This view of the matter is fully enough covered by the jury's findings, special and general. But it is said you cannot give effect to the general verdict. I ask why not? There is nothing in the special finding repugnant to the general verdict. If there were, a question would arise which does not arise now. The jury have said, and there is evidence which, if the general verdict stood alone, would, I think, amply support it, that the defendant is entitled to succeed. The fact that they have given their reasons, or some of their reasons, in the form of answers to questions, none of which are inconsistent with the verdict, cannot, in my opinion, invalidate it: *Newberry* v. *Bristol Tram & Carriage Co.* (1913), 29 T.L.R. 177; *Ellis* v. *B.C. Electric R. Co.*, 20 D.L.R. 82, 20 B.C.R. 43.

Martin, J.A., has called my attention to *Balfour* v. *Toronto R. Co.*, 5 O.L.R. 735, affirmed by the Supreme Court of Canada, 32 Can. S.C.R. 239. The law in Ontario with respect to questions submitted to a jury is different from ours. It is the same here as in England. If what happened here had happened in an Ontario trial, I think the general verdict would have been regarded by the Court there as one not proper for the jury to bring in. There they could only properly deal with the questions. But the law is different here. Questions may be submitted to the jury which they are at liberty to answer or not, as they choose. If these answers, where they do answer questions and bring in a general verdict as well, are not inconsistent with the general verdict, then no difficulty arises. Here, in my opinion, the answers given are not inconsistent with the general

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verdict, and hence I do not find it necessary to decide what should be the practice in our Courts when answers or reasons are repugnant to the general verdict.

Since writing the above, one of my learned brothers has discovered that, according to the stenographer's note, the jury returned their verdict after an absence 9 minutes short of 3 hours. No objection was taken here or below to the circumstances which this note purports to record. Whether or not the jury were out 3 hours is a question of fact. If they were not out the 3 hours, objection should have been taken at the time, when the matter could have been remedied. If objection had been taken then, or even in the grounds of appeal, evidence might have been adduced to shew that the jury were in fact out for 3 hours. The proof of the fact would be found in the clerk's record. The stenographer had no official duty in the premises, and the clerk's record is not before us. I think, therefore, we ought not to take judicial notice of the stenographer's note. I would allow the appeal.

Martin, J.A.

MARTIN, J.A.:—I have been not a little embarrassed by the form of the verdict herein, which has been urged upon us by the plaintiff as being a general verdict and by the defendant as being a special one. It must be one or the other, for it cannot, clearly, be both, and, if it becomes necessary to decide here the exact point, I am prepared to hold that it is a general verdict only, and that the questions should be disregarded as surplusage. The difficulty arises from the fact that the Judge rightly told the jury that, though he wished them to answer the questions as being in the interests of the litigants, yet, at the request of counsel, he added that they need not do so, but could bring in a general verdict only. The opinion has already been more than once expressed by members of this Court, myself included, that this is a request counsel ought not to make to a presiding Judge once he has decided that he will put questions, because it has a tendency either to induce the jury to evade answering the questions *in toto* or to confuse them, thereby resulting in a partial or incomplete answer to the questions, or an abandonment of some or all of them after difficulty is encountered, followed up by falling back on a general verdict, but often accompanying this verdict by the questions being returned to the Court more or less answered, as here. This is a very unsatisfactory and disturbing state of affairs, and, in my opinion, the proper practice

is that, where a special verdict in answer to questions is sought, no mention should be made of a general verdict, any more than it is proper to tell a jury in advance that, after 3 hours' time, they need not be unanimous, but the verdict of a 6 out of 8 of them only will be taken, which tends to discourage the most conscientious efforts to reach unanimity, based upon reason, and to encourage a reliance upon the power of a specified majority only. We have already held, in *Rayfield* v. *B.C. Elec. R. Co.*, 15 B.C.R. 361, and *Shearer* v. *Canadian Collieries*, 16 D.L.R. 541, 19 B.C.R. 277, that, where answers to questions are ambiguous, inconclusive, indefinite or otherwise unsatisfactory, it is the proper course for the trial Judge to ask further questions to clear up the difficulty, if possible, and this is the practice in some other provinces of Canada at least, *e.g.*, in Ontario, as noted in *Shearer's* case, and in Quebec—*Jolicœur* v. *G.T.R. Co.*, 34 Que. S.C. 457—as well as in England—*Arnold* v. *Jeffreys*, [1914] 1 K.B. 512, a decision of the K.B. Division. And that last case also held that, where a general verdict has been returned, it is wrong for the Judge to ask the jury a special question. This follows the decision of the Court of Exchequer in term in *Brown* v. *Bristol & Exeter R. Co.* (1861), 4 L.T.N.S. 830, wherein it was held that Martin, B., was right in refusing the application of the defendant's counsel to ask the jury on what ground they had founded their verdict for the plaintiff.

Before that, in *Horner* v. *Watson*, 6 Car. & P. 680, Gurney, B., refused to hear the reasons for the verdict of the jury, though they offered to give them.

This, indeed, is only in accord with a very long established practice, for it was held in *Clark* v. *Stevenson*, 2 Wm. Bl. 803, that the subsequent declaration of a jury, in answer to the question of a Judge, after their general verdict, should not be let in to explain it. So long ago as 1749, it was held, on appeal from the Irish Court of Chancery, that, "though the jury state the particular evidence upon which they find the fact, yet this is only surplusage and will not vitiate the verdict": *Plunket* v. *Viscount Kingsland*, 7 Bro. P. C. 404. And, long even before that, in 22 Car. 2, 10 of the 11 Judges of the Common Pleas agreed, in *Bushell's* case (1670), (124 E.R. 1006) Vaugh. 135, at 150, that:—

The legal verdict of the jury to be recorded, is finding for the plaintiff

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or defendant, what they answer, if asked to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives wherefore, as well as Judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary.

In *Tonkin* v. *Croker* (1704), 2 Ld. Ray. 860 (92 E.R. 74), the King's Bench unanimously held that, when the jury had returned their verdict, "what was found afterwards was surplusage and idle;" and, in *Walton* v. *Potter* (1841), 3 M. & G. 411 (133 E.R. 1203), Maule, J., at 444, says, after making observations upon questions:—

> There is no rule that a verdict cannot be just unless each juryman arrives at the same conclusion and by the same road.

My brother McPhillips drew our attention, at the argument, to the case of *Newberry* v. *Bristol Tramway*, 29 T.L.R. 177, wherein the Court of Appeal took cognizance of the answer a jury gave, after a general verdict, to the question of Channell, J., as to the grounds thereof. But it is to be observed that no objection was raised to this being done by the Court of Appeal, and none of the authorities above cited was brought to its attention; therefore, I think the regular practice should be preferred to the course pursued by the Court of Appeal. I have not overlooked the *nisi prius* decision of Keating, J., in *Dimmock* v. *North Staffordshire R. Co.* (1866), 4 F. & F. 1058, 1065, wherein the Judge did question the jury after a general verdict, but no objection was taken to the propriety of that course, and, therefore, the point now raised did not come up. I am confirmed in my opinion by two cases in Ontario—*Sheridan* v. *Pidgeon* (1886), 100 R. 632, and *Balfour* v. *Toronto R. Co.*, 5 O.L.R. 735 (affirmed 32 Can. S.C.R. 239), the latter a decision of the Court of Appeal of the K.B. Division, which held that an "opinion" of a jury, added to a general verdict, should be regarded as surplusage, which also was the opinion of the Court of King's Bench, in Term, in Quebec, in *Montreal* v. *Enright*, 16 Que. K.B. 353, where the jury added a "recommendation." The situation is different here from Ontario, because there, as also in New Brunswick (*cf. Thorne* v. *Bustin* (1905), 37 N.B.R. 163, and *Sullivan* v. *Crane*, 39 N.B.R. 438), and in Quebec (*Montreal's* case, *supra*) the practice, either by statute or rule, requires the jury to answer questions, so the parties cannot be put into such an unfortunate

position as we find now before us, but *Balfour's* case is of special importance, because the Supreme Court of Canada has refused to interfere with it—(1902), 32 Can. S.C.R 239—because the view of the Court below that the verdict was a general one (despite the fact that, in answer to the Judge, the jury gave two reasons for it) was a decision in a matter of practice or procedure.

The result of all the many authorities is, in my opinion, that where questions are submitted to a jury, and, at the same time, they are instructed that, according to law, they need not answer them, but may bring in a general verdict, then, if they do bring in a general verdict and also answer the questions, the latter must be disregarded as surplusage. Once the right to return a general verdict has been exercised, everything else in that relation becomes immaterial, or, to adopt the language of Armour, C.J., in *Balfour's* case, *supra*, "the reasons given by them form no part of their verdict and are not to be treated as affecting it in any way," and I am of the opinion, after long consideration, that no addition to that verdict can legally be even considered, under our system, in regard to a new trial, whatever may be done in Ontario, as suggested only by Osler, J.A., in *Balfour's* case, at 740; the other Judges, I note, do not adopt his view.

This case is very similar to *Rayfield* v. *B.C. Elec. R. Co.*, 15 B.C.R. 361, in which certain questions only were answered and a verdict returned, which the Chief Justice and Irving, J.A., were of the opinion the jury intended as a general one. I found it impossible to satisfy myself on the point, but in the case at bar I do not doubt, having regard to the very clear direction of the trial Judge on the point, that the jury intended to exercise their right to return a general verdict, while at the same time, as a matter of courtesy and respect, complying with the request of the Judge to answer the questions. In such circumstances I think that we are confined to the general verdict, and must reject the questions. I refer again to my repeated observations on this very important matter of questions to juries, as most recently collected in *Shearer's* case, 16 D.L.R. 541, and am entirely in accord with the views of McPhillips, J., as to the desirability of the legislature taking steps to put an end to the many cases that come before us where there has been a complete or partial failure of justice, or at least a grievous burden

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of unnecessary costs and delay, because of the most unsatisfactory state of the law on this point.

But, in the alternative, contrary to my opinion, if it should be deemed necessary or proper to consider said questions in regard to the granting of a new trial, I should agree in refusing it, because, to do so, would be to "drop into that loose practice of granting new trials" which is deprecated by Meredith, J.A., in *Brennen* v. *Toronto R. Co.*, 15 O.L.R. 195, at 201. I cannot, with all due respect, agree with the later reasons of the trial Judge, particularly when he says there was no evidence to go to the jury on the most important question of Vanstone's fraud; in his prior charge to the jury he rightly told them that there was evidence for them to consider on this head. The effect of the charge of the Judge, as a whole, was much in favour of the bank's manager, Vanstone, but the jury were entitled to disbelieve it, as they did that of the general manager of the plaintiff bank in *Western Bank* v. *McGill*, 32 Can. S.C.R. 581, who was found guilty of procuring promissory notes through undue influence. The answers of the jury, if they are to be considered at all, should be read with the general verdict and supplemented by it. It is the duty of the Court to give due effect to the real intention of the jury, and to harmonize their answers so far as possible, and I note that, even where no answer was given to a question about which there was no doubt, the Court of Appeal in Alberta supplied the right one—*Waterous Engine Works* v. *Keller*, 1 D.L.R. 880, 4 A.L.R. 77.

There seems some doubt upon the face of the record as to the time that the jury was out so as to entitle them to bring in a verdict of six only, but, as that point was not raised before us and no objection was taken below, it must be taken to have been waived by agreement, even if it ever existed, and, in the absence of definite evidence, that would not be assumed: *Midland R. Co.* v. *McDougall*, 39 N.S.R. 280; *Sullivan* v. *Crane*, *supra*.

The appeal, therefore, should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—The jury in this case brought in a general verdict, as well as finding specific facts in answer to questions submitted, and the trial Judge held that the facts found did not warrant in law the general verdict, and gave judgment for plaintiffs. From this judgment the defendant appeals. The

verdict was a majority verdict, which is permissible, under our statute law, after the jury have been in retirement for 3 hours.

The jury have found that the making of the original note, of which the note sued on is a renewal, was induced by the representations of Vanstone, the bank's manager; that such misrepresentations were false to the knowledge of Vanstone, and made with intent that Harrell should act upon them. They also gave particulars of the representations, but omitted to answer the question as to whether Harrell signed the note relying on these representations, but that, I take it, would be cured by the general verdict in Harrell's favour. I think there was evidence on which the jury could find as they did on these questions.

Then certain other questions were put to the jury and answered by them as to what representations were made to Harrell, at the time of the renewals of the note, after he had discovered the false representations made at the time the original note was signed. In the view I take of this case, these findings are not inconsistent with the general verdict rendered.

The note was an accommodation note given, as the jury have found, on the representation that the money to be advanced upon it by the bank was to be applied in a certain way, which was not done, and, after Harrell discovered this, he would have been entitled, when they called upon him to renew, to have refused to do so and to have elected to avoid the contract.

Taking the evidence of Harrell and the architect, which, apparently, the jury believed, as evidenced by their findings, I am of opinion that Harrell made no election either to confirm or avoid the contract at the time the renewal notes were given and after discovery of the misrepresentations, and, if this view is correct, then *Clough* v. *London & N.W.R. Co.*, L.R. 7 Ex. 26, is authority for the proposition that, where a party makes no election, he retains the right to determine it either way, subject to certain qualifications which do not obtain here.

If Harrell's story is correct, he was induced to sign the renewals on the assurance of the bank manager that he would not be called upon to pay and that the note would be taken care of. This surely does not amount to an election to confirm the original contract after knowledge, nor does the jury's finding with regard to Ball amount to an election.

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I think, therefore, that the general verdict must govern, as there is nothing in the findings that is inconsistent therewith. The appeal should be allowed and judgment entered for the defendant.

McPhillips, J.A., has raised a point that the stenographer's notes shew that the jury were not out the full three hours, so as to entitle them to bring in a majority verdict.

This point was not taken at the trial, when it could have been remedied, and, as it is a question of fact, whether they were out 3 hours or not, evidence might have been adduced to shew that the stenographer might have been in error in his notation, but all parties, the trial Judge included, treated the verdict as proper in that respect, and no mention was made of it before.

I think, under these circumstances, we should not now consider it.

McPhillips, J.A.

MCPHILLIPS, J.A. (dissenting):—In my opinion there must be a new trial. Questions were submitted to the jury and answered, but a general verdict as well was found for the appellant. The trial Judge, notwithstanding the general verdict, entered judgment for the respondent. The answers to the questions submitted and the general verdict were handed in before the expiration of three hours from the time when the jury retired to consider their verdict, the procedure being by the handing in of a sealed verdict to the sheriff at 7.46 p.m. It was consented to by counsel that the verdict could be handed in, the Court adjourning until the next day. The next day the verdict was looked at by the trial Judge in the presence of counsel—no objection being taken—and later the arguments on motions made for judgment took place.

It is plain that the general verdict cannot be looked at as the unanimous verdict of the jury—the questions submitted and answers thereto shew that the jury were not unanimous and the requisite time required by the statute did not elapse: Jury Act, ch. 34, 3 Geo. V., 1913, secs. 45 and 46. By sec. 66, Supreme Court Act (R.S.B.C., 1911, ch. 58), the stenographer's notes "shall be deemed to be an accurate record of the proceedings:" *Midland R. Co.* v. *McDougall*, 39 N.S.R. 280.

The Court of Appeal, in my opinion, must take the point—the Court was without jurisdiction to give effect to what the

jury had done. It is true the learned trial Judge does not adopt the general verdict, but can this Court adopt it? In my opinion, that cannot be done: *Norwich* v. *Norwich Electric T. Co.*, 75 L.J.K.B. 636.

In my view—and with the greatest respect to my learned brothers who think otherwise—it is impossible, unless this Court thinks it a proper case to decide apart from what the jury have said (*Paquin* v. *Beauclerk*, [1906] A.C. 148), to rely in any way upon what is not a verdict at all, *i.e.*, a nullity.

Further, there is variance between the general verdict and the answers of the jury to the questions submitted.

This is not a case of a general verdict without explanation (*Newberry* v. *Bristol*, 29 T.L.R. 177, at 179).

Being of the opinion that the verdict is ineffective and cannot be looked at, and as the case is one that entitled the appellant to have the issues decided by a jury, there can be but one result of this appeal, and that is that a new trial be had.

I do not enter upon any detailed discussion of the facts, for the obvious reason that, in my opinion, it is a proper case for a new trial.

The appellant sets up fraud, yet a long time elapses and new transactions take place, which the respondents claim are inconsistent with the contention of the appellant; and the respondents further claim that the appellant elected not to avoid the contract. The principle of law governing in such cases is to be found in *Clough* v. *The London & N.W.R.*, L.R. 7 Ex. 26, and *United Shoe Co.* v. *Brunet*, [1909] A.C. 330.

LOWERY AND GORING v. BOOTH.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. April 19, 1916.

WATERS (§ II 1—155)—RIGHTS UNDER RIVERS AND STREAMS ACT—"UNNECESSARY DAMAGE."

The right to use a river for driving logs exercisable under the Rivers and Streams Act, R.S.O. 1914, ch. 130, are subordinate to rights exercisable under the authority of the Dominion Parliament, in respect of the navigation of rivers, and, therefore, the driver of logs down a river is liable to the owner of a coffer-dam on the river for unnecessary injury; the driver should have taken precaution to prevent it.

[*Lowery* v. *Booth*, 24 D.L.R. 865, 34 O.L.R. 204, reversed].

Statement.

APPEAL by the plaintiffs from the judgment of Middleton, J., 24 D.L.R. 865, 34 O.L.R. 204. Reversed.

R. McKay, K.C., for appellants.

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Meredith, C.J.O.

Wentworth Greene, for defendant, the respondent.

J. R. Cartwright, K.C., for Attorney-General for Ontario.

MEREDITH, C. J. O.:—If, as I think may reasonably be found on the evidence, the appellants' coffer-dam was lawfully constructed and maintained under the authority of the Dominion Parliament for the purpose of improving navigation, either in the Montreal river or below that river, by the creation of a storage-dam to conserve the head-waters, the respondent was, in my opinion, bound to exercise his rights under the Rivers and Streams Act so as not, at all events unnecessarily, to destroy or injure the coffer-dam.

That the coffer-dam was there, the foreman knew or ought to have known, and yet no precautions were taken by him to prevent injury being done to it in carrying on the operations which he was directing and superintending, but he went on with them just as if the coffer-dam was not in existence.

It may be and perhaps is the fact that the formation of side-jams is a step usually taken in driving logs, but it is clear that the logs might have been brought down without that being done, though only by the expenditure of more money and time, and with the risk of the water getting so low as to impede the floating of the logs and the possibility that they could not have been brought down during the spring freshet, which was then on.

The respondent was, I think, bound to take these risks, if he knew or ought to have known that there would be danger of the coffer-dam being destroyed or seriously injured if the driving were done in the manner in which it was done, and the damage that was done was therefore an unnecessary damage within the meaning of sec. 4 of the Rivers and Streams Act.

If I am right in the view that the coffer-dam was lawfully where it was, and was placed there under the authority of the Parliament of Canada, in the exercise of its exclusive authority to make laws with respect to navigation, the rights conferred by the Rivers and Streams Act were, in my opinion, subordinate to the right to maintain the coffer-dam; and the provision of sec. 4 of the Rivers and Streams Act as to the dam or other structure being provided with "a convenient apron, slide, gate, lock or opening . . . for the passage of timber, rafts and crafts authorised to be floated down the river," cannot cut down or impair the paramount right to maintain the coffer-dam.

I would, therefore, allow the appeal, and substitute for the judgment which has been directed to be entered, judgment for the plaintiffs to recover the damages sustained by them owing to the destruction by the respondent's logs of the coffer-dam, with costs. If the parties are unable to agree as to the amount of the damages, there must be a reference to ascertain them, and in that event the question of the costs of the reference and of subsequent costs will be reserved to be dealt with on further directions.

Meredith, C.J.O.

MAGEE, J.A.:—I agree.

Magee, J.A.

HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice. Forgetfulness of the existence of the coffer-dam, when he first went to see the rapids, may be credited to Ferguson, but he knew of it and saw it before the jam across finally formed, and decided to let things go on. His attitude is expressed at the close of his evidence in this way: "I did not think it was anything of my business to attend to their property there or their boom."

Hodgins, J.A.

If liability for the damage is to be tested by the expression in the statute "doing no unnecessary damage," then I should be disposed to view the effect of that phrase as more comprehensive than is indicated in the cases cited in the judgment below.

The fact that damage may be the necessary consequence of an act does not determine the character of that act, which may be due to negligence or done with careful intent.

The statute, I think, includes damage unnecessarily caused during the normal and usual process of driving, as well as that which arises, though inevitably, from a method of operation originally improper, unnecessary, or negligent.

The respondent may have followed the practice generally adopted in these and similar rapids. But it is no answer that the damage thereby caused was inevitable if that method should have been modified in view of the circumstances of the particular case, and because the rights of others intervened.

GARROW, J. A.:—The defendant's right as a lumberman, derived under the provisions of the Rivers and Streams Act, R.S.O. 1914, ch. 130, to use the river at the time and for the purpose for which he was using it when the injury to the plaintiffs' coffer-dam is said to have occurred, is not questioned.

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That right, however, seems to be limited, so far at least as it is a special privilege, to the time of freshets. See *Caldwell* v. *McLaren*, 9 App. Cas. 392, 410.

The river is said to be navigable, although I see nothing on the subject in the evidence. If navigable, it would seem properly to fall under the jurisdiction of Parliament, which, by sec. 91, clause 10, of the British North America Act, is given exclusive jurisdiction to legislate concerning the subjects of navigation and shipping. The work which the plaintiffs had contracted to perform was duly authorised, and was undertaken for the purpose of improving the navigation of the river. These circumstances would seem to confer upon the plaintiffs the right which they assert to build in the bed of the river, as a necessary part of the work which they had undertaken for the Crown, a coffer-dam, and to maintain it there for a reasonable time in aid of the work which they had undertaken.

These rights, however, are not, I think, mutually exclusive, but were quite capable of being reasonably exercised without any necessary clash.

The defendant's special right exists only, as before pointed out, in time of freshets, a time when it would at least be unusual to attempt to do such work as the plaintiffs', in the bed of the stream, requiring the use of a coffer-dam, work one would expect to be done in the low water of summer after the spring freshets are over and the lumbering operations are at an end for the season.

Nor is it properly a question of conflict between the provisions of the Imperial Act conferring jurisdiction on Parliament in matters respecting navigation, and the provincial statute which gives the right of floatage in all streams of the Province to the lumbermen in time of freshet. The latter right existed long before Confederation. Its history is given in the case before referred to of *Caldwell* v. *McLaren*. And there has been no legislation by Parliament upon the subject in any way altering or limiting this right. The plaintiffs' position is that merely of a contractor with the Crown. As against the defendant's statutory right, they can only assert the exigency of their contract, an exigency of which they offered no proof—for that the work is unfinished is none.

The coffer-dam was built in the previous autumn, apparently too late to finish in that season; certainly in itself no sufficient

reason for claiming a right to occupy and to be protected by the lumberman in occupying river during the following spring freshets.

For wilful injury the defendant would of course be liable. And it may even be concluded that for negligence in the use of the highway he would also be liable. Middleton, J., expressed the opinion, and his judgment proceeds upon the proposition, that the defendant was excused by the terms of the statute, sec. 3, sub-secs. 2, 3, which authorises the removal of obstructions. I, however, with deference, am unconvinced that the defendant is put upon the defensive.

The learned counsel for the plaintiffs at the trial, as appears in the shorthand notes, put his case on the only intelligible ground upon which, in my opinion, it can rest, namely, that of negligence. And the negligence which he then proposed to shew was negligence in the management of the drive. The evidence, however, entirely fails to shew that the defendant in the management of the drive acted negligently, or otherwise than in the usual and customary way.

The injury of which the plaintiffs complain was evidently caused by the consequences of the jam at the railway bridge, which forced back the logs upon the coffer-dam.

No one suggests that the jam, a common occurrence, occurred by reason of any mismanagement on the part of the defendant. The defendant's operations were also interfered with because of it, and he was as much interested as any one in having it broken up and the logs dispersed and sent on their way downstream, and apparently made all reasonable efforts to that end. The utmost that is said is, that, after the jam had formed, more men should have been employed by the defendant to force and keep the logs moving and away from the coffer-dam. And the suggestion is even made that the defendant should have constructed defensive works to protect the coffer-dam from the pressure of the logs.

But I am quite unable to see why the duty of protecting the plaintiffs' dam against the ordinary consequences of floating logs down the stream in the customary way should be imposed upon the defendant, and not, in the circumstances, upon the plaintiffs themselves.

I would dismiss the appeal with costs.

MACLAREN, J.A.:—I agree. Maclaren, J.A.

Appeal allowed; GARROW *and* MACLAREN, JJ.A., *dissenting.*

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CANADIAN NORTHERN WESTERN R. CO. v. MOORE.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. June 24, 1916.

1. ARBITRATION (§ III—17)—RAILWAYS—COURT'S POWER TO REMIT AWARD.
The provisions of the Arbitration Act (Alta., 1909, ch. 6) apply to arbitrations under the Alberta Railway Act (1907, ch. 8), so as to empower the Court or a Judge, on appeal from an award, to remit it to the arbitrators for reconsideration.

2. ARBITRATION (§ III—16)—INVALIDITY OF AWARD—IMPROPER EVIDENCE—EXPERTS.
The reception by the arbitrators of testimony of a number of expert witnesses greater than that limited by the Evidence Act (Alta., 1910, 2nd sess., ch. 3) is a ground for setting aside the award.

3. EVIDENCE (§ IX—675)—ADMISSIONS—AFFIDAVIT—VALUE OF LAND.
An affidavit by an owner of land whose property has been expropriated, made by him prior to the expropriation, when he was acting in the capacity of an administrator, should not be received in evidence against him as an admission of its value at the time of expropriation.
[*Can. Northern-Western R. Co. v. Moore*, 23 D.L.R. 646, 8 A.L.R. 379, affirmed.]

Statement. APPEAL and cross-appeal from the judgment of the Appellate Division of the Supreme Court of Alberta, 23 D.L.R. 646, 8 A.L.R. 379, setting aside an award made by arbitrators and referring the matter back to the arbitrators for reconsideration and determination anew of the compensation to be awarded for lands expropriated for railway purposes. Affirmed.

Chrysler, K.C., for appellants.

Frank Ford, K.C., for respondent.

Fitzpatrick, C.J. FITZPATRICK, C.J.:—This appeal and the cross-appeal should be dismissed with costs.

Without expressing any opinion as to whether in expropriation proceedings under the Dominion Railway Act the arbitrators having once made an award are *functi officio* (compare *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, with *Holditch* v. *Canadian Northern Ontario Rway. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536 at 541), I am satisfied that the provincial Arbitration Act (ch. 6 Alta., 1909, sec. 11) gives to the Alberta Court, on appeal, in all cases of arbitration the power to remit or set aside an award. The sections of the Alberta Arbitration Act are quoted at length by Davies, J., in his judgment.

I agree in the conclusions reached by my brother Idington with respect to the admissibility in these proceedings of the affidavit made by the respondent Moore at another time for an entirely different purpose. One can easily imagine conditions under which such a document might be properly introduced, but although

a statement made by a party to a proceeding may be used against him as an admission, whenever it is made, I am satisfied that no fault can be found with the arbitrators for having refused to receive the affidavit in the circumstances under which it was offered here.

I am not quite satisfied that sec. 10 of the Evidence Act limiting the number of expert witnesses is applicable to proceedings in which such wide powers are given to the arbitrators. Sec. 106 of the Railway Act directs the arbitrators to proceed to ascertain the compensation due "in such way as they, or he, or a majority of them deem best." That statute creates for expropriation purposes a tribunal with wide and exceptional po ers which it cannot fully exercise if hampered by the special limitations of the Evidence Act, and I would be disposed to hold that the arbitrators were at liberty to examine or permit the examination of as many witnesses as they thought desirable. In other words, the arbitrators are, in this regard, limited solely by the bounds of a sound and honest discretion, but I defer on this point to the views of the majority.

Davies, J.

DAVIES, J.:—The appeal by the railway company in this case is from the judgment of the Supreme Court of Alberta, only in so far as that judgment purports to refer the award back to the board of arbitrators.

There is also a cross-appeal by the respondent claiming the judgment appealed fro n to be *erroneous* in holding that the arbitrators erred in admitting the testimony of more than three witnesses giving their opinion as to the value of the lands compensation for the taking of which under the provincial Railway Act the arbitrators were assessing.

On the main appeal as to the power of the Court to refer the award back to the arbitrators, I am of the opinion that the Court possessed such power.

The Alberta Railway Act, 1907, ch. 8, sec. 114, provides for an appeal to the Court in cases where the award exceeds $600 and declares that upon the hearing of the appeal the Court shall, if the question is one of fact, decide the same upon the evidence taken and in sub-sec. 2 declares that, upon such appeal, the practice and proceedings shall be as nearly as may be the same as upon an appeal from the decision of an inferior Court.

Sub-sec. 3 says: "The right of appeal hereby given shall not

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affect the existing law or practice in the province as to setting aside awards."

Then the Arbitration Act has the following provisions (Alberta statutes, 1909, ch. 6, defining the law with respect to references to arbitration):—

Sec. 2:—In this Act, unless the contrary intention appears:—

1. "Submission" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.

Sec. 11.—In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

Sec. 17.—Whenever it is directed by any Act or Ordinance that any party or parties shall proceed to the appointment of arbitrators or appoint arbitrators as provided by this Act or that any party or parties shall proceed to arbitration under this Act or any similar direction shall be made with respect to arbitration under this Act such direction shall be deemed a submission.

While sub-sec. 3 of sec. 114 of the Railway Act, above quoted by me, is not as clear as it might be and does not in so many words speak of remitting the award back, I cannot doubt that in its true construction it covers such a power of remitting back the matter referred for reconsideration.

In my judgment sub-sec. 3 of sec. 114 of the Railway Act should be held to cover and incorporate these sections of the Arbitration Act above cited and, when read together with sec. 17 vest in the Court the power of remitting awards back made under the Railway Act for reconsideration, which they have exercised in this case.

This conclusion renders it unnecessary on my part to consider the question of the power of the Court to remit back an award where no statutory authority to do so exists.

Then as to the cross-appeal of the respondent, who contends that the award should be upheld and not remitted back, I am also of opinion that this cross-appeal must be dismissed.

Two contentions were advanced against the validity of the award—one was that the arbitrators valued the lands as of the wrong date, taking the time when the arbitration was held, December 16, 1913, instead of the date when the Judge's order was made appointing the arbitrators, namely, June 25, 1913.

It is not necessary under the circumstances of this case to determine the exact date with reference to which "compensation or damages are to be ascertained." Sub-sec. 2 of sec. 100 men-

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tions three different dates. The first is where there is an agreement made between the parties respecting the lands taken or the compensation to be paid as provided in sec. 99 and, in such case, the date of the agreement is to be the date for fixing compensation. The other dates where there is no agreement are the service of the notice to treat or the order of the Judge made for the appointment of an arbitrator or arbitrators. As between these two latter dates cases may arise in which it would be important to determine which should govern.

In the present case, I concur with the judgment of the Appellate Court that the parties having agreed at the opening of the arbitration proceedings to adopt the "time of the arbitration" as the date for fixing the compensation, and as the evidence shewed clearly there was no difference in the values of the lands during the year 1913, the date agreed upon, December 16, 1913, was for all practical purposes the same as that of Judge's order, June 25, of the same year, so that no error prejudicing either party was under the circumstances committed. No question was raised as between the date of the Judge's order and that of the notice to treat given in the latter part of 1912 and it must be taken that all parties agreed at the arbitration to take the time of the arbitration as the proper time to fix the valuation.

The other objection to the validity of the award and the one sustained by the Appellate Court was that the provisions of sec. 10 of the Evidence Act limiting the number of expert witnesses to three upon either side had been violated by the admission against the objection of the railway company of more than the statutory number.

The facts respecting the number of witnesses called and examined on the part of the owner are set out fully in the reasons for the judgment of the Court given by Stuart, J. It is unnecessary for me to repeat them here. I agree with the conclusion reached by him that the statute had been clearly violated and that "the arbitrators admitted very important evidence as to value which was inadmissible and that it was impossible to say what weight they attached to that evidence," or whether it was not "the controlling evidence in their minds."

Under these circumstances, I think the Court was right, having the power to do so, to remit the award back to the arbi-

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trators and not to attempt under the circumstances the almost impossible task of making an award themselves.

I am also of opinion that the Court was right in holding that the affidavit of the respondent as to the value of the land made by him on his application for probate was improperly rejected. The weight to be given to such an affidavit was a matter entirely for the arbitrators under all the facts and circumstances existing when the affidavit was made. But it should not have been excluded from their consideration.

For the foregoing reasons, I would dismiss both the appeal and the cross-appeal with costs.

Idington, J.

IDINGTON, J.:—The appellant claims that the Court of Appeal for Alberta had no power, upon setting aside the award, made by the arbitrators appointed under the Railway Act of Alberta, to determine the compensation to be made respondent for lands taken and injuriously affected by the exercise of some of the powers of the appellant in the way of expropriation, to remit the matter so in question to the arbitrators.

It argues that the same result should follow as formerly followed upon the setting aside of an award under a submission at common law. It overlooks, in making such a contention in this appeal, the wide difference in many respects between a submission by parties, relative to the disposition of a matter in dispute between them, and this statutory method of determining the amount of compensation to be made for what must be surrendered and endured by him whose rights have been invaded by virtue of the statutory powers given the expropriating company.

The common law award being set aside the parties still had their full right to resort to the Courts to enforce their respective claims and recover or have therein determined what they might be entitled to.

In expropriation cases the party whose property is taken has no remedy except that furnished by the statute authorizing the taking. That remedy is the constitution of a board appointed by the parties, or, default their agreeing, by the Court, and that board has not discharged its duty until it has made an award reached by due process of law within the contemplation of the statute. If it produces an award which in law is null, then on what legal principle can it be said to be discharged of or relieved from the performance of that duty it has undertaken?

That, however, is not the only thing the appellant has overlooked, for there has been much legislation in the several jurisdictions, where the common law prevails, to supplement the powers of the Court relative to awards and enable much to be done which could not formerly have been done in the way of relieving unfortunate litigants.

It does not appear to me herein necessary to follow the argument relative to the legislation of that kind in Alberta, or forming part of the law introduced into Alberta, and determine whether or not it is applicable to the arbitration here in question, further than to point out that the Alberta Arbitration Act expressly provides:

[See secs. 2, 11 and 17, cited in judgment of Davies, J.]

The enactments seem clearly designed to provide for the very contingency in question herein.

It is to be observed that the appellant railway company is the creation of the Alberta Legislature and the proceedings were taken under its Railway Act.

And in any event, as already suggested, the award having been set aside because of the non-performance according to law of the duty assumed by or cast by law upon the board of arbitrators they must in law proceed to the discharge of that duty in a proper manner, whether specially directed or not, does not seem to matter very much.

The judgment in the case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, seems to assume as a matter of course the power and duty of the Appellate Court to remit the matters to the arbitrators, who had erred, as here, to hear evidence and make an award in accordance with the principle expressed in the opinion judgment of the Judicial Committee. The powers of expropriation and method of fixing compensation in question therein were those of the Dominion Railway Act as it stood revised in 1903. Surely if that set of provisions enabled a remitting of the case those under the Acts I have referred to which are still more comprehensive and elastic can enable the Court below to do so.

The Court of Appeal for Alberta has decided it cannot under the circumstances of the appeal there determine the matter pursuant to sec. 114 of the Railway Act and it has not been contended by the cross-appeal herein that such conclusion is erroneous

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if the questions of law or either of them passed upon by it has been properly maintained. The cross-appeal however claims that Court erred therein and seeks a reversal of the decision.

I see no reason to quarrel with the judgment so far as it relates to the question of opinion evidence and therefore the judgment remitting the matter to the board of arbitrators should stand. I am, however, not able to agree with the holding of that Court relative to the admissibility of the respondent's affidavit made as an administrator in the course of settling the question of succession duties when valuing the entire property of which only a fractional part is in question. The question to be tried is the value of the property taken or injuriously affected at another and later time, and, hence, as evidence of that it certainly cannot be treated as an admission against an administrator of the fact to be tried or anything clearly and directly bearing thereon.

I can conceive of such an affidavit being used in cross-examination, had respondent been a witness, or in the like event in contradiction; and as a most efficient weapon in the hands of the counsel for appellant if he saw fit to put respondent in the witness box. But in principle I cannot think the affidavit apart from some such contingencies can be properly admitted.

I do not think the part of the formal judgment directing a trial anew necessary or even expedient, if respondent is willing to strike out the excessive expert testimony and rest the case there. In such event there should be no such order touching costs as the judgment directs.

I think the appeal should be dismissed and the form of order adopted by the Court above in the *Cedars Rapids* case, 16 D.L.R. 168, [1914] A.C. 569, in regard to costs throughout, and otherwise should be adopted.

Anglin, J.

ANGLIN, J.:—I agree with the view of the Appellate Division of the Supreme Court of Alberta, stated by Scott, J., that the provisions of sec. 10 of the Alberta Evidence Act were violated on the arbitration under review. It may be that sec. 106 of the Alberta Railway Act authorizes arbitrators themselves to call expert witnesses in addition to the number allowed by the Evidence Act to be "called upon either side." That case is not before us and I express no opinion upon it.

Likewise it may be open to the parties themselves to give in evidence the opinions of three witnesses on each issue in an action

or arbitration which admits of such testimony being adduced. That question also is not before us and I express no opinion upon it.

While the meaning of sec. 100 (2) of the Alberta Railway Act is quite uncertain, and clarifying legislation would seem to be greatly needed, I think that under the circumstances of this case there was no error in fixing the date as of which compensation should be ascertained.

The arbitration here in question was held under the provincial Railway Act. Sec. 17 of the provincial Arbitration Act is invoked by the respondent as a provision making the various sections of that statute applicable to any arbitration directed by any Act or Ordinance of the province. But the limitative words "as provided by this Act," found in sec. 17, indicate that its effect is much more restricted. One of the provisions of the Arbitration Act is that "In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire (sec. 11). If this section were applicable, this case would be clearly distinguishable from *Canadian Northern Ontario R. Co.* v. *Holditch*, 20 D.L.R. 557; 50 Can. S.C.R. 265, in which the arbitration dealt with took place under the Dominion Railway Act.

I understand a majority of the Court is of the opinion that the order referring the award back to the arbitrators was properly made. I incline to the contrary opinion.

BRODEUR, J.:—The question on the main appeal is whether the Appellate Division of the Supreme Court of Alberta had the power, under the provisions of the Railway Act of that province, to direct a reference back to the board of arbitrators to determine anew the compensation. Brodeur, J.

By sec. 114 of the Railway Act of 1907, of Alberta, ch. 8, it is stated that

> Whenever the award exceeds $600, any party to the arbitration may within one month . . . of the making of the award appeal therefrom upon any question of law or fact to the court.
>
> (3) The right of appeal hereby given shall not affect the existing law or practice in the province as to setting aside awards.

It is submitted on the part of the respondent that the provisions of the Arbitration Act of that province (ch. 6, of 1909) apply to arbitration proceedings under the Railway Act, so long as they

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are not absolutely inconsistent with its provisions, and he relies on sec. 2 and sec. 17 of the Arbitration Act.

Sec. 2 defines a submission as meaning a written agreement to submit differences to arbitration. (See also sec. 17.)

The Railway Act determines how the arbitrators are to be appointed and regulates to a certain extent their proceedings. But I cannot agree with the appellants when they claim that the provisions as to arbitration in the Railway Act are self-contained and constitute a complete code of provisions for the expropriation of land. Of course, in cases where the provisions of the Railway Act and of the Arbitration Act are inconsistent the Railway Act should prevail; but in virtue of sec. 17 of the Arbitration Act, it seems to me that where there are no provisions in the Railway Act as to procedure or as to the power of the Court then that procedure and those powers should be determined by the Arbitration Act.

Now, by the Arbitration Act, it is stated that in all cases of reference to arbitration the Court may remit the matter referred to the reconsideration of the arbitrators (sec. 11). In the case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, the Privy Council, in setting aside an award, ordered that the matter should be remitted to the arbitrators.

In the latter case the proceedings were instituted under the Dominion Railway Act in which we find provisions which might lead us to conclude that the arbitrators were *functi officio*. Those restrictions are not to be found in the Railway Act of Alberta.

It seems to me in these circumstances that the Court below had the power to send back the matter referred to be determined anew by the arbitrators. The respondent has made a cross-appeal and claims that the reasons given by the Court below for setting aside the award should not be accepted. The grounds upon which the Court below set aside the award are that evidence was admitted which should have been rejected and that proper evidence was not admitted.

There is no doubt, in my opinion, that the Alberta Evidence Act applies to proceedings before arbitrators; sec. 2, sub-sec. 1. By the provisions of sec. 10 of that Act it is declared that the number of expert witnesses should not exceed three. The arbitrators in this case, however, have allowed a larger number of

expert witnesses than the law permits to be examined. It was one of the grounds on which the Court below found that the award should be set aside. I do not see any valid reason why this opinion should not stand.

It is not necessary for me then to examine the other question which was raised as to whether some evidence had been improperly excluded.

For these reasons the appeal and the cross-appeal should both be dismissed with costs. *Appeals dismissed.*

MONCUR v. IDEAL MANUFACTURING CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ. June 9, 1916.

1. CORPORATIONS AND COMPANIES (§ VI D—335)—ACTION FOR FRAUD—POWERS OF LIQUIDATOR.
A right of action for fraud practised upon individual shareholders, to induce them to take shares, must be asserted by them individually, not by the liquidator of the corporation.

2. CORPORATIONS AND COMPANIES (§ IV F—101)—LIABILITY FOR DECEIT.
A corporation may, in its corporate character, be called on to answer in an action for deceit.

3. CONTRACTS (§ V C 2—397) RESCISSION—RESTITUTIO IN INTEGRUM.
Rescission of a contract cannot be had where there can be no *restitutio in integrum*.

Statement.

APPEAL by plaintiff from the judgment of MIDDLETON, J. dismissing the action. Affirmed.

C. W. Bell and *T. B. McQuesten*, for appellant.

M. J. O'Reilly, K.C., for respondents.

Riddell, J.

RIDDELL, J.:—In 1913 and prior thereto, the defendants were conducting a manufacturing business in Hamilton. One William Alexander Welsh, who is said to have been the proprietor of an employment bureau, was ambitious to become a promoter, and procured from the defendants, on the 13th August, 1913, an option on their property, land, buildings, etc., for $25,000. Apparently he then had in view a project of obtaining English money for the scheme. He had a company incorporated, on the 6th September, 1913, under the name of "The Nagrella Manufacturing Company Limited," "to manufacture and deal in safes, cash registers, kitchen cabinets, and other domestic articles and specialties." It is quite clear from all the facts that it was the purpose and intention to acquire the defendants' business. The capital stock was $2,500 shares of $100 each.

On the 12th September, Welsh obtained from the defendants

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an option for $5,000 upon certain patent rights. On the same day, an organisation meeting of the company (Welsh and four associates) was held, and by-laws adopted, amongst them one making 1,125 of the shares preferred stock.

The new company then (the 19th September, 1913) took an assignment of Welsh's options, giving therefor the 1,375 shares of stock which remained common stock.

Welsh, still president of the company, on the 18th October, 1913, caused a prospectus to be filed in the office of the Provincial Secretary (sec. 101 of the Ontario Companies Act, R.S.O. 1914, ch. 178), and proceeded to sell some of his shares.

On the 26th August, he had procured letters from Fletcher, the president and general manager of the defendants, and Main, their auditor, which contained statements concerning the business of the defendants that were misleading. It requires a great stretch of charity to acquit Main of wrongdoing; and no charity can, I think, acquit Fletcher. These letters were incorporated by Welsh in the prospectus filed. He sent copies of the prospectus to some persons and shewed it to others.

By means of this prospectus and the glowing letters of Fletcher and Main contained therein, Welsh was able to sell shares to Bruce Murdock in November, James Murdock in November, 1913, and February, 1914, and to E. W. Nichol and Albert E. Petty in November, 1913.

The Nagrella Manufacturing Company failed, and a winding-up order was made. The plaintiff, as liquidator of the company, sues the defendants substantially for rescission of the contracts entered into in pursuance of the acceptance of the options, and for general relief.

Rescission is impossible, as there can be no *restitutio in integrum;* and the only question now open is as to damages for fraud—in other words, does a common law action lie here for deceit?

Assuming that the defendants would be liable for the fraud of their agent Fletcher, the fraud, so far as the evidence goes, was practised on the persons already named as purchasing stock from Welsh; and the learned trial Judge has reached the proper conclusion when he says: "The fraud was practised upon the individual shareholders who purchased from Welsh, and their right of action has to be asserted by them individually."

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So far as the Nagrella Manufacturing Company is concerned, I can find no evidence that it was misled or that Welsh was misled. If it had been so, there would have been no difficulty in proving it; but Welsh was not called nor any of his associates; no one connected with the company gives evidence.

It seems to me clear "that the statements made by Mr. Fletcher and the letter given by Main were intended by Mr. Fletcher to induce subscribers to take stock in the Nagrella Manufacturing Company," and that "neither Welsh nor the company was, so far as shewn, the victim of any fraud," as the learned Judge finds. I would dismiss the appeal on that short ground.

Had it been otherwise, I cannot agree that the law is as seemed to be contended: i.e., that "an incorporated company cannot in its corporate character be called on to answer in an action for deceit." This supposed proposition of law rests upon a dictum of Lord Cranworth's in *Western Bank of Scotland* v. *Addie*, L.R. 1 H.L. Sc. 145, at pp. 166, 167, partially but guardedly supported by Lord Chelmsford in the same case. This quite overlooked the case of *Denton* v. *Great Northern R.W. Co.* (1856), 5 E. & B. 860, and cannot be considered law in the light of such cases as *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259 (*Cam. Scacc.*); *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; *Swire* v. *Francis* (1877), 3 App. Cas. 106; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; *S. Pearson & Son Limited* v. *Dublin Corporation*, [1907] A.C. 351; *cf.* Bowstead on Agency, 5th ed., pp. 353, 354; Halsbury's Laws of England, vol. 1, p. 214, para. 454; Pollock on Torts, 9th ed., pp. 305, 314, 315.

The learned Judge has indeed said: "Though Fletcher and the Ideal Manufacturing Company are in many respects identical, yet in law they are separate, and nothing was shewn to make the company answerable for his deceit." But the learned Judge had given the true ground for refusing relief, in the preceding paragraph, where he said that "neither Welsh nor the company was . . . the victim of any fraud."

LENNOX, J., concurred. Lennox, J.

MASTEN, J.:—I have had the opportunity of perusing the judgment of my brother Riddell, and I concur in the result at Masten, J.

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which he has arrived, and have nothing to add except that I would base my judgment exclusively on the conclusion of the trial Judge that "the fraud was practised upon the individual shareholders who purchased from Welsh, and their right of action has to be asserted by them individually," and on the conclusion of my brother Riddell that "so far as the Nagrella Manufacturing Company is concerned, I can find no evidence that it was misled or that Welsh was misled."

With respect to the further proposition that "an incorporated company cannot in its corporate character be called on to answer in an action for deceit," I would desire to consider the cases very carefully for fear of stating the proposition too broadly.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (dissenting):—All persons concerned in the trial of this action seem to have been under the erroneous impression that the law in regard to fraud of incorporated companies is as in the dicta of the two law Lords who considered the case of *Western Bank of Scotland* v. *Addie*, L.R. 1 H.L. Sc. 145, it was said to be: and accordingly it was held that the plaintiff cannot have damages from the defendants for the deceit which it was found their servants had practised upon the company now represented by the plaintiff; and that he could not have the transaction in question set aside, on account of such fraud, because unable to make that which is called *restitutio in integrum*.

The oversight of the fact that the law is not as so expressed, and that any effect of such dicta has long been swept away by authoritative decision, plainly makes the judgment in question unsustainable: the well-established rule of law now being: that "with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business . . . no sensible distinction can be drawn between the case of fraud and the case of any other wrong:" *Hern* v. *Nichols* (1708), 1 Salk. 289; *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, 265; and *S. Pearson & Son Limited* v. *Dublin Corporation*, [1907] A.C. 351, 358.

That being so, the plaintiff should now have judgment against the defendants in such manner as may be best fitted to give relief from the loss which the company he represents sustained by the alleged fraud, if the findings of the trial Judge, as to such fraud, can be supported; and there is no difficulty in supporting them:

that the company represented by the plaintiff in this action was induced to buy by fraud is well proved; and the defendants, having taken advantage of that fraud to effect the sale, cannot avoid the effect of it as fraud.

The best means of now doing justice between the parties is, in my opinion, by a reference to the proper local officer to ascertain and state what damages, if any, the company represented by the plaintiff sustained by reason of the deceit alleged in the pleadings; with a direction that judgment be entered up in accordance with the findings upon such reference, forthwith after the confirmation of the report thereupon; costs of the action and reference to follow the event, subject to any of the Rules of Court that may be applicable to the case, but without costs of this appeal: so I would allow the appeal and let judgment go as indicated: but, my learned brothers being of an opposite opinion, the appeal is dismissed with costs.

The suggestion now made, and to which effect is now to be given in this Court: that the fraud of the defendants was practised upon those who became shareholders of the Nagrella Manufacturing Company, and not upon the company itself, has no weight in my mind—indeed it seems to me to be self-contradictory. What purpose could the defendants, or their officers, have in deluding such persons only? In order to accomplish the object of their deceit, it was necessary first to deceive the new company, and "unload" upon it their unprofitable and "hopeless" property and business; that being accomplished, it may, or may not, have been necessary for them, in order to ensure payment of the purchase-money of their fraudulent sale, to delude, or aid in deluding, persons to buy stock in the new company, but they had no other object in those fraudulent transactions.

It is quite immaterial whether Welsh was or was not a party to the fraud by which the new company was induced to buy its own insolvency, which was, and ought to have remained, the insolvency of the defendants. If the defendants made use of him, for a price, that but adds to their dishonest and disgraceful conduct; it does not make the new company itself any less innocent or less imposed on by the defendants—it but intensifies that imposition. Whilst, if Welsh were also imposed upon, the deceit of the defendants was only that much further-reaching.

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Whether shareholders who were deluded by Fletcher's conduct, deluded into purchasing their shares in the new company, may have an action against him or against the defendants, is quite another question, and one which cannot properly be considered in this action: whether they have, or not, cannot affect the plaintiff's rights, whatever they may be. And there may be shareholders who did not buy their shares upon any misstatements of any one, who are injuriously affected only through the fraud practised upon the new company.

Unless it can be found that the new company itself was a party to the gross fraud that was practised upon it, the plaintiff must succeed in this action. It would be absurd to say that of it; to say other than that it bought in good faith, relying upon the written statements of the defendants' president and auditor, false statements made for the purpose of foisting upon the new company a business that was unprofitable and had already led to insolvency, and false statements which primarily were intended to lead and led to the purchase, innocently by the new company, of that business; and secondarily may have been intended to lead and may have led to the raising of the money by which part, at all events, of the price of it was paid.

But, if circumstantial evidence will not do, if the oath of some one, to the very fact, be desired, why dismiss the action, and perpetuate a wrong, or, if preferred, a possible wrong? Why not let the reference go, for upon it no damages can be assessed which are not there proved to have resulted from the fraud of the defendants practised upon the new company?

Appeal dismissed; MEREDITH, C.J.C.P., *dissenting.*

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EVANS v. FARAH.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox, and Masten, JJ. April 28, 1916.

DAMAGES (§ III A 3—62*a*) EXPENSES OF RESALE OF LAND.

Where vendor and purchaser of property have come to an agreement that the vendor shall re-sell the property on the purchaser's account, the rights of the parties to be adjusted on the basis of the first agreement, the vendor is entitled upon such re-sale, in addition to his loss in price, to claim the expenses of the re-sale, insurance, tax and mortgage interest adjustments, and a proper allowance for interim interest on the unpaid purchase money over the amount of the mortgages.

Statement.

APPEAL from the judgment of Clute, J. in an action by a vendor against the purchaser to recover the amount of loss by

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reason of the defendant having declined to complete his purchase. Affirmed.

The judgment appealed from is as follows:—

Action to recover $1,497.03, balance due upon a resale of certain property sold by the plaintiff to the defendant for $30,000, and which the defendant, having paid $2,000 deposit, refused to take; and the property was thereupon resold at $28,000. The agreement is in the form of an offer by the defendant, dated the 4th June, 1915, to purchase the premises on the north side of Binscarth road, Toronto, street number 70, including the household furniture, for $30,000, $2,000 in cash, $12,800 on the 15th July, 1915, and the balance of $15,200 by assuming a mortgage thereon. The offer further states that the title is to be good and free from incumbrance, except local improvement rates and the restrictions that run with the land.

This offer was accepted by the plaintiff on the 5th June. The plaintiff was ready to complete the sale on the 15th July, but the defendant was not ready, and asked further time, which was extended from time to time until the following September, when the defendant finally refused to carry out the purchase, alleging at the time that his wife was not pleased with the house. He now complains that there are restrictions on the lot which prevent the erection of an apartment house, and he further alleges that he was told that if the title was not good there would be no sale, and he relies upon these restrictions as shewing that the title was not what he bargained for.

I find as a fact that the defendant was expressly informed that there were restrictions and that they were of a beneficial kind, namely, to prevent the property in that neighbourhood from being built upon for manufactories or apartment houses, etc., and that he made no objection, but recognised the restrictions as favourable to the property for residential purposes. The restriction in question is imposed by a city by-law. I find that there was no objection to the title; and, had the plaintiff seen fit, he was entitled to enforce specific performance of the agreement. The plaintiff, however, after informing the defendant, took proceedings to resell the property, which he did for $28,000. This resulted in a loss, as claimed by the plaintiff, after giving credit for the $2,000, of $1,497.03.

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The defendant now takes the position, in addition to the above objections as to restrictions, that the plaintiff cancelled the contract and sold the property as his own, and that, while he is entitled to retain the $2,000 deposit, he is not entitled to claim under the contract, which was put an end to by his own rescission, and he relies upon a statement of the law as laid down in Halsbury's Laws of England, vol. 25, pp. 397, 398, para. 680, where it is said that if the vendor, acting within his rights, rescinds the contract, he may resell the property as owner and retain any excess of price obtained on such resale beyond that fixed by the contract; but he cannot recover damages, nor, if the purchaser has been in possession, occupation rent.

I find that the contract was not in fact rescinded; that the plaintiff did not sell the premises as his own; but that, having a lien upon the property for the unpaid purchase-money, he sold the same, realising what he could out of the property; and, not having realised sufficient after applying the $2,000 to reimburse him for the defendant's breach of contract in not carrying out the sale, he had a right to sue the defendant for such breach of contract and to recover such damages as would arise naturally from the breach. This principle is applicable in the case of a sale of land where the contract is broken by the purchaser: Halsbury's Laws of England, vol. 25, p. 409, para. 703; *Laird* v. *Pim* (1841), 7 M. & W. 474.

On a resale at a lower price, he can recover the difference in price and the expenses of the resale: *Noble* v. *Edwardes* (1877), 5 Ch.D. 378, where Bacon, V.-C., held that the vendor had a right to resell the estate and claim the difference by way of damages, there being no distinction in this respect between a sale of chattels and of land. This decision has been recognised as good law in the text-books: Dart on Vendors and Purchasers, 6th ed., p. 185; 7th ed., p. 179. In the last edition of Dart reference is made to an article in 43 Solicitors' Journal, p. 601, where doubt is thrown upon the right of a vendor to resell in such a case. Closing the article, the learned writer says (p. 602): "If resale by a vendor of lands on the purchaser's default be unlawful without the authority of the Court, it is questionable whether the vendor would be entitled to recoup himself the expenses of resale out of the proceeds thereof."

The *Noble* case has not, so far as I am aware, been overruled. It commends itself to me as sound in principle, and I think I am bound by it. See also Davidson's Precedents, 4th ed., vol. 1, pp. 568-570; 5th ed., p. 476.

There is, in addition to the naked right of the plaintiff, strong evidence of acquiescence on the part of the defendant, but I prefer to rest my decision upon the ground first indicated.

A further objection was made that the property was not sufficiently advertised on the resale. Having regard to the fact that the property was in the market for over a year prior to the sale to the defendant and was fully advertised, I think the plaintiff pursued the proper course in again placing the property in the hands of the same agents who formerly sold it. They had already advertised the place very fully and were in touch with possible purchasers; and, it being proven that they were competent and reliable agents, it was reasonable to leave the course to be pursued to them; and I find that they pursued a reasonable course in the resale. The defendant in fact blamed the agents for putting so high a price upon it, $30,000, as they might not be able to get a purchaser at that price; a sale at $28,000, having regard to the depression and the fact that property was almost unsaleable, was a reasonable and fair price, and I do not think the plaintiff would have been justified in refusing, through his agents, this offer. I fully accept the evidence given by the agents, Robins & Burden, as against that of the defendant, and I think the course pursued by these agents is supported by the evidence of Mr. Smith, a witness produced by the defendant, and I find that the sale was sufficiently advertised, properly conducted, and a reasonable price obtained.

But it is said that in any event the plaintiff is not entitled to recover more than $700, being the amount of the commission; that all charges for interest and insurance and the proportion of municipal taxes should be disallowed. I am not of this opinion. There having been a breach of the contract, the plaintiff is entitled to be placed as nearly as may be in the position in which he would have been had there been no breach. Had the agreement been carried out on the 15th July, the interest upon the mortgages against the property would have been borne by the purchaser, or rather, paid out of the purchase-money or assumed by the

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purchaser, and so of the insurance and proportion of the taxes. It was agreed that the solicitor's fees should be agreed to and fixed at $75, and it was further agreed that, if the plaintiff was entitled to recover for interest and insurance charges, the amounts charged were correct.

I find that he is so entitled to recover, and judgment should therefore be entered for the plaintiff for $1,497.03.

The plaintiff is entitled to the costs of the action.

G. H. Sedgewick, for appellant.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—It is not necessary to consider in this case the broad question of the remedies of a seller of land against his purchaser, who breaks his contract to purchase; because the parties themselves came to an agreement respecting them when it was made plain that the purchaser could not pay the price of, and take, his purchase; and that agreement in effect was that the land should be sold again by the seller, but on the purchaser's account, and that, after the completion of that sale, the rights of the parties, to the first sale, should be adjusted on the basis of the first agreement, that is, as if that sale had been completed and the second sale had been made by the first, to the second purchaser.

The second sale was made accordingly, with the first purchaser's assent—indeed, it is said, at his request; and the damages which have been awarded to the plaintiff are just the sum coming to the plaintiff upon such an adjustment as was so agreed upon, though not computed by the trial Judge just upon such a basis.

The only item about which there could be any reasonable controversy, in any case, is the interest allowed for non-payment of the purchase-money over and above the amount of the mortgages; but, as the seller cleared the property sold of tenants and held it ready for the purchaser from the day he was to have had possession until the second sale, the vendor is entitled to such interest: in that item and in the other items comprised in the damages awarded, the plaintiff gets no more nor any less than would have been his if the first agreement had been carried out; and that was, as I have said, the intention of the parties in all that was done between the abortive and the concluded sales.

Appeal dismissed with costs.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. October 11, 1916.

SPECIFIC PERFORMANCE (§ I A—3)—EXCHANGE OF LANDS—INDEFINITENESS.

Specific performance will not be decreed of an agreement containing terms that are vague or uncertain, such as "to give back an agreement on the land" in part payment.

Statement.

APPEAL by defendant from the judgment of the Court of King's Bench in an action for specific performance. Reversed.

W. L. McLaws and *J. T. Beaubien*, for appellant.

S. R. Laidlaw, and *L. F. Earl*, for respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—It seems to me that the agreement, although very badly drawn up, can readily be construed to be a transfer or exchange of land. The plaintiff by its terms is to give to the defendant the farm, for which the defendant is to give the three city lots. The latter are encumbered by a mortgage for $1,000, which the plaintiff is to assume. On the valuations made in the agreement there will be a balance due plaintiff of $700, and this sum is to be charged on the farm in favour of the plaintiff, payable $100, on October 1, 1919, and balance of $600, on October 1, 1920, with interest at 8%. The interest is, apparently, to be paid annually.

The provision as to adjustment of taxes, insurance, rents and interest can readily be made, and because of the reference to "interest" I would construe the contract to be that the defendant is to provide for all interest on the $1,000 mortgage, to date of agreement, and I would hold that this clause means that any balance due on these charges is to be paid by the party against whom the balance has been found, and this payment should be so ordered.

If this sum cannot be agreed upon, there should be a reference to settle it. If the parties or either of them do not accept the title, there should also be a reference as to title.

The titles being found good, each should be ordered to convey to the other, the defendant at the same time executing a charge or mortgage on the farm to the plaintiffs, securing $700, payable as above stated.

If by any chance either party cannot make title through no fault of his own, so that the rule of *Bain* v. *Fothergill*, L.R. 7 H.L. 158, applies, then no decree should be made; but the party so defaulting must pay the costs of suit.

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Further directions and costs have, by the Judge, been reserved, and, I think, very properly. Very likely on further directions the Judge will saddle the party who causes the reference with the chief costs of the reference.

I think the decree as entered is not in proper form, and should be redrawn on the lines above indicated.

There should be no costs of this appeal.

Cameron, J.A.

CAMERON, J.A., agreed.

Richards, J.A.

RICHARDS, J.A.:—I agree with the view expressed by Perdue, J.A., that the contract in this case is too indefinite to be enforced in an action for specific performance. I also agree with Haggart, J.A., that, on the evidence, apart from the vagueness of the contract, the plaintiffs have failed to make a case for the relief sought.

I would allow the appeal with costs, set aside the judgment entered in the Court of King's Bench, and enter judgment there for the defendant with costs.

Perdue, J.A.

PERDUE, J.A.:—The plaintiffs, Campbell and Schadek, are real estate brokers, and the defendant is a foreign labourer who cannot speak or read English. The agreement sought to be enforced is dated June 17, 1915, and purports to provide for an exchange of properties between the parties, the plaintiffs giving a farm of 160 acres and the defendant giving 3 lots and a house in Winnipeg. Schadek, one of the plaintiffs, is a German who speaks Polish, which appears to be the language of the defendant. One Boreski, who calls himself a real estate agent and who speaks Polish, approached the defendant with the proposition to make the exchange. The defendant saw Schadek and certain negotiations took place. The plaintiffs and Boreski claim that the interviews between the parties extended over a period of time from May 28 to June 17, 1915. They say the agreement was prepared by Campbell, that it was interpreted and explained to the defendant and that he signed it after it had been so interpreted and exp ained. The defendant states that he did not know that he was signing an agreement, that he asked for a description of the land so that he could go and examine it before making the exchange. He says something was written by Campbell and he was asked to sign it. He further states that he was told by Schadek and Boreski that if he did not like the farm when he saw it, the paper

would be torn up. He then signed it. He found out on the same evening that he had signed an agreement. Next day he saw Schadek and, as he says, repudiated the transaction.

The evidence of the parties is very conflicting. The story relied on by the plaintiffs that the negotiations extended over a period of 2 or 3 weeks, giving the defendant ample opportunity to make enquiries and examine the farm—is clearly proved to be untrue. Boreski came in touch with the plaintiffs by reading an advertisement in a newspaper which was first inserted on June 12, 1915. I think it is clear that defendant had not any opportunity of seeing, and did not see the land before the agreement was signed.

Both the plaintiffs and Boreski (who is claiming a commission from defendant) are interested witnesses. One Manichuk states that at a time which he places as about the last of June, he met the defendant at the plaintiffs' office and defendant said: "I am making a deal. I give my city property for a farm. I have seen the farm, it will be all right." This is denied by defendant. I do not consider Manichuk's evidence of importance. The statement, if made by defendant, must have been made during the negotiations. No doubt he was treating with plaintiffs in regard to an exchange of his property for a farm if he was satisfied with the land offered. From the statements of Schadek and Boreski as to the interviews that took place with defendant on different days before the execution of the agreement, it is impossible that defendant could have visited and examined the farm between June 12 and 17, the latter being the date on which the agreement was signed.

A careful examination of the evidence leaves upon my mind the impression that the defendant was entrapped into signing an improvident agreement before he had an opportunity of examining the land. It is suspicious that Schadek refused to put a value on the land. He said he did not know its value. "Couldn't say—may be a cent, may be $100," is his answer to the question, "What do you believe it was worth?" Yet in the agreement the price is put at $6,000, and the defendant is induced to give in exchange his house and three lots on Magnus St., Winnipeg, and $700 to boot.

But apart altogether from the facts stated in evidence, there is the question whether the agreement in question is capable of

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specific performance. So much turns upon the form of the agreement that it is necessary to set out the important parts of it. The plaintiffs are the parties of the first part and are called the vendors. The defendant is the party of the second part and is called the purchaser. The consideration is expressed to be $1. The main parts of the agreement are as follows:—

The parties of the first part agree to sell and exchange to the party of the second part the following property:—

The north-west quarter of section 30, township 8, range 16, west of the first meridian, with all buildings and improvements which are on same subject to lease which is now against the said property and which the said party of the second part agrees to take over and assume, for the price and sum of $5,700 and agrees to take as cash payment on same the following property:—lot 232, 233, and 234, which lot is shewn on a plan of survey as part of lot 38 Parish of St. John and registered in the Wpg. Land Titles Office as plan number 53 for the price and sum of $6,000, subject to a mortgage of $1,000 which the said parties of the first part agrees to assume and pay and the difference of $700 which is coming to the parties of the first part the said party of the second part agrees to give on same an agreement on the farm for the said amount of $700 to be payable as follows:—Interest at 8% first interest payable October 1, 1918. $100 and interest October 1, 1919, and the balance on October 1, 1920.

The said party of the second part agrees to purchase from the parties of the first part that herein and before mentioned farm for the price and sum herein and before set forth, and agrees to give as cash payment the herein and before mentioned Winnipeg property, subject to the mortgage herein and before set forth and the difference that will be coming to the parties of the first part the said party of the second part agrees to give back an agreement on the farm as herein and before set forth and agrees to assume and faithfully fulfil.

It will be observed that the agreement is for an exchange of properties, the farm being valued at $5,700 and the Winnipeg lots at $5,000, the latter being taken as a cash payment on the price of the farm, leaving a balance on the exchange of $700 in favour of the plaintiffs. This balance is intended to be dealt with by the provision, "and the difference of $700 which is coming to the parties of the first part the said party of the second part agrees to give on same an agreement on the farm for the said amount of $700 to be payable as follows." In the next clause, the defendant, after agreeing to purchase the farm on the foregoing terms, agrees "*to give back an agreement back* on the farm as herein and before set forth and to assume and faithfully fulfil."

There is no provision as to any conveyance of the farm land to the defendant. "To give an agreement back on the farm" must mean that the $700 is to be secured by some form of charge

or lien upon it, not specified, to be given when the purchaser obtains a conveyance of the farm or concurrently therewith. If it means simply that the defendant agrees to pay the money and interest at the time set out, why did not the executed contract so say and provide that he should receive his conveyance when all the money had been paid?

The meaning placed by the trial Judge upon the above provision is set out in par. 6 of the judgment. That paragraph directs that plaintiffs and defendant "join in an agreement for sale converting the following lands (describing the farm land), providing for the payment of $700 or for such sum as shall be found due to the plaintiffs on said reference and upon the terms provided in said agreement in the Statement of Claim mentioned." Then the terms as to how the $700 is to be paid are repeated from the first agreement with something additional which is not on the first agreement, namely, that the interest is to run from June 17, 1915, and that the interest at 8% is to be paid on the amount remaining unpaid from time to time whether before or after the same becomes due. The trial Judge directs the parties to join in an agreement for sale "covering" the farm land. He does not say who is to be vendor and who purchaser. It is to be an agreement "providing for the payment to the plaintiffs of $700, or for such sum as shall be found due," etc. It says nothing about the nature of the sale and nothing about a conveyance. The trial Judge construes the meaning of the expression "an agreement on the farm" as meaning an agreement of sale for $700 or such amount as shall on the reference be found due from defendant to plaintiffs. Assuming that the agreement of sale in which the parties are to join under clause 6 of the judgment means a sale from plaintiffs to defendant, then they are ordered by that clause to make an agreement quite at variance with the first agreement. The purchase price in the first is $5,700, in the second $700. But the language used in the written document shews that the "agreement" is something to be given back by the defendant "on the farm," and its object clearly is to secure the $700. The document to be given cannot be an agreement of sale as the trial Judge has construed it. If such a meaning could be taken from the expressions used, the plaintiffs would be met with the objection that there is a further agreement of sale to be executed containing the terms, or some of the terms, of the sale

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or exchange of the farm which had not been included in the first agreement.

It is suggested that the agreement to be given by the defendant means an agreement for sale of the farm by the plaintiffs to the defendant for $5,700, upon which $5,000 has been paid, the balance of $700 to be paid by the defendant in the manner mentioned. If this was the meaning why was it not so expressed in the first agreement. Why should the parties provide for the making of a further agreement in order to express the manner in which the balance of purchase money should be paid, when this could have been done in the first agreement by the use of a few words? Plainly something else was intended. If the purpose of the clause was that the defendant should execute an agreement of sale on one of the printed forms that are so common in real estate dealers' offices, containing numerous covenants and conditions and elaborate provisions for cancellation on default, and forfeiture of payments made, and other well known clauses, then the agreement, specific performance of which is asked, is, as to essential parts, an agreement to enter into an agreement, and does not contain al the terms of the contract. Whatever view we may take of the meaning of the clause, it is open to that objection. If the intention was that a charge on the land should be created, the agreement is silent as to the nature of the charge intended, the covenant or covenants to be entered into and other necessary terms. If the intention is that a further agreement should be made providing some of the terms of the sale or exchange of the farm which had not been included in the first agreement, then the latter is an agreement to enter into an agreement. The terms of the second contract so far as they are disclosed are contradictory of the first. If no new terms are to be introduced by the agreement yet to be signed and if they are all contained in the first agreement there was no object in providing that a second agreement should be made.

Where two persons agreed in writing upon all the terms of a contract, except one which was to be made the subject of future consideration between the parties, this was regarded by Sir John Romilly as a contract to enter into a contract and he therefore refused specific performance: *Honeyman* v. *Marryat*, 21 Beav. 14; *Ridgway* v. *Wharton*, 6 H.L.C. 238, 305. I would also refer to

the judgment of Jessel, M.R., in *Winn* v. *Bull*, 7 Ch.D. 29; and to *Stowe* v. *Currie*, 21 O.L.R. 486. See also *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 638; *Rossiter* v. *Miller*, 3 App. Cas. 1124, 1151.

If by the expression "to give an agreement back on the farm" it was intended that a mortgage should be given by the defendant, it would have been so expressed in the written document. Campbell, a real estate dealer, would have used the word "mortgage" in drawing up the document, if that was what he meant. He would not call a mortgage an agreement on the land. In the letter of June 28, 1915, written by plaintiffs' solicitors to defendant, they speak of the document to be signed as "an agreement back on the land," not as a mortgage or charge. I think it is impossible to determine what was really intended by the expression. There is no evidence which lends assistance. The Court cannot order the specific performance of terms that are so vague and uncertain.

The necessity for certainty in the terms of the contract specific performance of which is sought to be enforced by suit, is obvious and is established by authority. "In proceedings for specific performance it must appear not only that the contract has not been performed but what is the contract which is to be performed:" Fry, 5th ed., 189. In *Callaghan* v. *Callaghan*, 8 Cl. & Fin. 374, an agreement had been drawn up and signed by the parties, but a memorandum was added, bearing the same date and also signed, which was inconsistent with the agreement. It was held that the uncertainty introduced by the memorandum precluded specific performance of the agreement. *Douglas* v. *Baynes*, [1908], A.C. 477, was a case where a contract had been made for the transfer of a farm on which deposits of tin ore had been found, in consideration of 3,500 shares of one pound each in a syndicate for the purpose of developing the same, the shares to represent the vendor's interest in a syndicate of 12,000 shares, specific performance at the suit of the purchaser was refused on the ground of uncertainty of the price. I would also refer to *Tait* v. *Calloway*, 2 Man. L.R. 289, and *Bell* v. *Northwood*, 3 Man. L.R. 514, upon the question of uncertainty in the agreement as a ground for refusing specific performance.

The agreement to be signed under clause 6 of the judgment is not only indefinite and uncertain as to its terms, but no pro-

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vision is made for enforcing it, when it shall have been executed, and it might become necessary to bring a fresh suit for the specific performance of it. It is doubtful whether the agreement ordered by the judgment to be signed could be enforced. If there was a contract between the parties that could be enforced and was a proper one to enforce, it should have been directed to be performed in its entirety. Instead of that a piecemeal performance of the contract has been ordered. This is not authorized by authority. In *Merchants Trading Co.* v. *Banner*, L.R. 12 Eq. 18, Lord Romilly, M.R., said, at p. 23: "This Court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all." So also in *South Wales Ry. Co.* v. *Wythes*, 1 K. & J. 186, affirmed, 5 DeG. M. & G. 880, part of the contract was to give a bond to secure its performance. Sir W. Page Wood refused to direct the bond to be executed on the ground that it would be a piecemeal performance of the contract. He doubted whether there was authority to make an order to execute the bond.

In the present case the judgment enforces a part of the original agreement and directs the remainder to be covered by an agreement. This agreement is to be drawn up and executed pursuant to the meagre and uncertain direction as to its contents. There is no stipulation for a conveyance to the defendant or as to the time when he shall receive it. The judgment on the other hand orders the defendant to convey his lands and premises forthwith to the plaintiffs with full directions as to the conveyance.

I do not think that the Court has power to compel the parties to enter into the agreement mentioned in the sixth clause of the judgment. There is no authority for making such an order. Cases have occurred where the Court has specifically enforced a contract to execute such an instrument as a mortgage to secure money that had been advanced: *Ashton* v. *Corrigan*, L.R. 13 Eq. 76; *Herman* v. *Hodges*, L.R. 16 Eq. 18. In these cases the terms of the mortgage could be ascertained from the contract and settled. A mortgage is of much the same nature as a deed of conveyance the execution of which may be ordered. But where the contract is "that a party agrees to give back an agreement back on the farm for the said amount of $700" the meaning is so uncertain that the Court, in the total absence of anything to explain it, cannot order specific performance.

I think the appeal should be allowed with costs and the action be dismissed with costs.

HAGGART, J.A.:—In addition to the reasons given by Perdue, J.A., for reversing the verdict of the trial Judge, I would observe that the formal judgment as it is entered could not stand. It could not be justified without the plaintiff asking for, and establishing a case for the reformation of the writing set out in the statement of claim. Its language is loose and vague. In order to enable the Court to give relief on a contract the statements must be clear and absolute. The degree of certainty required in proceedings for specific performance of a contract has been the subject of discussion in the text books and many authorities.

In our own Court in *Tait* v. *Calloway*, 2 Man. L.R. 289, Wallbridge, C.J., in delivering the judgment of the Court, held that the certainty required in proceedings for specific performance is greater than in an action for damages, that specific performance is an appeal to the discretion of the Court and uncertainty itself is a good answer for relief. See Fry on Specific Performance, p. 189, 5th ed.; *Fowler* v. *Russell*, 12 O.R. 136; *Ledyard* v. *McLean*, 10 Gr. 139; *McLaughlin* v. *Whiteside*, 7 Gr. 573; *Marsh* v. *Mulligan*, 3 Jur. N.S. 979; *Gough* v. *Bench*, 6 O.R. 699.

Aside, however, from the foregoing question, it appears to me that the trial Judge did not fully appreciate the serious nature of the reckless statements made by John Boreski, one of the plaintiff's witnesses. It was contended that Boreski brought the parties together and in the transaction acted as agent for the defendant. I do not think the question of agency arises. Boreski was working for himself, was earning a commission, or trying to earn a commission, and I believe there is now a suit pending to recover it. His interest in establishing the sale is the same as that of the plaintiffs who want the agreement specifically performed. Boreski tells a story as to how he caused the plaintiffs and defendant to be brought together and as to the negotiations which is entirely inconsistent with the then existing facts and the specific instances are so given in detail as in my mind to throw grave doubt on the reliability of his testimony and I would not hold the plaintiffs innocent. He swears he saw the plaintiffs' advertisement on or about May 28, when, as a fact, no advertisement appeared till June 12. The effect of such evidence would

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naturally be to shew that the different interviews and transactions took place during all the time that elapsed between May 28 and June 17.

I appreciate the reluctance with which appellate tribunals interfere with the findings of fact of the trial Judge who saw the witnesses and personally heard them tell their story; but it appears to me that this part of the evidence was overlooked by the trial Judge. I would observe also that the defendant had to give his testimony through the medium of an interpreter, and it appears to me that we are in as good a position to judge as to its value as the trial Judge.

On the question of reversing the trial Judge's finding, *McBride* v. *Ireson*, 26 D.L.R. 516, 35 O.L.R. 173, is an authority. There the finding of the trial Judge upon a question of fact was reversed when it appeared clear to the Appellate Court that he had entirely overlooked 2 pieces of evidence given by witnesses whose testimony he had credited and that had they received due consideration the result would have been different. In that case Riddell, J., delivered the judgment of the Court, and he adopts and cites what is the duty of the appellate Court as stated in *Beal* v. *Michigan Central R.R. Co.*, 19 O.L.R. p. 502.

Lord Bramwell, in *Jones* v. *Hough*, L.R. 5 Ex. D. 122, discusses this question.

The foregoing authority was cited by Taschereau, J., in his reasons for judgment in *North British & Mercantile Ins. Co.* v. *Tourville*, 25 Can. S.C.R. 177, where it was held that, if a sufficiently clear case is made out, the Court will allow an appeal on mere questions of fact against the concurrent findings of two Courts. Garrow, J.A., also cited this case in his judgment in *Bateman* v. *County of Middlesex*, 6 D.L.R. 533 at 535, where the Court substituted their judgment for that of Riddell, J., the trial Judge.

In the present case the defendant was entirely dependent on the plaintiffs and Boreski, and, on account of the existence of some suspicious circumstances, detailed in the evidence, I think the trial Judge should have admitted testimony that was tendered as to the value of the properties. In coming to a correct decision the Court ought to be able to judge whether the enforcement of the agreement would create a hardship, whether it was a fair bargain or an unfair one, because these are important features that

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ought to be taken into consideration in deciding the specific performance of a disputed agreement. Want of fairness and hardship, although not always decisive, should be taken into consideration where circumstances exist such as in the case before us.

The refusal to admit this evidence might in itself be sufficient grounds for a new trial, but on the best consideration I can give, upon the whole evidence, I think the judgment for the plaintiffs should be set aside and the action dismissed.

The appeal should be allowed. *Appeal allowed.*

Annotation—Specific performance—Vague and uncertain contracts. Annotation.

In *Foster* v. *Russell*, 12 O.R. 136, specific performance of an agreement was refused because of the terms being too vague and uncertain. The plaintiff, a bookkeeper and accountant, entered into an agreement with a firm in the form of a letter addressed to himself, in the following terms: "In consideration of you advancing us the sum of $3,000, we agree to give you collateral security and to pay you interest at the rate of eight per cent. per annum." No kind of security was specified in the agreement and it was held that parol evidence could not be given to supply the defect. The case of *DeGear* v. *Smith*, 11 Gr. 570, was followed as an authority that there could be no specific performance of such an agreement.

In *Ledyard* v. *McLean*, 10 Gr. 139, the objection was taken that the contract was of too uncertain a character to be specifically enforced. The owner of the land had made a devise of 50 acres for 14 years at a nominal rent for the purpose of boring for oil, and contemporaneously executed an agreement by which the owner agreed to convey at any time a roadway from any wells the lessee might dig or bore to a certain road, and also sufficient land for the working of such well or wells, the lessee agreeing to pay one hundred dollars for the first well he might work for oil, and the sum of $50 per acre for the land necessary for working such oil well or said roadway, and the sum of $50 for any oil well he should work after the first one, and the sum of $25 per acre for any land necessary for working said well or wells and the roadway.

The Court held that the objection was not sustainable. The case of *Hook* v. *McQueen*, 2 Gr. 503, was cited, where the contract was for the sale of lot 16, and as much of lot 17 as should require to be flooded for the purposes of working a mill on lot 16. Esten, V.C., had held that this was not too uncertain to be executed, thinking that a jury or the Master would be competent to determine the quantity of land on lot 17 which it would be necessary to flood for the purpose of working any saw-mill that would be reasonably erected on lot 16. In contracts respecting oil springs, it was scarcely possible from their novelty to define beforehand what quantity of land would be necessary for working them, and the Court adapting itself to the exigencies of mankind as they arose from time to time should so deal with new subjects as they presented themselves as best to effectuate the intention of the parties, and not allow rules and principles applicable to a different state of circumstances to interfere with the exercise of its jurisdiction whenever, in its judgment, it could be usefully exercised.

In *Carroll* v. *Casemore*, 20 Gr. 16, it was held that *primâ facie* the term

Annotation. "railway station" in a contract, means the station house. It having been ascertained that a railway company intended to have a station on the defendant's land, he contracted to sell to the plaintiff a quarter of an acre next to the railway station as soon as laid out. The company having afterwards located the station grounds but not the position thereon of the intended station house, it was held that the plaintiff's parcel could not be ascertained until the locality of the station house was determined, and that, until then, a bill to enforce specific performance was premature.

In *Burnham* v. *Ramsay*, 32 U.C.Q.B. 491, a bond was given for the conveyance of a water privilege on lot 17 and to convey also so much land as might be required for the purpose of making a race-way, or for erecting buildings on the said lot, at the rate of ten pounds per acre. It was questioned by Wilson, J., whether a bill would lie for the specific performance of such a contract. Whether the obligee could have filed a bill for specific performance of a contract to convey so much land as he might require for the purpose of making a race-way or for erecting buildings on the lot. It was conceded on the argument that he could. See *Stewart* v. *The London, etc., R.R. Co.*, 15 Beav. 513, *South Wales R.R. Co.* v. *Wythes*, 5 D.M. & G. 881.

In *McLaughlin* v. *Whiteside*, 7 Gr. 573, it was held that specific performance will not be decreed where the terms of the contract signed by the parties are uncertain, nor will it be decreed where it is plain from the evidence that there was a misunderstanding. Where, therefore, the terms of the agreement contained in a letter written by the intending purchaser were: "We will give you for your mill privilege in Laxton, with all the improvements including the saw-logs and your claim on the land you applied for, viz., the north half of six in the eleventh and the north half of seven in ditto, lots numbers six and seven in the tenth concession, $4,000, etc.," and in reality the premises mentioned comprised two mill privileges, but the vendor insisted that only one was embraced in this agreement, and filed a bill to enforce the specific performance of the contract according to this construction, whilst the defendant by his answer insisted that both were included in his offer to purchase, the Court dismissed the bill. *Per* Blake Ch.: "There has been a plain misunderstanding. The plaintiff intended to sell one thing, the defendant to purchase another and an entirely different thing, and that would be in itself a sufficient defence to the suit, for, to decree specific performance under such circumstances would be obviously unjust; but the case fails on the ground of uncertainty also. I cannot tell what the expression, "Your mill privilege in Laxton" means, and the meaning of the contract being uncertain, it cannot be specifically performed.

In the following case the apparent uncertainty of the contract was obviated by the construction put upon its terms by the Court.

In the *G. T. R. Co.* v. *C. P. R. Co.*, 39 Can. S.C.R. 220, by agreement through correspondence, the former was to tender for a triangular piece of land, offered for sale by the Ontario Government, containing 19 acres, and convey half to the C.P.R. company, which would not tender. The division was to be made according to a plan of the block of land with a line drawn through the centre from east to west, the C.P.R. company to have the northern half. The G.T.R. company acquired the land, but the Government reserved from the grant two acres in the northern half. In an action by the C.P.R. company for specific performance of the agreement, it was held, affirming the judgment of the Court of Appeal, that the

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C.P.R. company was entitled to one-half of the land actually acquired by the G.T.R. company and not only to the balance of the northern half as marked on the plan, Maclennan and Duff, JJ., dissented. *Per* Maclennan, J., dissenting, concurred in by Duff, J.: "The contract, unfortunately, makes no provision for the case which has occurred of the appellants failing to obtain all the land bargained for. There was no tenancy in common created in the whole parcel. The price to be paid was one-half the price to be paid for the whole. If the respondents are to receive so much of the north half, as was actually acquired, how is the price which they should pay to be ascertained? There is no evidence how the price to be paid for the whole was estimated, whether at so much per acre, or how otherwise. I see no way in which the price to be paid by the respondents for the only part of the land to which they can have any claim under the contract can be ascertained. This difficulty is overcome in the judgment appealed from by holding that the respondents are entitled to one-half of the land actually obtained by the appellants, and that the price to be paid is one-half of the purchase money of the whole with interest, and by referring it to the Master to make a proper division. In my humble opinion, that is not warranted by the only agreement made between the parties." *Per* Davies, J.: "I think it must be taken to have been the common intention of the parties and that it sufficiently appears in the correspondence, that whatever land was in fact acquired was to be divided equally between the companies, each paying half the purchase money." This was the judgment of the majority.

It was held that a reference to the Master, in case the parties could not agree upon a line of division, was unnecessary:

In *Bell* v. *Northwood*, 3 Man. L.R. 514, specific performance was sought of the following agreement:

"I hereby agree to sell you 1850 shares in the Q'Appelle Valley F. Co.'s stock, for the sum of $15,000, you to pay $10,000 to the Bank of Commerce, payment of the $15,000 to be made as follows: $5,000 by endorsed notes at 4 months, $5,000 by note at 1 year's date; $5,000 by note at 2 years' date at 7%, the last mentioned note to be secured by a portion of the stock."

It was held that this was too indefinite to be enforced, not shewing what particular shares were to be sold, and being uncertain as to the endorsement of the notes, and not providing what portion of the shares was to form security for the notes.

In *Tait* v. *Calloway*, 2 Man. L.R. 289, it was pointed out that the certainty required in proceedings for specific performance of a contract was greater than in an action for damages. Specific performance being an appeal to the discretion of a Court, uncertainty itself was a good answer to the prayer for relief.

In the following case the Court inferred from the whole evidence a mutual intention sufficiently clear to be enforceable.

In *McLeod* v. *Orton*, 17 Gr. 84, the plaintiff, having occasion to raise $3,100 to pay the Church Society for a lot which he had leased and improved and which was worth $4,200 cash, procured the defendant to raise the money and to pay it to the Society, whereupon the Church Society conveyed the land to the plaintiff, and the plaintiff conveyed it to the defendant. The defendant in a few days afterwards sold the lot for $4,200 cash to a person with whom the plaintiff had been previously negotiating. The defendant admitted that after the sale he intended to give the plaintiff the difference

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less his own expenses and $200 for his trouble. There was great inequality between the parties and some evidence of confidence between them and the negotiations between the two were private. The Court inferred from the whole evidence that the intention had been expressed during the negotiations between the plaintiff and defendant and that the plaintiff had conveyed on the strength of it and held that it constituted an agreement which the Court would enforce.

One Kinnear, in 1835, purchased from the defendant part of lot number one, being a portion of a block of land owned by the latter, and 2 years afterwards agreed for the purchase of 50 feet additional land, and then erected his fences enclosing on the north 27 ft. on the west 6 ft., and on the south a quantity of land which could not now be defined, additional to the original purchase. Of the land so enclosed, Kinnear, and those claiming under him, remained in undisputed possession for about 10 years, with the knowledge of the defendant who acted as agent for some years in respect of this property and was constantly in the habit of visiting it whilst the fences were in the course of erection. The plaintiff, having purchased this property from Kinnear, afterwards purchased from defendant the remainder of a lot situated on the south thereof, whereupon he removed the southern fence that had been erected by Kinnear, in order to put all the land into one parcel. On a plan of the property made by the defendant a lane had been laid out on the south of the original purchase, 17 ft. wide, and on the west another lane 6 ft. whereof were comprised within the limits of lot number one. Kinnear's fences enclosed the 6 ft. on the west and were supposed to have embraced the 17 ft. lane on the south, which together with the 27 ft. to the north, made in all 50 ft. The vendor subsequently sought to recover possession of the strips of land to the north and west, whereupon the plaintiff filed a bill to restrain the action at law and for a conveyance of the land. No place could be assigned to the 50 ft. unless the 27 ft. and 6 ft. formed part of it, and it having been established that the purchase money for the 50 ft. had been paid, the Court made the decree as prayed with costs. *Howcutt* v. *Rees*, 3 Gr. 527.

In *Robertson* v. *Patterson*, 10 O.R. 267, there was an agreement for the sale of land from Robertson to Patterson, with the terms: "Price, $1,000. $200 cash and balance in 5 yearly payments, interest at the rate of 7% and covenant of Patterson to build a house worth not less than $4,000 to be commenced in year from date and finally completed in two years." The $200 was paid down and Robertson's solicitor prepared and tendered the deed, in which was inserted a covenant to build and a mortgage to Patterson for execution. Patterson refused to execute them and an action was brought for specific performance, which was resisted on the ground that the covenant to build was too vague and would not be enforced by the Court, but the contention was not sustained. Proudfoot, J., referred to Waterman on Specific Performance, citing the case of *Wells* v. *Maxwell*, 32 Beav. 408, as marking the distinction between a contract to build a house and a contract of sale with a stipulation to erect a building or do certain work. "If the present case was a simple agreement to build a house of certain value, that authority would shew that it might be enforced, but that is not precisely the case here. The plaintiff seeks performance of the defendant's agreement to give a covenant to build of a certain value within a specified time, and to this I think him clearly entitled. The size, the plan, and the material are probably in the discretion of the defendant. The case of *Wood* v. *Silcock*,

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50 L.T.N.S. 251, which was much relied on by the defendant appears to me to decide nothing contrary to what I propose to do. Bacon, V.C., held that the agreement to build houses was not a concluded one, but merely preliminary to something to be agreed upon at a future time, the plaintiff stating when examined, that he had plans when the agreement was prepared, but the defendant objected to them, and it was then agreed that plans which should make clear the agreement should afterwards be prepared; and there was no agreement, as here, to build of a certain value."

In *Boyd* v. *Shouldice*, 22 Gr. 1, the owner of land promised the father of the plaintiff that if he would marry his daughter, he would give him 50 acres of land and after the marriage he did execute a bond for a conveyance thereof, reciting the payment of $300 as the consideration therefor. The bond also contained a recital that the obligor, the father, desired that the land should go to the male issue of his daughter and her husband. The obligee having died, a suit to compel the specific performance of the agreement was filed by his infant heiress to which the obligor pleaded want of consideration and also denial of having executed the bond. At the hearing, Blake, V.C., refused to allow a supplemental answer to be filed setting up a defence as to the estate agreed to be conveyed, and, being of opinion that there was adequate consideration, made a decree for specific performance of the agreement with costs, which, on rehearing, was affirmed with costs. He held as to the recital that the obligor desired the property to go to the male issue of the marriage, that, taking the whole instrument together, the agreement was for the conveyance in fee simple and that the wish expressed by the obligor as to its ultimate destination did not qualify or modify the agreement.

In *Foster* v. *Anderson*, 16 O.L.R. 565, among the words of description of the parcel of land agreed to be sold, the contract contained the words, "being the premises known as number twenty-two Ann Street." The correct number was 24. There was no number 22, and the defendant owned no other property in Ann Street. It was held that, there being a description which identified the parcel without the aid of the street number, the words quoted might be rejected as surplusage, and there remained sufficient, with parol evidence, to satisfy the Statute of Frauds. Osler, J.A., dubitante.

In *Treadgold* v. *Rost* (1912), 7 D.L.R. 741, an action was commenced for specific performance of an agreement in writing alleged to be contained in the following letter:—

"Dear Sir:—In consideration of your assistance in consolidating my position on Dominion Creek, I agree to give you the exclusive right to purchase all my interests on Dominion Creek and its hillsides and branches for the price and sum of $200,000, payable as to $10,000 on October 1 of this year and as to the remainder in stock of a company to be formed by you to acquire and work Dominion Creek as you may consider advisable.

"I will give you all the assistance in my power to ascertain the values of all the ground on the creek and to acquire such claims as you may consider desirable, turning over to you all claims which I have acquired or may hereafter acquire, with your help at the price paid by me for same.

"You shall form the company at your discretion as to place and time of incorporation and amount of capital and my stock shall be issued to me fully paid and you shall decide when it may be desirable to merge the company in a larger company."

Annotation.

The Court held that specific performance could not be decreed as the agreement was too uncertain and indefinite.

Schaefer v. *Miller*, 8 D.L.R. 706, affirmed in 11 D.L.R. 417, was a case where land was described in a listing agreement to a real estate broker and containing the following words: "I hereby give you the right to sell the above property," and the broker arranged for a sale with the plaintiff who executed a formal agreement of sale. The subsequent conduct of the parties and the evidence shewed that the ordinary meaning of the word "sell" was considered as modified or restricted to "finding a purchaser."

The Court held that the plaintiff was not entitled to specific performance of the agreement as against the owner.

In *Mitchell* v. *Alberta Steam Laundry Co.*, 16 D.L.R. 846, the Court held that while an agreement for the purchase by one partner of the other's share might be the subject of specific performance in a proper case, that the remedy must be refused where the alleged agreement was vague and uncertain as to whether the liabilities were to be assumed or divided and as to other material points.

McDonald v. *Leadlay*, 20 D.L.R. 157, was a case where an agent had given a receipt for a payment on land in the following terms:—

"Received from Murdock J. McDonald and Roderick W. McDonald, of Red Deer, Alta., the sum of $750, being payment on account of the total purchase-price of $3,887.20 for the whole of section 31, township 36, range 28 west of the 4th meridian containing 575.28 acres. Balance to be paid as follows: $777.44 on March 19, 1907, $777.44 on March 19, 1908, $777.44 on March 19, 1909, $777.44 on March 19, 1910, with interest upon the unpaid purchase money from time to time and arrears of interest, payable half-yearly, computed at 6 per cent. per annum. This receipt is a voucher for the money paid, pending the execution of the formal printed agreement of vendors. Failing execution of agreement by vendors, money to be repaid on demand. When purchase-money is paid in full, a deed of the property, at expense of purchaser, is to be delivered by vendors."

The Court held that specific performance might be ordered, the purchaser having been let into possession, and the money retained by the vendors for an unreasonable time without repudiating the sale made by the agent although the sale might not have conformed with the principal's instructions, and the formal agreement was never executed.

See annotation on "Oral Contracts," 2 D.L.R. 636.

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ROBINSON v. MOFFATT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. April 28, 1916.

VENDOR AND PURCHASER (§ I C—13)—INCUMBRANCE ON TITLE—RESTRICTIVE COVENANT—EXECUTION.

The vendor's inability to convey land free from restrictive covenants, having been unsuccessfully set up and a decree of specific performance having been made, cannot be again raised, but the purchaser cannot be compelled to take the land until the effect of a *fi. fa.* placed in the sheriff's hands after the agreement of sale was made has been removed.

[Execution Act, R.S.O. 1914, ch. 80, secs. 10, 11; Land Titles Act, R.S.O. 1914, ch. 126, sec. 62, considered; *Robinson* v. *Moffatt*, 25 D.L.R. 462, 35 O.L.R. 9, referred to.]

Statement.

MOTION by the plaintiff for further relief in pursuance of the judgment of a Divisional Court of the Appellate Division (25

D.L.R. 462, 35 O.L.R. 9), and for judgment for the plaintiff with costs throughout.

This motion first came before the Court on the 13th March, 1916, when a reference was directed to the Master in Ordinary to ascertain and state whether the defendant could make a good title to the lands in question and convey to the plaintiff, and, if so, when.

On the 24th March, 1916, the Master reported that the defendant was able, on and at any time after the 2nd March, 1916, to make a good title and convey to the plaintiff.

The plaintiff (by leave) appealed from the report, and renewed his motion for judgment.

J. J. Gray, for plaintiff.

W. E. Raney, K.C., for defendant.

MEREDITH, C.J.C.P.:—This motion—which it is to be hoped may bring to an end this prolonged litigation over a simple contract for the sale and purchase of the land in question—is made for the purpose of having a determination of the question whether the vendor can now give to the purchaser that which he sold to him, namely, the land in question in fee simple free from incumbrance.

The purchaser contends that he cannot, for two reasons: (1) because there are some restrictive building conditions with which it is burdened: and (2) because of a writ of execution against the goods and lands of the vendor, now in the hands of the sheriff of the county in which the land is, for execution, in full force and virtue.

As to the first of these reasons, it is enough to say: that this action was brought by the purchaser to set aside his agreement to purchase, on the ground, among others, that the vendor could not convey to him, as agreed, because of these very restricting conditions: that ground of action, and all others upon which the purchaser sought to escape from the agreement, failed, and, with his consent, indeed at his request, a judgment for specific performance was made upon an appeal from the judgment at the trial. There is no ground for any contention, and none such is made, that the purchaser did not fail altogether on all grounds upon which he sought to get rid of his agreement to purchase, or that there was any intention to refer to a Master of the Court the question whether or not the vendor could convey

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free from the restrictive conditions. If the judgment made upon the appeal were signed in proper form, all that branch of the purchaser's action should have been dismissed; but, however that may be, the purchaser cannot seek the benefit of this ground of action a second time, here. It is said, and not denied, that the restrictions are beneficial altogether to the purchaser, and doubtless that circumstance accounts for the claim made to set aside the agreement, because of them, having been abandoned, and a judgment for specific performance having been taken.

On the other ground, the contention of the purchaser seems to me to be, plainly, right, that is: that he cannot be compelled to take the land in question until the effect of the *fi. fa.* is removed.

The writ was placed in the sheriff's hands for execution long after the agreement in question was made; but the greater part of the purchase-money is yet unpaid; and the question which seems to have given trouble to the Master, to whom it was referred to ascertain and state whether a conveyance could be made, namely, what effect, if any, the writ of execution has upon the vendor's power to convey, seems to me to be one easily answered, and in respect of which the reason for the answer easily can be given.

Both at law and in equity, the vendor is the owner of the land in the sense of having the lawful title to it; the purchaser has only an equitable right to it; but, to that extent, if the agreement be carried out, is treated in equity as substantially the owner, the real owner, or formal owner, if you choose to call him such, though that would not be strictly accurate; the vendor is a trustee for the purchaser, but bound to convey to him only on fulfilment by the purchaser of all things agreed to be done, on his part, before getting the conveyance. An agreement may never be carried into effect, it may end in nothing by various ways, and it may be that Equity, however measured, may refuse specific performance, and so the vendor may remain owner, unaffected by the agreement, without the aid of any Court. But, whether he does or not, he is still owner and can convey his ownership, subject of course to any equitable right which the purchaser may have: he has none at law except a personal action against the vendor if he should refuse or be unable to carry out his contract.

That being so, on what ground, or with what reason, can it be urged that an execution creditor of the vendor cannot acquire any charge upon the land, though a purchaser from the vendor would acquire right and title? He cannot, of course, acquire any higher right than his debtor had; but why not that much? I have no manner of doubt that the execution creditor, assuming that his execution is valid, has such a right in the land in question, but of course to be worked out in the regular way by sheriff's sale of the judgment debtor's interest in the land. In a case in which the judgment debtor has no real interest in the legal estate in the land, as, for instance, if all the purchase-money had been paid, or validly assigned before the writ took effect, the execution could not stand, substantially, in the way of a conveyance to the purchaser free from incumbrance: and all this seems to me to be quite in accord with the judgment of the Court of Error and Appeal of this Province in the case of *Parke* v. *Riley*, 3 E. & A. 215: whilst, if the views of the dissenting Judge in that case could be accepted, the same result should follow now, even if it could not, as he contended, then. That view was that vendor and purchaser must, in all things and inflexibly, be looked upon as mortgagee and mortgagor: and of course in some respects they are in equity substantially the same; and in some cases, for some special purposes, expressly they have been made so, by legislation: see the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 14 (2). And, since the case of *Parke* v. *Riley*, the scope of the Execution Act has been widened from time to time, and is now so comprehensive that the dissenting judgment in that case, even if it had been the judgment of the Court, might not govern the question now involved in this case: see *McPherson* v. *Temiskaming Lumber Co. Limited*, [1913] A.C. 145, 9 D.L.R. 726.

This view of the matter is one which makes care on the part of a purchaser of lands, before parting with his purchase-money, necessary: but that is a care which, I have always understood, was and is well-known to be necessary; hence searches in the sheriff's office for executions, which have always, I have thought, been the general practice.

Upon the vendor clearing the way to a conveyance of the land free from all incumbrances, within 10 days, the transaction should be closed; and in that event the vendor should pay all costs subse-

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quent to the judgment for specific performance, to be set off against the costs now payable, under that judgment, by the purchaser to the vendor: otherwise there should be the usual judgment upon the failure to convey after reference; and the vendor should pay all costs subsequent to the judgment for specific performance, but not the costs prior to that, because that judgment was made on the terms of payment of such costs, and these costs should be set off against the costs awarded to the purchaser, and, if there be a balance in the vendor's favour, the amount of it may be deducted from the purchase-money to be returned.

Lennox, J.

LENNOX, J.:—I agree.

Riddell, J.

RIDDELL, J.:—This is another—it is to be hoped the final—act in this Comedy of Errors, which, however amusing to the onlookers, will probably not prove to be very gratifying to the actors—the previous proceedings will be found reported in 25 D.L.R. 462.

The plaintiff, then an infant of eighteen years, with an eye to business and of some experience, bought of the defendant certain land, to be paid for in instalments. The value of land went down, and the infant, with infantile notions of honesty, served notice that he repudiated the contract—the defendant would not consent to the cancellation of the contract, and the plaintiff, still an infant, brought an action for the return of the money already paid.

In his statement of claim, he alleged: (1) that the defendant had not the title to the lands; (2) that the plaintiff had tendered the remainder of the purchase-money necessary to entitle him to the deed, and the defendant refused to accept; (3) that the lands were subject to onerous building restrictions; and (4) that the plaintiff was an infant and had repudiated the contract. (Of these Nos. 1 and 4 were in the original statement of claim and Nos. 2 and 3 by amendment more than a month thereafter.) The claim was originally for the return of the money paid, damages, &c., but, by amendment, a claim was made in the alternative for specific performance.

At the trial, judgment was given dismissing the action, but giving the plaintiff the privilege, if he saw fit, on paying the defendant's costs, to have judgment for specific performance (the reason of this direction as to costs being that the defendant early in the case offered specific performance and the plaintiff's costs up to that time).

The plaintiff declined to take advantage of this provision, and the judgment went dismissing the action (see 25 D. L. R. 462, 35 O.L.R. 9.) An appeal was taken; and the Appellate Division thought it should be dismissed; but, the defendant consenting, the direction was given that, upon payment of all costs, including the costs of the appeal, the plaintiff might have specific performance.

It should be sufficiently obvious to any one what was meant by the Court—if the plaintiff should elect to pay and should actually pay the costs, he should have the ordinary judgment for specific performance: if not, the appeal would simply be dismissed with costs.

The plaintiff elected to take advantage of the privilege given him; he apparently led the defendant's solicitor to believe that he was going to pay the costs—at all events the defendant's solicitor did not insist on the payment of costs before the judgment should be taken out. (It is not in a usual form, but it is not necessary at this stage to refer to its contents.)

The plaintiff then made a tender of the amount of the costs and of the balance of the purchase-money and demanded his deed—the deed tendered not being such as he considered himself entitled to, he did not hand over the money.

Then he moved this Court for relief, alleging that the defendant could not make title; the defendant contended that he could; and we sent the matter to the Master to determine if title could be made. The Master reported that a good title was shewn: the plaintiff was not satisfied with this report, and it was agreed by all parties that we should hear an appeal from the report as though it had come regularly before us; and at the same time dispose of the plaintiff's motion for relief—this is the present motion.

There are two objections to the title taken by the plaintiff: (1) certain building restrictions; and (2) a *fi. fa.* lands.

As to the first, without expressing any opinion on the Master's reasons, I think that the plaintiff cannot be heard to urge these restrictions; in his statement of claim he alleges (para. 8): "The said lands were sold to the defendant subject to onerous building restrictions;" this was set up as a ground for the return of his payments already made, i.e., a rescission of the agreement, and it failed. With this knowledge, the plaintiff accepted a judgment for specific performance, and it is not now open to him to say that

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these restrictions are a ground for non-performance of his contract.

Moreover, in the judgment of the Divisional Court as entered there is a declaration by the Court "that the plaintiff has accepted the title of the defendant to said lands and premises."

While this might not affect an objection made by matter subsequent, it must oust any objection based on existing and known defects.

The second objection is not in the same position — there is an execution against the lands of the defendant for over $4,500, as appears by the certificate of the Deputy Master of Titles.

Reading between the lines, I should gather that it was on the discovery by the plaintiff or his solicitor of this writ, that the plaintiff decided to take a judgment for specific performance — however that may be, it is found and admitted that the writ was lodged after the contract was made specific performance of which is decreed—not till the 17th January, 1916, in the office of the Master of Titles; the 9th December, 1915, with the sheriff—and also that it was not known to the plaintiff until after the judgment.

If then the writ is an effective bar to the defendant making title, the plaintiff should *primâ facie* have relief.

The case of *Parke* v. *Riley*, 3 E. & A. 215, was pressed upon us as decisive in favour of the defendant's contention—and, if it were in point, that would be so. While I had some trouble in the consideration of the resemblances and differences of the two cases, I think the Chief Justice has come to the proper conclusion. If this be not the law as the Legislature wishes it to be, it can readily be changed by the Sovereign body.

I therefore agree in the disposition of the case proposed by my Lord.

Masten, J.

MASTEN, J.:—I have had the advantage of perusing the reasons for judgment prepared by the Chief Justice of this Divisional Court and also the reasons of my brother Riddell. The facts have been so fully and so lucidly stated by them that I need not repeat them.

I agree in the conclusions at which the Chief Justice has arrived.

I do not think that the principle of *Parke* v. *Riley*, 3 E. & A. 215, is at variance with this conclusion. At p. 228, Draper, C.J., says: "I understand the decision of His Honour Mr. V.-C. Mowat

to be rested on this ground: that the Andrews were bound by contract to convey to Riley, who was bound to reconvey to them by way of mortgage; that in the view of a Court of Equity Riley thus became equitable mortgagor, and the Andrews (the vendors) equitable mortgagees, and, inasmuch as if they had been legal mortgagees their estate and interest would not be saleable under a *fi. fa.*, so neither can the land of which they are equitable mortgagees be sold, though they are seized of the legal estate. There is some analogy between the cases, but to me it seems imperfect, and the possible mischief of such a determination is, in my humble judgment, so apparent that I should, even under the pressure of the most direct authority, reluctantly adopt the conclusion. I have not, however, found any such authority."

After further discussing the matter he continues, at p. 229: "It is, however, unnecessary to pursue this discussion, as I have arrived at the conclusion that, in fact, the Andrews had parted with their interest in the unpaid purchase-money due by Riley to the defendant Smith, before the plaintiff's execution could bind their lands or their interest in them."

The judgment proceeds on the ground last stated, and the above quotations indicate that the basis of the decision was the fact that the Andrews had—before the *fi. fa.* was lodged with the sheriff—assigned to Smith the whole balance of the purchase-moneys coming to them, so that, when the writ in question was placed in the sheriff's hands, they had no beneficial interest, and were bare trustees of the legal estate. My understanding of that case is that, if the facts had there been the same as the facts of this case, the judgment of Draper, C.J., concurred in by Richards, C.J., and by Hagarty, J., would have been that the execution was effective against the lands.

If, as I think, the reasoning in *Parke* v. *Riley* is in favour of rather than against the purchaser's contention, then it seems to me that the words of secs. 10 and 11 of the Execution Act, R.S.O. 1914, ch. 80, when read in their ordinary and natural meaning, apply to make the *fi. fa.* bind the interest of the vendor, under the circumstances here shewn.

This view is not weakened by the words of the Land Titles Act, R.S.O. 1914, ch. 126, sec. 62, sub-sec. 1. That section, after providing for the transmission by the sheriff to the Master of Titles of a copy of the writ of *fi. fa.*, goes on to provide that

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"after the receipt by him" (the Master of Titles) "of the copy no transfer by the execution debtor shall be effectual, except subject to the rights of the execution creditor under the writ."

For these reasons, the objection of the purchaser to the conveyance seems to me to be effective, and I concur in the judgment proposed by the Chief Justice. *Judgment accordingly.*

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FAWCETT v. HATFIELD.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. September 29, 1916.

SALE (§ I B—6)—GOVERNMENT INSPECTION—DE FACTO OFFICER—EFFECT.
Under a contract of sale of goods, to be "government inspected," the purchaser is not entitled, after delivery, to a refund of the price paid upon the ground that the inspection actually made was not made by the official government inspector, but by an assistant appointed by such inspector.

Statement.

APPEAL from the judgment of Jonah, J., Westmorland County Court. Reversed.

J. C. Hartley, K.C., for defendants, appellants.

A. W. Bennett, for plaintiff, respondent.

McLeod, C.J.

MCLEOD, C.J.:—(Oral). I agree that a new trial shall be granted. My opinion is that the defendants made the application to the proper officer to have the potatoes inspected. They were inspected. The party who gave the certificate was *de facto* an officer.

In addition to that I think the case should not have been withdrawn from the jury. There was evidence on which the jury might find that there was a waiver by the plaintiff of the inspection, and that should have been submitted to the jury.

On both these grounds I think the appeal should be allowed with costs.

White, J.

WHITE, J., agrees.

Grimmer, J.

GRIMMER, J.:—This action brought to recover the sum of $365.15, being the amount paid by the plaintiff to the defendants for a carload of potatoes, together with freight and exchange paid and damage claimed, was tried in the Westmorland County Court, before Jonah, J., and a jury, in December, 1915; but the same having been by the Judge withdrawn from the consideration of the jury, a verdict for $267.63 was ordered to be entered for the plaintiff.

The facts are that in March, 1915, the plaintiff by telephone purchased two carloads of potatoes from the defendants, in bulk,

and to be government inspected. One car was shipped under order of plaintiff to Chatham, Ont., and was accepted and paid for. The other car was also, by plaintiff's order, shipped from Peterson, Victoria County, N.B., to defendants' order, "Notify C. Fred Fawcett," at Sackville, N.B. A sight draft for $202.55 (the price of the potatoes), attached to a copy of the bill of lading, in which were the words "allow inspection," was forwarded through the Bank of Montreal, and in due course paid by the plaintiff, together with the freight on the car, but without any inspection of the potatoes. This was paid at Sackville, where the car was shipped by his order, and afterwards, at his request, it was moved to Upper Sackville, where his warehouse was. When the car was opened, the plaintiff claims, some of the potatoes, which were in bags, were rotten, and some of the bags wet, and it is alleged a few cases of powdery scab were also discovered. The plaintiff thereupon rejected the car of potatoes and returned it to the custody of the Canadian Government Railways, and thereafter brought this suit. All the bags of potatoes in the car were certified as inspected, as also was the car by cards and placards, furnished by the Department of Agriculture of Canada, which cards were signed by one J. B. Christian, as "inspector," under the regulations relating to the inspection of potatoes. The inspection was made upon the request of the defendants, who applied to the regular government inspector, Johnston, who sent his assistant, Christian, with all insignia of office, to make the inspection according to law, before the shipment was made, thus complying, as far as they possibly could, with the regulations above referred to.

It was contended, on the part of the plaintiff on the trial, that the potatoes had not been inspected as required by law, and, therefore, the plaintiff was not bound to accept or pay for the same. On the part of the defendants, it was argued that, notwithstanding the manner of the appointment of the acting inspector, the fact of his professing to act, and his acting as inspector, constituted him a *de facto* officer, and made his acts legal and valid.

The Judge held that the appointment of the acting inspector, not having been made by the Minister named in the Act or in any way through him, to fill a position which had become vacant,

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or which was not already occupied by a *de jure* officer, his actual performance of the duties of the office could not satisfy the requirements of the contract, and would not be good in law; and he withdrew the case from the consideration of the jury, as stated, and ordered a verdict for the plaintiff.

In this I think he was in error, and there should be a new trial. There is no doubt under the evidence the defendants, in making the sale of the goods to the extent of their ability, complied with the regulations relating to the sale of potatoes, which in this case were seed potatoes. When they were ready to ship, they called upon the government official duly and regularly appointed under the Act (Dom.) 9-10 Edw. VII., ch. 31, to have the potatoes inspected. In due course a man arrives to do the work, who represented himself as being sent by the government's inspector. He has all the necessary labels, tags and printed certificates, which are furnished by the Department of Agriculture of Canada and used in such cases, or, in other words, he had all the insignia of the office he professed to fill. He proceeded with the work, inspected the potatoes, labelled and tagged them, when approved or passed, per bag, and finally issued a certificate shewing what he had done, whereon he stated the potatoes, marked, loaded and consigned, as shewn in the certificate, had been inspected by an inspector of the Dominion of Canada and found to be within the regulations, etc., and permission was given to the railway to accept and forward the consignment to its destination. Under these conditions, the main and general question in the case is, can the defendants be compelled to refund to the plaintiff the price of the potatoes and freight paid for carriage, because, as he claims, they were not inspected by a regularly appointed government inspector under the Act before stated.

This question which embraces the whole matter of inspection should clearly have been left to the jury for its finding, and it was the defendants' right to have it so left, which, not having been done, there must be a new trial. In my opinion, the inspector acting in this case under the circumstances described in the evidence was a *de facto* officer for all the purposes of the inspection, and, so far as the shipping of the potatoes was concerned, his inspection was good. In *O'Neil* v. *Att'y-Gen'l of Canada*, 26 Can. S.C.R. 122, at 130, it was held that

The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding.

Under this the test might be found in a prosecution against Christian by Johnston or the government for exercising the functions of the office, which I have little hesitation in saying, in my opinion, would signally fail.

Several other questions of importance were also involved in the suit upon which the jury should have made a finding. These include the passing of the goods of the plaintiff; the right to accept part of the contract and reject the rest; the waiver of the right of inspection by payment of the draft and acceptance of delivery of the car; and of the quality of the potatoes sold. A number of witnesses gave evidence on this last question at considerable length, and it was especially the function of the jury to find upon it, exclusive altogether of the matter of inspection. In view, therefore, of the facts stated, and the judgment ordered for the plaintiff, without the submission of these facts for the consideration and finding of the jury, I am of the opinion there should be a new trial, which must be allowed with costs.

New trial ordered.

NAEGELE v. OKE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. April 20, 1916.

EASEMENTS (§ I—2)—PERMISSION TO USE SPRING—LICENSE.

An agreement by an owner of land granting a privilege, to an adjoining owner, for a term of years, to draw water from a spring on his land, is a personal license by the granter, not an easement, and does not run with the land.

Statement.

APPEAL by the defendant from the judgment of the Judge of the County Court of the County of Huron in an action to obtain a declaration of the right to maintain an hydraulic ram upon and take water from the land of the defendant for the restoration of the ram to working order, and for damages. The judgment of the County Court Judge declared the plaintiffs' right to the easement claimed, granted an injunction restraining the defendant from interfering therewith, and awarded the plaintiffs $10 damages and the costs of the action.

C. Garrow, for appellant.

W. Proudfoot, K.C., for plaintiffs, respondents.

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MASTEN, J.:—In the year 1903 or 1904, Charlotte Ophelia Halliday owned and occupied (along with her husband, John Halliday) lot 14 in the 3rd concession of the township of Colborne, in the county of Huron, fronting on the Maitland river, and one Joseph Naegele was the owner of the adjoining lot, known as lot 13. Francis Naegele, one of the plaintiffs, was the son of Joseph, and at that time lived with his father on lot 13. The Hallidays and the Naegeles had been neighbours for years, and were on good terms. In 1903 or 1904, an oral agreement was made between the plaintiff Francis Naegele and Mr. and Mrs. Halliday, licensing Francis Naegele to put in an hydraulic ram at a spring situate on the Hallidays' lot, and, by means of the ram, convey the water from the spring to the farm buildings on the Naegele farm. The account of this verbal arrangement is detailed by the plaintiff Francis Naegele in his evidence as follows:—

"A. The way I came to put in the hydraulic, the well I used for my stock caved in, and I came into town here. Halliday had moved into Goderich, and he was there himself and his wife, and I asked him about the use of the spring on his bank, and the proposition he had made to me several years before, that any time I wanted to use it I was welcome to do so; it was no use to him where it was, and he might make some use of it if I made use of it. I asked him if I could have the use of this spring, and what he wanted for it, and he said, 'I don't want anything for it;' and Mrs. Halliday spoke up and said, 'We don't want anything for the water—it is no use for us where it is.' John himself said he would reserve the right to the waste water to use it in the west field. His tenant had leased the place for three years, but he was going to seed down and pasture the farm, and the waste water was more than a consideration to him if he could get it in the corner of the field. I told him if I couldn't get water enough to drive the hydraulic I wouldn't put it in, but I found enough water to drive the hydraulic, and I sent for the piping and installed the hydraulic, and there was nothing more said about the hydraulic. It was used from 1903 until September, 1911.

"Q. You used it all of these years and up to that time there was no writing between you? A. Nothing at all, just that verbal agreement."

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On the 29th September, 1911, the Hallidays were about to put up their farm for sale at auction, and, in order to confirm and protect the continued use of this ram and of the spring water, the following agreement was signed:—

"The undersigned agrees to lease hydraulic water privilege on part of lot 14, township of Colborne, county of Huron, for 49 years, to Frank Naegele, of Colborne Tp., and also privilege of making any repairs on said privilege without damage to crop and also that undersigned to have privilege of using waste water to be taken by him to his property. "John Halliday."

The Halliday farm was not sold at the auction sale, and nothing further transpired at that time. On the 11th August, 1912, Joseph Naegele died, leaving a will by which he devised all his lands to his wife Albertine for life and after her death to his son Francis, the plaintiff. After the plaintiff Francis Naegele became the owner of the property under his father's will, and some time about April, 1915, he made an agreement for the sale of his farm to his co-plaintiff, Pitblado, the latter being his son-in-law. Though no deed has yet passed, both parties (Naegele and Pitblado) agree that the agreement of sale is effective and is to be carried out. Pitblado is in possession of the lands. On the 17th April, 1915, Mrs. Halliday conveyed lot 14 to the defendant, Oke. Oke, in the month of May last, prevented the further use of the ram and of the water, and this action was thereupon launched to establish the plaintiffs' right and for damages.

The learned County Court Judge in his judgment has maintained the plaintiffs' claim.

On the argument before this Court many interesting and important questions were raised, some of which do not appear to have been presented before the trial Judge.

It is important, in dealing with this appeal, first to ascertain within what legal category the rights of the parties fall.

Is the right claimed an easement, a lease, or a license?

It is of the essence of an easement that a dominant tenement be specified, and that the grantee of the easement shall have an estate or interest in the dominant tenement at the time of the grant: *Rymer* v. *McIlroy*, [1897] 1 Ch. 528.

No authority need be quoted for the proposition that there cannot be an easement in gross.

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It is manifest, therefore, upon the facts as above stated, that the interest in question is not an easement.

Neither can the arrangement be construed to be a lease, though the parties so characterise it, for it is of the essence of a lease that the lessee acquire the exclusive possession of the leased premises: *Watkins* v. *Milton-next-Gravesend Overseers* (1868), L.R. 3 Q.B. 350; *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405.

No exclusive possession of any part of Halliday's lands was acquired by Naegele.

In *Ward* v. *Day* (1863), 4 B. & S. 337, it was held that a license to get all the copperas stone which might be found in part of a manor for twenty-one years at the yearly rental of £25 was not a demise and would not support a distress for rent.

In *Stockport Water Works Co.* v. *Potter* (1864), 3 H. & C. 300, it was held that the grant by a riparian proprietor of a right to take water from a natural stream on which his land abutted operated as a license in gross, and not as a mere demise, and would not enable the grantee to maintain an action in his own name against a wrong-doer.

The written agreement of September, 1911, is, I think, to be construed as relating to the existing ram and pipes and to their then use for supplying water to lot 13. The evidence shews clearly that it was drawn to confirm and continue that which had been in existence and in actual use under an oral agreement for seven or eight years, and was not a general right to take water. That which the plaintiff Naegele acquired under his agreement with the Hallidays was, therefore, I think, a license personal to himself, good for 49 years, subject to earlier determination by his death, or because he was no longer in occupation of the Naegele farm, so as to enable him to enjoy the benefits of the license.

No estate in the lands of Halliday (or Oke) was acquired by Naegele. The license does not include "assigns," and so was not transferable.

At the time this action was instituted, Francis Naegele had sold the lands to which the hydraulic ram conveyed the water, and Pitblado, the purchaser, was in possession, so that, on the date when the writ was issued, he (Francis) had no rights capable of enforcement by the Court.

As Naegele's interest amounts only to a personal license by his grantors and not to any estate or interest in the lands of his

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grantors, I do not think that Oke was in any way bound (even with notice) by the license granted by his predecessor in title. The right was a personal right given by the Hallidays to Naegele. Not being an interest in the lands, Oke on his purchase took the land clear of any right or license.

The result is, that Naegele's enjoyment of the personal right given him by the Hallidays has been interrupted. But that gives him no claim against Oke, who bought the lands clear and free of any claim against them.

If Naegele has any claim, it is not against Oke, but against Mrs. Halliday. This action, being against Oke, must be dismissed.

If Naegele were to sue Mrs. Halliday for breach of agreement, he must also fail, on the ground first mentioned.

It is therefore unnecessary to consider other interesting and important questions raised on this appeal —which should be allowed and the action dismissed.

A reasonable time should be allowed in which to permit the parties to adjust themselves to the changed situation arising from this judgment.

The judgment of this Court should therefore not issue for six months, and meantime the rights of the parties should continue as under the judgment of the trial Judge, with the right to the plaintiffs to remove the ram during that period.

RIDDELL, J.:—I agree, but I should prefer to put the judgment on the ground that at the most the license was a personal license by Halliday, and did not at all bind the land.

Riddell, J.

LENNOX, J.:—I agree, and adopt the ground stated by my brother Riddell.

Lennox, J.

MEREDITH, C.J.C.P.:—I am quite in accord with my brother Masten in regard to the proper judgment to be pronounced on this appeal, as set out in his opinion; but, as we are overruling the judgment of a Local Judge of much experience, upon a subject of litigation somewhat infrequent in the Courts of this Province —so infrequent that I can recall to memory but one case of the kind within recent years; a case tried at Chatham in the autumn of the year 1914; and a case which was fully argued in all its aspects but went off on a narrow ground*—I feel in duty bound to add something to that which that learned Judge has said.

Meredith, C.J.C.P.

It must not be forgotten that the title to the land in question

*Milner v. Brown (1914), 7 O.W.N. 303.

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is a registered title, and that the defendant, being the duly registered owner of the land, is entitled to the protection which the Registry Act affords, except in so far as he had actual notice of any adverse right; and the actual notice which the defendant had was of the Halliday-Naegele agreement in question, and so he is in the same position as, but not worse in any way than, if that agreement had been registered: he is not chargeable with any notice beyond that which the writing conveys: and that is really nothing affecting the title to the land in question, or the adjoining Naegele farm to which the water in question is conveyed: because neither party to the writing had any estate or interest in either farm; it is an agreement between persons strangers to such titles. If it be so that either owner—at the time the agreement was made—is estopped from denying that some right in the lands was given by the writing, or if it be that the parties to it were really the agents of the owners, acting for them in the making of it; or if it be that there was a prior verbal agreement between the owners, or those representing the owners, of which specific performance might be adjudged, the defendant had no notice of such things, and so they cannot be urged as against his registered title: and so, whatever might have been the effect, if any, of the writing, as between the owners of the two farms, at the time it was signed and delivered, or of any other unwritten agreement, it does not affect the defendant's registered ownership.

I agree that the writing would not, if made by the owner, effect a demise of any part of the farm in question: there is no rent reserved; the possibility, depending on Naegele's willingness, and other chances, of Halliday getting some "waste water" is very far removed from the annual certainty of even a peppercorn. Nor could it create an easement, in the strict sense of the term "easement;" and, if a right in gross only, would not be assignable: see *Ackroyd* v. *Smith* (1850), 10 C.B. 164, and *Thorpe* v. *Brumfitt* (1873), L.R. 8 Ch. 650; and, as the right is to be used only in connection with land in which the owner of the right has now no substantial interest, I am unable to imagine any kind of legal or equitable right the plaintiffs can have against the defendant, under the writing in question, enforceable in this action.

Appeal allowed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. June 24, 1916.

BANKS (§ IV C—111)—GUARANTY—BILLS OF LADING—IMPAIRMENT OF SECURITY—DISCHARGE.

When a guarantee of the payment of a "draft with bill of lading attached" is given, a condition is implied that the bill of lading shall be in a form which protects the guarantor, and therefore such a guarantor was not liable where the bill of lading was endorsed with a provision that the shipment might be delivered on the shipper's order without production of the bill of lading.

[*Pioneer Bank* v. *Can. Bank of Commerce*, 25 D.L.R. 385, 34 O.L.R. 531, affirmed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 25 D.L.R. 385, 34 O.L.R. 531, reversing the judgment at the trial in favour of the plaintiff. Affirmed.

Saunders, K.C., for appellant; *Cassels*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The appellant sued upon a contract contained in a telegram in the following words:—

We guarantee payment of drafts on J. J. McCabe with bills lading attached not exceeding in all sixteen hundred and twenty-nine 70/100 dollars covering two cars oranges containing 396 boxes each in P.F.E. 8304 and P.F.E. 11914.

The bills of lading attached to the draft shew that the goods were consigned by the vendors, "Mutual Orange Distributors," to themselves and on the face of the bills appears:—

Note on waybill.—Permit inspection without bill of lading. Deliver without bill of lading on order of Mutual Orange Distributors' Agent.

The contract is short, and, as I think, simple; indeed if it were not for the introduction into the case of matters foreign to it, there would not seem to be much more room for difficulty. It cannot, I think, matter what were the motives of McCabe, the purchaser, in refusing to accept the goods; all that we have to consider is whether the conditions of the contract were fulfilled so as to render the guarantee binding.

A bill of lading is not a thing of little known or uncertain character; on the contrary, it is in everyday use and to a very wide extent in commercial transactions. I should suppose it would be difficult to find any business man who would consider that the bills of lading attached to a draft were such as the respondent intended and had a right to expect. They carried no title to the goods as is proved, if proof were needed, by the fact that the vendors were able properly to, and did actually, divert one of the cars in transit. The appellant indeed can only support

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these bills by alleging some rather dubious customs of the fruit trade in California. I think the true explanation is that, as frequently happens in the conduct of business of every description, matters were dealt with in the most convenient and practical rather than strictly regular way. In the vast majority of cases, particularly when the parties are known to each other, such a course of dealing leads to no trouble; when it does, however, and it becomes necessary to resort to the Courts to settle disputes that have arisen, it is only legal rights that can be considered. Mr. Hicks, the vendor's agent, says, in his evidence, that the bills of lading need not necessarily have been made out to J. J. McCabe "because I knew that I was dealing with a reputable concern in the Mutual Orange Distributors, and I knew that they would not take McCabe's money and not deliver to him what I had bought for him."

An express and vital condition of the contract was not complied with and the obligation under the contract never attached.

It is unnecessary for me to add that if in this suit the issue was between McCabe and his agent in California I would in all respects agree with the trial Judge; because I fear that in last analysis McCabe may be the party benefited by this judgment; I must reluctantly agree that this appeal be dismissed with costs.

Davies, J.

DAVIES, J.:—I concur with Anglin, J.

Idington, J.

IDINGTON, J. (dissenting):—A guarantee was given at the request of McCabe named therein and a dealer in such goods as specified, and was confirmed by a letter of same date signed and countersigned respectively, on behalf of respondent, by its acting manager and accountant.

The appellant relying thereon discounted a draft of one Hicks upon McCabe for the sum of $1,629.70 and complied literally with the condition in the guarantee by annexing the bills of lading to the draft.

The trial Judge held that in doing so the appellant, under the circumstances in question, had done all that was required of it to demand the observance of respondent's obligation.

Both he and the Appellate Division of the Supreme Court of Ontario recognize to the fullest extent the obvious facts that not only could the respondent bank or McCabe have got the two car loads of goods in question, if McCabe had so desired, but also

that under the facts and circumstances there was no one else than McCabe or it, claiming or entitled to claim the goods in question.

I am, I respectfully submit, unable to understand how or why under such circumstances the Appellate Division can interpose in the terms of the guarantee a condition which is not expressed therein.

It is idle to suggest that sometimes and for argument's sake I will admit usually bills of lading of a certain class are made to so read that a delivery of the goods by the carrier shall be made to the shipper, or according to, and in compliance with, an order endorsed thereon. What has that to do with the real question? A bill of lading might be made to read, as it has been, to deliver to the bearer (See Scrutton on Charterparties and Bills of Lading, art. 56, p. 154 of 7th ed.) and then in such a case would the Court insist that doing so was all wrong and should not be permitted? Are business men to be bound to follow and observe the notions of Judges and Courts as to how they should conduct their business and communicate to and with each other their understanding of what they intend? Or must not Courts rather try to understand what men of business are about and see that their common purposes are fully and fairly executed, no matter how foreign the methods adopted may be to the ways in which the Courts might desire to see them travel?

Indeed, in this very case, the bill of lading, which is the standard approved by the Interstate Commission and substantially adopted by our own Railway Commission, is headed "non-negotiable."

Yet I have no doubt that the goods were deliverable to the owner, whomsoever he might be, at the point of destination.

The method in use is shewn to be, to name a consignee and to let his directions be obeyed. To facilitate this business method a direction is given which all concerned and properly instructed in regard thereto understand the meaning of. That is to name someone at the point of destination to be notified. Such party, if nothing intervenes to create a conflicting right, gets, as of course, the goods. In this case the matter is disposed of on the face of the bills thus:—"Consigned to Mutual Orange Distributors. Notify J. J. McCabe."

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And we are told the way bill was made so clearly in conformity with this method, that when one Moore, a local agent of the consignee, by mistake sought to divert one of the cars at Hamilton, he was called up on the 'phone by the railway company's agent at Hamilton and told that the direction as to that car was to notify J. J. McCabe at Toronto. Immediately he called on McCabe and asked him if those were his cars and was answered in the affirmative. McCabe himself had also been 'phoning to Hamilton to have one of these cars, then there on its transit towards Toronto, diverted there for a possible purchaser.

It seems this accidental circumstance of Moore's ineffectual attempt, led McCabe to inquire further. And, as the market was falling, when he learned the form of the bills of lading, he fancied he saw a dishonest means of escape from his obligations. Accordingly, without inquiry as to the real nature and effect of such form of bill of lading, he at once saw fit, without asking to see the bills of lading annexed to the draft, or the draft itself, which indeed had not yet been presented, to repudiate, and induce the respondent to repudiate, its obligations.

Both wired accordingly such repudiations to California; without waiting for presentations of the draft, or once attempting to get delivery of the cars by accepting the draft, getting the bills of lading and taking delivery of the cars, which beyond a shadow of doubt would have been accorded him, as the Courts below both find. To maintain such a course of dealing seems to me to put a premium upon dishonesty.

Bills of lading and their endorsement, or want of endorsement, give rise to many questions, often difficult of solution, where there are conflicting claims to the property in the goods, or disputes involving something of that nature. But this case is entirely free from any of such embarrassments. It turns, or should turn, upon the obligations of respondent in guaranteeing and representing McCabe and enjoying whatever rights he might have, yet subject to the due observance of such obligations as rested upon him. It is, therefore, well that we should appreciate exactly what these rights and obligations of McCabe were.

He was in communication with one Hicks, a broker at Potterville in California, and induced him as such broker to buy for him, McCabe, for shipment to Toronto, the two car-loads of

oranges in question. Hicks on his behalf bought these two car-loads of oranges from the Mutual Orange Distributors, and, the bargain made, they loaded the cars accordingly, and to expedite the business started them on their way, consigned, as they had a right to do, to themselves, till the price paid. The need of getting this guarantee, before the appellant would advance the money to pay the price, took a day or two, I imagine. Be that as it may, the appellant advanced the money and the full price (less brokerage charges to pay Hicks) was paid the Mutual Orange Distributors, who thenceforward had no claim or possibility of claim on the goods.

Their right ceased thenceforth to divert or order any other delivery than to McCabe or any one, such as the bank, possessing the bills of lading.

It is idle, therefore, to point to the original memo. at the foot of each of the bills of lading as having longer effect on the destination of the goods. Even the carriers, having notice of the facts, could no longer take any orders from such consignors or consignees. No one else than McCabe had any rights in the premises saving only the bank holding the bills of lading, and them only, until he accepted the draft, when the appellant became bound to surrender to him the bill of lading, and entitled to look only to such acceptance and the guarantee of respondent.

When the draft was presented he refused instead of accepting it. When the railway company tendered him the remaining car left after his interference with the other at Hamilton he refused that also.

The railway company upon delivery to it by McCabe, of the bills of lading without any indorsement by anyone, was bound upon payment of their freight to deliver to McCabe the goods which then and thereby should have become his property.

As I read the documents and the evidence and the law upon the subject as laid down in decided cases, that was his right. I respectfully submit it needed no telegraphing, as suggested by the learned trial Judge, to reach that result. Nothing was needed but a straightforward honest and usual course to be pursued by McCabe in order to reap the fruits of the work of himself and of his own agent, for that was all that Hicks was in the premises.

The Mutual Orange Distributors never intended by taking

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the bills of lading in the form they did to assert or retain any property in the goods beyond the time needed for McCabe's own agent arranging to get the cash from the bank and pay them, and their surrender of the bills under such circumstances needed no endorsement of the bills.

Something was suggested in argument as flowing from what Moore, an agent of the vendors, had said. He had said, though he was not asked to do so, that he would give no order. It was urged that this supported respondent and McCabe's positions.

I interpret that incident as of quite the contrary effect. Moore had no more authority than any one else to interfere and it needed no help from him or his principals under the circumstances, as he well knew, to enable McCabe to get the goods.

I have not the time at my disposal to enter upon a long exposition of the law, but those desiring to find it can do so by reading the chapter in Scrutton's work, already cited, on the effect of endorsement and the cases therein referred to and the chapter in Leggett's Bills of Lading, p. 4, pp. 611 *et seq.*, the case of *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. 164, and Benjamin on Sales, 5th ed., pp. 380 *et seq.*, and pp. 395 and 396.

The peculiar facts of this case, including Hicks' agency and the non-negotiable nature of the bill of lading and the intention of the parties, which must always be borne in mind, render it impossible to accept literally judicial dicta based on an entirely different sort of bill of lading and other purposes than evident herein.

I do not think if one reaches a correct view of the facts there need be much puzzling over the law.

Hicks swears he has handled during 6 seasons of such dealing from 500 to 1,000 cars a season and in 75% of the cases of shipment he had substantially acted as he did in this case and no difficulty had arisen in any one of them by reason of so doing. I believe him. Business men and carriers find the honest simple course the best and that course pursued by such men in California, where McCabe tried to do business and initiated this transaction, binds him.

The Banking Act, I incline to think, would have protected respondent if it had advanced the money and taken delivery of the bills of lading as they were presented. See sec. 87, sub-sec. 2.

Although having suggested that in the course of the argument as worth looking at I have not had time to form a definite opinion and express none.

The reasoning in the case of *Saunders Bros.* v. *Maclean*, 11 Q.B.D. 327, properly applied, supports the appellant instead of respondent for whom it was cited. The respondent here is like unto the defendant there. See also *Anglo-Newfoundland Development Co.* v. *Newfoundland Pine and Pulp Co.*, 110 L.T. 82.

The appeal should be allowed and the trial judgment restored with costs.

Anglin, J.

ANGLIN, J.:—The sole question in this case is whether the bills of lading (so called) attached to the draft discounted by the plaintiff bank were in compliance with the terms upon which the defendant bank guaranteed payment of the draft. I agree with the Judges of the Appellate Division that, in guaranteeing "payment of drafts on J. J. McCabe with bills of lading attached," the guarantors were stipulating for documents to be attached to the draft which would exclusively entitle them or their customer McCabe (whom they knew and were prepared to trust) to delivery of the consignment from the carrier. The bills of lading in fact attached to the draft made the vendors, the Mutual Orange Distributors, consignees, and each on its face also bore this note:—"Deliver without bill of lading on written order of Mutual Orange Distributors' agent."

The way bills also carried the same note. The effect of these documents, according to their terms, was to leave the consignment under the control and subject to the order of the vendors, the Mutual Orange Distributors, and, if it had been delivered to them or upon their order or that of their agent, the carrier would probably have had a complete answer to any claim by the defendant bank. In other words, the effect of the bills of lading was that (if liable on its guarantee) the bank would have been compelled to trust for its security upon the goods to the responsibility of the Mutual Orange Distributors and not to that of its own customer or of the carrier, for which it had stipulated.

It was contended that in California, where the shipment was made and the draft discounted, it was customary for banks to accept a bill of lading under which the consignor should also be the consignee as equivalent to a bill in which the purchaser was

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named as consignee, and that when such a bill of lading had been issued the carrier would make delivery to the person producing it and to him only. It is possible that if this had been the situation the stipulation upon which the bank guaranteed payment would have been complied with. But there is no evidence that it was customary in California or anywhere else to treat a bill of lading, bearing a note, such as that placed upon the bills here in question, entitling the carrier to deliver without production of the bills of lading, as equivalent to a bill of lading wherein the purchaser was named as the consignee, or that such a bill of lading would exclusively entitle the person producing it to delivery from the carrier. As Riddell, J., said, while the defendant bank may not have been entitled to have McCabe named as the consignee rather than the vendors, "the effect of the added clause permitting delivery without bill of lading on the mere order of the consignors (consignees) is different."

Admittedly the bill of lading sent did not, as it could not, prevent the goods being dealt with (and lawfully dealt with so far as the carrier is concerned) without the bank's consent; and, therefore, in my opinion, this was not such a bill of lading as the Canadian bank had a right to receive before being bound by their guaranty.

Much was made in the argument of the words, "notify J. J. McCabe," which followed the name of the consignee on the face of the bills of lading. But these words are under the heading "Mail address, not for the purpose of delivery," and do not import any right to delivery in McCabe. They were probably meant to enable McCabe, upon advice from the carrier of the arrival of the goods, to take steps to obtain a right to delivery under the terms of the bill of lading. As a fact, on application to the consignor's agent, McCabe was refused an order for delivery without instructions from the consignors, which were not given.

It may be that by some means or device McCabe could have got the goods from the carrier on their arrival at destination. It may be that, if sued for the price by the vendors, McCabe would have no defence to the action. But it does not follow that there was compliance with the terms on which the defendant bank agreed to assume the liability of a guarantor. Those terms were that

from the moment that liability should arise, *i.e.*, from the time at which the draft should be discounted by the plaintiff bank, the guarantor should have, through the bill of lading attached to the draft, such security as would be afforded it by goods held by the carrier subject to delivery only to itself or its customer McCabe. In my opinion the defendant bank did not receive the consideration for which it stipulated as a term of guaranteeing the draft on McCabe and on that short ground its defence should prevail.

For authorities shewing the necessity for strict compliance with the terms of a guarantee reference may be made to De-Colyar on Guarantees (3rd ed.) p. 201 n. (*i*) and 15 Hals. Laws of England, p. 479, par. 914.

I would dismiss the appeal with costs.

BRODEUR, J.:—I concur with Anglin, J. *Appeal dismissed.*

HAMILTON GAS AND LIGHT CO. etc. v. GEST.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. May 12, 1916.

GAS (§ IV A—15)—CONDUITS—DUTY OF CARE—NEGLIGENCE.

The right of the Provincial Hydro-Electric Department to lay pipes and conduits in public streets is subject to a continuing duty not to disturb the existing pipes and works of others who have similar rights; the latter are entitled to recover from a contractor of the department damages caused through his breach of such duty, but they cannot recover for losses which, by the exercise of reasonable care, they might have avoided.

APPEAL by the defendant from the judgment of the Judge of the County Court of Wentworth in favour of the plaintiffs in an action brought in that Court to recover damages for injury to the gas-pipes of the plaintiffs laid in the streets of the city of Hamilton, by the negligence of the defendant, a contractor for the construction of a conduit for the transmission of Hydro-Electric current. In the course of the defendant's work, it was alleged, he caused the plaintiffs' pipes to sag and leak. The judgment against the defendant was for $1,323.05 and costs.

A. O'Heir, for appellant.

S. F. Washington, K.C., for respondents.

MEREDITH, C.J.C.P.:—I am in agreement with the County Court Judge in his view of the law applicable to the questions of liability dealt with by him in this case: I am not in agreement with him altogether on the question of damages.

Mr. O'Heir's well-put and logical argument regarding the question of liability for loss sustained after the sale of the property

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in question by the one company, of plaintiffs, to the other whatever might be said of it if the case were one in which the injurer and the injured were altogether strangers in regard to the things out of which the injury arose—quite misses its mark in this case because of the particular rights and duties existing between the injured and the injurer in regard to such things.

The gas company and the Hydro-Electric Department had each a right to place and maintain pipes and conduits in the public street where the injury in question was done.

The gas company's pipes were laid there: and those of the Hydro-Electric Department were being laid there by the defendant under a contract with the Department; and were being so laid at a lower level than and underneath the pipes of the gas company.

The right so to lay the pipes or conduits of the Hydro-Electric Department was, therefore, subject to the duty to disturb the other pipes as little as reasonably could be, and to restore them, after disturbance, as nearly as could be, to the condition in which they were before interference with them.

Through some want of care, it is said, one of the pipes of the gas company was broken, and through that fracture a large quantity of gas escaped, both before and after the sale by the one company, of all its property, to the other: and damages have been awarded to each gas company for the loss thus caused, to the one for the loss before and to the other the loss after the sale.

Mr. O'Heir's contention that there can be no liability after the time of the sale is based upon the notion that the whole cause of action arose when the break occurred; and that the first owners can have no damages after their sale to the other company, because after that they sustained no loss, the loss was that of their purchasers; and that as to them there was no liability because no wrong done to them: but, as I have said, there was, in my opinion, the duty to restore the pipes, a duty which, as long as it lasted, was a duty owed to the owner for the time being of the pipes and of the gas wasted by reason of the continued neglect of that duty; a duty of the same character as if, instead of a broken pipe, it had been a length of pipe, or a plug removed, or a tap turned on, either negligently, or necessarily, in exercising the right to lay the pipes or conduits of the Department below those of the company. The price of the right to disturb the earlier laid pipes

was, in part, the restoration of them when disturbed and leaving them intact.

But the plaintiffs cannot, nor can either, recover for losses which the exercise of ordinary care, under all the circumstances of the case, on their part, would have prevented.

The law in this respect is thus enunciated in one of the latest cases upon the subject: "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach, and cannot claim as damages any sum which is due to his own neglect:" *Jamal* v. *Moolla Dawood Sons & Co.*, [1916] A.C. 175. And the subject of the measure of damages has been much discussed and made plain, generally speaking, in such recent cases as: *Erie County Natural Gas and Fuel Co.* v. *Carroll*, [1911] A.C. 105; *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301; *British Westinghouse Electric and Manufacturing Co. Limited* v. *Underground Electric Railway Co. of London Limited*, [1912] A.C. 673; and *Williams Brothers* v. *Ed. T. Agius Limited*, [1914] A.C. 510.

The outstanding facts bearing upon this question are:—

The defendant was only a contractor for the work of laying the pipes or conduits for the Department; his place of business was the city of New York; and his work on these pipes had ended for the working season.

According to the claim and evidence of the plaintiffs, late in November an enormous escape of gas began and continued through the months of December, January, and February, so great as to amount to about fifteen per cent. of the whole quantity made, that quantity being about eight million feet a month, for the three months.

Besides this, complaints flowed in to them of escaping gas in the street where the work had been done.

Unless the gas company took the unreasonable and inexcusable position that it was not a case of emergency for them—the emergency was that of the "other fellow" only—that it was really only the case, on their part, of a very large wholesale taker of their wares to be charged by them the highest retail prices, as they have charged him in computing their damages in this action, it must have seemed to them to be a case of great emergency calling for all effort, reasonably available to them, to stop the waste and the great danger it might cause.

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Yet really little, very little in the circumstances, was done. The defendant's foreman was notified of the leakage; but little, if anything, could be expected from that, as the work had ended for the season and the workmen had been disbanded. It could not have been thought that this man had much, if any, power to act then.

It was known that the leak was from the pipes in the trench which the defendant had opened; and I should have thought that, beginning at the end where the work ended, there could have been no great difficulty in finding the place of leakage by ordinary methods, in, at most, not many days, and the more so because the trench had been filled in only roughly.

The County Court Judge allowed the whole month of December, and one-third of the month of January, as the time during which full compensation, at retail rates, should be allowed for the escape of the gas, calculated at the quantity the plaintiffs said was lost; in addition to cost of search and repair.

In that he was quite too liberal in two respects—time and price—at least.

As to quantity, if the plaintiffs' statements of the actual quantity made and sold, and of the usual waste, be accurate, or nearly so, I agree with him in accepting the plaintiffs' rather than the defendant's contention as to the leakage being from the broken pipe which was eventually found; and for the leakage from which, for a reasonable length of time, liability is admitted by the defendant.

Thirteen days are said to have been spent in discovering the break, eleven in searching for it, and two in "investigating unsuccessfully;" and the County Court Judge thought the plaintiffs should be allowed about that length of time for searching and repair, in addition to the whole month of December for discovering that something was wrong and should be remedied by them; and this although the general complaints came in to them during the whole of the last week of December. In that, I am sure, the learned Judge erred. I cannot believe the company to have been so ill-managed, so very regardless of their own welfare, as to have allowed an extra loss in *waste* at the rate of a million feet of gas during the month to have happened without their knowledge, and indeed without knowledge of the cause of it, as well as the fact.

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Then as to the price: it is the defendant's obligation to make good the loss, not to make good, in addition to that, the retail profit upon it, which would not have been earned: the loss did not prevent the supply of every demand for gas; it was only the additional cost of labour, if any, and of material, and wear and tear, if any, that made up the actual loss.

Three weeks seem to me to be ample, in time, and 85 cents enough in money, to allow in computing the plaintiffs' damages; and, so computed, with the addition of $120 for labour and another length of pipe, the plaintiffs' damages are $684: it was not enough for the plaintiffs to give evidence of the retail selling price of their gas only; the onus of proof of the loss was on them, and they knew that the retail price was not the best evidence of it; they knew that price included profit and additional cost to them for "reading" meters and keeping and collecting many accounts, and probably other things; so they cannot complain at the price being put at 85 cents: and their charges for cost of finding and repairing the broken pipe are very high.

I would allow the appeal and reduce the damages to $684: there should not be any order as to the costs of this appeal.

Riddell, Lennox, J.

RIDDELL and LENNOX, JJ., concurred.

Masten, J.

MASTEN, J.:—This is an action for damages alleged to have been suffered by the plaintiffs, or one of them, in consequence of an interference by the defendant with the plaintiffs' pipe-line, situate on a street in the city of Hamilton.

The defendant is a contractor, who was employed by the Hamilton branch of the Hydro-Electric Commission to put down certain wires necessary for their system, in the city of Hamilton. In the course of so doing, in pursuance of the statutory authority enjoyed by the Hydro-Electric System, the street was broken up and a trench dug to a depth considerably below the depth of the pipes of the plaintiffs, which had been there for many years previously.

Owing to the failure of the defendant's workmen to proceed with adequate judgment and caution, the pipes of the plaintiff companies were not shored up or otherwise maintained in place, and the result was that they sagged, and a leak occurred. This leak continued from about the 1st December, 1913, until some time in the month of February, 1914, a period of about three

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months. Ultimately the leak was found and the pipe was repaired at a cost of $122.45.

The claim is put forward by the plaintiffs, charging the defendant at retail prices with the gas which was lost and with $122.45, cost of repairing the broken pipes.

The cause of action is, in my view, tort. The liability is admitted, and the sole question is the measure of damages. I agree with the view which has been expressed on that point by my Lord the Chief Justice, namely, that the plaintiffs cannot recover for losses which the exercise of ordinary care, under all the circumstances of the case, would have prevented. In addition to the cases referred to by my Lord (all of which are cases on contracts), I refer to the case of *Lavere* v. *Smith's Falls Public Hospital*, 26 D.L.R. 346, 35 O.L.R. 98, at p. 115, and *Bateman* v. *County of Middlesex* (1911), 24 O.L.R. 84, at p. 87, affirmed 25 O.L.R. 137.* These cases afford authority for what on principle would seem to be the law, namely, that the rule in question is applicable to cases of tort, as well as to cases of contracts.

With respect to the period during which the plaintiffs can reasonably claim damages, the quantity of gas and the price of gas per thousand, I agree with the view expressed by my Lord, and have nothing to add.

For these reasons, I think that the appeal should be allowed and judgment should pass in favour of the United Gas and Fuel Company for the sum of $684, as proposed by the Chief Justice, with costs down to the hearing.

With respect to the costs of this appeal, the defendant should, I think, be entitled to these, having succeeded substantially in reducing the judgment by about one-half.

Appeal allowed without costs; MASTEN, J., *dissenting as to costs.*

*Varied, as to the quantum of damages, in 6 D.L.R. 533, 27 O.L.R. 122.

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BODDINGTON v. DONALDSON LINE LTD.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. September 29, 1916.

1. MASTER AND SERVANT (§ II A4—60)—DEFECTIVE SYSTEM—NEGLIGENCE OF FELLOW-SERVANT—LIABILITY.

Where injuries sustained by a workman in loading a vessel are primarily due to a defective system in vogue, the employers are liable in damages under the provisions of Lord Campbell's Act (C.S.N.B., 1903, ch. 79), even though the accident was the result of the negligence of a fellow employee.

[*Wilson* v. *Merry*, L.R. 1 H.L. (Sc.) 326, distinguished; *Ainslie Mining*

v. *McDougall*, 42 Can. S.C.R. 420; *Brooks* v. *Fakkema*, 44 Can. S.C.R. 412, followed.]

2. EVIDENCE (§ IV L.—450)—REGISTER OF VESSEL—ADMISSIBILITY.

A certified copy of the register of a vessel is admissible as *primâ facie* evidence of its ownership.

[Merchants Shipping Act (Imp., 1894, ch. 60, secs. 64, 695); Evidence Act (C.S.N.B., 1903, ch. 127, sec. 39), considered.]

APPEAL by defendant from the judgment of Barry, J., refusing to set aside a verdict for plaintiff. Affirmed.

Statement.

F. R. Taylor, K.C., for appellant.

G. H. V. Belyea, for respondent.

McLEOD, C.J.:—I agree with the judgment of White, J., and I only desire to add a few words. In my opinion, the register of the vessel was properly admitted in evidence, and was *primâ facie* evidence from which the jury might draw the inference that the men working on the ship were employed by the defendant company: *Hibbs* v. *Ross* (1866), L.R. 1 Q.B. 534, Blackburn, J., at 543.

McLeod, C.J.

He states that this presumption may be rebutted by shewing that the ship may be demised or may be in the possession of someone else. This, however, has not been done in the present case. It was contended that the evidence of Gillies did rebut its possession, but his evidence does not sustain that contention. He says in cross-examination when he is asked who owns the "Marina," his answer is, "I couldn't say," and he says that he cannot say whether or not she is leased to Donaldson Bros. or whether she was chartered to them. The jury, however, have found that at the time of the accident the steamship was controlled and managed for the defendant company.

In my opinion, the principal question to be determined in this case is whether the defendant company is liable under what is known as Lord Campbell's Act (C.S. 1903, ch. 79), or only under the Workmen's Compensation for Injuries Act (Acts 1914, ch. 34). It is claimed by the defendant company that the accident was the result of the negligence of a fellow employee, and therefore the defendant company, if liable at all, would be only liable under the Workmen's Compensation Act. The jury found that the accident was caused by a defective system of loading the vessel. They also found that some of the men were negligent in the use of that system, stating what the negligence was in each case. If the accident was caused entirely by

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the negligence of the deceased's fellow employees the defendant company would only be liable under the Workmen's Compensation Act, but if the system of loading was an improper one and damage was caused thereby, the company would be liable notwithstanding the fact that some of their workmen had been negligent in using it. *Wilson* v. *Merry*, L.R. 1 H.L. (Sc.) 326, was cited and relied on by the defendant company, but in that case the system of the ventilation of the pit was of the usual kind, and was not as a system defective in any particular, but the workmen erected a scaffold in the pit for some purpose in connection with the work, which affected the ventilation, and the accident was thereby caused. The Court held that the erecting of the scaffold was an act of a fellow workman, and the company was not liable. Two cases decided by the Supreme Court of Canada seem to me to govern this case: The first is *Ainslie Mining & R. Co.* v. *McDougall*, 42 Can. S.C.R. 420. The second is *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*, 44 Can. S.C.R. 412, which follows the *McDougall* case.

The defendant company also claims that the deceased was guilty of contributory negligence. The jury found that he was not guilty of contributory negligence, and the evidence warranted that finding.

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

White, J.

WHITE, J.:—In discussing the several grounds on which the verdict in this case is attacked, I will do so in a somewhat different order from that in which these grounds were argued.

Although four defendants were joined in this action, the verdict was against one only, namely, the Donaldson Line Ltd. For convenience I will, in speaking of that company, refer to it simply as the defendant.

The ninth, and last, of the objections to the verdict urged by the appellant, is, "the trial Judge was in error in admitting what the plaintiff's counsel offered as a certified copy of the registry of the steamship 'Marina.' If this contention were sustainable, there would remain no proof that the defendant was the owner of the ship at the time Boddington was killed. Inasmuch as, without such proof, there would, admittedly, be no evidence sufficient to establish that the defendant is liable for the negligence complained of, I will consider this ground first.

The plaintiff claims that the certified copy of registry was properly received in evidence under the provisions of the Merchant Shipping Act, 1894, 57 & 58 Vict. (Imp.) ch. 60, secs. 64 and 695. Sec. 64 enacts: I quote only so much of the section as is material here:—

(2) The following documents shall be admissible in evidence in manner provided by this Act, namely,—(*a*) . . . (*b*) A certificate of registry under this Act purporting to be signed by the registrar or other proper officer.

Sec. 695 provides as follows:—

(1) Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence in any Court or before any person having by law or consent of parties authority to receive evidence, and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act or by any officer in pursuance of his duties as such officer.

(2) A copy of any such document or extract therefrom shall also be so admissible in evidence if proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original document was entrusted, and that officer shall furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same. . . .

The appellant argues that these sections, relating as they do to the admissibility and effect of evidence, are not in force here. But sec. 695 is in Part XIII. of the Act; and by sec. 712, which is the last section of that Part, it is enacted as follows: "This part of this Act shall, except where otherwise provided, apply to the whole of Her Majesty's Dominions." Under these provisions of the Merchant Shipping Act which I have quoted, I would be disposed to think the certified copy in question was properly admitted. But, in my opinion, sec. 39 of our Evidence Act, C.S. 1903, ch. 127 places the admissibility of the certificate beyond question.

The appellant contends that the certified copy in evidence does not come within this section because there was no proof "who the person was who signed this copy, or that he had charge of the original, and he does not appear to have been in any way a person having any authority to give the document."

Mr. Belyea, the plaintiff's solicitor, made a statement at the trial which the defendant's counsel admitted correctly set forth the facts thus alleged, and part of that statement is as follows: "Immediately after serving the notice of injury I wrote to the registry office in the city of Glasgow for a certified copy of the

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registry of the 'Marina,' and when it was received, I took out a summons asking that I be permitted to join the Donaldson Line Ltd., who were represented by this registry, as submitted in evidence, to be the registered owners of the 'Marina.' "

The certified copy referred to, bears at the bottom the stamp of a crown surmounting the words, stamped in red ink, "Registrar of Shipping, Custom House, Glasgow, 9 Dec., 1915." To the right of this is a certificate, likewise stamped or printed except the date and signature, and which reads as follows:—

Custom House, Glasgow, December 9, 1915.—I certify the foregoing to be a true extract from the register book in my custody, shewing the present description, ownership, and interest of the vessel mentioned, pursuant to secs. 64 and 695 of the Merchant Shipping Act, 1894.—C. F. TALLACH, asst. registrar.

This, I think, is sufficient to render the certified copy admissible in evidence; and, as the registry, as shewn by the certified copy, states the "names, residence and description of the owners" of the "Marina" to be, "The Donaldson Line Ltd., of 58 Bothwell St., Glasgow," that is sufficient evidence of ownership by the defendant.

In the case of *Reg.* v. *Bjornsen* (1865), 34 L.J.M.C. 180, a Crown case reserved, the question was, whether the ship on which was committed the crime of murder with which the prisoner stood charged was a British ship. To prove that the ship was British a certified copy of the registry was put in evidence. A copy of this document is given in the report of the case. The case was decided in 1865, and, therefore, under the Merchant Shipping Act, 17 & 18 Vict. No objection appears to have been taken to the certified copy as proof of the registry, but it was contended the registry was not proof of ownership. Erle, C.J., says (p. 184):—

There was undoubtedly *primâ facie* evidence that the ship was a British ship, for she had a certificate of registry as a British ship, stating her sole owner to be resident in London, and she sailed from London under a British flag. But Rehder, the registered owner, was proved on the trial to have been an alien born. This fact negatived the presumption that *primâ facie* arose from the other facts previously stated.

All the other Judges, Channell, B., Blackburn, J., Mellor, J., and Smith, J., expressed like views.

In *Hibbs* v. *Ross* (1886), L.R. 1 Q.B. 534, the facts were: A ship, of which the defendant was the registered owner, was lying in a dock under the care of a shipkeeper. One of the hatchways

was left open by the negligence of that person, and the plaintiff, who was lawfully passing across the ship, fell down the hatchway and was injured. He brought an action against the defendant. At the trial, it was proved and found by the jury that the injury was occasioned by the negligence of the shipkeeper; but the only evidence to fix the defendant was the proof of the register in which he was described as "owner."

Blackburn, J., refers to *Frost* v. *Oliver*, 2 El. & Bl. 301, and *Mitcheson* v. *Oliver*, 5 El. & Bl. 419, in which, as he points out, the law on this subject was discussed, and he quotes with approval from what he terms, the "very able and instructive judgment" of Crompton, J., in *Frost* v. *Oliver*, the following extract: "How is the *primâ facie* case to be rebutted? Surely by proof of all the circumstances by which the contract is proved to have been made with, and the credit given to, another, and not to the legal owner."

Lush, J., agreed with Blackburn, J. Mellor, J., delivered a dissenting judgment, holding that under the facts in that case, the owners' liability was not established. He, however, after quoting (p. 539) what was said by Erle, J., in *Frost* v. *Oliver*:—

> The doctrine that the legal ownership of a ship is proof that the master has authority to contract for such owner has been repeatedly negatived. . . .

adds that—

> it is a material circumstance as a step towards proof, is undoubted, and, coupled with evidence that the repairs were done for the benefit of the ship, or the stores were supplied for its use, may in general be a sufficient *primâ facie* case to call for evidence by way of explanation or answer.

From this language, I think it is by no means clear, that had Mellor, J., been dealing with the facts of the present case, he would not have held there is here *primâ facie* proof of the defendant's liability.

The evidence that the "Marina" was managed by Donaldson Brothers, Ltd., does not, I think, rebut the presumption that they managed the vessel for the registered owners, the Donaldson Line, Ltd., and as the latter company's agents.

For these reasons, I think the defendant's first objection, that there is no evidence that the defendant, the Donaldson Line Ltd., was the master or employer of Olsen or Truscott, or in any way responsible for the alleged, or any, defect in the "Marina," must fail.

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I come now to the defendant's second contention, that "there is no evidence upon which the jury's answers to questions 9 and 10, that there was a defective system and that the boom of the inshore winch was guyed too close to the hatch, can be supported." I think there is evidence to warrant this finding of the jury. We have the direct testimony of Olsen, that the derrick was guyed about over the middle of the deck's stage. He further says, that in operating his winch he never "walked it back," that is to say, reversed his engine so as to lower the load upon the stage; but that, after clearing the upper end of the landing-stage, the load would, without the winch being walked back, land about the middle of the deck-stage. The evidence shews that owing, in part, to the fact that the deck-stage was laid on the roof of cattle sheds erected on the main deck, and, in part, to the fact that when the injury occurred it was near high-water, the upper end of the landing-stage projected upwards some distance above the outer edge of the deck-stage. The step thus formed was filled with a shoe, some four or five feet long, which inclined downwards from the end of the landing-stage to the deck-stage.

As the deck-stage, which was ten or twelve feet wide, had a slope upwards from the side of the ship to the edge of the hold of one inch to the foot, the forward, or thin end of this shoe would meet the deck-stage near its centre, and form there, with the stage, an obtuse angle or depression. Now, it is obvious that under these conditions, if the derrick were so guyed that, as soon as the load had cleared the end of the landing-stage, its sustaining whip would be perpendicular, then, if the load swung further forward, it would, as in the case of a pendulum swinging past its centre, rise higher the further it swung, and would not ground upon the deck-stage till it had passed some distance beyond the outer end or point of the shoe. The distance it would thus go would, of course, depend upon the length of the whip, which would, in such case, form the radius of the circle in which the load swung. But if, as Olsen states, the derrick was guyed in the middle of the deck-stage, then the load, as soon as it had cleared the end of the landing-stage, would drop as it moved forward, till it came over the centre of the deck-stage. The fact, therefore, that, as testified by Olsen and other witnesses, the load usually stopped before passing the

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middle of the deck-stage, coupled with Olsen's evidence, that he never walked back the winch, might well convince the jury that the derrick was guyed as Olsen says it was, over the centre of the deck-stage. With the derrick guyed in that position, it is evident that if the load were lifted too high, or came up with too much speed, it would be much more liable to swing forward beyond the middle of the deck-stage, than if the derrick were guyed over the end of the landing-stage. The jury might, therefore, I think, quite reasonably find that the derrick, guyed where it was, constituted a source of danger to the plaintiff which could have been avoided by the exercise of proper care.

A more difficult question, perhaps, is raised by the defendant's contention, that assuming the derrick to have been improperly guyed too far out, that is the fault of the plaintiff's fellow-servants, and not negligence for which the master is responsible.

What difficulty there is, arises, not so much as to law itself, which is, I take it, well settled, but in applying the law to the facts. *Smith* v. *Baker*, [1891] A.C. 325, established that the master is responsible in point of law, not only for a default on his part, in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used. The defendant claims here that the derrick itself was a proper one, suitable for the purpose it was intended to serve, and that the position in which it was guyed formed no part of the system of work. He argues that in loading the derrick must be adjusted from time to time, as the exigencies of the work require, and that this adjusting is the duty of the fellow-servant of the plaintiff and not of the master. Had the derrick-rope been suspended from a swing-boom, as is not unusual in some kinds of loading operations, and the injury occasioned by the negligence of a workman in allowing the boom to swing too far in a particular instance, I would have doubted the master's liability. But here the boom was, so far at least as the system of loading employed at hold "Two" is concerned, a fixture. Its position formed part of the system provided when the plaintiff engaged in the work.

In *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326, the master had provided a proper system of ventilation for the mine, but his workmen, in the course of their mining operations, erected a platform in the shaft to enable them to run a level, which plat-

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form, owing to the defective method of its construction, brought about a collection of fire-damp, which exploded, and caused the injury. The House of Lords held the defendant not liable. But there the master had provided a proper system of ventilation. The ventilation was obstructed by the act of the workmen done in the course of their ordinary work. Here, when the work began, the machinery which the workmen had to use, was improperly set up, and therefore dangerous from the start. It was a "defect in original installation," to adopt the phrase used by Anglin, J., in *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*, 44 Can. S.C.R. 412. This, I think, not only distinguishes the case from *Wilson* v. *Merry*, but brings it well within the rule I have stated as laid down in *Smith* v. *Baker*.

The case here is likewise distinguishable from *Bergklint* v. *Western Canada Power Co.*, 50 Can. S.C.R. 39, cited by the appellant. There, as pointed out by Anglin, J., at p. 65,

> the protection alleged to have been lacking . . . was not for a place where men would be required to work in the same spot and under the same conditions for any considerable time.

Here the jury have expressly found the system defective in that the boom was guyed too close to the hatch. The case, therefore, as I have already stated, falls well within the decision in the *Fakkema* case. In that case Duff, J., after stating that the finding of the jury "is in effect a finding that the arrangement of works taken as a whole was faulty by reason of the fact that the engine was placed too near the chute," and, that he agreed there was evidence to sustain that view, says:—

> As to the first point (that is, whether in law such finding is sufficient to cast the liability on the company), the employer is responsible according to the view of the majority of the Judges in *Ainslie Mining and R. Co.* v. *McDougall*, 42 Can. S.C.R. 420, for the installation of a system of work which needlessly exposes his workmen to risk of injury.

I do not propose to re-state the grounds on which that opinion rests; they are sufficiently explained in the judgment of Davies, J.

Questions 4, 5 and 8, and the jury's answers thereto, are as follows: Q. 4: Was the death of Boddington caused by the negligence of the defendants, that is, by either their workmen, labourers, superintendents or foremen? A. Yes. (Unanimous). Q. 5: If so, in what did such negligence consist? A. Inshore boom guyed too close to hatch, and winch-man of inshore winch (Olsen) neglecting to stop winch when sling reached end of cargo-stage.

(Unanimous). Q. 8: If you find there was negligence on the part of both the defendants' servants or workmen and the deceased himself, then whose was the ultimate or proximate negligence without which the accident could not have happened: that is, who had the last chance of avoiding the accident? A. Mr. Olsen, inshore winchman. (Unanimous).

The defendant argues that, by these findings, the jury have negatived the master's liability, because they have found that the negligence of Olsen, the winch-man, was the proximate cause of the injury. I do not agree with that contention. Admitting that Olsen, by the exercise of due care, might have prevented the injury, the jury could very well find, as I think they have, in effect, found, that notwithstanding Olsen's negligence, the injury would not have occurred had the boom been properly guyed. The jury have distinctly found that the death of Boddington was caused by the negligence of the defendants in guying the boom too close to the hatch, and by the negligence of Olsen in neglecting to stop his winch when the sling reached the end of the cargo-stage.

The defendant further claims, "that the evidence is conclusive, that there was contributory negligence on the part of the deceased," and the answers to questions 6 and 7 are against the evidence. There is testimony, that when Boddington was struck by the flour-board, he was standing looking into the vessel's hold; that the foreman, Hoyt, shortly before the deceased was knocked into the hold, saw him standing on the end of the deck-stage lighting a cigarette; that he called Boddington to him and said, "you are in danger there, you have no business there;" and that upon Boddington answering, "I am all right," he replied, "you keep out of that." The evidence shews that Boddington's duty was to unhook the empty board, brought up from the hold, from the whip by which it had been landed on the deck-stage, and to hook this whip into the full board landed upon the deck from the warehouse; and, conversely, to unhook the whip which brought up the loaded board from the warehouse, and attach it to the empty board from the hold. There was a double crew, and the work was being rushed. Boddington had to be ready to unhook and rehook the boards, whether loaded or light, as soon as these

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landed on the stage. The testimony is that sometimes both boards landed on the deck simultaneously, and sometimes one after the other. These boards were about 2½ ft. wide by 5 ft. long. Bearing in mind these facts, and the limited area of the deck-stage, and that four men, including deceased, had to work there, I think the jury was quite warranted in finding there was no contributory negligence. As to Hoyt's evidence, Burchill, who was Boddington's assistant, testified that, after the latter's death, Hoyt ordered the witness to unhook the empty board from the sling, while a full board was coming up, and before it was landed. This, he says, he refused to do, and in that testimony he is corroborated by another workman, Watters. Hoyt denies that he gave the alleged orders. The jury might well have disbelieved Hoyt.

The defendant claims there is no evidence in support of the answer of the jury to Q. 15, that the deceased did not, at the time he entered the employment of the defendant for the purpose of the loading of the steamship "Marina," perceive and appreciate the dangerous nature of the employment, and voluntarily agreed to take all risks. Having in mind the law applicable to the maxim, *volenti non fit injuria*, as laid down by Lord Watson in *Smith* v. *Baker*, *supra*, I think the evidence warrants the finding of the jury. Not alone Boddington, but all of the other men working with him, on the deck-stage, appear not to have noted the position in which the inshore derrick was guyed, or to have appreciated the danger consequent on its being guyed too far out; for none of these men could tell with any certainty, just where the boom was guyed. Olsen, the winchman, was the one witness for the plaintiff who seemed to be quite certain upon this matter.

As to the finding of the jury in answer to Q. 8, that the winchman had the last chance of avoiding the accident, and the defendants claim that the evidence does not warrant such finding, I confess that this question as to the last chance does not seem to me to be very material, or applicable, to the facts of this case. If the jury meant that Olsen, by the exercise of proper care, could have avoided the accident, despite Boddington's position on the stage, I agree the evidence justifies that finding. It is, however, quite clear that Boddington, who had his back toward the incoming loaded sling, and was watching the up-coming empty board, could not properly be said to have had the last chance of avoiding

the injury. The loaded sling came with exceptional swiftness, or as one witness described it, "wicked." N. B. S. C.

For these reasons I think the appeal should be dismissed with costs.

GRIMMER, J., agreed. *Appeal dismissed.* Grimmer, J.

JAROSHINSKY v. GRAND TRUNK R. Co.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. May 12, 1916.

TRIAL (§ V C 1—285)—CONCLUSIVENESS OF VERDICT—NEGLIGENCE.

The Court should not interfere with the verdict of a jury in an action for damages for injuries resulting from negligence where there is some evidence to support their findings, even though their findings and answers upon questions submitted to them as to negligence and contributory negligence may not appear altogether complete and satisfactory.

APPEAL from the judgment of FALCONBRIDGE, C.J.K.B., and a jury, dismissing the action as against the Wabash company; the case went to the jury as against the G.T.R. Co. Affirmed. Statement.

Questions were left to the jury and were answered by the jury in writing and supplemented orally by the foreman in the court-room, to the following effect: (1) The injury which the plaintiff sustained was caused by the negligence of the Grand Trunk Railway Company. (2) The negligence was that the company "did not sound proper warning" by "the bell." (3) The plaintiff did not cause the accident by his own negligence. And the jury assessed the plaintiff's compensation or damages at $1,254.

FALCONBRIDGE, C.J.K.B.:—The action was dismissed by me at the trial as against the defendants the Wabash Railroad Company, without costs. Falconbridge, C.J.K.B.

As to the Grand Trunk Railway Company, the jury answered questions.

Mr. McCarthy argued that, on the plaintiff's own evidence, his action ought to be dismissed: *Grand Trunk R.W. Co.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838.

The examination and cross-examination of the plaintiff were most unsatisfactory. He is an illiterate Russian—he cannot read or write his own language, and, disclaiming any knowledge of English, his evidence was given through the medium of an interpreter. There were two of them in Court, and one criticised the other's rendering of the answers.

The plaintiff was therefore understood to give at least two

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different accounts of where he was when he looked to the right and to the left. I think I ought to assume that the jury accepted the answer which would place him where he ought to have been when he looked, i.e., just before crossing. As to the alleged want of warning by bell, I must accept the jury's finding, and I enter the verdict for the plaintiff accordingly.

The damages are very moderate and reasonable.

Falconbridge, C.J.K.B.

Judgment for the plaintiff for $1,254 against the Grand Trunk Railway Company with costs.

The defendants the Grand Trunk Railway Company appealed from the judgment of FALCONBRIDGE, C.J.K.B.

D. L. McCarthy, K.C., for appellants.

F. W. Wilson, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—If the defendants the Wabash Railroad Company were parties to this appeal, there should be a new trial of this action, because otherwise complete justice cannot be done in it: but those defendants were, at the trial, while counsel were addressing the jury, but before the jury was charged, dismissed out of the action, and have since been treated as if they were not parties to it.

I should have thought that, upon the evidence adduced at the trial, it might have been found that their negligence was the primary cause of the plaintiff's injury, if he were not himself the primary cause of it; and that, but for their negligence, he could not have any cause of action against their co-defendants.

And, besides that, the form of the questions submitted to the jury was embarrassing; and what took place when the verdict was rendered was not the best way of taking and recording the verdict: and so all things point to an unsatisfactory trial.

The Wabash Railroad Company's servants had backed a train down until it stood with the front part of its locomotive engine close to, if not actually overlapping to some extent, the sidewalk of the public street; and they kept it in that position, for the purpose of letting their co-defendants' train pass it, on the next track, until it did pass, injuring the plaintiff in so passing.

The street was one much used by highway traffic of all kinds; the railway tracks crossed it on a level with it, and were five in number; plainly a dangerous crossing, calling for more than ordinary care on the part of every one affected by, or concerned in, its dangers.

The time of the day was when workmen in large numbers were returning to their homes from their work; and there were, according to one witness, two girls, and, according to another witness, a woman and a girl, going to cross the tracks in the same way, and at the same time, as the plaintiff went to cross them.

The position in which the Wabash Railroad Company's servants placed their train was such as completely to shut out the view of the on-coming train, of their co-defendants, by any one proceeding to cross the tracks, as the plaintiff, and the others I have mentioned, were: and, besides that, there was such noise as this locomotive engine, close to, or partly on, the sidewalk, created, and the uncomfortable, if not alarming, sensations which close proximity to such an engine causes to a good many persons.

And there was no reason whatsoever for these servants taking up such a position; no reason why they might not just as well have gone further down the track, so that there could be no interference with the line of view, nor any distraction or disturbance, of men, women, or children desiring to cross the tracks.

That alone seems to me to have been a plain piece of disregard of the rights and welfare of others, inexcusable on the part of those in charge of this engine and the cars attached to it; but that was not all. In that position it was they who signalled to the other trainmen to bring on their train as they did: and, although doing all that, took no steps whatever to warn men, women, or children, about to cross the track, of their danger which the on-coming train that they had so brought on, caused: but seem, in laziness and indifference, to have remained in or near their engine and train, oblivious, or indifferent, to the danger to life and limb they were creating, unless they gave such warning. I cannot at all understand why the plaintiff so tamely submitted to the dismissal of the action, without going to the jury, as against these defendants; I can understand why the defendants did if they were acting in concert, because it took away the plaintiff's much stronger cause of action.

But so the parties have left the case; and so it must be dealt with now.

Against the appellants the jury found that the plaintiff's injury was caused by their negligence in not sounding proper warning: and, this finding being a doubtful one, the jury were

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asked whether they meant the bell or the whistle, and the foreman answered "the bell." It was then discovered that they had not answered the question as to the plaintiff's negligence or contributory negligence: but it does not seem to have been discovered that that was caused by the peculiar form of the question in this respect. The first question was, in effect, whether the plaintiff's injury was caused by the negligence of the appellants; and then followed, after a question as to the character of the negligence, the unanswered question, which was in this unusual and embarrassing form: "*Or* was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened?" The jury, no doubt, saw at once that the questions gave them but a choice of one of two things: was it the appellants' *or* was it the plaintiff's negligence that caused the accident: so they were quite right in thinking that the one answer necessarily covered both questions, it was the one *or* the other thing they were to find.

If the trial Judge had observed the error in inserting the word "or" between questions 2 and 3, I am sure he would have struck it out and have charged the jury again, making it very plain to them that questions 1 and 3 should not be alternative, that both, quite consistently, could be answered in the affirmative, and would have directed them to retire and deal with question 3 in the light of his further charge.

Not observing it, the Judge elicited an answer from the foreman to question 3 in this, far from satisfactory, manner:—

"(3) Or was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened?

"His Lordship: Do you find that he was not guilty of negligence? You have not answered that.

"The Foreman: The railway.

"His Lordship: You are satisfied he did not cause the accident by his own negligence?

"The Foreman: Yes.

"His Lordship: Then I will put down the answer 'No.'"

Instead of the jury having had the separate and independent character of the question as to contributory negligence made plain to them, they were asked: "You are satisfied he did not *cause* the accident by his own negligence?" And the answer to

this very leading—and may I not say misleading because of its words "*cause* the accident," as well as its general form?—question was merely "Yes." If the matter stood thus, I could not be satisfied in letting the judgment, directed to be entered upon the verdict, stand: but it does not; the Judge then told the jury that he would put down as their answer to question 3 the word "No:" and he did so, without objection by any juror, and, that which is more important, without any objection by counsel for any of the parties, although counsel for all were present: and no objection, in that respect, has been made, to the verdict or judgment, upon this appeal. The written verdict must therefore prevail, as it did in the case of *Gray* v. *Wabash R.R. Co.* (1916), 28 D.L.R. 244, in which case there was nothing but the foreman's personal view, expressed in the words, "I could not go further," etc.—and words expressed under unfavourable circumstances—opposed to it. But, nevertheless, it is far from being a verdict so pronounced and so taken as quite to bring a sense of complete justice done.

That brings me down to the main, if not the only, grounds urged in support of this appeal, namely: that there was no evidence upon which reasonable men could find that the proximate cause of the plaintiff's injury was a failure on the part of the appellants' servants to ring the bell of the locomotive engine which cut the plaintiff's arm off; or could find that the plaintiff was not guilty of contributory negligence.

Upon the question of the ringing of the bell, the weight of the testimony is decidedly in the appellants' favour; and is so without giving effect to Mr. McCarthy's two unusual contentions: the first of which was that the evidence of those witnesses who did not hear either whistle or bell should be excluded because the jury had found that the whistle was sounded; that one who did not hear the greater sound could not be a witness regarding the lesser; but I am not able to accept the statement of fact, upon which this contention is based, that the jury must have found that the whistle was sounded; it is true that placing their verdict on the fact, as they found it, that the bell was not rung, they must be taken to have negatived the plaintiff's right to recover on the ground that the whistle was not sounded; but that is different from a finding that the whistle was not sounded; it may very well have meant that failure to sound the whistle was not

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sufficiently proved for the jury to have found whether it did or did not—therefore not proven only. But the case does not turn upon this point; or upon the other, which is: that the testimony of the witnesses who testified merely that they did not hear the bell, and who were not asked whether they should have heard it if it had rung, should be excluded. It is not always necessary to ask such a question, though invariably in cases tried before me it has been asked: nor am I quite sure that in strictness it is quite a proper question. But the law of evidence upon this subject is simple and general: no witness is competent to give any evidence until he qualifies himself; in such a matter as this a witness is qualified when it is shewn in any way that if the bell had rung he could have heard it. For instance, if a witness testifying in the first instance, irregularly, as to the ringing of a bell, answers "Yes" or "No," and afterwards testifies that he was not at the place in question at all, but that he knows it did or did not ring because his wife was there and told him so and that he would sooner take her word for it than his own, he is disqualified, and his whole testimony in that respect should be rejected. But, if it is self-evident that the witness is not deaf, and if he is shewn in evidence in any way to have been in hearing distance, he is a competent witness, however little, or however much, weight his testimony may have.

The circumstances of the case favour the testimony that the bell was rung: it worked automatically and was said to be in proper order: the fireman, whose duty it was to ring it when not working automatically, and who had the best knowledge of the fact, testified that he also rang it with the bell-rope, a thing that habit and a desire to be sure would impel: the train was coming to a very wide level highway crossing, it had had to wait until the Wabash train had backed down upon another track, and had then been signalled to come on, and it was the workmen's home-returning hour from the great factory in the neighbourhood, and so it was just one of those occasions on which the fullest warning should, and ordinarily would, have been given; just one of those things which, if done, would be well described by what was testified to have been said by the driver of the Wabash engine at the time: "Carter," the driver of the Grand Trunk engine, "is making a lot of noise coming up to-day."

To disregard altogether the testimony of the trainmen, be-

cause they may be interested in the success of the defence of the action, is altogether wrong. To attempt, as is sometimes done, to treat it as something in the nature of a joke, is inexcusable; and the more so when a verdict is rendered or sought on the testimony of a plaintiff alone, notwithstanding his greater interest in the success of his action. There is no good reason for treating the testimony of trainmen, in an accident case, any differently from that of any other class of witnesses giving testimony, whether alike interested or disinterested, in any other kind of case: and sometimes the contrast between the faith in, and not infrequently deference to, trainmen, by jurors, and others, proceeding by train to, or returning from, the Assizes, and their treatment during some trials and in some verdicts, are in marked contrast, and not extremely creditable to those who create the contrast. It would be concealing the truth if one did not say that to-day, as well as in years past, jurors sometimes, in cases such as this, exchange the scales of justice for the scale of pity; a thing which might be distinctly creditable to them if the hand of pity reached their own pockets only.

But there was testimony that the bell did not ring, a good deal of testimony, however little its weight might be in some minds: take for instance the witness Borland, who was driving the waggon of an express company and waiting for an opportunity to cross the tracks at the place in question, and so looking out for moving trains and engines, his mind intent on driving across at the first moment of safety; he heard the whistle but did not hear the sound of any bell. The trial Judge, rightly, could not have "nonsuited" on this ground.

And now I come to the main point involved in this appeal: Could reasonable men, acting conscientiously, have found, upon the whole evidence in the case, that the plaintiff was not guilty of contributory negligence? And, if there were no exceptional circumstances favouring the plaintiff, I should unhesitatingly answer that question with an emphatic "No:" and would add that his conduct shewed an entire absence of any kind of influence of the first law of nature.

Who are they who mainly suffer such injuries? Full-grown men, who ought, if they used their common sense, to suffer least. Why is it that women and children suffer less? And why even domestic dogs apparently still less? Because familiarity with

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such dangers breeds indifference to, if not contempt of, them in men; that and man's self-deceiving conceit in his own power to "take care of himself."

If women and children, if even domestic animals, take some precaution which saves them: if even the piccaninnies of the South lay down the true doctrine in their sometime familiar refrain: "Oh! look to de Eas'; And look to de Wes'; And see the bullgine a-coming; Then get off de track; Or she'll hit you a smack; And land you on de udder side Jordan"—what excuse can this plaintiff, or any one in his behalf, offer, for not looking, and seeing the danger, and avoiding the injury, an injury exceedingly undesirable on all hands, including the country of the man's adoption, which, like other countries, is not partial to maimed men?

If the obstruction to the man's view had been a fixed and unattended one, such as a fence, or even a standing car, he would be without excuse; and I cannot think any unprejudiced person would venture to say that he was not plainly "the author of his own injury." The only ground upon which he could be exculpated would be that the law permitted him to close his eyes and stop his ears and yet hold the appellants liable if a jury should find that the bell did not ring: that such is not the law every one must know, as well as that, it may be, the law goes too far in depriving an injured person of all compensation, if by the exercise of ordinary care he could have avoided his injury, no matter how negligent were those who caused his injury.

Where there are no exceptional circumstances, a person going into danger must take those precautions which reasonable persons would ordinarily take in the same circumstances. To have crossed without taking any care would have been, as I have said, more careless than even the man's dog would have been. To say in one breath that he looked, and in another that he did not, affords no evidence that he took any such care. It would be so, too, if he had throughout said that he did look; because then he would have been fairly and squarely within the pincers of the logic of the Lord Justice frequently referred to: "If you did not look you were negligent: and if you looked and did not see you were negligent:" and so having both looked and not looked, if judged by his own estimony, the plaintiff is doubly condemned.

If the man looked, why was he hurt? Did he look too late? If so, that look does not count in his favour, it condemns him. If he did look, and took his chances of getting over in time, a thing consistent with all the testimony regarding his running or hastening and turning out, then he took his life and limbs in his own hands, and must suffer the consequences. And that he did not, as the others did—men, children, and a woman—is also very much against him; what they did, and were uninjured, is pretty good evidence of what would be done ordinarily.

But there were exceptional circumstances—there are in most of the cases that come before this Court. Cases would not be brought here if there were not. Few are foolish enough to bring an action with a nonsuit staring them in the face.

The special circumstances are those I have already referred to: the Wabash shunting engine, and cars attached, had just been brought down, by the yard crew, and placed so as to obstruct the view, so as to make a real trap for the unconscious and unwarned; the crew had signalled the other engine to come on; they saw and knew of the traffic intending to cross the place that this engine must pass over, traffic on foot, including men and children and at least one woman, according to the testimony, as well as at least one horse and waggon and a driver: and there were four of these yard and engine men—the yard crew—all, or at least some, of them, idle: in these circumstances, I am not prepared to say that reasonable persons, acting ordinarily, under those circumstances, might not have proceeded to cross the track, on their way home from their work, in the faith that, if there were any danger, these idle men, who were creating it, would stop or otherwise warn them: and so the trial Judge rightly could not have withdrawn the case from the jury on this point.

The result is that, in my opinion, the verdict and judgment cannot be interfered with on any ground of right the appellants have to attack it: and few indeed should be the cases, of this character, in which a new trial should be granted in the absence of such a right: a new trial being such an extremely hard thing upon him who has regularly won the victory.

Though by no means satisfied that complete justice has been done, I would dismiss this appeal, seeing now no fair and reasonable means by which it can be made completer, now that the

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Wabash Railroad Company are beyond the reach of the arm of this Court—though if in truth there be some arrangement between these defendants as to bearing the brunt, one need have no regrets because of the result of this appeal.

RIDDELL, J.:—The plaintiff, a Russian living at Ford City, on Drouillard road, at a little distance south of the railway tracks used by both the Wabash and the Grand Trunk Railway companies, and employed by the Ford company north of the tracks, was, at the close of his work for the day, going home about 4.45 p.m. on the 2nd September, 1915. Crossing one of the lines of rail, he was struck by an engine of the Grand Trunk company and somewhat seriously injured.

He brought this action against both railway companies, failed as against the Wabash, but had a verdict for $1,254 against the Grand Trunk—the Grand Trunk now appeal.

There are five lines of rail which cross Drouillard road, substantially parallel and close to each other. On that furthest north stood an engine (with some cars) facing east, and with the cow-catcher close up to the western sidewalk, along which the plaintiff was proceeding southward—this was a Wabash train, and the engine was letting off steam. The plaintiff, thinking it was going to move east (it had, he says, been moving east till he came within 5 or 6 feet), stopped and looked at it, but, finding that it did not move, he passed south in front of the engine and remembers nothing more till he was in the hospital.

After he walked in front of the Wabash engine "he did not look," "he did not see nothing, he did not look," "he looked both ways and he did not see anything." He does not know what struck him; the man who was with him, he thinks, stopped talking to some one and he left him there and he does not remember that man yelling at him and telling him not to cross—after he started to go forward, after looking at the standing train, "he looked first one way and then the other way," he looked "on the right first and then on the left, that would be west and east:" he was close up by the train "when he looked both ways . . . when he passed the engine, he says." This is the story, as told in the first day of the trial, through an interpreter—on the second day another interpreter is on hand and the plaintiff gives further evidence.

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Questions were left to the jury, and the following took place when the jury came in with their answers as follows:—

"(1) Was the injury which the plaintiff sustained caused by any negligence of the Grand Trunk Railway Company? A. Yes.

"(2) If so, wherein did such negligence consist as to the Grand Trunk Railway Company? A. Did not sound proper warning.

"*His Lordship: Do you mean as to the bell or the whistle?*

"*The Foreman: The bell, your Lordship.*

"(3) Or was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened?

"*His Lordship: Do you find that he was not guilty of negligence? You have not answered that.*

"*The Foreman: The railway.*

"*His Lordship: You are satisfied he did not cause the accident by his own negligence?*

"*The Foreman: Yes.*

"*His Lordship: Then I will put down the answer 'No.'*

"(4) If you answer 'Yes' to the last question, in what did his negligence consist? No answer.

"(5) If the plaintiff is entitled to recover, at what sum do you assess the compensation to be awarded? A. $1,254."

The learned Chief Justice added to the answer to the second question the words "*as to bell*" and as the answer to the third "*No.*" (I italicise what is not in the original questions and answers.)

I do not think there is any reason to doubt that the learned Chief Justice obtained the meaning of the jury in respect of questions 2 and 3. *Gray* v. *Wabash R.R. Co.*, 28 D.L.R. 244, was not intended to revolutionise the practice which has prevailed for many years and to compel a trial Judge to send the jury back to their room and insert answers, explanations or qualifications, with their own hand. In the *Gray* case, the majority of the Court thought that "the statement of the foreman, especially when given in the course of a conversation, in which there was no time to weigh his words, ought not to be taken as overriding the deliberate written verdict of the whole jury" (28 D.L.R. at p. 246)—in other words, that Mr. Justice Middleton, the

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trial Judge, had not obtained the real meaning of the jury. I was and am unable to see that such was the case: but, in any event, there is no contradiction here by oral communication by the foreman of what had been put into writing—what he says does not at all override the written statements.

That being so, we must take it that the jury have been able to find as proved only one act of negligence, i.e., the omission to ring the bell. It has, of course, been laid down more than once that for all purposes of the verdict the finding of one or more specific acts of negligence negatives all others which are charged.

Several witnesses say they did not hear the bell—of course that in itself would be of little or no consequence unless they go further and say that, had the bell rung, they would have heard it, or circumstances are made to appear which would justify the conclusion that the fact that they did not hear the bell shewed that the bell was not in fact rung.

In *Ellis* v. *Great Western R.W. Co.*, L.R. 9 C.P. 551, at p. 557, Bramwell, B., says: "The only thing relied on for that purpose" (i.e., to prove that warning was not given) "is the statement of the plaintiff that he did not hear it. That is no evidence that it was not done. It is consistent with two things—one that it was not given, the other that, though given, it was not heard. And when testimony is equally consistent with two things, it proves neither. This may seem a subtlety, but it is not. We all know what is done at nisi prius on such occasions. The question is, 'Had he called out, should you have heard?' If the answer is, 'I can't say,' then there is no evidence. If 'Yes,' there is. But 'I did not hear' is no evidence."

But, when this was cited in the House of Lords in the celebrated case of *Dublin Wicklow and Wexford R.W. Co.* v. *Slattery* (1878), 3 App. Cas. 1155 (see p. 1161), Lord O'Hagan said (p. 1183): "It was urged, and the authority of an eminent Judge was vouched to sustain the suggestion, that proof of the want of hearing was no material proof at all. But this seems to me untenable. Assuming that a man stands in a certain position, and has possession of his faculties, the fact that he does not hear what would ordinarily reach the ears of a person so placed, and with such opportunities, seems to me manifestly legal evidence, which may vary in its value and persuasiveness—which may in some instances be of small account, and in others be the

strongest and the only evidence possible to be offered; but at all events cannot be withheld from the jury. And if this be so, there was here a conflict of testimony on which the jurymen, and they alone, were competent to pronounce."

There is, however, at least one witness who "is not deaf" and who hears every bell that rings, and he did not hear the bell alleged by some witnesses to have been rung—the jury might, if they thought it credible, believe this witness, and they have done so. I do not think that, consistently with the rules so often laid down, we can interfere with this finding.

The sole question, then, is, whether the jury should have answered the third question as they did: and that is just another way of saying, "Should the learned Chief Justice not have nonsuited?"

It is argued that the plaintiff has put himself out of Court by swearing that he did not look after coming in front of the Wabash train. Had this been the case, we might have had to apply the cases cited on pp. 80, 81 of the report in *Tinsley* v. *Toronto R.W. Co.* (1908), 17 O.L.R. 74, modified perhaps by the decision in the Court of Appeal in *Wright* v. *Grand Trunk R.W. Co.* (1906), 12 O.L.R. 114. But we are not called upon so to do under the evidence here.

The plaintiff swears at one time definitely and specifically that when he passed the Wabash engine he looked both ways—it is true that at other times he says differently, but that is for the jury.

In *Scott* v. *Lake Erie and Detroit River R.W. Co.* (1900-01), unreported, the plaintiff brought his action against the railway company. When he was examined by his own counsel, he would give one account, when by the counsel for the defendants, another and a contradictory one, ending up with the latter. Mr. Justice Ferguson, the trial Judge, nonsuited; but this was reversed by the Chancery Divisional Court, Boyd, C., and Robertson, J.—Meredith, J., dissenting. A new trial was ordered at the expense of the defendants. An appeal to the Court of Appeal was dismissed, as was an appeal to the Supreme Court of Canada. The facts of this case will be found in Cases in the Supreme Court of Canada, vol. 210, 1901, in the General Library at Osgoode Hall.

It cannot, consistently with this decision, be held that all the

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statements of the witness are not to be submitted to the jury —or that the jury must necessarily take either view of their effect.

The jury believing that the plaintiff took all proper care, their answer would be justified.

The fact that the plaintiff began to run (if he did) does not necessarily connote negligence—that again is for the jury.

I would dismiss the appeal with costs.

LENNOX, J.:—The action was tried by the Chief Justice of the King's Bench and a jury.

The claim against the Wabash Railroad Company was withdrawn from the jury, and judgment directed dismissing the action without costs.

[The learned Judge then set out the questions left to the jury and their answers, as above, and proceeded:]

The defendants the Grand Trunk Railway Company ask to have the judgment entered upon the findings of the jury set aside, and, alternatively, for a new trial.

The action could not properly have been withdrawn from the jury. There was evidence to go to the jury, and, in my opinion, evidence upon which ten reasonable men could answer the questions submitted in the manner above set out. The only question which, to my mind, is even reasonably open to argument is as to contributory negligence. Upon the evidence adduced, a jury might perhaps reasonably conclude that the plaintiff could, by the exercise of reasonable care, have avoided the casualty, but they could, upon the evidence, at least as reasonably come to the opposite conclusion. Upon the question of looking out for danger at the only point at which looking was practically possible, when the plaintiff had emerged from the track occupied by the Wabash train—there was evidence both ways; and it was none the less evidence which the jury *must be* allowed to consider and pass upon, because it was all given by the same witness, the plaintiff himself. That, wisely or unwisely, he was trying to avoid a collision is the evidence of all the witnesses, and to accept the evidence of the company's witnesses as to haste—which I would think would be only accepted with reservations—is to emphasise this. That he passed rapidly in front of the stationary, or slowly receding, engine, does not indicate indifference to personal safety, but the contrary—to that extent it is the act of a

prudent man—and, as neither Tatro, Duchene, Clark, nor any other witness said to have been in a position to know whether the plaintiff was looking or not, was questioned as to this matter, the jury may have inferred that the company were not anxious to have this point cleared up. And so it resulted that the plaintiff's evidence as to looking went to the jury without contradiction, and it was for the jury to determine which of the plaintiff's divergent statements they would accept, if either, just as it is for the jury to consider whether a witness tells the truth upon examination in chief, or upon cross-examination, or at all.

There was evidence upon which the jury, as reasonable men, could say that the plaintiff was not guilty of negligence but for which the injury would not have occurred. If he is to be believed —and the jury is to pronounce upon this—he had *no actual warning* of any kind when he passed in front of the Wabash engine; he could not see and he did not hear the approaching train; and, aside from the train crew, I do not remember that there is a witness who says he heard the bell until the engine was on or almost at Drouillard road; and, in the absence of this, it was not negligence for him to cross in front of the Wabash engine; at all events, this was not suggested as negligence at the trial or upon argument of the appeal.

As to the negligence of the company and how the accident occurred—including the question, as the learned Judge puts it, whether the engine ran the man down or the man ran into the engine—even if he did look, was the company's negligence in any case the cause of the injury? Or, even if the bell was not rung, yet, knowing of the danger, and having a chance to escape, did the plaintiff decide to plunge ahead and take chances? These are all questions upon which there was evidence to go to the jury, and, upon conflicting testimony, to be weighed and determined in answering questions 1 and 2. Their answers are not necessarily final. It is again a question of whether ten reasonable men could answer as this jury have answered. I can see no reason why they could not. Neither do I find anything in the evidence, after a very careful perusal of it, that would indicate a miscarriage of justice. Mr. McCarthy's argument, that much of the evidence for the plaintiff, perhaps all of it, being that neither whistle nor bell was sounded, or at all events heard or recollected,

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and the jury's finding being impliedly and legally a rejection of this evidence so far as it related to the sounding the whistle, the conclusion, based upon the evidence of the same witnesses, that the bell was not kept ringing, could not be accepted as the finding of intelligent and reasonable men, was ingenious, and, if technical, was somewhat captivating and presented with very great skill. I can conceive that a case might arise in which it would be unanswerable. The evidence shews that it is very far from being unanswerable in this case. The evidence as to the bell and whistle was not limited to the evidence for the plaintiff. The jury does not say that the bell was not rung at all, but that the defendant company "did not ring the bell continuously for a quarter of a mile, as required by the statute, in approaching and making this highway crossing." This is not the language used; but, taken with the specific instructions of the learned Chief Justice, there is no room whatever for doubt as to the meaning. As to the whistle, the jury may have left the question undetermined or may have been unable to agree, and, as reasonable men, it was open to them to accept the positive testimony of two or three Wabash employees—financially unconnected with the Grand Trunk. But of the thirteen witnesses called for the defence (an unfortunate number) there is not one, with the exception of the train crew and possibly Hutchinson, who says that he heard the bell until the train was practically upon the plaintiff. Edward Tatro, the first witness for the defence, whose attention was directed to the railway at the time, heard a whistle, but heard no bell. Duchene heard whistle and bell; but, as far as I can make out his evidence, he says that the bell and whistle were sounded and the collision occurred at about the same moment. Borland heard the whistle, but did not hear the bell. He too was in a position to hear, and was paying attention to the operation of the railway. Hutchinson was up the track a little way, and he says that the bell was ringing when it passed him. He says nothing as to the bell before or after this time. McGorlish and Stevens were at switches and heard no bell. They were east of the track, I think.

Rennie, fireman, and Butler, engineer, on the Wabash engine, the engine being immediately north of where the accident happened and partly on the roadway or just clear of it, say the bell was ringing *when it passed them*, but nothing about when it began

to ring. This was just when the accident happened. Of course there is a difference between not hearing or not noticing and positive affirmative evidence, but it is sufficient, although not conclusive. It was all for the jury to consider. I am not of the opinion that the finding as to the bell, to be logical, involved a finding also that the whistle was not sounded. On the contrary, I think that the finding, just as it is, is cogent evidence that the jury took an intelligent and rational view of the evidence, taken as a whole, as to the alleged negligence of the defendant company. This disposes of the appeal.

The learned Chief Justice, in charging the jury, limited them to finding negligence upon two grounds only, namely, neglect to ring the bell or sound the whistle as required by the statute. This was a shunting engine, plying back and forward over a much frequented highway, and the requirement of the public as to speedy transit is not involved, as it would be in the case of freight and passenger trains.

The accident happened at a time of the evening when, as the railway employees would know, hordes of people would be crossing to their houses from the Ford factory.

There is a great deal of evidence to suggest that the bell, if rung, was not an effective warning to people using the highway. There is no evidence as to the character of the bell used except that it was intended to work automatically, was rung by hand when out of order, and was being rung by hand at the time of the accident. It is in evidence that it was not always rung. The Legislature meant a bell that would be heard on a highway a quarter of a mile away, and this having regard to prevailing conditions; and this I would think particularly applicable to shunting engines operating over crowded thoroughfares, or where other noises are liable to drown a feeble tongue. Here the danger was greatly aggravated by the number of people using the highway, the volume of railway traffic, the running rights of the Wabash upon the same tracks, and the complicated switching and shunting operations over five tracks at a point which was practically a railway yard. Counsel for the plaintiff did not ask, but I should have asked, that the question of the company's negligence should be left at large, with instructions to the jury to assign negligence, if established, upon grounds other than or in addition to breach of the statutory duties referred to. The

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JAROSHINSKY v. GRAND TRUNK R.W. CO.

Lennox, J.

speed of a shunting engine approaching and crossing a highway of the character here might in itself be evidence of negligence; and the distance the train moved after notice of the danger, with brakes applied, might perhaps be evidence of negligence, in the circumstances of this case. It would be an unwarranted presumption on my part, with my comparatively limited experience, to speculate as to whether the learned and experienced Chief Justice would or would not have thought that there was evidence proper to be submitted to the jury upon any of these questions if his attention had been pointedly called to them. The submission was not made, and for the time being, at all events, the plaintiff is not prejudiced if my learned brothers reach the conclusion I have come to.

I think the appeal should be dismissed with costs.

Masten, J.

MASTEN, J.:—The trial appears to me to present so many unsatisfactory features that I would have been glad to see a new trial directed; but I feel myself overborne by the reasoning which has been so effectively presented by the other members of the Court; and, accordingly, I reluctantly concur in the conclusion at which the majority have arrived. *Appeal dismissed.*

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PEARCE v. CITY OF CALGARY.

Alberta Supreme Court, Walsh, J. November 14, 1916.

[See also *Pearce* v. *Calgary*, 23 D.L.R. 296].

TAXES (§ III B 1—110)—*Municipal assessment—Land—Reduction.*].

W. P. Taylor, for Pearce; *C. J. Ford*, for the city.

WALSH, J.:—I held at the close of the argument that all of the land in question was affected by sec. 17 of ch. 63 of the Statutes of Alberta 1911-12, and that Mr. Pearce is therefore entitled to a discount of 25% off all taxes levied thereon exclusive of local improvement taxes for the years 1915, 1916, and 1917.

Upon the other question submitted it is very plain to me that the reduction authorized by the council was a reduction from the values as fixed by the assessor and not from the value as finally fixed by the Court of last resort. In effect the council made a new assessment. I should say that after this any comparison that was made on the hearing of appeals between the values of properties whose assessments were under appeal and other properties must have been on the basis of this practically new assess-

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ment. In doing this the council in effect said to every assessed person "instead of your property being assessed at the assessor's figure it is now assessed at that sum less 15%; if you still think the assessment excessive go on with your appeal and it will stand at the amount of the final assessment." If Pearce is entitled to this reduction based upon his final assessment equally so is every other person whose appeal finally resulted in a lowering of the assessment beyond this 15% reduction. It follows that if every assessed person had thus successfully appealed the council would have been forced to grant the 15% discount upon a completely different roll from that which existed when it passed this resolution. It voluntarily cut down the values given to assessable properties because it thought them high under the circumstances. To say that after these reduced values were cut and slashed by the Court of Revision or the District Court Judge or the Supreme Court of Canada the whole body of ratepayers, assuming that they all successfully appealed, could come back and demand the promised reduction on this new basis would be most unjust. It seems unreasonable, I know, to suggest such a wholesale appealing, for such a thing would never occur, but that does not impair the force of what I am pointing out as the logical consequence of Pearce's contention. The action of the council was based upon conditions which existed at the time that the resolution was passed. An assessment admittedly high under the circumstances had been made and the council met it with this blanket reduction and there this situation began and there it ended.

In my opinion Pearce is not entitled to have his assessment of this land at $2,000 per acre as fixed by the Supreme Court of Canada reduced by 15%.

CALGARY MILLING CO. v. AMERICAN SURETY CO.

Alberta Supreme Court, Hyndman, J. October 25, 1916.

PRINCIPAL AND SURETY (§ I B—12)—*Building contract—Non-compliance with conditions as to payments—Discharge of surety—Liability of principal.*]—Action on a building bond.

J. B. Roberts, for plaintiffs; *D. S. Moffat*, for Amer. Surety Co.; *W. F. W. Lent*, for Tromanhauser and Moers.

HYNDMAN, J.:—The plaintiff on July 18, 1910, let a contract to the defendants Tromanhauser and Moers to build a reinforced concrete flour mill in the city of Calgary, at the contract price

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of $65,000, the building to be completed on or before October 15, 1910. Payments under the contract were to be made at stated intervals on proper estimates up to 80% of the value of the work and materials done and supplied and 20% after the completion of the work. The defendant, the American Surety Co., executed a bond as sureties to indemnify the plaintiff against any loss or damage arising by reason of the failure of the defendants, Tromanhauser and Moers, to faithfully perform their contract, their total liability in any event however not to exceed $30,000.

The defendants, Tromanhauser and Moers, entered upon the work but did not complete same within the time limited and in fact the building was finished by the plaintiffs themselves in alleged conformity at least with the provisions of the contract.

The plaintiffs claim they have suffered damages to an amount exceeding $30,000 due to the failure of the defendants to fulfil their agreement, the building having cost $94,670.94, making a difference of $29,670 in excess of the contract price in addition to those occasioned by delay in completion, it not having been completed until the fall of 1911, and have taken this action to enforce their claim.

The American Surety Co. was duly notified of default in completing the work by its co-defendants by October 15, 1910. Everything seems to have proceeded satisfactorily until about this date.

The defendant Tromanhauser was the practical man of the partnership and Moers was entrusted with the financial side of the business. Tromanhauser admitted having no substantial resources of his own and associated Moers with him believing that he would supply the financial strength which he needed. It is clear that in this respect Moers did not measure up to expectations and this fact in my opinion was the primary cause of their subsequent difficulties.

Finding themselves handicapped for money, on October 11, 1910, the defendant Tromanhauser borrowed from one Prince, a director of the company, the sum of $5,000 and gave as security an order on the plaintiff for that amount to be paid out of moneys coming on the contract.

On November 9, 1910, the partnership between Tromanhauser and Moers was dissolved, notice of which was duly served on the Surety Company. Again, on November 12, the defendant

Tromanhauser gave another order on the plaintiff company in favor of one Ker, another director of the company, for the sum of $3,500 as security for a loan which he obtained from him.

There was some question as to whether these amounts were to be paid out of the 80% or 20% but I do not think it material, though I am satisfied they were to be paid out of the 20%, but the fact is they are charged up in the books of the plaintiff company as against the 80% as of November 17, 1910, and subsequently, viz: on January 15, 1911, and February 15, 1911, Ker and Prince respectively were paid or settled with by the plaintiff. (See examination on discovery of W. F. Brown, Q. 96.)

To all intents and purposes however as between the plaintiff and defendants, Tromanhauser and Moers, the said moneys ($8,500) were treated as having been paid to Ker and Prince as of November 17, 1910, at the latest.

In his evidence Mr. Brown, manager of the plaintiff company, states that on November 17, 1910, the defendant, Tromanhauser, presented a payroll to the plaintiff and was paid $1,982.92 and he (Brown) said in effect that "this was all I could pay after providing for the $5,000 and the $3,500" which makes it perfectly clear that the loans referred to were paid or provided for out of the 80% and prevented the payment of certain proper payments under the contract.

I think it can fairly be said that no clear and unequivocal notice was given to the Surety Company which would warrant the inference that they in any way assented to what had been done in that regard by the plaintiff.

Although Ker and Prince were directors of the plaintiff company, in making these loans they must be regarded as strangers, as for instance a bank or any outside party.

No notice of these payments or appropriations were given to the Bond Company until January following and consequently they were deprived of any opportunity to object if they thought fit to do so. The statements too which were sent by plaintiff to the defendant company shewing the payments of $5,000 and $3,500 are not at all clear as to what these items were for and those rendered the Surety Company by the other defendants would lead to the inference that they were only guaranteed by the company to be disbursed out of the 20% after the completion

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of the building. It appears to me after the best consideration I can give to the point that this was a serious act on the plaintiff company's part and one which the law seems to be clear upon, has the effect of releasing the surety.

At the conclusion of the trial I was inclined to agree with counsel in his contention that at most the consequences should be a reduction of even amount from the verdict which might be given against the Surety Co. Since then I have examined numerous authorities and have come to the opposite conclusion. The general rule seems to be that "non-performance of conditions applies to sureties for building contracts, and, to hold surety, conditions imposed by him must be complied with, such as the amount to be paid during the progress of the work; that payments are to be made on certificates or estimates only." (32 Cyc. 176 and 177).

In the case at bar, I think it quite clear that the plaintiff company was limited in its rights to pay out money only on estimates or progress certificates certified by the superintendent of the work to an amount not exceeding 80% of the work done. Admitting the plaintiff's assertion to be true that the full proceeds of these loans was expended in construction of building, still that might equally be true had the loans been from a bank or any outsider. It is clear in my opinion that payments to such last mentioned parties would be improper under the circumstances. To me it seems there is no question but that it was a material departure by the plaintiff company from the proper performance of its duties under the contract.

The difficulty I find is that it is quite impossible to say whether and to what extent it was as matter of fact prejudicial to the surety and the impossibility of answering that question is a very sound reason why the surety should be considered as wholly discharged. Had this money been paid to the principals instead of to outside creditors, who can say how much or how little of the balance of the work the contractors might have performed? Contractors' inability to pay for labor and material would doubtless affect their financial standing to an extent which might paralyze them for future operations. This case is different from that of a relinquishment, loss, or mis-application, of a security held by a creditor. There the surety is discharged only to the extent of the value of the security lost, relinquished or misapplied

and the liability of the surety is not affected if he had not suffered any injury. The burden, however, is on the creditor to show that the surety has not suffered any damage. (See 32 Cyc. 225 and 226.) Here it is not only the question of the amount of the illegal payment but the possible consequences of the contractor being deprived of its use in liquidating claims against them in respect of the building. It is argued further that, granting there was a material departure from the agreement, the surety company waived by its acts or silence any right to take advantage of it. The conduct of the surety company perhaps is open to the charge of lack of frankness which left plaintiff company in a very unsettled position, but a perusal of the documents leads one to the conclusion that they have not done or omitted anything which can be considered legally binding upon them or as expressing assent to or waiver of their right to object to the payments referred to. The extension agreement expressly reserved all defences which they might have had and was entered into only for the purpose of extending the time within which action might be brought, and as pointed out above I do not think they can be charged with having full and clear notice of all the facts surrounding the transactions.

Having come to the above conclusion it is unnecessary to refer to the other defences raised by the Surety Co.

The action is therefore dismissed against the defendant the American Surety Co. with costs.

The position of the principals on the bond is quite different. If the payments referred to or other acts of the plaintiff were in violation of the arrangement, in my opinion all objections were waived by the defendants Tromanhauser and Moers. There never was any release of them by the plaintiff and if it can be said that the plaintiffs in reality carried on the work themselves the defendants Tromanhauser and Moers acquiesced therein. There will therefore be judgment against the defendants Tromanhauser and Moers for the difference between the contract price and the actual cost of the building to be ascertained by reference to the clerk of the Court and $10,000 damages for delay in completion of the contract, not to exceed however the sum of $30,000 (that being the maximum amount claimed in the statement of claim), and costs of the action. *Judgment accordingly.*

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FETHERSTON v. BICE.

Alberta Supreme Court, Walsh, J. October 12, 1916.

LANDLORD AND TENANT (§ III E—115)—*Re-entry—Breach of covenant.*]—Appeal by the plaintiffs from an order of the Master at Calgary dismissing their overholding tenant application, their right to possession being based upon the breach by the tenant of one of his covenants. Affirmed.

Peacock, for plaintiffs; *Stack*, for defendant.

WALSH, J.:—A right of re-entry for breach of a covenant by the lessee is not the landlord's, as, of course, it only arises either by force of some statute or when the lease confers it. The statute here invoked for that purpose is sec. 56 of the Land Titles Act, which provides that there shall be implied, in every lease within the section, power in the lesser *inter alia* to enter upon and take possession of the demised land in case default is made in the fulfillment of any covenant in the lease on the part of the lessee, and is continued for the space of 2 months. I think that this lease is not within that section. Sec. 54 applies only to leases for a life or lives or for a term of more than 3 years. Then come sec. 55 which sets out the covenants that shall be implied "in every such lease" and sec. 56 which sets out the powers of the lessor which shall be implied "in every such lease." The reference in each of these sections to "every such lease" plainly is to one which is within sec. 54, namely one for a life or lives or for a term of more than 3 years. The lease in question is for only 3 years and so is not one in which the powers of re-entry provided by sec. 56 can be implied. The plaintiffs are therefore compelled to fall back upon the terms of their lease.

The only clause in the lease which can be said to be a proviso for re-entry is "for re-entry by the said lessor on non-payment of rent or *non-payment* of covenants." This clause as it stands is insensible, as of course, there can be no such thing as the non-payment of a covenant. I have no doubt but that this is either a clerical mistake on the part of the draughtsman or a typographical error in the setting up of the printed form and that what was really meant to be provided for was the non-observance or non-performance of covenants. But I do not think that I have any power, at any rate, upon such an application as this and upon such material as is before me to travel outside of the plain language of the contract of the parties and because I think that

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a word in it is mistakenly used substitute another one for it. In one case in England, *Doe d. Wyndham* v. *Carew* (1841), 2 Q.B. 317, where the proviso for re-entry was insensible the Court refused to decide its meaning and non-suited the plaintiff in an ejectment for a forfeiture. In another case, *Doe d. Spencer* v. *Godwin*, 4 M. and S. 265, where the proviso was for re-entry for breach of any of the lessees' covenants *thereinafter* contained and all of his covenants were *thereinbefore* contained it was held that the proviso was restrained by the word *thereinafter* to subsequent covenants and though there were none such yet the Court could not reject the word. If the wording of the proviso was changed to read, as I have suggested it was intended to be, I would still be doubtful of its effectiveness, for it would be difficult to say exactly what power would even then be given by it. It is intended to be adapted I think from the form of proviso for re-entry to be found in leases prepared in Ontario under the Act respecting short forms of leases. That Act gives to these words an extended meaning which leaves no room for doubt as to their interpretation, but that extended meaning cannot, of course, be read into this lease and so there is nothing but the bare words of the proviso itself which can be relied on by the lessors as giving them the right to re-enter. Without however expressly deciding that point I must hold that there is not given by this lease as it stands a right to the plaintiffs to re-enter for breach of this covenant and their appeal must for this reason fail and with costs.

Appeal dismissed.

WADE v. JOHNSTON.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, and McPhillips, JJ.A. October 3, 1916.

SALE (§ III B—61)—*Vendor's lien—Postponement of—Non-interference with findings of trial Court.*]—Appeal by defendant from the judgment of Clement, J., dated March 23, 1916. Affirmed.

J. W. DeB. Farris, for appellant; *Douglas Armour*, for respondent.

MACDONALD, C.J.A., agrees with GALLIHER, J.A.

MARTIN, J.A.:—After a careful perusal of the evidence I have come to the conclusion that no good ground has been shown for disturbing the judgment given herein.

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C. A.

GALLIHER, J.A.:—This appeal resolves itself in a very short point. Did Wade postpone his vendor's lien for unpaid purchase-money in favour of Worsnop at the time Worsnop took possession of the printing plant?

This is purely a question of fact and is found in favour of Wade by the trial Judge.

Worsnop's evidence is that he went into possession of the plant as security for the money he was advancing and it was understood between Wade, himself, and Johnson, who had taken the option to purchase from Wade, that Worsnop's claim was to be prior to Wade's.

Wade's evidence when summed up amounts to this—that he has no recollection of any such proposition as that he was to be postponed to Worsnop. That he never directed his mind to such a contingency and would not have assented to such.

It seems to me we would not be justified in upsetting the finding of fact of the trial Judge.

The appeal should be dismissed.

MCPHILLIPS, J.A.:—I cannot say that it is without hesitation that I have arrived at the conclusion that this appeal should be dismissed—however with the express finding of the trial Judge that the sale was a sale to Johnston and that Worsnop failed to establish to his satisfaction that Wade agreed with him (Worsnop) that he should retain the plant as security for the money advanced by him and paid over to Wade—it would appear to be a case where the judgment of the trial Judge should not be disturbed *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704. *Appeal dismissed.*

The KING v. DIMOND.

S. C.

British Columbia Supreme Court, Macdonald, J. October 4, 1916.

SUNDAY (§ III B—15)—*Sale of fruit by storekeeper.*]—Stated case: (1) Is the selling of fruit on Sunday contrary to the provisions of 29 Car. II., ch. 27, and of the Lord's Day Act, R.S.C. 1906, ch. 153? (2) Does the Lord's Day Act by its terms save and except the existing Act, 29 Car. II., ch. 27, in force in this province, and if so is the selling of fruit on Sunday contrary to 29 Car. II., ch. 27, and if not can a conviction made in the face of this latter Act be supported under the Lord's Day Act?

J. A. Russell, for defendant; *R. L. Maitland*, for Crown.

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MACDONALD, J.:—As to the application of 29 Car. II., ch. 27, I think this statute could have been utilized if the information had been laid in time. The sale of fruit from a store and not from an eating or victualling house is not within the exemptions covered by the Act. See *Slater* v. *Evans*, [1916] 2 K.B. 403. It has been strongly argued that McPhillips, J., in deciding *Rex* v. *Waldon*, 14 D.L.R. 893, 18 D.L.R. 109, 19 B.C.R. 539, in the Court of Appeal, expressed a view of the law which would support the contention of counsel for the defendant. I do not so read his judgment. I think he was dealing with the facts of that particular case and the "necessities" that might arise under certain circumstances. If I am wrong in the construction I place upon such judgment, it would be open to the defendant, I presume, by some other proceeding, to obtain a further decision upon the point.

The answer then to be given to the submission will be, as to the first question that the sale of fruit on Sunday by a merchant from his store is contrary to both the provisions of 29 Car. II., ch. 27, and also of the Lord's Day Act, R.S.C. 1906, ch. 153. The second question is not as clear in its terms as I would desire. However, if I understand its meaning, it is that an opinion is desired as to whether a conviction, for such a sale of fruit on Sunday, can be supported under the Lord's Day Act, notwithstanding any of the provisions of 29 Car. II., ch. 27, if this be the opinion desired then I have already answered such question in the affirmative. *Conviction affirmed.*

JEFFERSON v. PACIFIC COAST COMPANY MINES Ltd.

British Columbia Supreme Court, Morrison, J. October 4, 1916.

CORPORATIONS AND COMPANIES (§ V D—205)—*Power to issue debentures—Fraud—Knowledge—Bonâ fide purchaser.*]—The plaintiff, who at the time material to the issue herein resided abroad, is suing to recover on a block of debentures purchased for him by his agent, who resided at the time in Vancouver.

MORRISON, J.:—The debentures in question were issued by the defendant company, which was duly incorporated, all the statutory requirements in that respect having been complied with. According to the memorandum and articles of the company it had the power to issue the said debentures; *primâ facie*, this

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transaction was within the powers of the company. I think Mr. Taylor asks me to fix an additional obligation upon the plaintiff to those already imposed, viz.: constructive knowledge of the "indoor management of the company" but the incidence of the obligations of constructive notice to those dealing with the registered company is lightened by the rule in *Royal British Bank* v. *Turquand*, 6 E. & B. 327. In holding this view I am not unmindful of a special Act, ch. 72, secs. 2 & 3 (1911) B.C. Statutes.

Mr. Taylor referred to the element of fraud in the case of the *Pacific Coast Coal Co.* v. *Arbuthnot et al.*, tried before Clement, J. (since reversed by B.C. Court of Appeal, 31 D.L.R. 378). As to that if fraud appears it was committed as between rival warring factions in the directorate or inside element of the company. The plaintiffs should not be visited in the circumstances of the present case with its consequences. All he had to do acting bona fide was to see that the company might have power to do what it purported to do. *Biggerstaff* v. *Rowatt's Wharf*, [1896] 2 Ch. 93. As I understand the issue in the suit brought by the defendant company, and which is the subject of appeal, the contest was between the two factions for ascendency in the control of the company in the outcome of which the plaintiff has now sought to be made the vicarious victim. The issue in the case at bar is as between the plaintiff Jefferson and the company which is bound by its acts when dealing with an innocent *bonâ fide* purchaser of debentures without notice as I find the plaintiff herein is.

There will be judgment for the plaintiff. The third parties are dismissed from the suit. *Judgment for plaintiff.*

MAN.
K. B.

FARMERS ADVOCATE v. MASTER BUILDERS.

Manitoba King's Bench, Prendergast, J. October 27, 1916.

CONTRACTS (§ IV E—365)—*Breach—Disintegration of work caused by temperature condition of building—Duty of owner to provide sufficient heat.*]—Action for breach of an agreement whereby the defendants are alleged to have undertaken to finish the floors in the plaintiffs' building with a coating of certain material manufactured by them and warranted to be dust-proof.

W. M. Crichton and *E. A. Cohen*, for plaintiff; *P. C. Locke* and *C. P. Locke*, for defendants.

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K. B.

PRENDERGAST, J.:—In my opinion the blistering, disintegration and dusting was due to frost.

There was a duty on the plaintiff's part, as I take it, to keep the building at that time of the year sufficiently warm at all events for ordinary building operations, and in this they seem to have failed.

It was the plaintiffs' duty (whether the building should be held to have been under the immediate control of the architect or of the contractors) to provide sufficient heat to carry on therein at least ordinary building operations.

It was not the duty of the defendants' supervisors, as I view it, to see that conditions obtained, other than those which were specially brought into requirement by the Master Builders' process. Had the use of the process required an appreciably higher temperature, I should say that the onus would then shift onto the defendants to shew that all due representations of the defective conditions of temperature were made by them to the plaintiffs.

But the use of this chemically inert matter apparently adversely affected in no way the setting process, nor made the surfacing more susceptible to the influence of cold. The evidence would rather shew, judging from the state of the fifth floor, and of a large patch of pure cement on the fourth, that the hardener, if it had any influence on the mixture, rather made it more immune to the disintegrating effect of frost.

The defendants had a right to expect such conditions as would allow carrying on at least the necessary ordinary operations for the completion of the building, such as laying ordinary cement flooring, and those conditions were not provided.

That the temperature of the building was not fit for the prosecution of work of that class (irrespective of the modifications brought into the work by the use of the Master Builders' method), seems to me a sufficient answer for the defendants to make to the plaintiffs' claim.

That the supervisors did not act with prudence seems clear enough. But the primary duty was on the plaintiffs, and the evidence by which they attempted to shift the onus which lay on them is not sufficiently certain and conclusive. There is also this which would tend to exonerate the supervisors, or at least

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minimise their responsibility, that the defects in most cases did not shew at once but became apparent only weeks later.

I can conceive, sitting as a jury, that a different view might be taken of the whole matter. I confess that the decision I have reached is short of satisfying me altogether, and I may say I have sought earnestly for some reason for ordering at least a return of the money, which I felt unable to do. On the whole, however, I cannot bring myself to maintaining the plaintiffs' claim. *Action dismissed.*

WHITE v. CANADIAN GUARANTY TRUST CO.

Manitoba King's Bench, Curran, J. November 1, 1916.

GIFT (§ III—16)—*From husband to wife—Constructive delivery—Claim by administrator—Costs.*]—Action to recover by way of replevin a certain McLaughlin-Buick 4-cylinder automobile, which plaintiff alleges was a gift during marriage to her from her deceased husband, and which automobile, after the decease of her said husband, the defendant company, as administrators of his estate, claimed and took possession of as being and forming part of the deceased's estate, denying the plaintiff's right and title thereto.

F. M. Burbidge, for plaintiff; *Kilgour*, K.C., for defendant.

CURRAN, J.:—The sole question to be determined is whether or not there was a valid gift of the motor car in question by the deceased to the plaintiff.

Upon the evidence, wholly uncontradicted or shaken in any way, I think it is impossible to hold otherwise than that there was an absolute gift of the car to the plaintiff by the deceased; that possession symbolically was given the plaintiff when the deceased presented her with a copy of the order, and again when he handed her the cheque to pay for the car. At all events, I think the deceased did all he could do to effect a delivery of possession to the plaintiff. There were words of present gift, followed by a transfer of possession. Manual delivery is not necessary in a case such as this: *Kilpin* v. *Ratley*, [1892] 1 Q.B. 582.

In *Shuttleworth* v. *McGillivray*, 5 O.L.R. 536, it was held that under the Married Woman's Property Act of 1884, R.S.O. (1897), ch. 163, a married woman is under no disability as to receiving and holding personal as well as real property by direct gift from her husband, and that the subsequent possession of the property

was the wife's although the house was occupied by her husband and herself.

In *Ramsay* v. *Margrett*, [1894] 2 Q.B. 18, it was held that the wife had sufficient possession of the goods; for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title.

I find as a fact, as was found in *Tellier* v. *Dujardin*, 16 Man. L.R. 423, that there was a gift of the property to the wife, and an acceptance of the gift by her; that the gift transferred the legal title to her, and possession would, under the circumstances, follow and be referred to the legal title which was in the plaintiff. This case seems to be an authority for supporting the plaintiff's claim.

In *Grant* v. *Grant*, 34 Beav. 623, 627 (55 E.R. 776), a gift of chattels by husband to wife was supported on the principle that a husband may constitute himself a trustee for his wife, and the declaration need not be in writing, but the words must be clear, unequivocal and irrevocable.

Mews v. *Mews*, 15 Beav. 529 (51 E.R. 643), cited and relied on by the defendant, can be distinguished, as the facts in that case were essentially different from those in the case under consideration. It establishes no different principle of law than that enunciated in the cases I have referred to.

I am of opinion, therefore, upon the facts, that the plaintiff is entitled to a verdict for a return to her of the automobile in question, and that she is entitled to her costs of suit, and there will be a verdict accordingly.

By cl. 3 of the statement of defence, the defendant submits in all things to act as this Court shall direct, and it claims to have the costs, charges and expenses properly incurred by it paid out of the estate of the said Edmund W. White, deceased. I refuse to give effect to the contention as to costs—at all events, to the extent of permitting the defendants to charge against the estate the costs of this litigation in such way that the plaintiff's share as the widow of the deceased will in the slightest degree be diminished. Beyond this I decline to go. The judgment as to costs will include any discovery examinations properly conducted by the plaintiff in the course of the action. *Judgment for plaintiff.*

MAN.

C. A.

KING v. IRVINE.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 26, 1916.

[See Annotation on real estate agents' commissions, 4 D.L.R., 531.]

BROKERS (§ II B 1—14)—*Commission—Liability of brokers between themselves—Admissibility of evidence.*]—Appeal by plaintiff from a judgment dismissing the action. Reversed.

L. D. Smith, for appellants; *Hamilton*, for respondent.

RICHARDS, J.A.:—The defendant had an arrangement with a company that dealt in farm lands, under which he was entitled in case of making a sale for them of sec. 28, tp. 2, r. 3, east in Manitoba, or of procuring parties to whom they sold, to receive a commission of 50c. per acre for selling, and also all moneys which the purchaser should be willing to pay for the land, over and above $17.50 per acre.

The plaintiffs were acting under an agreement with the defendant, the terms of which it is very difficult to gather from the evidence. Under that agreement the plaintiffs procured two men, who afterwards bought the section between them. These men were brought into the matter, and put into dealing with the defendant, by the plaintiffs introducing the sale to them and procuring them to deal with the defendant, who again got them in touch with Mr. Ert, the company's agent or manager, from whom they actually bought.

As nearly as I can make out from the confusion of evidence, the plaintiffs claim that their agreement with the defendant was that they should share with him whatever he made out of the transaction.

I gather from the evidence that plaintiffs produced the purchasers prepared to buy for $18 per acre, if that price should be insisted on. If they had so bought, the plaintiffs would, on the defendant's shewing, have been entitled to claim 50c. per acre, the difference between $17.50 (the minimum price) and the $18.

Ert in fact sold to the purchasers for $17.50 per acre. The defendant claims that, as a result of that, there was nothing for which the plaintiffs could claim against him, there being no surplus realised over the minimum price, and that he had never agreed to share the commission with them.

MAN.

C. A.

After the sale, the present defendant sued the land company, and garnisheed certain moneys due to them. That action was compromised by the company paying $500 to Irvine, the plaintiff in that action, and the defendant in this one.

On the trial of this action, the plaintiffs sought to give in evidence the statement of claim in the present defendant's action against the company, and his affidavit filed on the garnishee proceedings. The trial Judge refused to admit them.

With deference, I am unable to concur in that ruling. It seems to me that they should have been admitted and their effect considered. The Judge nonsuited the plaintiff, holding that he had not proved his case. The said statement of claim and affidavit have been proved on the appeal and are very important evidence for the present plaintiff.

It is patent that that action was brought for Irvine's own benefit as to $320 and for that of the plaintiffs as to the other $320. How, in the face of the above statement of claim, affidavit and letters, he could claim that he was not acting for the present plaintiffs, it is hard to see.

There is no evidence that the plaintiffs consented to the $500 compromise, or of what costs, if any, Irvine had to pay out of the $500.

As that sum exceeds the $320 that he was claiming as commission out of the $500 there is no doubt that, in compromising, he got a benefit from having sued for the $320, the difference between the $17.50 and $18 per acre.

It is a question whether he should not be made to account to the plaintiffs for the full $320 that he claimed from the company for their benefit. I think, however, that justice would be done by holding him liable to them for half of the $500 realised. On that he is to be credited with $36.90, which he advanced to them, leaving a balance of $213.10.

I would allow the appeal with costs, set aside the judgment of nonsuit in the County Court, and enter judgment there for the plaintiffs for $213.10 and costs.

HOWELL, C.J.M., HAGGART, and PERDUE, JJ.A., concurred.

CAMERON, J.A., (dissenting)::—Irvine's commission was a matter between him and Ert. I cannot see on what grounds the plaintiffs can claim to share in it. The evidence is that they knew of the existence of the agreement between Ert and Irvine.

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C. A.

The view of the evidence which was no doubt taken by the trial Judge appears to me as reasonable. The plaintiffs bring this action and must establish their case. This I consider they have failed to do, and I would dismiss the appeal. *Appeal allowed.*

KETTLE RIVER v. CITY OF WINNIPEG.

K. B.

Manitoba King's Bench, Prendergast, J. October 27, 1916.

MUNICIPAL CORPORATIONS (§ II F 3—180)—*Supplying electricity—Essence of time—Delay—Liability.*]—Action for damages alleged to have resulted from the defendants' delay of 37 days in supplying the plaintiffs with electric power to be used in carrying on their business, which is that of paving block manufacturers.

F. M. Burbidge and *W. H. Curle*, for plaintiffs; *T. A. Hunt*, K.C., for defendants.

PRENDERGAST, J.:—I am of opinion, applying the usual principles to the facts, that there was a good and valid undertaking on the part of the city, that time was of the essence thereof, and that there was default.

I attach no importance to the fact that, by resolution of the city council of January, 1912, John G. Glasco was appointed "acting-head of the Light and Power Department, under control of the city controller till such time as his duties were assigned by by-law or resolution of council."

This was not a special matter, an exceptional transaction standing by itself as in *Manning* v. *Winnipeg*, 21 Man. L.R. 203, but was one in a very large class coming under a department whose ends are commercial, and which was transacted conformably with a confirmed practice amounting to a system, under which (and there was no other) the city allowed the department to be run for a commercial profit. See Biggar's Municipal Manual, p. 41, with respect to Trading Corporations and Municipal Corporations acting as a trading body. Also, *Wells* v. *Kingston-upon-Hull*, L.R. 10, C.P. 402-409.

It seems to me that *Mackay* v. *Dick*, 6 App. Cas. 251, where there was a conditional sale and the purchaser prevented the possibility of the plaintiff fulfilling the condition, offers only a very distant analogy to the present case where all the city had to do was to bring power home to the plaintiffs.

I also think that the evidence of congested traffic on the railway, was not such as to be a sufficient justification for the delay.

Judgment for plaintiffs.

UNION BANK OF CANADA v. GOURLAY.

MAN.

K. B.

Manitoba King's Bench, Macdonald, J. October 28, 1916.

CORPORATIONS AND COMPANIES (§ V F 3—263)—*Liability for unpaid stock—Illegality as defence—Estoppel.*]—Action for balance due on unpaid stock.

C. P. Wilson, K.C., and *W. C. Hamilton*, for plaintiff; *H. J. Symington*, K.C., and *H. E. Swift*, for defendant.

MACDONALD, J.:—The defendant was (or was entitled to become) the holder of 50 preference shares of the Christie Grant Co., Ltd., at $100 per share. $2,500 was paid upon the said shares in the summer and autumn of 1914, the balance, $2,500, remaining due and unpaid, was duly assigned to the plaintiff bank, who now claims payment and brings this action to recover the same.

The defendant attempts to avoid liability by alleging illegality in proceedings on the part of the company, in that the directors were not duly elected or qualified; that the meeting of directors at which the shares were allotted was not a duly constituted meeting, and that it was not lawfully held, and that the allotment of shares was and is irregular and void.

The legality of this meeting and its by-laws are questioned particularly from the fact that the letters patent are dated the day following the date of the meeting and it is contended on behalf of the defence that this meeting was not legally constituted, and that all and every transaction founded on the authority of the by-laws passed at this meeting must be illegal, void and of no effect.

In view of the directors' meeting being that of the provisional directors named in the letters patent together with the reading by the secretary of the powers contained in the letters patent, I think, it can safely be held that the letters patent had issued at the time of the passing of these by-laws, and a clerical error must have been made either in the date of the letters patent or in the date of the holding of the meeting. I find that the by-laws were and are the regularly made and passed by-laws of the company in so far at any rate as this action is concerned.

That the defendant was a director at the date of the second advance is beyond question and as such he must be held with knowledge of the company's business and that the bank advanced the money on the strength of the security of the assignment of

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the amounts unpaid by the shareholders on their subscribed stock in the company.

Under these circumstances it seems to me the defendant is estopped by his conduct from denying his liability for the balance unpaid upon the shares subscribed for by him and from denying the legal status and the regularity of the proceedings of the company of which he was a shareholder and a director.

The case for the plaintiffs appears to me even stronger than that of the plaintiff in the *Dominion Bank* v. *Ewing*, 35 Can. S.C.R. 133. In that case there was a repudiation, although held too late, whereas here there never was a repudiation until this action was brought. On the contrary, the defendant in writing admitted his liability. *Judgment for plaintiff.*

SMILEY v. RUR. MUN. OF OAKLAND.

Manitoba King's Bench, Curran, J. October 31, 1916.

HIGHWAYS (§ IV A 5—151)—*Unguarded culvert—Injury to traveller—Motor Vehicles Act—Sufficiency of notice to municipality—Amount of damages.*]—Action for damages for personal injuries received whilst travelling in a motor car on the night of June 16, 1916, on a public highway in the municipality of Oakland.

Kilgour, K.C., for plaintiff; *Henderson*, K.C., for defendant.

CURRAN, J.:—The plaintiff claims the accident was caused through the negligence of the defendant municipality in permitting the road to fall into and continue in a state of non-repair by failing to properly fill in and repair an opening across the highway caused by a wash-out of the earth covering a certain culvert placed by the municipality across the roadway and which culvert it was the duty of the municipality to keep in repair.

I have no difficulty in reaching the conclusion that it was deep enough to be dangerous to some classes of vehicular traffic, and manifestly that it was so to the plaintiff's car and caused the accident and consequent injury to the plaintiff complained of. Had the cavity been filled up with earth or a platform or plank placed across the opening the accident to the plaintiff would not in all human probability have happened. At all events if it had happened, the defendants would not have been at fault. As it was, I think the defendant was guilty of negligence in allowing this culvert to be and remain for the space of about two months not only out of repair and in a defective and dangerous

condition, but in failing to place or erect signs or signals of some sort that would have been reasonably effective to warn the travelling public of the defect in the road and calling attention to the diverging road around it, in the following of which lay safety to the traveller.

The excuse put forward by the defendant for neglecting permanent and proper repairs to this culvert, namely, the difficulty of getting men and teams during seeding, is no answer for their neglect to fulfil a legal duty, even if it was true, of which I am not at all certain, for Councillor Dawley said he did not try to get the work done. Again, assuming that the difficulty of getting men and teams was a real one, still this does not excuse the neglect of the municipality to place warning signs to the east and west of the culvert, which would notify travellers of the danger and cause them to turn out or the diverging road to avoid it. This seems to me to have been the clear legal duty of the defendant municipality and it wholly neglected to perform it.

I have no difficulty in holding on the evidence that the municipality was guilty of actionable negligence and that such negligence was the proximate cause of the accident and resultant personal injuries to the plaintiff.

I find that the plaintiff was not guilty of any contributory negligence, and that the defences based upon the Motor Vehicles Act set up are not borne out by the evidence.

The defence have not established that there was not a compliance on the part of the plaintiff with sec. 16 of the Motor Vehicles Act. I cannot find either that the evidence establishes a violation of sec. 30 as to the rate of speed at which the plaintiff was travelling or of sec. 34, which provides that on approaching a culvert a person operating a motor vehicle shall have it under control and operate it at a speed not exceeding 1 mile in 5 minutes, or 12 miles an hour. The plaintiff's evidence, practically uncontradicted, is to the effect that he slowed up as he came down the grade which led to the culvert, and that he was not travelling more than 5 or 6 miles an hour when the car hit the culvert. Anyway he did not know the culvert was there and could not see it at night.

No objection was taken at the trial to the sufficiency of the notice of the accident served upon, or mailed to the clerk or reeve. The notice put in at the trial appears to comply with the statute

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and was given in proper time and received by the clerk of the municipality, who brought it promptly to the notice of the reeve.

Dr. Bigelow, a witness for the plaintiff, and who was his medical attendant, says the plaintiff will never have as good a spine as he had before owing to the accident; that the plaintiff suffered considerable bodily pain and was confined to his house from the date of the accident until July 11, following, is clearly established. Also that he suffered considerable pecuniary loss directly attributable to the accident. Some of his claims on this latter account appear to me to be somewhat speculative, others appear to be reasonably definite and well founded. The plaintiff held the position of district manager of the Manufacturers Life Ins. Co., working upon salary and commission, and his financial loss is confined to loss of commissions on business which he claims he would have been entitled to if he had not been disabled, and to loss of increased salary which was dependent upon a certain volume of business being secured for the company, which he says fell short owing to the accident.

Upon consideration I think $1,200 was not an excessive amount to allow the plaintiff, and I therefore assess his damages at that figure and enter a verdict in his favour for that amount, together with costs, which will include examination for discovery of the defendant's reeve. *Judgment for plaintiff.*

WINDEBANK v. CANADIAN PACIFIC R. CO.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 6, 1916.

DAMAGES (§ III A 3—60)—*Valuation of hotel property—"Open market"—Conclusiveness of findings.*]—Appeal from a judgment for plaintiff in an action to recover the value of hotel property. (See also 25 D.L.R. 225, 26 Man. L.R. 1). Affirmed.

Andrews, K.C., and *Reycraft*, for appellant; *Elliott*, K.C. and *Macneil*, for respondent.

PERDUE, J.A.:—The circumstances out of which this litigation arose are set out in *Re Windebank* v. *C.P.R.*, 25 D.L.R. 225, 26 Man. L.R. 1. The arbitration, or the method of valuing the hotel building and the goods and chattels contained therein, having failed by reason of the death of one of the arbitrators named by the parties to value the hotel building, the present suit

was brought to recover the amount to which the plaintiffs claim they were entitled under the agreement. The trial Judge, after hearing the evidence as to the value of the building and chattels, entered judgment for the plaintiffs in the sum of $8,841.03.

The question was purely one of fact in which the trial Judge after careful consideration arrived at a conclusion upon a large mass of evidence given by a number of witnesses, who express wide diversity of opinion as to the valuations to be placed upon the properties in question. I see no sufficient reason why this Court should interfere with the finding of the trial Judge, who heard the witnesses, and was in the best position to estimate their credibility to weigh the whole evidence and to place a valuation upon the properties.

I would dismiss the appeal with costs.

HOWELL, C.J.M., concurred.

CAMERON, J.A. (dissenting):—It would seem to me, on reflection, that it would be reasonable and equitable, in view of the evidence and the circumstances, to place the value of the buildings and chattels, under the provisions of sec. 8 of the agreement, at a sum equal to the amount due the defendant company. To this extent I would allow the appeal.

RICHARDS, J.A., concurred.

HAGGART, J.A.:—I agree with the conclusion arrived at by the trial Judge. I agree with him when he finds that the provision in sec. 8 of the contract in question, that the value should be fixed "at a sum which in their opinion the said buildings and chattels would reasonably command on the open market," is here inapplicable to the existing conditions. Here we are not measuring the damages sustained by a breach of contract for the sale and purchase of ordinary goods and chattels. There the price in the market (which means open market) is an important factor and the measure of damages is the difference between the contract price and the market price at the time appointed for acceptance.

The words "open market" are not applicable here. "Open market" implies competition between intending purchasers. Here there could be no real competition. The actual purchaser is the defendant company. Even if the defendants had not bought and were only prospective purchasers, every one would know that the hotel and contents were an appurtenance

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or adjunct to the defendants' railway system and that the value could be appreciated or reduced by the attitude of the company towards the summer resort. The company could encourage or discourage traffic to the hotel and would be under no obligation to consider the interests of another purchaser.

I submit the foregoing in addition to the reasons given by the trial Judge. As to the amount of the verdict, the trial Judge has found on a question of fact, which finding we should hesitate to interfere with. The appeal should be dismissed.

Appeal dismissed.

ONT.

S. C.

REX v. DUCKWORTH.

Ontario Supreme Court, Meredith, C.J.C.P., and Clute, Riddell, Lennox, and Masten, JJ. May 22, 1916.

NEW TRIAL (§ II—8)—*Misdirection as to inquest evidence—"Substantial wrong or miscarriage."*]—The prisoner, who admittedly shot and killed his brother-in-law, was tried on a charge of murder. The plea was that the shooting was accidental or done in self-defence. Three Crown witnesses who, at the coroner's inquest and at the preliminary investigation before a magistrate, had testified to facts which made against the defence, at the trial mainly contradicted their former testimony, and gave unsatisfactory evidence tending to exculpate the prisoner. Counsel for the Crown, treating them as adverse, cross-examined them, and read to them portions of their depositions before the coroner and magistrate, which they mainly either contradicted or did not altogether admit to be true. The depositions were put in, and in his charge to the jury the trial Judge referred to them. No objection to the charge was made by counsel for the prisoner before the verdict, which was "guilty," but, after the verdict and sentence, upon the application of counsel for the prisoner, a case was stated by the trial Judge for the opinion of the Court, the question submitted being, "Was there in my charge to the jury either misdirection or nondirection in respect to the use made at the trial of the evidence of these three witnesses, or any of them, given at the inquest, or at the preliminary investigation?"

C. R. McKeown, K.C., for the prisoner, argued that there had been misdirection and nondirection by the trial Judge. The counsel for the Crown had been allowed in effect to place before

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the jury evidence taken at the inquest, by reading a large portion of such evidence before the questions were asked. This evidence could not have been allowed if put in as part of the Crown's case in the usual way. The Crown's witnesses were allowed by the trial Judge's discretion to be treated as hostile. Counsel stated that his objection was not that the evidence had been allowed in, but to the use that had been made of it. The trial Judge should have told the jury that the evidence taken before the coroner was inadmissible to prove the facts, and was receivable only for the purpose of discrediting these witnesses: Phipson on Evidence, 2nd ed., pp. 419, 420.

J. R. Cartwright, K.C., and *Edward Bayly*, K.C., for the Crown, contended that the most that could be said was that the whole of the evidence of these witnesses should be disregarded; and even without their testimony there was sufficient proof of guilt: *Rex* v. *Thompson* (1913), 24 Cox C.C. 43. As to the Judge's charge, if it were looked at as a whole, as it should be, no fault could be found with it: *Regina* v. *Garner* (1889), 6 Times L.R. 110. A new trial should not be granted unless a substantial wrong or miscarriage of justice would follow the refusal of one: *Eberts* v. *The King*, 7 D.L.R. 538, 47 Can. S.C.R. 1; 20 Can. Cr. Cas. 273; Criminal Code, sec. 1019. And it was for the prisoner to establish that there would be such a substantial wrong: *Rex* v. *Romano*, 21 D.L.R. 195, 24 Can. Cr. Cas. 30. Here, even if there had been misdirection or nondirection, no injustice had been done thereby.

Held, by CLUTE, RIDDELL, and MASTEN, JJ. (MEREDITH, C.J.C.P., and LENNOX, J., dissenting in the result), that the depositions taken on the former occasions were not before the jury as evidence of the facts, but must be confined in their effect to the discrediting of the witnesses who had proved adverse; that the fact that no objection to the charge was made at the trial was not a fatal obstacle to the success of an objection made later; that the trial Judge misdirected the jury by giving them to understand that, in determining the facts, they might consider what the witnesses had sworn previously; that the question asked should be answered in the affirmative; and, notwithstanding that there was other evidence upon which the jury could properly have based a verdict of "guilty," that there should be a new trial, "some substantial wrong or miscarriage" (Criminal Code, R.S.C. 1906, ch. 146, sec. 1019) having been occasioned on the trial.

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Per MEREDITH, C.J.C.P., and LENNOX, J., that the trial Judge did not tell the jury—that which would be obviously erroneous—that the depositions, in themselves, were evidence: adverse witnesses having in part admitted the truth of their former testimony, and their contradiction of it, as far as it went, being of a very unsatisfactory character, that which the trial Judge did was to ask the jury which story they believed—and that he was obviously justified in doing, but, if that had not been so, as there were but two stories of the crime, the one told by all the witnesses at the earlier investigations, repeated by one of them at the trial, and strongly corroborated by the circumstantial evidence, and the other a new story unsatisfactorily told by some of these witnesses at the trial, there was no misdirection in saying to the jury that the case depended upon which of these stories they believed; and so the question should be answered in the negative and the conviction confirmed.

Per MEREDITH, C.J.C.P., that as to contradiction there is no difference between the case of an "adverse witness" and a witness called by the other party.

Per LENNOX, J., that, if there had been misdirection, "no substantial wrong or miscarriage was thereby occasioned," and so the conviction could not be set aside or any new trial granted (sec. 1019, *supra*). *New trial ordered.*

SASK.
S. C.

LANGLOIS v. AMYOT.

Saskatchewan Supreme Court, McKay, J. August 22, 1916.

CONTRACTS (§ IV A—321)—*Agreement to seed land—Claim for extra work unauthorized—Payment—Counterclaim.*]—Action to recover the sum of $714.35, which the plaintiff alleges he paid out while acting as defendant's agent in the spring of 1913 in connection with disking defendant's land in preparation for seeding it.

Skeltin, for plaintiff; *Livingstone*, for defendant.

MCKAY, J.:—It is quite clear from the evidence and that of the defendant, that both parties understood that the land was ready for the seed, and plaintiff had broken the land and prepared it for that purpose in 1911 and 1912, and had been paid for it. And both parties also understood that the portion that had been seeded in 1912, which had been broken in 1911, could be seeded on the stubble.

On April 24, 1913, defendant asks plaintiff at what price can it be seeded, and on April 26, 1913, plaintiff answers "cost same

as last year for seeding." The cost last year (1912) was the price of the seed grain, cost of hauling it to the farm, and blue-stoning it, and $1 per acre for putting it in the ground. It seems to me, then, the defendant is justified in his contention that that is all he agreed to pay, and the evidence from plaintiff's examination for discovery shews that that is what he understood the telegrams to mean. It appears, however, from plaintiff's evidence, that when he went to look at the land, he came to the conclusion that it would not be well to seed it as it was, but that he should have the stubble land disked once, and the other land twice, before seeding it and it is for money paid out in connection with this additional work that he sues.

I do not think that he had any authority to do this. He knew that defendant hesitated about incurring any further expense in connection with this land in 1913, and had been expressly asked what the cost of seeding would be, and he replied as above, and without getting permission to do so he incurs a further cost of $714.35 to do work which he had been previously paid for, that is, if this land had been properly broken, disked, and harrowed and made ready for seed in 1911 and 1912, it would not have been necessary to do this additional work, and even if necessary, he should, under the circumstances, have first obtained authority from the defendant to do so and in his examination for discovery, and in his letter to defendant of September 18, 1913, plaintiff admits he had no instructions or authority to do this work but took it on himself to do it.

I find that the plaintiff contracted with defendant to seed this land in question at $1 per acre, and defendant to pay for the actual cost of the seed grain, hauling it and blue-stoning or cleaning it, and that plaintiff had no authority to incur the expenses for which he is claiming payment from defendant, and defendant is not liable therefor.

The amount due to plaintiff under the said contract, taken from plaintiff's own statement, was $1,002.75.

In said statement, plaintiff admits he received from the proceeds of the sale of sheaves and screenings belonging to defendant $62.50, and he admits and the evidence shews he received from defendant, by two drafts and a cheque, $993.65, a total of $1,056.15, which would leave a balance in this account in favour of defendant of $53.40. All the above payments were

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received by plaintiff before this action was commenced. I, therefore find that he was paid in full by defendant for what was due him under his contract before this action was commenced.

Now, with regard to the counterclaim, wherein defendant claims $55.

As above stated, on the seeding contract account there is a balance in favour of defendant of $53.40. The difference of $1.60 between my figures and defendant's claim is explained by the fact that defendant in his defence claims he paid plaintiff in addition to the $62.50, the sum of $995, whereas I find it was $993.65.

But it appears from the evidence that defendant allowed plaintiff $38.40 for a trip to Regina and $15 for poisoning gophers, apart from the seeding contract, and when defendant was making the last payment in June, 1913, on the seeding contract account, he included these two items. These items amount to $53.40. Consequently there was in fact no over-payment on the seeding account because the $53.40 included in the last payment of $343 was to cover these two items which were not in dispute. I therefore dismiss the counterclaim.

The result is that the plaintiff's action is dismissed with costs to defendant, and the defendant's counterclaim is dismissed with costs to plaintiff. The defendant will be entitled to have so much of his costs as will equal the plaintiff's costs of the counterclaim, set off against said costs of counterclaim. *Action dismissed.*

IMPERIAL BANK v. HILL.

Saskatchewan Supreme Court, Newlands, J. May 16, 1916.

BILLS AND NOTES (§ V B 1—130)—*Liability as surety—Discharge—Right of holder in due course.*]—Action on a promissory note, and the defences are: that defendant was only surety to one Seger, who was also a maker of said note, and that it was agreed that said note should, at its maturity, be presented to Seger, and that notice would be forthwith given to defendant in case of dishonour. That the note was not presented for payment and no notice of dishonour given to defendant; that defendant is entitled to a credit of $600 paid by Seger; that the note was given by defendant and one Seger to the J. M. Annable Co. Ltd. on account of the purchase price of a section of land, that said Annable Co. repossessed the said land and released Seger from all liability on the agreement of sale and the note and thereby

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released the defendant; that Annable Co. resold the land to one Lockwood and transferred the same to him and the right of the defendant to be subrogated to the claim of Seger and his right to a lien on the land has been prejudiced and rendered valueless and plaintiff is thereby estopped from making any claim against defendant.

Benson, for plaintiff; *Taylor*, K.C., for defendant.

NEWLANDS, J.:—There was no evidence that the plaintiff had any knowledge that the note sued on was part of any of the above transactions nor was it proved that the Annable Co. had any intention to release Hill from his indebtedness thereon in making said dealings, and I am therefore of the opinion that the plaintiffs were holders of the note in due course and were entitled to recover. ——— *Judgment for plaintiff.*

UNION BANK v. ENGEN.

Saskatchewan Supreme Court, Elwood, J. September 23, 1916.

RECEIVERS (§ I B—12)—*Interim injunction—Preservation of income from land—Claim of equitable mortgagee—Amendment.*]—Application for a temporary injunction restraining defendants from receiving rents or profits of land and for an order adding A. E. Clarkson as a defendant to the action and also for an order appointing the sheriff of the above judicial district a receiver, to collect and receive the rents and profits and also for an order amending the prayer for relief in the statement of claim.

Bastedo, for plaintiff; *Hogarth*, for defendants.

ELWOOD, J.:—The plaintiff claims to be entitled, as an equitable mortgagee, and there is evidence before me that unless a receiver is appointed the plaintiff may be prejudiced. I am of the opinion that there is jurisdiction to appoint a receiver, see *Holmes* v. *Bell*, 2 Beav. 298; *Pease* v. *Fletcher*, 1 Ch. D. 273; *Aberdeen* v. *Chitty* (1839), 8 L.J. Ex. Eq. 30; *Aikins* v. *Blain*, 13 Gr. 646, 21 Hals. 261. There will therefore be an order continuing until the trial of this action the injunction granted therein by Newlands, J., dated August 25, 1916. There will be an order adding Clarkson as defendant herein and restraining the said Clarkson from paying, giving, or turning over in any way any rents or profits from the s.w. ¼ of sec. 21, in tp. 36, r. 4, w. of the 3rd m., in the Province of Saskatchewan, either in cash, grain, or otherwise to the defendants, Fred Engen, Laura Engen, and Walter Crozier and any or either of them before the trial of this action.

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There will be an order amending clause 5 of the prayer for relief in the plaintiff's statement of claim by adding thereto the following words, namely, "And a receiver appointed to receive the rents, and profits of the said land to which the said defendants are entitled." There will be an order appointing the sheriff of the judicial district of Saskatoon a receiver to collect and receive the rents and profits of the defendants Engen, and Crozier or any or either of them, of, from, or with reference to the said land from the said Clarkson or any other person, pending the trial or other disposition of this action.

The costs of this application and the said receiver are reserved for the trial Judge. ——— *Application granted.*

YUKON
T. C.

ROBERTSON v. CANADIAN KLONDYKE MINING CO.

Yukon Territorial Court, Macaulay, J. October 17, 1916.

MASTER AND SERVANT (§ II A 4—63)—*Defective foundation of dredge—Liability.*]—Action by servant for personal injuries.

F. T. Congdon, K.C., for plaintiff; *C. W. C. Tabor*, for defendant.

MACAULAY, J.:—I find as a fact on the evidence that the accident occurred by reason of the defective foundation upon which the foot blocks, which were spiked to the bottom of the posts which were used in the construction of the platform or ways upon which the dredge rested for repairs, were placed.

The superintendent was aware of the defective conditions and took no steps to remedy them, and was negligent in the duty imposed upon him in these respects, and this is not a case, in my opinion, where a competent man exercised his best judgment and honestly discharged his duty, even when that best judgment and duty turned out to be mistaken.

There was no evidence offered to shew that the plaintiff was aware of the defective condition of the foundation, and failed to report it to the superintendent within a reasonable time. The only evidence offered in this respect was the evidence of the plaintiff who said he "took it for granted that the men in charge knew all about the safety of the dredge," and apparently he did not expect an accident to happen.

There will be judgment for the plaintiff for loss of time for 102 days at $7.50 per day, plus hospital expenses, costs of medicine and doctor's bill above mentioned, making a total of $863, and his costs of this action. *Judgment for plaintiff.*

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Judicial Committee of the Privy Council, Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor. October 23, 1916.

MUNICIPAL CORPORATIONS (§ II F 1—171)—ELECTRICITY—ERECTION OF POLES AND WIRES.

The letters patent of the Toronto Electric Light Co., together with the Act of 1882 (45 Vict. ch. 19), conferred upon the City of Toronto the absolute right to permit or prohibit the erection of poles for the maintenance of wires for electric supply on the streets and public places of the city, and this right has always, by the subsequent agreements and contracts, been consistently guarded and preserved.

[*Toronto Electric Light Co. v. City of Toronto*, 21 D.L.R. 859, 33 O.L.R. 267, affirmed].

APPEAL from the judgment of the Supreme Court of Ontario, 21 D.L.R. 859, 33 O.L.R. 267. Affirmed. Statement.

The judgment of the Board was delivered by

LORD ATKINSON:—This is an appeal from a judgment of the First Appellate Division of the Supreme Court of Ontario, 21 D.L.R. 859, dated March 15, 1915, whereby the judgment of Middleton, J., 20 D.L.R. 958, in favour of the appellant, the plaintiff in the suit, was set aside and it was ordered that, subject to certain declarations therein set out, the action should be dismissed with costs. Lord Atkinson.

The case is not free from difficulty. This is due in a great degree to the fact that some important transactions which took place between the parties to this appeal were not evidenced by nor embodied in formal written instruments.

The appellant company was incorporated by Letters Patent September 20, 1883, under the provisions of one of the Revised Statutes of Ontario, entitled An Act respecting the Incorporation of Joint Stock Companies by Letters Patent (R.S.O. 1877, ch. 150), and of An Act respecting Companies supplying electricity for the purposes of light, heat, and power (45 Vict. (1882) ch. 19).

The Letters Patent purported to confer upon the appellant company the following amongst other powers, namely, power—

To manufacture, produce, use, and sell electric light and power, to erect and construct plant, works, buildings, storehouses, and all other machinery for the production or manufacture of such electric light or power, and to lay down, set up, maintain, renew and remove in and upon and under the streets, squares, and public places of the said city of Toronto all wires, lines, tubes, pipes, poles, posts, and all other apparatus and appliances to enable said company to supply and distribute such electric light and power; to supply electric light or power to such persons, companies, or corporations as may require the same on such terms as may be agreed. . . .

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By sec. 2 of the above-mentioned statute (45 Vict., ch. 19) it is enacted that:—

> Every company incorporated under this Act may construct, maintain, complete, and operate works for the production, sale, and distribution of electricity for purposes of light, heat, and power, and may conduct the same by any means through, under and along the streets, highways, and public places of such cities, towns, and other municipalities; but as to such streets, highways, and public places, only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively, and under and subject to any by-law or by-laws of the councils of the said municipalities, passed in pursuance thereof.

And by sec. 3 it is provided that secs. 50 to 60 and secs. 62 to 85 inclusive of an Act of the Revised Statutes of Ontario, entitled An Act respecting Joint Stock Companies for supplying cities, towns, and villages with gas and water (1877, ch. 157), should be used as part of the above-mentioned statute (45 Vict., ch. 19), the word "electricity" being substituted for the words "gas" or "gas or water" or "gas and water;" and the words "wires or conductors" being read after the words "mains and pipes" or "mains or pipes" where these words occur in those sections. On referring to the sections thus incorporated it will be found that compulsory powers are only conferred upon the company in respect of one or possibly two matters. It can undoubtedly under sec. 82 enter, if necessary, upon land outside but within 10 miles of the city of Toronto, and erect works thereon without the consent of the owner. Provision is made for arbitration on such occasions, and under secs. 56, 57, and 58 the company may possibly have compulsory powers where the different parts of a building belong to different proprietors, or are in the possession of different lessees or tenants, to carry their wires or conduits over the property of one or more of those proprietors or tenants to the property belonging to or in possession of another, or to break up and cut trenches in passages common to neighbouring proprietors or tenants and to erect works thereon or thereunder, making due satisfaction therefor, but in these two cases alone.

The company, however, is by sec. 69 prohibited from taking, using, or injuring any house or other building, or land set apart for a garden, orchard, yard, park, paddock, or such like, or from conveying from the premises of any person water already appropriated and necessary for domestic use, without the consent in writing of the owner or owners first had and obtained.

This provision thus incorporated into sec. 3 of the Act of 1882, touching the consent of the owners in writing, required as a condition precedent, may afford some clue to the proper construction of the immediately preceding section of the same statute dealing with the streets and highways under the control of municipalities.

The incorporation of a company, such as the appellant company, is, in the Province of Ontario, by no means a matter of course. By the Ontario Joint Stock Companies' Letters Patent Act (R.S.O. 1877, ch. 150), the Lieutenant-Governor in Council is empowered to grant a charter to any number of persons, not less than five, who shall petition therefor, constituting them, and such others as may become shareholders in the company about to be formed, into a body corporate for the purposes mentioned. Of the granting of the Letters Patent notice must forthwith be published by the Provincial Secretary in the "Ontario Gazette." The company so incorporated may, amongst other things, acquire, hold, alienate, and convey real estate subject to the restrictions and conditions imposed by the Letters Patent, and will also be entitled to all the powers, privileges, and immunities requisite for the carrying on of its undertaking as though it had been incorporated by a special Act of the legislature embodying all the provisions of this statute.

The appellant company, in exercise of the powers thus conferred upon it, established an extensive system for the distribution of electricity over almost the entire city of Toronto. It supplied current to private customers and to the respondents for the lighting of the street lamps. The system was in 1912 a composite one, partly overhead, partly underground, but inter-communicating. Much the larger part was overhead. It then covered 370 street miles, the wires being carried on 15,705 poles erected on the streets and public places of the city. These poles, the greater number of which were owned by the appellant company, the remainder used by it with the permission of their owners, carried 1,450 miles of wire. In the great majority of cases each of the poles carried wires supplying current for domestic lighting and power and also wires for street lighting. In a minority of instances the poles and wires were used for one service only, sometimes for street lighting alone, sometimes for domestic service alone.

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The underground system at this period consisted of about 350 miles of single conduit laid in 28 to 30 street miles. Many of the circuits of the company are in part overhead and in part underground. At many points the overhead conductors feed the underground, and at many others the process is reversed. The two systems were in 1912 so interlaced, as it was styled, that if the overhead construction were removed, the underground, in some instances, would have no connection with the terminal stations or sub-stations of the company or with any source of power. It was not disputed that the cost of constructing underground conduits so far exceeds that of carrying wires overhead upon poles, that having regard to the prices obtained for current, the former system is only commercially possible of adoption in a limited and favoured area in the city of Toronto where customers are both large and numerous. In this state of things the respondents, on February 6, 1912, passed a resolution, denying amongst other things, (1) the right of the appellant company to lay any underground conduits outside the limits of the city of Toronto as they existed on November 13, 1889, and (2) its right to construct pole lines within the city save for the purpose of implementing its contract with the respondents themselves for street lighting. They followed this up about the middle of October, 1912, by preventing by force the appellant company from erecting additional poles and wires, and also cut down and removed certain poles and wire, part of the appellants' overhead system, which had been erected and were in actual use for some three years previously. Thereupon the action, out of which this appeal arises, was on October 26, 1912, instituted, claiming an injunction restraining the respondents, their servants, agents, and workmen from cutting down, removing, or otherwise interfering with the poles and wires of the appellant company situate on the street and other public places in the city of Toronto, and also claiming damages and further relief.

On October 26, 1912, an interim injunction in the terms of the claim was granted by Middleton, J. It was on November 4, 1912, continued by him till the trial; and, on the hearing of the case was by the order of that Judge, dated May 14, 1914, made perpetual. It was referred to the Master in Ordinary of the Court to ascertain the amount of damages sustained by the appellant company by reason of the acts complained of.

On appeal from this judgment to the Appellate Division of the Supreme Court of Ontario, that Court, Garrow, J.A., dissenting, delivered judgment allowing the appeal, and by their order dated March 15, 1915, set aside the judgment and order appealed from, and declared that, save in the cases therein specified, the appellant company had not any right to use any street, highway, or public place within the limits of the city of Toronto, as they then were or might thereafter be constituted, in order to conduct electricity for the purpose of supplying light, heat or power. Nor any right to erect, construct, maintain, complete or operate in, along, over or upon any of the said streets, highways, squares, or public places any pole, wire, line, tube, pipe, post or other apparatus or appliance whatever for the purpose of conducting electricity. The exceptions mentioned are three in number. First, the right to erect poles and wires for the distribution of electricity on the aforesaid streets and public squares, and public places secured to the appellant company by the terms of an agreement dated August 30, 1883, entered into by the respondents and one George D. Morton. Second, the rights secured to it by the provisions of certain agreements made during the years 1901 to 1911, inclusive, giving special permission to erect poles and string wires thereon for certain purposes on certain parts of certain streets or public places in the city of Toronto. And, third, the right under the terms of an agreement made between the appellant company and the respondents, dated November 13, 1889, to construct, lay down, and operate, etc., certain underground wires and conduits in any of the streets, lanes, parks and public places in the said city for the distribution and supply of electricity and also the right to distribute the same thereby.

The question for the decision of the Board is in effect which of these two orders, that of Middleton, J., or that of the Appellate Division is right. To determine that question it is necessary, in the first instance, to decide what is the true meaning of the words: "Only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively," as used in sec. 2 of the statute of 1882 (45 Vict., ch. 19). It is admitted by the respondents that this agreement need not be under seal. It is not expressly required even to be in writing. They contend, however, rightly their Lordships

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think, that it must be at least a formal agreement as distinguished from mere silent acquiescence or implied consent, and the one thing apparently certain about it is that by the use of the words "only upon" its existence is made a condition precedent, which must be fulfilled by the company before it becomes entitled to enter upon the streets and public places of the city to construct its works.

A provision somewhat analogous to this is to be found in sec. 69 of the Act of 1877, incorporated into sec. 3 of the Act of 1882, dealing with the owners of private property. It enacts that

> Nothing contained in this Act shall authorize any such company, or any person acting under the authority of the same, to take, use, or injure for the purposes of the company, any house or other building or any land used or set apart as a garden, orchard, yard, park, paddock, plantation, etc., (or) convey from the premises of any person any water already appropriated and necessary for his domestic uses without the consent in writing of the owner or owners thereof first had and obtained.

The owner or owners could, of course, attach any conditions they pleased to their consent. It would be strange indeed if sec. 2 of this statute should confer upon municipalities, in respect of the streets and highways over which they had authority and control, protection altogether less effective than the succeeding section confers on the owners of the hereditaments thus mentioned, and that silent acquiescence or implied permission should be held sufficient to satisfy sec. 2 but insufficient to satisfy sec. 3. By holding that the actual making of a formal agreement is a condition precedent in the first case, just as the obtaining of consent in writing is a condition precedent in the second, two sections are made to harmonize, and the construction which makes them do so is, in their Lordships' opinion, the true construction of the statute.

It is next necessary to determine what is the character of the rights and powers, the nature and width of the so-called franchise conferred upon the appellant company by the Letters Patent and this statute of 1882 taken together. Upon this point the parties are at right angles. Sir Robert Finlay contends on behalf of the corporation that, whatever the nature of the agreement mentioned in sec. 2 of this statute, his clients have an absolute right to prohibit and prevent the company from constructing, maintaining, or operating any works under, along, or upon the streets, highways, or public places of the city

of Toronto for the production, distribution, or sale of electricity for any purpose whatever. While Sir John Simon contends on behalf of the company, on the other hand, that the franchise which it possesses entitles it to do all these and the other things mentioned in the Letters Patent and this statute, and that the right of the respondents is confined to merely prescribing and regulating the mode and manner in which the franchise is to be exercised and enjoyed. He insists that, should the respondents absolutely refuse to permit his clients to exercise their so-called franchise, they could, by suit at law, restrain the corporation from so doing, and compel them to confine themselves to their proper function of merely regulating the mode and manner in which the franchise should be exercised and enjoyed. That contention appears to their Lordships to mean, in effect, this: That the powers conferred upon the company are, in relation to this matter, really compulsory. But it is admitted that the Letters Patent do not, *per se*, confer compulsory powers; that they are only enabling in character and merely determine what is *intra vires* of the company, as would a memorandum of association determine it in this country in the case of a limited liability company under the Companies Act. The language of sec. 2 of the Act of 1882 is permissive, not compulsory. It provides that companies incorporated under that Act "*may*" construct, maintain, complete, and operate works, etc., etc. And by the Interpretation Act of Ontario (R.S.O., 1877, ch. 1) it is provided that in any of the revised Statutes of Ontario the word "shall" is to be construed as imperative, the word "may" as permissive, when not inconsistent with the context and object of the particular statute. Again, some of the sections of the Act of 1877, incorporated into sec. 3 of the Act of 1882, confer, as has already been pointed out, compulsory powers; but these powers are confined to the matters already mentioned. In no other cases have the company compulsory powers.

Their Lordships cannot, therefore, find anything in the Act of 1882 which would require the word "may" in sec. 2 of that statute to receive other than its permissive meaning. The very fact that special provision is made in sec. 82 of the Act of 1877 for dispensing with the consent of the owner of land outside the city and referring the matter to arbitration, furnishes a strong argument for holding that in all other cases the powers of the

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company are not compulsory. On the whole, their Lordships are of opinion that the Letters Patent, coupled with the statute of 1882, confer upon the respondents the right to refuse, with absolute impunity, to permit the appellant company to erect any poles or wires for the production, distribution, sale, etc., of electricity on the streets, highways, or public places in the city of Toronto; and that the contention of the company on this point cannot be sustained. These conclusions necessitate a brief examination of the dealings of the appellant company and the respondents touching the supply of electricity to the city of Toronto from the year 1883 to the date of the removal of the poles of the former in the year 1912. The agreement of August 30, 1883, mentioned in the order appealed from, was made between the respondents and the promoters of the appellant company, and was adopted by the company after incorporation. It begins with a recital that the promoters had applied for a charter of incorporation of a company under the name of "The Toronto Electric Light Company," but that same had not yet been granted; that the promoters were the provisional directors to be named in the charter of incorporation when issued; that they were desirous of making all provisions and agreements necessary to enable them to proceed with the erection of poles and wires and all other apparatus for supplying electric light on the streets and public places, and in buildings, public and private, in the city of Toronto, so that the same might be in operation during the Annual Exhibition of the Industrial Exhibition Association of Toronto; and that they had applied to the respondents for permission to erect such poles and wires in the public streets and places of the city as might be necessary for those purposes. It then further recited that the respondents had held a meeting, and on August 6, passed a resolution that permission be granted to the Toronto Electric Light Co. to erect poles and wires temporarily, for the purpose of testing the electric light, within an area about 1 square mile in extent, bounded as therein described, upon condition that the poles be erected under the supervision of the city engineer, be not less than 150 ft. apart and 30 ft. high, and that they and all other appliances and apparatus erected on any of the public streets and places within the described area should be subject to removal after three months' notice from the respondents, until otherwise provided by special agreement. And it then provides

that the permission be given to erect these poles and other apparatus within the area described for the purposes mentioned in, and in conformity with the terms of the resolution: and that the respondents should allow the Toronto Electric Light Co., when incorporated, to erect, subject to the provisions and conditions therein contained, "upon or in the public streets, squares, and other public places within" the aforesaid area, all such poles, wires, and other apparatus as the company might require for the purpose of lighting such streets, squares, public places, and public and other buildings within the same. It lastly provided that that agreement was only an interim agreement until the appellant company should receive its charter of incorporation, and should have duly executed an agreement similar to the present one in all its terms and conditions.

The appellant company having been incorporated on September 23, 1883, in the month of December 1883 applied to the respondents, through their Fire and Gas Committee, for permission to erect poles within the area of the city for electric lighting purposes, and where necessary to replace those already erected with poles of greater height. This committee made a report on this application recommending that permission should only be granted to place poles on Front St. as far west as Bathurst St. "on the same terms and conditions as the privileges already accorded" to the company. The respondents adopted this report with some amendments (not disclosed in the record), and an extract from it containing its substance was on December 13 forwarded by the city clerk to the appellant company with an intimation that the respondents had adopted the report of their committee. Now stopping there for a moment it is, in their Lordships' view, clear that the right asserted by the respondents in these early transactions with the appellant company was the absolute right to give or withhold permission for the erection on the streets, squares, and public places in this city of all poles and other appliances for the supply or distribution of electricity for the purposes of lighting the streets or any buildings, public or private, and to have any of these poles when erected removed when they so desired, on giving three months' notice. The appellant company do not appear to have ever challenged this right or asserted, as is now asserted on their behalf, that the right and power of the respondents was confined to the mere

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regulation of the mode and manner in which the company's franchise should be exercised. The requirement that poles actually erected should be removed without any permission being given to replace them with others seems inconsistent with the limited authority now contended to belong to the respondents, but is quite consistent with the absolute power they claim to possess. On March 8, 1884, less than 6 months after the incorporation of the appellant company, the respondents advertised for tenders for lighting the streets of the city. On March 28, 1884, the appellant company, in answer to this advertisement, sent to the chairman of the respondents' fire and gas committee a tender for the work mentioned. That tender was on August 30 accepted by the respondents; and on September 6, 1884, the first of a long series of contracts in writing for street lighting was entered into between the appellant company and the respondents.

This contract, after reciting the advertisement for tenders and the sending in and acceptance of that of the respondents, contains a covenant by the appellant company to supply for a term of 5 years from May 15, 1884, all the electric lights required by the respondents for street lighting purposes and for the lighting of public parks, squares, and other public places in this city. It also provides that the respondents may, on giving 6 months' notice, discontinue the use of any lights until their number is reduced to 50; may upon a like notice cancel the contract; and, further, that the appellant company shall on receiving 6 months' notice (presumably on the cancellation of the contract) remove, at their own expense, all their wire cables, poles, and other appliances from off the streets and other public places within the limits of the city, and restore these streets and public places to as good a condition as they were in when these poles and appliances were erected, and, further, that all the street lighting should be done to the satisfaction of the city engineer or such other officer as the respondents should appoint for the purpose. This agreement did not run its course. It was superseded by another agreement of January 14, 1886. It is quite true that the company commenced their commercial lighting before their street lighting. They began to receive revenue from the former in the month of February, 1884, and not from the latter till June, 1884, and the entire revenue obtained from the former in that year amounted to $7,323.61 and from the latter $4,805.62. As, however, the

agreement of 1884 was not made till September 6, more than half the latter sum, and more than two-thirds of the former must have been earned during the currency of the Morton Agreement adopted after incorporation. J. J. Wright, who had been manager of the company for 26 years, was examined on this point. He stated that when he first became connected with the company about 40 or 50 street lights were in operation; that for 10 to 15 years the company put up its poles and carried its wires to any customer who wanted electric light; that in the year 1901, when litigation was threatened between the parties, and the respondents apparently wished to get rid of the appellant company on the ground that it had amalgamated with another company, permission for the erection of poles for private lighting was for the first time required, and that from that time forward it was generally if not quite invariably, required. All this may well be. In Toronto, as in most other places presumably, electric lighting was looked upon as a boon, and those who provided it as public benefactors. Their Lordships are quite convinced that the respondents were perfectly cognizant of the loose practice which prevailed. They knew all about it. That is apparent from the reports of their city engineer from the year 1890 to the year 1900. And if the implied consent of the respondents during this period to the erection by the appellant company of poles and apparatus to supply customers was all the latter required to sustain their title to erect and indefinitely maintain them for that purpose, their case might be a strong one; but the former practice was practically abandoned during the eleven years from 1901 to 1912, and contemporaneously with its abandonment written agreements were entered into between the parties in reference to street lighting asserting the right of the corporation to insist on the removal of poles erected for that purpose, most of which poles, according to the finding of Middleton, J., served for the purposes of both public and private lighting. It will only be necessary to examine the provisions of three of these agreements at any length. That of January 14, 1886, provided for the supply by the appellant company of electricity for from 100 to 200 lights, as might be required by the respondents for street lighting and for the lighting of public parks, buildings, squares, and other public places in the city of Toronto for a period of 4 years and 6 months from July 1, 1886, on the terms set forth

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in the specification therein mentioned. By it the company was bound to erect and place electric lights when and where they should be, by notice, required so to do, and at all other places in the said city besides the places where the same were then set up. The agreement, unlike that of 1884, does not contain any provision for the removal of the necessary poles and apparatus after termination of the contract. Sir Robert Finlay contends, however, that this provision is implied, as the permission was only given to erect apparatus for the purposes of the contract, and therefore terminated with the contract.

That agreement was followed by an agreement of a somewhat different character, entered into between the same parties on November 13, 1889. It begins by reciting that the company had been engaged in the business of producing and supplying electric light in the city of Toronto, on the overhead system, and had plant and poles and material in use therefor, under which light was then being supplied to the city and to individual citizens thereof; that the company desired to extend their works for the production and supply of electricity for light, heat, and power, and for other purposes, and had applied to the respondents for the *right* to lay down underground wires, conduits, and appliances for the further distribution and supply of electricity throughout the city, and that the corporation had agreed to grant such right. It is to be observed that both the Letters Patent authorise the laying down and maintaining *under* the streets, squares, and public places of the city, of tubes, pipes, and all other apparatus and appliances for the supply and distribution of electric light and power to such persons, companies, and corporations as may require the same; and that sec. 2 of the Act of 1882 also empowered the company to construct works for the distribution of electricity for the purposes of light, heat, and power by any means, *under as well as* through and along the streets, highways, and public places of the city. The agreement proceeds to provide that the respondents thereby gave and granted to the company the right (in addition to their other works and plant in operation for the use of the city and individuals as aforesaid), to construct and lay down, and operate underground wires, conduits, and appliances for the distribution and supply of electricity for the purposes already mentioned, with the right to take up, renew, alter, and repair the same. And further provides that the respondents should

have the right at the expiration of 30 years from the date of the agreement, on giving 1 year's previous notice in writing, to purchase all the interests and assets of the appellant company, comprising plant, buildings, and materials used or necessary for carrying on its business. And that in case the respondents should fail to exercise this right of purchase at the expiration of the said period of 30 years they should have the right to exercise it at each succeeding period of 20 years on giving a like notice.

This was the origin of the appellant company's underground system. It was not disputed that an absolute indefeasible right was by this agreement conferred upon the company to maintain, use, and enjoy their underground system until the respondent should exercise their right of purchase, but it was resolutely contended by the appellants that owing to the presence in the agreement of the words in brackets, namely, "in addition to their other work," etc., and to the provisions touching the purchase of all the "interest and assets" of the company, comprising plant, buildings, and material, a right equally absolute and indefeasible was conferred upon them to use, maintain, and enjoy their overhead system for the same period. This appears to their Lordships to involve a rather forced construction of the language of the agreement; but even if this were its true construction it would, of course, be competent for the parties by a subsequent agreement to rescind the agreement so far as its provisions relate to the overhead system, and to give up the rights claimed to be acquired by it in reference to that system. It is, therefore, necessary to refer to some of the subsequent agreements to ascertain whether or not this has been done.

Of the many contracts entered into between the parties that of December 10, 1900, may be taken as a specimen. It is signed by the president and secretary of the appellant company, and by the mayor and treasurer of the corporation. It begins by reciting that the respondents have by advertisement called for tenders for certain electric lighting for the streets and other public places of the city for 5 years from January 1, 1901, in accordance with certain printed specifications marked A, and that the appellant's tender had been accepted. It then provides that the appellants shall for 5 years from the above date supply such number of electric lights, not exceeding 1,100, as may from time to time during

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the contract be ordered in writing by the secretary of the fire department or other duly appointed officer, same to be located on the streets, squares, parks, and lanes of the city as may from time to time be specified by the said secretary, and also shall erect such additional arc electric lights over and above the 1,100 when and where required as therein mentioned in other places and streets in the city besides "where the same are then already set up," that all poles (if any) erected or maintained for the purposes of the contract should be located and erected under the supervision of the secretary of the fire department, and that the location of any lights shall be changed from one place to another as directed by this officer. It was not suggested that these 1,100 lights did not include the lights supplied by the overhead system existing on November 13, 1889. An altogether new provision is then introduced (par. 12), to the effect that in case the appellant company should amalgamate with or enter into any pooling arrangements with the Consumers' Gas Co., the contract should be altogether forfeited. On referring to the specification it will be found that it is provided (par. 30) that at the expiration of the contract all poles and other appliances used by the contractor upon the city streets shall, at the option of the respondents, be removed by the contractor, and the road-bed and sidewalks restored as though the poles had not been erected thereon, or shall be purchased by the respondents at a price to be agreed upon or determined by arbitration, and if not purchased, that the respondent should, within three months after the expiration of the contract, be at liberty to remove the same at the expense of the contractor, in this case, the appellant company. These provisions, which manifestly applying to the overhead system existing on November 13, 1889, as well as the subsequent additions to it, are wholly inconsistent with the notion that by the agreement of that date the appellant company had acquired an absolute, indefeasible right to maintain and use the overhead system of supply then existing for a period of 30 years thence ensuing.

If such a right was conferred by that agreement it was by this later agreement of 1900 absolutely abandoned, and the right of the respondents again asserted to require the overhead system to be removed if they so pleased. The specification for the succeeding agreement, that of December 29, 1905, touching the

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supply of electricity for street lighting for 5 years from January 1, 1906, similarly requires that all the poles used by the contractor shall, at the expiration of the contract, be removed, or, at the option of the respondents, purchased. The absolute right conferred upon the respondents by sec. 2 of the Act of 1882 to permit or prohibit the erection or maintenance of an overhead system of wires for electric supply on the streets, squares, and public places of their city, has thus been asserted, guarded, and preserved, and in their Lordships' opinion the provision touching the purchase of overhead plant contained in the agreement of November 13, 1889, means no more than this, that the respondents shall be entitled to purchase, when they purchase the underground system, such poles and plant of the overhead system as may be then found lawfully erected on the streets and public places of the city. No estoppel arises in this case, as there is no evidence whatever that both the contracting parties were not fully aware of their respective legal rights. It may well be that the appellant company never anticipated that the respondents would insist upon the removal of posts carrying wires, erected with their implied consent but not in pursuance of any formal agreement. With the hardships (if any), or the moralities of the case this Board has no concern. It deals with the legal rights of the parties and those alone, and having regard solely to them their Lordships are on the whole case of opinion that the judgment appealed from was right and should be affirmed and this appeal be dismissed, and they will humbly advise His Majesty accordingly. The appellant company must pay the costs of the appeal.

Appeal dismissed.

LILJA v. GRANBY.

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British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. October 3, 1916.

MASTER AND SERVANT (§ II A 4—75)—MINING OPERATIONS—EXPLOSION —DEFECTIVE SYSTEM—CONCLUSIVENESS OF VERDICT.

The verdict of a jury, based on a reasonable conclusion from the evidence, that injuries occasioned by an explosion in the course of mining operations had been caused by a defective system of storing powder, cannot be disturbed on appeal.

[*Lilja* v. *Granby Consolidated Mining*, 21 B.C.R. 384, affirmed by Canada Supreme Court; *Toronto Power Co.* v. *Paskwan* (P.C.), 22 D.L.R. 340; *McPhee* v. *Esquimalt*, etc. *R. Co.*, 16 D.L.R. 756, referred to. See also *Lyons* v. *Nicola Valley Lumber Co.* (B.C.), 31 D.L.R. 133.]

Statement.

APPEAL by defendant from the judgment of Clement, J., of December 11, 1915. Affirmed.

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Macdonald, C.J.A.

S. S. Taylor, K.C., for appellant; *J. W. DeB. Farris*, for respondent.

MACDONALD, C.J.A.:—The only substantial point in this appeal is whether there is legal evidence of a defective system of caring for powder at defendant's mines, and if so, whether the system can be held responsible for the plaintiff's injuries.

There is evidence that defendants kept in their thawing room a large quantity of powder some of which remained there in an atmosphere of from 75 to 95° Fr. for months; that in such circumstances powder may get into a condition which renders it more dangerous to handle and load than if kept in an ordinary magazine in a frozen state until needed at the thawing room for immediate use. I think the jury could properly infer that the system of storing and thawing and distributing the powder was a dangerous and defective system.

I think they might also infer from the evidence that no systematic precautions were taken by defendants to avoid the dangers of keeping powder in that way. The defendants' superintendent said that the man in charge of the thawing room was to deal with the boxes of powder as a grocer deals with his stock of potatoes. He was to keep them going, "first in, first out." But the powder was of different kinds. Some kinds were not so much needed as others. That which caused the explosion was allowed to remain for months in this heated room. There was no system of tally or inspection worthy of the name. Had there been, the defects of the system might have been cured.

Martin, J.A.

MARTIN, J.A.:—There was, in my opinion, sufficient evidence of a defective system upon which the verdict of the jury may be supported at common law apart from the obligation by statute —Metalliferous Mines Inspection Act, 1864, sec. 33 (2)— to store explosives "in a magazine provided only for this purpose" which duty I think Mr. Taylor is right in submitting has not been properly pleaded, and cannot now be relied on, the facts not being set out to bring the case within the statute (Odgers on Pleading, 7th ed., 99) quite apart from the question as to whether or no the statute should be referred to. Strictly speaking, I do not think it is necessary in a statement of claim in a case of negligence to do so: cases are constantly before us based *e.g.*, on Lord Campbell's Act and the Employers' Liability Act wherein the

statute is not cited, though the plaintiff is seeking to enforce rights conferred that were unknown to the common law, and examples of this sort relating to the Statute of Frauds and Conveyancing Act, Married Woman's Property Act, and Judicature Act (*re* Assignments) are given in Odgers, *supra*, pp. 99-100. But at the same time where the plaintiff is attacking the defendant for non-compliance with a particular provision in a general statute of many provisions imposing new duties whereby it is sought to establish negligence, the position is in practice, if not in theory, somewhat different, and it would at least lead to a very desirable certainty to adopt the following good advice given in Bullen & Leake's Precedents of Pleading (7th ed.) p. 37:—

> Where the action is brought for the breach of some statutory duty arising independently of contract, the statute should be referred to and the facts which bring the case within it sufficiently stated in the pleading.

A question of the reception of the evidence of McDonald, the defendant's mine superintendent, has arisen under rules 370c and 370r. The order, XXXIA in which they are included has the word "(Ont.)" in brackets under its number, but our rule greatly differs from the corresponding Ontario r. 327, in providing that "such examination may be used as evidence at the trial if the trial Judge so orders," whereas the Ontario rule says "but such examination shall not be used as evidence at the trial." Our r. 370r relating to the admission (subject to the direction of the Judge as to "connected" parts) of "any part of the examination of the opposite party" is the same as Ont. r. 330. It was submitted that the words "such examination" in 370c (1) mean the whole of the examination, and that it must go in all or none, and that r. 370r does not apply. The matter is not without difficulty but I think after a careful consideration of the rules in both provinces, that the expression "such examination" and the power of the Judge thereover must be read in connection with his powers conferred under r. 370r. The word "such" I take there to mean "all of the" or "the whole of the" and as the greater includes the less the permission given to use it all may be exercised to a lesser degree in the use of part of its subject to the control of the Judge under r. 370r. whereby all parties are protected.

Other objections to the verdict were raised but while they

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have not been overlooked they do not call for special notice. It follows that the appeal should be dismissed.

GALLIHER, J.A.:—I find myself unable to say that the verdict of the jury should be interfered with. The appeal should be dismissed.

MCPHILLIPS, J.A.:—I remain of the view that the appeal must be dismissed. The appeal is from the judgment entered for the plaintiff upon the second trial, the verdict of the jury being a general verdict. The second trial was heard following upon an appeal to this Court which directed a new trial (21 B.C.R. 384) affirmed on appeal to the Supreme Court of Canada (9 W.W.R. 662).

The case which went to the jury was very concisely stated in the charge by Clement, J.:—

> With regard to the question of evidence in the case, the case comes to a very narrow case. If you find for the plaintiff here you must find that he was injured through defective powder; and you must find that that powder became defective through the negligence of this defendant company, and it is because the issue is just that one issue that I am not going to put any questions to you. I put it to you as strongly as I can because I think the issues have become defined during the trial boiled right down to that, and in his address to you Mr. Farris took that position. "We say that the powder that the company supplied to this workman was defective powder, defective beyond what it should be."

Counsel for the appellant strenuously argued that upon the facts it was not shewn that there was any defect in the powder used or any defective system, that the superintendence was proper and efficient and in the alternative that the appellant was entitled to succeed upon the plea of *volenti non fit injuria*.

It is apparent that the new trial has been helpful to the respondent in narrowing the case to one distinct issue, *i.e.*, the defective powder—yet the respondent is entitled to have the judgment stand if there is sufficient evidence to support it. Sir Arthur Channell, in delivering the judgment of their Lordships of the Privy Council in *Toronto Power Co.* v. *Paskwan*, [1915] A.C. 734, 22 D.L.R. 340 at 344, said:—

> It is unnecessary to go as far as Middleton, J., did in the Court below and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable.

I would certainly hesitate greatly—in fact, would not upon the facts of the present case say—that the jury arrived at the right conclusion. See also *Jones* v. *Spencer*, 77 L.T. 536, 538.

It is true that the Judge told the jury that there was but one issue, *i.e.*, defective powder—yet I am unable to say that the charge to the jury was not in accordance with the statute law—"A proper and complete direction to the jury upon the law and as to the evidence applicable to (the) issues" (Supreme Court Act, ch. 58, R.S.B.C., 1911). *Blue* v. *Red Mountain R. Co.*, [1909] A.C. 361, 78 L.J. (P.C.) 107.

Kleinwort v. *Dunlop Rubber Co.*, 23 T.L.R. 696. Further, unquestionably the case as presented by the plaintiff was formulated *simpliciter* upon the one act of negligence—the supply of defective powder. The verdict being a general verdict all the defences, inclusive of contributory negligence and the plea of *volenti non fit injuria*, must be held to have been found against the appellant and it cannot be said that the trial Judge failed to present to the jury the various defences advanced by the appellant.

The effect of the general verdict is dealt with by the Master of the Rolls in *Newberry* v. *Bristol Tramways*, 29 T.L.R. 177, at 179:—"Now if the jury had simply given a general verdict his Lordship thought they could not have interfered."

This is not a case where the Court of Appeal would be entitled to exercise the power which it admittedly has, of entering judgment for the appellant notwithstanding the verdict of the jury, the Supreme Court of Canada considered the exercise of that power in *McPhee* v. *Esquimalt and Nanaimo R. Co.*, 49 Can. S.C.R. 43, 16 D.L.R. 756 at 762.

I am unable to say that "no reasonable view of the evidence could justify the verdict for the plaintiff" and to direct a new trial —would mean a third trial in the action—and I cannot say that a new trial would enable the production of any further relevant evidence in respect to the issues already determined or that any different result would follow.

The respondent is rightly entitled to a trial before a Judge and jury, this cannot be withheld from him, the law so provides and it is not the province of the Court of Appeal to interpose or attempt to discharge the duty which in accordance with the law devolves upon the jury—when the issues are committed to them after a charge both upon the law and the facts, save, as we have seen, *McPhee* v. *Esquimalt*, etc., *supra*, where "no reasonable view of that evidence could justify a verdict for the plaintiff."

I am unable to say that there has been error in law which

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affected the verdict or any miscarriage, or that the jury in any way misunderstood the points put to them. That the conclusion they came to might not, in the language of Lord Atkinson (in the *Kleinwort* case) be "that at which one would be disposed to arrive"—does not constitute good ground for disturbance of the verdict, it not being against evidence or the weight of evidence, nor in the language of Duff, J., can it be said that "no reasonable view of that evidence could justify a verdict for the plaintiff."

I would dismiss the appeal. *Appeal dismissed.*

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Ontario Supreme Court, Middleton, J. April 29, 1916.

TRADE MARK (§ IV—21)—PASSING OFF—INJUNCTION.

A trade mark may exist independently of registration, and where there has been no abandonment of it by laches or acquiescence, and it has not become *publici juris*, its infringement by way of "passing-off" will be enjoined.

Statement.

ACTION to restrain the defendant from infringing certain trade marks of the plaintiff company for playing cards.

D. L. McCarthy, K.C., and *Britton Osler*, for plaintiff.

F. B. Fetherstonhaugh, K.C., and *A. C. Heighington*, for defendant.

Middleton, J.

MIDDLETON, J.:—The action is brought to restrain certain alleged infringements by the defendant of the trade marks claimed by the plaintiff company with respect to playing cards. These trade marks consist, first, of the word "Bicycle" as applied to playing cards; secondly, of three designs, separately recorded as trade marks. The first of these designs is a picture of a safety bicycle; the second, some elaborate scroll work with four circular panels or fields, one near each corner of the card, each containing a figure riding upon a bicycle, this design being known as "The Expert;" the third, a representation of acorns and oak leaves surrounded by a border composed of bicycles and bicycle wheels. These four trade marks are all registered, and the registration has never been in any way impeached. The registration took place on the 3rd August, 1906, but the marks had been in use many years previously.

The plaintiff company is a very large concern, monopolising most of the playing card business in the United States. It has carried on business there for many years, and has exported its products to Canada and other countries.

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Messrs. Warwick Brothers and Rutter, wholesale stationers, Toronto, as a branch of their stationery business, sold playing cards, and among other cards they dealt in were those made by the plaintiff company. The cards were imported by them at any rate from the year 1887 on.

The defendant was a traveller in the employ of Warwick Brothers and Rutter for six or seven years, ending in 1902, and was recognised as an expert in connection with the sale of cards. The plaintiff company's cards were not the only ones in which Warwick Brothers and Rutter dealt; they also imported cards from Messrs. Goodall & Co., the largest English manufacturers of playing cards; and the defendant in this way became not only familiar with the market but well posted in its requirements and the adaptability of the goods of the plaintiff company and of the English firm to these requirements.

The plaintiff company had manufactured for many years a grade of playing cards which had been placed upon the market under the trade name "Bicycle Cards." These cards were first manufactured in July, 1885. It was thought that a good market would be found for cards which could be sold at 25 cents a pack retail, if they were manufactured of thin card, superior in quality to anything then upon the market, and the name "Bicycle" was chosen as the trade name to designate this new card. Very large sums of money were spent in advertising it and a high grade card, retailing at 50 cents, then placed upon the market under the name "Congress." The amount spent in advertising these two brands ran as high as $150,000 in one year. This expensive advertising and the fact that the cards were superior to anything on the market at similar prices had its legitimate result, and a very large trade was done throughout the United States and to some extent throughout Canada. Bicycle cards were not made of one uniform design, but different designs were adopted to appeal to the popular fancy. At first there were only four or five different designs, but new designs were from time to time adopted, and, if they turned out to be good sellers, they persisted; if not, they were abandoned. The "Expert" design was one of the original designs, and is still very popular. The acorn design was adopted in 1888, and is reckoned a good seller.

In 1902, Mr. Hurst, who, as I have said, was thoroughly familiar with the situation, resigned his position with Warwick

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Brothers and Rutter, a course he had contemplated for some few years, and become connected with the Goodall firm. He went to England to complete his arrangement with the firm, and has acted as their Canadian representative ever since. When he went to England, he took with him samples of cards manufactured by the plaintiff company, and he has since gone to England at least once a year, taking with him samples of the plaintiff company's cards.

Almost immediately, Goodall & Co. adopted designs manifestly copied from the plaintiff company's. In some instances, there has been a colourable difference in the details of the design; e.g., in the "Expert" the bicycle faces a different way, and the bicycle, instead of being of the old style, is made a "safety," and a woman is substituted for a man. But, as the field containing the figures is only half an inch across, this is a detail and not noticeable unless the backs of the cards are carefully scrutinised. In the acorn design there was no difference whatever.

It is not only in these two designs that there has been plainly copying, with colourable variations. In a series of designs, covering a dozen or so, the copying is plainly evident.

These cards were then put up in "tuck" cases, in which the word "Bicycle" was made a prominent feature, and the cases closely resembled in general appearance the tuck cases used by the plaintiff company to contain its packs. These tuck cases were sold to the trade packed in cartons containing one dozen, and the cartons were marked in a way well calculated to deceive.

Goodall & Co. advertised these cards through Mr. Hurst in a way which is suggestive. The advertisements they published were not advertisements which would reach the general card-using public, but were confined to a trade journal which would reach dealers; and in this, as shewn by the sample advertisement produced, "Bicycle" is made a conspicuous feature. They also sold cards to the trade at a lower price than the plaintiff company's card, and in this way sought to avail themselves of the expensive advertising utilised to create a market, and afforded to the dealers an opportunity of obtaining greater profit by substituting the English for the American card.

The proper inference from all the evidence is, that Hurst and the Goodalls conspired together to defraud the plaintiff company

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of its trade name and of the profits legitimately its, as the result of its advertising and enterprise.

In 1905, some knowledge of the defendant's practices came to the plaintiff company, and apparently a suit was threatened, but it was not prosecuted. Mr. Hurst says that he then modified the form of the "Acorn" design which he used, and also the "Expert" design, and abandoned the use of the word "Bicycle" on the tuck cases, although he retained it on the cartons. It is very significant that more than a year after this—in September, 1906—he is found advertising "Bicycle" cards in the trade journal; this advertisement, according to Mr. Hurst himself, being one that was changed from month to month by him, so that the advertising could not have been a mere slip or oversight by not changing the advertisement ordered at an earlier date.

The changes then made in the two designs are, to my mind, clearly indicative of an attempt to depart from the plaintiff company's design only so far as was absolutely necessary to evade, as it was hoped, an infringement of the trade mark. In this attempt, I think, there has been entire failure, and the altered "Expert" and "Acorn" designs are still objectionable, as being colourable imitations of the plaintiff company's designs.

As usual in cases of this kind, numerous defences have been argued, but I do not think that any of them has been made out. Under our law, the trade mark existed independently of any registration; and here, I think, the plaintiff company is entitled to succeed, not only by virtue of the trade mark, but because, as I think, a plain case of passing off has been made out. It is true that no witness was called who had been deceived. In some cases this may be a matter of great importance; but where the intention to pass off is abundantly proved, and the goods are put up in such an imitative form as to make the passing off easy, I do not think it is by any means essential than an actual case of passing off should be proved.

Then it is said that the plaintiff company has, by acquiescence and laches, abandoned its trade marks, and that the marks have now become *publici juris*, not only because of the defendant's user, but because of the manufacture of cards which might be deemed an infringement, by two Montreal manufacturers. One of these makes and sells "Cyclist" cards. These cards are not put up so as to deceive the public, and I do not regard the "Cyclist"

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card as an infringement. The other card relied upon is one labelled "Sports," which again I do not regard as in any way an infringement. It has on the back a boy upon a bicycle, but there is no suggestion of imitation of the plaintiff company's design.

Another firm manufactured a card called the "Bicyclette," which was probably intended as an imitation of the "Bicycle" card, and may well have been put out fraudulently. The name of the manufacturer does not appear upon the card, but initials appear, which, it is said, are the initials of a local firm in Montreal, at whose instance it was got out for use in their trade. It is not shewn that the plaintiff company knew of this card.

This same firm manufactured another card called the "Senator," which I think it is quite likely was intended to be an imitation of the plaintiff company's card. Again, the manufacturer's name is suppressed and the name of a non-existent firm—"Kaiser and Lehman, London"—was substituted, for the purpose of concealing and misleading. Knowledge of the existence of this card was also not brought home to the plaintiff company.

Another matter which is much relied upon is the fact that it is said that Goodall & Co. had, long prior to their employment of the defendant, themselves used the word "Bicycle" in connection with playing cards. The facts appear to be that Goodall & Co. manufacture an enormous number of different designs of cards. These are arranged in series, having descriptive names indicating the quality and character of the card, in the same way that the word "Bicycle" indicates the character and quality of the plaintiff company's series of cards. Each of these series has a descriptive name, one being "Viceroy"—a series of cards supposed to be adapted for use in India. Among the different designs of "Viceroy" cards was one in which a bicycle was used, and this was called the "Bicycle" series. The "Viceroy" cards are not marketed in Canada. Most of the cards sent to the Canadian market belong to the series designated as "Imperial Club," possibly because "Imperial Club" was a trade mark already well known here; but, immediately following Mr. Hurst's first visit, the "Bicycle" design was transferred from the "Viceroy" to the "Imperial Club" series. This design, as might be expected from its independent origin, did not in any way resemble the plaintiff company's productions.

This limited use of the word "Bicycle" appears to me to be

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quite insufficient to prevent the plaintiff company from acquiring an exclusive trade mark for its "Bicycle" series.

I am content to accept the law as laid down by The Hon. H. Fletcher Moulton in the article on Trade Marks, Halsbury's Laws of England, vol. 27, p. 774, para. 1356: "Long user by another, if fraudulent, does not affect the plaintiff's right to a final injunction."

But I think that here there clearly has been no sufficient evidence of any acquiescence in the user by the defendant or Messrs. Goodall & Co. to constitute an abandonment.

In 1905, apparently, an action was threatened, exactly what for is not made plain; but the defendant himself says that the action was not prosecuted because of his assurances; and his further conduct has not been shewn to have come to the knowledge of the plaintiff company before the bringing of this action.

In *Ford* v. *Foster* (1872), L.R. 7 Ch. 611, the test is clearly stated by Sir G. Mellish, L.J., at p. 628: "I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone." Lord Justice James thus deals with the argument that the thief acquires a right by continual thieving, saying (p. 625): "It has been said that one murder makes a villain and millions a hero; but I think it would hardly do to act on that principle in such matters as this, and to say that the extent of a man's piratical invasions of his neighbour's rights is to convert his piracy into a lawful trade."

National Starch Manufacturing Co. v. *Munn's Patent Maizena and Starch Co.*, [1894] A.C. 275, shews that, where the trade mark has become *publici juris*, mere fraud on the part of the defendant is not enough to entitle the plaintiff to an injunction; but that cannot help the defendant here; for, in my view, the trade

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marks never became in any sense *publici juris*, within the meaning of that term as explained by Sir George Mellish.

I therefore award the plaintiff company an injunction against the infringement of its trade marks, including the use of the word "Bicycle;" but I think that there should be excepted from this injunction the use of the pictures of bicycles found on the "Viceroy" card, for I do not regard this as constituting an infringement of the plaintiff company's rights.

The defendant should pay the costs of the action, and damages, which I fix at $250, subject to the right of either party, at its own risk as to costs, to have a reference, and subject to the right of the plaintiff comapny, at its own risk as to costs, to have an inquiry as to profits. *Judgment for plaintiff.*

Annotation.

ANNOTATION BY RUSSEL S. SMART, B.A., M.E., OF THE OTTAWA BAR.

Nature of trade mark—Passing off—Abandonment.

The property which a manufacturer obtains in a mark which he applies to articles made or sold by him with the intention that the mark should indicate they are of his manufacture or selection, has long been supported by English Courts, and invasions against this right of property protected, (*Ransome* v. *Graham*, 51 L.J. Ch. 897; *Millington* v. *Fox* (1838), 3 My. & Cr. 338; *Hall & Barrows*, 4 De. G.J. & S. 150).

Lord Langdale said in *Perry* v. *Truefitt*, 6 Beav. 66:—"A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other indices which may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

The protection thus afforded by the Courts is for the benefit of the public as well as the owner of the trade mark. The public have the right to assume that goods to which a trade mark has been applied are genuine manufactures of the owner of the trade mark.

In *Davis* v. *Kennedy* (1867), 13 Gr. 523, the judgment quotes with approval the following words of Lord Cranworth in *Farina* v. *Silverlock* (1856), 6 De G.M. & G. 214: "I apprehend that the law is perfectly clear, that any one who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade mark and make purchasers believe that it is the manufacture to which that trade mark was originally applied."

A trade mark has thus the function of giving the purchaser assurance as to the make and quality of the article (*Spottiswoode* v. *Clarke*, 2 Ph. 154).

In the leading case of *Partlo* v. *Todd*, 17 Can. S.C.R. 196, Gwynne, J., said: "The right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where and by whom or at what manufactory the article to which it is attached was manufactured. A man may mark goods of his own manufacture either by his name or the initials

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of his name, or by using for the purpose any symbol or emblems, however unmeaning it may be in itself, and if such symbol comes by use to be recognized in the trade as the mark of the goods of a particular person, no other person has the right to stamp his goods of a like description with a mark so resembling the mark of the former as to be likely thereby to induce incautious purchasers to believe that they are buying the goods of the former; but no person can acquire property in any marks, names, letters, or symbols which are known in the trade as designating the quality merely, wholly irrespective of the goods to which they are affixed being the manufacture or stock-in-trade of any particular person."

Sec. 20 of the Trade Mark and Design Act (R.S.C. ch. 71) provides: "No person shall institute any proceedings to prevent the infringement of any trade mark, unless such trade mark is registered in pursuance of this Act."

This section does not, however, prevent an action being brought for passing-off or unfair trade competition as in the present case.

Kay, L.J., in *Powell* v. *Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. at p. 79, summarizes the principles governing passing-off actions as follows: "The law relating to this subject may be stated in a few propositions: (1) It is unlawful for a trader to pass off his goods as the goods of another. (2) Even if this is done innocently it will be restrained (*Millington* v. *Fox*, 3 My. & Cr. 338). (3) *A fortiori* if done designedly, for that is a fraud. (4) Although the first purchaser is not deceived if the article is so delivered to him as to be calculated to deceive a purchaser from him, that is illegal (*Sykes* v. *Sykes*, 3 B & C. 541). (5) One apparent exception is where a man has been describing his goods by his own name, another man having the same name cannot be prevented from using it, though this may have the effect of deceiving purchasers (*Burgess* v. *Burgess*, 3 DeG.M. & G. 896; *Turton* v. *Turton*, 42 Ch. D. 128). (6) But this exception does not go far. A man may so use his own name as to infringe the rule of law. "It is a question of evidence in each case whether there is a false representation or not" (per Turner, L.J., in *Burgess* v. *Burgess*, 3 DeG.M. & G. 905). So he may be restrained if he associates another man with him, so that under their joint names he may pass off goods as the goods of another person (*Croft* v. *Day*, 7 Beav. 84; *Clayton* v. *Day*, 26 Sol. Jour. 43; *Melachrino* v. *The Melachrino Egyptian Cigarette Co.*, 4 R.P.C. 215. (7) Another apparent exception is where a man trading under a patent had a monopoly for fourteen years, and had given the article a descriptive name, he cannot, even when the patent has expired, prevent another from selling it under that name (*Young* v. *Macrae*, 9 Jur. N.S. 322; *Linoleum Co.* v. *Nairn*, L.R. 7 Ch.D. 834). (8) I am not sure if this would be so if the name so used were the name of the patentee, or even a purely fancy name not descriptive. (9) Certainly where there has not been a patent, and an article has been made and sold under a fanciful name not descriptive, so that the article as made by one person has acquired a reputation under that name, another trader will not be permitted to use the name for a similar article made by him. (*Braham* v. *Bustard*, 1 H. & M. 447; *Cochrane* v. *Macnish*, 13 R.P.C. 100). (10). In this last proposition there is again a limitation. If the first maker has slept upon his rights or allowed the name to be used by others until it has become *publici juris*, this Court will not interfere."

There are few cases in Canada which are strictly passing-off cases, but in some of the true trade mark cases observations are met with illustrating the principles applicable to the former.

Annotation.

In *Davis* v. *Kennedy*, 13 Gr. 523, the action was brought under the Trade Mark Act (1861), (Can.), and also upon the common law—which is the safer method of proceeding in the event of the infringement action not succeeding through defect in title, etc. Spragge, V.C., while doubting the plaintiff's right to proceed under the Act in view of the fact that the declaration of ownership produced upon the application to register was not made by the proprietor, but by an agent, upheld the plaintiff's action at common law for passing-off, and granted an injunction as prayed.

Davis v. *Reid*, 17 Gr. 69, was in reality a passing-off case, though the plaintiff was under the impression, shewn to be erroneous, that he had registered the trade mark in question. Mowat, V.C., said, "From the similarity of the two stamps . . I have no doubt that the defendants copied their stamp from the plaintiffs; and that whether they had or not any intention of misleading purchasers—a point which is for the present purpose quite immaterial . . their mark is well calculated to have that effect . . Nor is it necessary that the resemblance should be so close as to deceive, notwithstanding close examination. If even ordinary purchasers **may** be deceived, or "incautious purchasers" . . an injunction will be granted."

The next case in point of time is *McCall* v. *Theal*, 28 Gr. 48, which was a purely common law action. The plaintiff sought to restrain the defendant from using the name "Bazaar Patterns" in such a manner as to induce the public to believe they were purchasing the plaintiff's patterns. Blake, V.C., adopting the principles laid down in *Perry* v. *Truefitt* (1842), 6 Beav. 66, held that although there was no right in the plaintiff to the exclusive use of the word "Bazaar"—it having become *publici juris*—yet the plaintiff was entitled to an injunction restraining the defendant from representing that his goods were the goods of the plaintiff, *e.g.*, *Singer* v. *Charlebois*, 16 Que. S.C. 167, where similar relief was given, see also *Vive Camera Co.* v. *Hogg*, 18 Que. S.C. 1.

In *Rose* v. *McLean*, 24 A.R. (Ont.) 240, the plaintiffs obtained an injunction restraining the defendants from using the word "Bookseller," as being too close to the title of the plaintiff's journal, "The Canadian Bookseller and Library Journal," commonly known as "The Canadian Bookseller." Rose, J., citing MacMahon, J., said: "There is every probability of the plaintiff being injured by the public being deceived." Burton, J.A., said: "The defendant shall not be allowed to assume a name for their journal which is practically the same as the plaintiff's and thereby probably obtain advertisements which were intended for his." "For the purpose of the present case," said Ferguson, sitting with the Court of Appeal, "I think (the law) may be stated thus: To entitle the plaintiff to the interposition of the Court, the name of his journal must be used in such a way as to be calculated to deceive or mislead the public . . and to induce them to suppose that the journal published by the defendants is the same as that which was previously being published by the plaintiff."

See also *Pabst* v. *Ekers*, 20 Que. S.C. 20, where it was held that a trader has a common law right to protection against a competitor using his trade mark only upon proof of either fraud or deception as regards such use and damage resulting therefrom.

A trade mark, like any other property, may be lost by abandonment.

To constitute abandonment, an intention to abandon must be shewn. Mere non user of a trade mark can no more be said to consti-

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tute abandonment than the mere non user of the right to a stream belonging to a mill as an easement can be said to constitute an abandonment of the easement. (*Mouson & Co.* v. *Boehm*, 26 Ch. D. 398). The burden of proof lies on the party who affirms abandonment (*Julian* v. *Hoosier Drill Co.*, 75 Ind. 408).

In *Re Vulcan Trade Mark* (1914), 22 D.L.R. 214, 15 Can. Ex. 265 (affirmed 24 D.L.R. 621, 51 Can. S.C.R. 411) at 268, Cassels, J., considering a contention that the petitioners had abandoned their right to the reasons of length of time which had elapsed between the various shipments of matches from Sweden to Canada said, "It is to be borne in mind that no intention to abandon can reasonably be inferred in this case as the petitioners were continuously engaged in the manufacture and sale of these matches practically over the world. Sales, according to the evidence, have amounted in value to about one million pounds sterling, and according to the evidence of Palmgren at the time of giving his evidence the sale of goods was at the rate of over one hundred thousand pounds sterling per annum.

In the case of *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398, the judgment of Chitty, J., is very pertinent the facts in this case being much stronger against any idea of abandonment than in that case.

In some cases, words which are originally distinctive are used in such a way as to indicate an article itself or its method of manufacture instead of the origin. If a trader allows a word coined by him to be generally used and appropriated by others in the trade, it may become "*publici juris*" and cease to be capable of protection as a trade mark. In the leading Canadian case of *Partlo* v. *Todd*, 17 Can. S.C.R. 196, the words "Gold Leaf" were found to be well known and in use as a brand designating a particular quality of flour manufactured by what is known in trade "patent process" by whomsoever manufactured; the term has no connection with any particular persons or mills. "Gold Medal" has been held open to the same objection (*Dominion Flour Mills Co.* v. *Morris*, 2 D.L.R. 830).

The word "Singer" as applied to sewing machines has been the source of extended litigation involving this point. In the *Singer Manufacturing Co.* v. *M. Charlebois*, 16 Que. S.C. 167, it was held that the petitioner has not the right to prevent the respondent from using the word "Singer" in connection with sewing machines, although they were entitled to an injunction against the use of the name in any way which would deceive the public and lead to the belief that the machines made by her were of petitioner's manufacture.

The decision in the above case is consistent with the principle established in a number of cases in England, that where a word, which has no descriptive meaning to persons unacquainted with the particular trade, indicates to traders in those goods a process or principle, it is descriptive and incapable of exclusive appropriation.

In *Wheeler & Wilson* v. *Shakespeare*, 39 L.J. Ch. 36, the defendant had advertised himself as the agent for sale of the Wheeler-Wilson machine, although he was not the plaintiffs' agent, and was not selling their machines. James, V.C., while restraining him from advertising himself as the plaintiffs' agent refused to restrain him from describing the machines sold by him as Wheeler & Wilson's. That was not the name of the makers, but of the principle or process and the monopoly granted under the expired patent could not be continued by granting a monopoly in the name.

The decision was followed in 1875 in *Singer* v. *Wilson*, L.R. 2 Ch. 434.

Annotation. The House of Lords, however ((1877), 3 App. Cas. 376), gave no decision as to whether the word "Singer" was indicative of a maker or of a principle of construction, the defendant's evidence being incomplete; but in *Singer* v. *Loog* (1880), 18 Ch. D. 395; (1882), 8 App. Cas. 15, it was decided that a trader has a right to make and sell machines similar in form and construction to those made and sold by a rival trader, and in describing and advertising his own machines, to refer to his rival's machines and his rival's name, provided he does so in such a way as to obviate any reasonable possibility of misunderstanding or deception. There the defendant had placed upon the machines which he sold a plate marked Singer Machine, but bearing also words referring to the foreign makers of the goods. This plate he offered to abandon, but he claimed the right to use the word Singer to describe his machines. In his advertisement he referred to our Singer Machines, and to machines made on the Singer system. It having been held by the Court of Appeal and the House of Lords that the documents issued by the defendant were not calculated to deceive and the action having, therefore, failed, the question as to the secondary meaning of the word "Singer" did not arise (18 Ch. D. 417), but the plaintiffs admitted that if the defendant should shew that the article in question was a specific article known by a specfic name, and that, as in the case of Wellington boots or Hansom cabs, he was unable to designate the article in any other way than by its known name, the plaintiffs could claim no exclusive use of the word. Lush, L.J., said, at the close of his remarks (18 Ch. D. p. 428): "Possibly the time has come when the Singer Machine might now be popularly understood to mean not a machine by any person of the name of Singer, but a machine of the description and kind known as the Singer machine. However, . . that question does not arise. . . I would only further observe that whenever the question does arise, there is a great body of evidence before us now to shew . . that at all events at the present time the word Singer has become in popular use and acceptation a word of description, rather than a word denoting the maker." Lord Selborne, on the other hand, came to the conclusion (8 App. Case, p. 26), unhesitatingly, that the term Singer system had become a *bonâ fide* and intelligible description of some really distinctive character or characters in that method of construction.

In the United States there are a number of cases following the lines indicated above: *Singer Manufacturing Co.* v. *Larsen* (1878), 8 Biss. 181; *Singer Manufacturing Co.* v. *Stanage* (1881), 2 McRary 512; *Singer Manufacturing Co.* v. *Riley* (1882), 11 Fed. Rep. 706, and *Brill* v. *Singer* (1884), 41 Ohio 127. Treat, J., in the *Stanage* case: "Where a patented article is known in the market by any specific designation, whether the name of the patentee or otherwise, every person, at the expiration of the patent, has a right to manufacture and vend the same under the designation thereof by which it was known to the public."

In England where a trade mark is found to be in use by more than three firms in different parts of the country, what is known as the "three mark rule" is applied and the mark is considered to be common to the trade (*Re Walkden Aërated Waters Co.*, 54 L.J. Ch. 394; *Re Hyde & Co.*, 54 L.J. Ch. 395).

In *Lambert Pharmacal Co.* v. *Palmer*, 2 D.L.R. 358, 380 (annotated), 21 Que. K.B. 451, the failure by the owner of the trade mark Listerine to complain against a party using the word "Listuated" for tooth powder in the United

States was held to create a presumption that he suffered no injury therefrom, and was stopped from taking proceedings subsequently in Canada for infringement. Annotation.

A mark is not made common to the trade, by fraudulent use by infringers (*Barlow & Jones Ltd.* v. *Johnson & Co.*, 7 R.P.C. 395, 414).

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British Columbia Court of Appeal, Martin, Galliher, and McPhillips, JJ.A. November 7, 1916.

VENDOR AND PURCHASER (§ I B—5)—RIGHT TO PURCHASE PRICE—TITLE PREVENTED BY PURCHASER.

An agreement for the sale of mill site lands, under which the balance of the purchase price was to be withheld until a Crown grant has been procured, entitles the vendor, the purchaser having taken possession of the lands, to claim the balance, without any abatement, where, owing to the conduct of the purchaser, the Crown grant was refused.

APPEAL by plaintiff from the judgment of Morrison, J. Reversed. Statement.

Ritchie, K.C., for appellant; *Harvey*, K.C., for respondent.

MARTIN, J.A.:—As I understand this case, there is no real dispute about the law, the difficulty arising upon the application of the facts thereto. Martin, J.A.

Shortly, my opinion, is that with every respect for the view expressed by the trial Judge, the action cannot properly be regarded as having been prematurely brought owing to non-performance of the covenant respecting the obtaining of title from the federal government to the old mill site, because the defendant by his action in building on the new mill site brought about a state of affairs which, unfortunately, made it impossible for the plaintiff to perform that condition and therefore it is dispensed with.

The appeal should be allowed and udgment entered for the plaintiff and the counterclaim dismissed.

GALLIHER, J.A.:—The plaintiffs claim $15,000, being balance due under a certain agreement between plaintiffs and defendant whereby defendant purchased certain timber limits, rights to lands, and mill machinery from plaintiffs. Galliher, J.A.

The plaintiffs had applied for certain lands in the agreement described to be used as and in connection with a mill site on the Nicola River in the Province of British Columbia, and it was a term of the agreement that payment of this balance of $15,000 should be withheld until plaintiffs procured a Crown grant of these lands from the Dominion Government and executed a deed thereof to defendants.

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The plaintiffs had erected, on the site applied for, a mill and had commenced operations, but after running for a short time the mill was destroyed by fire, and being insured only for a limited amount, they were unable to rebuild, and negotiations were entered into with the defendant resulting in the agreement aforesaid.

There is no question upon the evidence that the plaintiffs endeavoured to procure the Crown grant of the lands they had applied for, constant negotiations having for a period of over two years been carried on between the plaintiffs, the land agent at New Westminster, and later at Kamloops (to which district the territory in question had been transferred) and also with the department at Ottawa.

The chief trouble seems to be that the defendant or the company which he had formed after the purchase upon advice decided to build their mill not on the old mill site but on the site about a mile and a half distant.

It seems that the practice of the department is not to grant lands as industrial sites except when they are to be used in connection with some industry to be built and established thereon, and whilst the defendant was applying for a release of some 7 acres, a part of a homestead taken up by one Ross, and on which the present mill of the defendant company is erected, he informed the government agent, Mr. Cowley, that he did not require the old mill site.

Later, the defendant by letter informed the agent that he did not mean to relinquish his rights to obtaining the lands under the old application and efforts were renewed by the plaintiff and defendant to obtain this grant from the government.

It appears that the Ross ranch or homestead cuts in between the site where the old mill was built and the site of the new mill and the department for this reason and for the reason that they did not deem these lands necessary to the new mill site finally refused to make any grant of same.

When this was finally decided the plaintiffs brought their action for the balance of the purchase money. The defendant claimed that the action was premature and that he was entitled to what he had contracted for. The trial Judge held the action premature and dismissed same. With respect I think the trial Judge was wrong.

When the department finally refused the grant it became impossible for the plaintiffs to carry out their agreement, and the defendant or his company having gone into possession of the limits and mill machinery and having operated said limits by cutting timber therefrom, and continuing to do so, they elected to affirm the contract.

I quite realise that the defendant, after the expenditure of so much money, could not well do otherwise.

Had the defendant erected his mill on the old site there seems no reason to doubt that the original application for land, though somewhat tardy in performance, would have been granted.

In my view the defendant, in building his mill on the present location, and by giving the agent to understand that the old site was no longer necessary (whatever reservation may have been in his mind as to his position with plaintiffs) contributed largely, if not entirely, to the position of affairs which induced the government to refuse the original application.

There remains only for consideration the question as to whether the defendants are entitled to an abatement in price.

The law on the question is well settled and is dealt with exhaustively in the judgment of McPhillips, J.A., which I have had the advantage of reading and considering. I was at first inclined to the view on the facts of this case that it was one for reasonable compensation, but on reconsideration I adopt the view of the other members of the Court.

The appeal should be allowed.

McPhillips, J.A.

McPHILLIPS, J.A.:—The questions that arise and which require determination are the following:—(a) whether the respondent can be called upon notwithstanding the non-acquirement of title to the land in question, *i.e.*, the origina mill site and the surrounding lands—to complete the agreement and pay over the $15,000 and accrued interest? (b) if it be that completion can be rightly decreed will it only be decreed with compensation?

In *Counter* v. *Macpherson* (1845), (13 E.R. 421), 5 Moo. P.C. 83 at 108, in the judgment of their Lordships, it is said:—

> . . . Where a binding contract is subsisting, the completion of which in its exact terms becomes impossible through accident, without any default of the party seeking relief, a Court of equity will struggle with points of form—it cannot, for that purpose, alter the substance of the agreement or impose upon either party obligations totally different from those which, by the agreement, he had contracted. In this case there is no reason why the

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Court upon any principle of moral justice should at all desire to interfere; both parties are equally innocent, and the only question is upon which of them the loss arising from an inevitable accident is to fall.

The present case is not one of inevitable accident, it is clear that the intention of the respondent was at the time of the purchase to proceed and erect the saw mill at the old site but later it was not deemed to be commercially expedient to do so and a site at a very different point and upon lands not included in the original application was chosen, resulting in rendering it impossible for the appellants

To (in the terms of the agreement) take all the proceedings necessary to obtain a Patent or Crown Grant of said lands and hereditaments from the Government of the Dominion of Canada.

There has been no default proved against the appellants, the insuperable obstacle has been the action of the respondent and the contention is that, notwithstanding this action of the respondent, the appellants must forever be barred from the recovery of the balance of the purchase price for the property sold. This is an unconscionable contention, and is one of the cases where "a Court of equity will struggle with points of form;" further, the present case is one in which in my opinion the Court is unable to say that "there is no reason why the Court upon any principle of moral justice should at all desire to interfere"—cogent reason does here exist; the principles of natural justice require the Court to interfere. The position of matters was well known to the contracting parties; there was no warranty of title to the lands or covenants for title; the lands could not be otherwise acquired than as an industrial site; that was the application; the appellants had parted with their timber holdings to the respondent and it was in connection therewith that the application had been made; this was all known to the respondent, but the respondent, advisedly, changes his first contemplated plan and decides upon an entirely new site for the saw mill and does this without consultation with the appellants and absolutely destroys all chance of the appellants ever afterwards acquiring the land; and, as it has been seen, proceeds to acquire other lands, making use of the original application in furthering or advancing the acquirement of the new site. It may well be said that all the appellants agreed to do was to proceed with the application made and that would necessarily mean proof to the Government of Canada that a saw mill was situate upon the land or about to be constructed and the

necessity for the land as an industrial site. This the respondent rendered impossible; further, the respondent by his active interference and statement that the land was not desired communicated to the Dominion Lands Agent, rendered powerless all further efforts of the appellants in the direction of obtaining title to the land. The appellants in fact upon their part are in no way in default and the respondent waived compliance with the terms of the agreement in respect to the land. The appellants really transferred all that they had, *i.e.*, the rights following the application made for the lands as an industrial site, and the respondent chose to abandon these, and proceed differently, thereby excusing further performance upon the part of the appellants. The intention of the appellants was to transfer what rights they had, and those rights were what the respondent purchased.

It is to be noted upon the facts of the present case that the land in question was not the most valuable of the property covered by the sale, the mill site as set forth in the inventory of March 21, 1910, which was made up at the time of the giving of the option which preceded the agreement for sale, only stated the mill site to be of the value of $5,000, whilst the timber holdings alone, all of which have been conveyed and taken possession of by the respondent, who later transferred them to the Nicola Valley Pine Lumber Co., were valued at $25,000, equal to the full purchase price. Further, it is to be remembered that over 6 years have now elapsed since the sale during all of which time the property sold has been out of the possession of the appellants and enjoyed by the respondent and the company to which he transferred the same, viz.: the Nicola Valley Pine Lumber Co., which calls for most serious consideration and there is no possibility of the parties being restored to their original position; can it be upon all the facts that this is not a proper case for the enforcement of the contract, and its enforcement without compensation? To my mind there can be but one answer, and that is that the contract should be enforced and without compensation. It is evident that the mill site was not deemed by the respondent to be at all essential in the carrying out of the adventure of himself and his associates, and it was the act of the respondent alone which prevented the appellants completing the transaction in respect to the transfer of the mill site and it would be inequitable to now admit of this non-performance—being the bar to the en-

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forcement of the contract the countervailing equities ought to prevail. Hals. Laws of England, vol. 27, p. 56. (See Gilbert's History & Practice of Chancery, pp. 240-242, citing *Faversham (Earl)* v. *Watson* (1680), Cas. *temp.* Finch, 445; *Medith* v. *Wynn* (1711), 1 Eq. Cas. abr., 70; see also 1 Fonblanque, Treatise of Equity, Book 1, c. 6, s. 3; Story, s. 772).

Upon all the facts, the mill site apparently was not deemed to be of such value that the application therefor should be proceeded with. *Norris* v. *Jackson* (1862), 3 Giff. 396. Hals.' Laws of England, vol. 7, p. 436.

In my opinion, upon the construction of the agreement for sale, having reference to the mill site, it was incumbent upon the respondent to place the saw mill upon the mill site, the land described in the agreement. It was well known, in fact, it was common knowledge, that without a mill there could be no grant of the land as a mill site, the regulations under the Dominion Lands Act (8 Edw. VII. ch. 207) made this imperative. This must have involved the respondent upon his part doing nothing to prevent the granting of the application, in truth it involved more, it involved the placing of the saw mill upon the land if the land was desired as a mill site, and even this being done, there was no certainty as to the area that would be granted.

Fry on Specific Performance (1911) 5th ed. (Canadian Notes) at p. 3.

In my opinion the language of Lord Blackburn in *Mackay* v. *Dick*, 6 App. Cas. 251 at 263, is very much in point in the case now before us.

Can there be any doubt here upon all the surrounding facts and circumstances? I would think not, and here we have the respondent not doing that which he could reasonably be said to be required to do, *i.e.*, to proceed and establish the saw mill upon the land, but he actively takes steps to establish the saw-mill elsewhere and advises the Dominion Lands Agent that the mill site as originally applied for is not desired. This must be conduct which furnishes to the appellants an excuse sufficient for non-performance. Upon this premise, that it was the act of the respondent which rendered it impossible for the appellants to comply with the contract with reference to the mill site land, how can it be successfully contended that it is a case for compensation

or abatement in price? Farwell, J., at pp. 398-399, in *Rudd* v. *Lascelles* (1900), 69 L.J. Ch. 396.

The case Farwell, J., was dealing with was one of undisclosed restrictive covenants, it being the case of an innocent vendor, and the purchaser sought specific performance with an abatement of the purchase money.

The case before use is one of the sale of all the timber and property of the appellants, the land being the mill site, but not acquired from the Dominion Government, with no certainty of its being acquired, and certainly never capable of being acquired save the land was in use as a mill site, *i.e.*, used for industrial purposes. This was well known to the purchaser, the respondent; nothing was withheld from him and his act defeated its acquirement. The further language of Farwell, J., at pp. 398, 399, 400, in *Rudd* v. *Lascelles*, *supra*, is very much in point in the present case.

It would certainly not be fair, even if compensation were thought to be proper, that the compensation should be the $15,000 which is withheld by the respondent; but, of course, in my view, no compensation is claimable.

The evidence in the present case shews that the respondent elected to treat the contract as binding with knowledge that the title to the land had not been acquired and could not be acquired, coupled also with the fact that it was his act that prevented the acquirement of the title to the mill site land, and he has not even yet repudiated the contract, in fact, cannot now as he has parted with that which was sold and conveyed to him, and upon the particular facts of this case, there should be specific performance of the contract, without relation to the mill site land, and full payment, *i.e.*, payment of the balance remaining unpaid, the $15,000. The present case is not similar to *Halkett* v. *Dudley* (*Earl*), [1907] 1 Ch. 590, 76 L.J. Ch. 330; but as that case was decided by such an eminent and now very distinguished Judge (Lord Parker of Waddington) some of the language appearing in that case is useful and instructive as defining the application of equitable principles in actions for specific performance.

It will be observed that Lord Parker makes use of this language, "unless waived is generally fatal to relief by way of specific performance," unquestionably there was waiver upon the facts of the present case: can the respondent now be heard in the face

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of his conduct and statements to the Dominion Lands Agent, that the mill site land should be granted to him? It would seem to me that there can be but one answer, and that answer, especially in a Court of equity, must be that he cannot at this late date and in view of all the facts and circumstances be heard in support of any such contention. In the present case other property and the most valuable property is conveyed and there remains the question of the mill site land only, it being known at the time of sale that no title thereto existed in the appellants, the subsequent conduct of the respondent constituted a complete waiver upon his part of the right which he would otherwise have had to insist that title should be shewn at least upon a reference and then only when good title was shewn should a decree for specific performance go, although possibly in the absence of waiver the position of the respondent would not be quite as strong as this, as all that the appellants were to do was to pursue the application, and it might have been that apart from the conduct of the respondent no title could have been obtained, and that that was a risk that the purchaser, the respondent, took in the sale made to him.

In *Halkett* v. *Dudley (Earl)*, *supra*, Lord Parker quoted with approval language of Knight Bruce, V.C., in *Salisbury* v. *Hatcher*, (12 L.J.Ch. 68, 2 Y. & C.C.C. 54).

In *Kohler* v. *Thorold*, 27 D.L.R. 319, 52 Can. S.C.R. 514. Duff, J., in his judgment said:—"The case is within the principle stated by Lord Blackburn in *Mackay* v. *Dick*, 6 App. Cas. 251."

With respect to the counterclaim, even were this a case where the appellants being required to establish title to land failed in so doing, the respondent would not be entitled to any such damages as are claimed in the counterclaim. The principle of law is so well known it is perhaps quite unnecessary to cite it. The leading case is *Bain* v. *Fothergill*, L.R. 7 H.L. 158, and this case was lately considered by the Supreme Court of Canada in *Ontario Asphalt Block Co.* v. *Montreuil*, 27 D.L.R. 514, 52 Can. S.C.R. 541.

The appellants in the present case did everything upon their part which they could be called upon to do, but the respondent by his conduct made it impossible for the mill site land to be acquired.

In my opinion, therefore, the appeal should be allowed, the appellants to have judgment for the balance of the purchase money upon the sale, viz.: $15,000 and the accrued interest thereon and the counterclaim dismissed. *Appeal allowed.*

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REX v. LECLERC.

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Quebec Sessions of the Peace, Hon. Charles Langelier, J.S.P. October 6, 1916.

1. THEFT (§ I—25)—GOODS IN PROCESS OF MANUFACTURE.
An information or charge for stealing goods in process of manufacture should specify the value of the goods, so that the accused may know whether the prosecution seek to apply the added penalty provided by Cr. Code, sec. 387, in case the value is over $200.

2. INDICTMENT OR INFORMATION (§ II E—25)—DESCRIPTION OF OFFENCE—CLASSES OF THEFT.
An information or charge which, in addition to the date of the alleged offence and the name of the local municipality, gives only the following particulars of the nature of the offence: "did steal a certain quantity of towels, the property of the Dominion Textile Co," is insufficient because of its vagueness; and such insufficiency being a matter of substance is not amendable by the Court on the trial so as to charge theft of goods in process of manufacture under Cr. Code, sec. 388.

Statement.

TRIAL of a charge of theft.

J. P. A. Gravel, for prosecution.

Alleyn Taschereau, K.C., for the prisoner.

Langelier, J.

LANGELIER, J.:—The accused has been tried for having, on the 22nd of September, in the parish of St. Gregoire, "stolen a certain quantity of towels, the property of the Dominion Textile Co."

At the opening of the trial the learned counsel for the defence raised the objection that the charge did not reveal any offence known to the law and that the Court had no jurisdiction.

What must the information contain? Our own Court of Appeal, in the case of *The Queen* v. *France*, 1 Can. Cr. Cas. 321, has decided that:—

"An information should give a concise and legal description of the offence charged, and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence."

In the same case Judge Wurtele said:—

"It is essential that whatever words may be used should be sufficient to give the accused notice of the offence with which he is charged and to identify the transaction referred to."

Daly's Criminal Procedure, p. 135, also says:—

"In the information the charge must be set out in such distinct terms that the accused may know exactly what he has to

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answer, for the accused cannot be convicted of a different offence from that contained in the information."

The same author says (page 137):—

"An information charging that the accused did abstract from the table in the house of John Evans a paper, being a valuable security for money, does not charge an indictable offence."

The prisoner is accused of having stolen towels in the factory where they are made, and he could be prosecuted in virtue of sec. 388 for stealing goods in process of manufacture, also in virtue of sec. 387 if the value exceeds $200.

But the information does not shew anything of the kind; it has omitted to mention the value of the goods stolen, which would have indicated which offence the accused had to answer. In the present case the value was a necessary ingredient of the offence; without it he is left completely in the dark to prepare his defence.

Stone's Justices' Manual, last edition (1916), p. 1016, says:—

"The information should specify the value, number or quantity of the articles which are the subject matter of the prosecution, where the same is the measure of punishment to be awarded by the justice or where a *certain value* is essential to give jurisdiction or *to constitute the offence*." It is exactly our case.

The learned counsel for the prosecution contends that the evidence would reveal the true nature of the offence; the law does not permit the prosecution to complete by proof the description of an offence. It would be unfair for the accused, who, once engaged in his trial, would be caught napping in his defence.

Neither can the charge be amended, as it is a matter of substance, as decided by Mr. Justice Würtele in *R.* v. *Weir*, 5 Can. Cr. Cas. 503, where he says:—

"A formal defect or an imperfect averment in an indictment or in a count may be corrected by the Court when an objection is raised, but matters of substance cannot be amended, and essential allegations which have been entirely omitted cannot be added by the Court."

In the case of *R.* v. *Beckwith*, 7 Can. Cr. Cas. 450, it was decided that if the charge did not contain the particular facts which constitute the offence, the indictment will be quashed.

I am of opinion that the charge does not reveal any offence known in the law. The prisoner is acquitted. *Prisoner acquitted.*

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. November 7, 1916.

1. PARTIES (§ I B—55)—JOINDER OF PLAINTIFFS—"SERIES OF TRANSACTIONS"—RESCISSION FOR FRAUD.
Sales of shares, attacked for fraud by different purchasers, may be viewed, under Rule 123 (Eng. O. 16, r. 1), as "arising out of the same transaction or series of transactions" warranting the joinder of the several plaintiffs into one action.
[*Stroud* v. *Lawson*, [1898] 2 Q.B. 44, considered.]

2. DAMAGES (§ III F—148)—SALE OF SHARES—FRAUD.
The measure of damages, in an action to set aside a sale of shares, on the ground of fraud, is the difference in value of the shares with all their incidents, at the time of discovery of the deceit, and what was paid for them.

Statement.

APPEAL from the judgment of Murphy, J., in an action for rescission of contracts for the sale of shares of the Bank of Vancouver, or, in the alternative, damages. Reversed.

A. H. Maclean, K.C., for appellant; *Mayers*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The first question, and one which if decided in appellant's favour may save consideration of the appeal on the merits, is one of parties.

The plaintiffs are several purchasers of shares in the capital of the Bank of Vancouver. They purchased separately and on different occasions 50 shares each. They sued in this action, in which the bank was joined as party defendant with the appellant for rescission of their contracts, or, in the alternative, for damages for deceit against the appellant. The Judge dismissed the action as against the bank and gave judgment against the appellant for damages.

Objection was taken by appellant's counsel at the opening of the trial to what he contended was misjoinder of plaintiffs.

The Judge did not give full effect to this objection, but, as I understand it, proceeded to try the action as if there were two separate actions brought by the plaintiffs respectively. This course I do not think was warranted. If the Judge thought there was misjoinder, the better course, in my opinion, was to have called upon the plaintiffs to elect which should remain in.

I think what the Judge really did in the result was to try the action as if both plaintiffs were proper parties.

On the question of whether the plaintiffs were rightly joined, I have to consider the meaning of O. 16, r. 1, of the Rules of the Supreme Court as applicable to the facts of this case.

The respective sales were negotiated by one Martin whom the

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Judge found to have been the appellant's agent. Martin received his instructions partly by word of mouth and partly in writing from the appellant. On these instructions and with the writing in his hands, which were shewn to at least one of the plaintiffs, he made the representations which the Judge found to have been fraudulent, not on the part of Martin, but on the part of the appellant. On the strength of these representations Martin succeeded in effecting sales to the respondents severally on separate occasions.

The representations in substance were that the shares offered were the property of the bank, and that the moneys to be received therefor would belong to the bank, whereas unknown to Martin they were the individual shares of appellant who would receive the proceeds of the sales.

The Judge has found that these representations were relied upon by the respective plaintiffs and induced them to purchase the shares.

The plaintiff, Bryce Allan, was told by Martin that his brother Claud Allan, had agreed to subscribe for shares, and this statement induced Bryce Allan to inquire less carefully into the matter than he otherwise would have done, but there is no doubt the evidence on the whole bears out the Judge's finding that Martin did make to Bryce Allan the same false representations that he had previously made to Claud Allan.

In my opinion there was no misjoinder of plaintiffs. Appellant's counsel placed his main reliance on *Stroud* v. *Lawson*, [1898] 2 Q.B. 44. There the plaintiff sued the directors of a company for damages for fraud in inducing him to take shares. He joined with this claim a claim on behalf of himself and all other shareholders to have it declared that a certain dividend paid out of the capital was *ultra vires* of the company. The Court of Appeal held that in effect there were two plaintiffs, Stroud in his individual capacity, and Stroud in his respresentative capacity, and that their respective claims did not arise out of the same transaction or series of transactions.

If I may say so, that seems reasonably manifest. The declaration of dividends and the sale of shares have no fundamental connection with each other. But in the case at bar Martin was deputed by appellant to sell a specified number of shares, viz.,

2,000, and it was clearly in the minds of both that these shares would not be sold *en bloc* to one person but to several persons in what I think may be fairly called a series of transactions in respect of that block of shares.

I see no distinction in principle between sending forth a living solicitor and an inanimate one. In *Drincqbier* v. *Wood*, [1899] I Ch. 393, plaintiffs were held properly joined in one action for deceit, who had severally purchased shares in a company on the faith of a false prospectus.

While I am not free from doubt, yet having regard to the object of the rule as extended in scope by the amendment to the English rule in 1896, from which our rule is copied, and the facts as above recited, I do not think I ought to disturb the judgment on this ground of appeal.

On the merits, I think the judgment appealed from is wrong in one particular, as was admitted by respondent's counsel during the argument before us. It is the difference between the value of the shares at the time respondents discovered the fraud and what they paid for them with interest, which is the true measure of damages, not "the difference between the amount of money paid by each plaintiff plus interest at 5% from the date of such payment *and the present value of the shares*." The Judge left it to the parties to agree upon the amount of damages calculated on this basis, and in the event of failure to agree, ordered a reference. With the variation above indicated, and the one about to be referred to, the judgment should be affirmed.

The judgment appealed from ordered the appellant to indemnify each of the plaintiffs against all

> Calls, claims, costs, charges or other liabilities whatsoever which may at present or at any time attach to the said plaintiffs or to which the said plaintiffs may become liable by reason of his ownership of the said shares of the defendant bank or any of them.

This term in the judgment is, in my opinion, wrong. The measure of damages to be awarded each plaintiff will be the difference in value of the shares with all their incidents, at the time of discovery of the deceit and what was paid for them. Hence, assuming that the Court could make an order respecting contingent future loss in an action of this kind, which I do not grant, that matter is already provided for in the measure of damages.

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The appellants should have the costs of the appeal on the issues upon which he has succeeded, and the costs of the cross-appeal, which I would dismiss. The respondents should have the costs of the issues in the main appeal on which they have succeeded.

MARTIN, J.A.:—At the outset the objection to the jurisdiction taken during the trial, raised by sec. 12 of the defence, and renewed and urged here, that there has been a misjoinder of parties, must be met. What happened at the opening of the trial was, that when the objection was raised by both defendants to the joinder of the plaintiffs, as not being within r. 123, and that therefore there was no jurisdiction to combine two distinct causes of action in one suit, the trial Judge refused the motion to strike out one of the plaintiffs, but he expressed the opinion that:—

I do not think these cases should ever have been joined, but I am not strong enough to say it was not possible to join them to the extent of saying I must strike one out. I think the language of the rules is wide enough to allow this sort of thing to be done, but I think if it had been objected to in the early stages the cases would have been brought separate. I propose to separate them now if either counsel desire me to do so.

Mr. Martin: I do. As far as the Bank of Vancouver is concerned, it is very necessary.

Court: I am going to separate them. I will proceed with either case, and try them separately.

And later he went on to say:—"I will proceed to try the cases now consecutively and you can take which ever one you want."

Plaintiff's counsel then took up Claud Allan's case, and judgment upon it and upon that of Bryce Allan, was reserved, and in the formal judgment of the Court both the plaintiffs are still kept as such upon the record. I pause here to say that it is clear to my mind there was no waiver by Mr. Woodworth of his objection to the misjoinder which had been raised in the morning and continued after the mid-day adjournment; on the contrary, indeed, it was decided in his favour, but the Judge adopted an intermediate course for which, in my opinion, there is no warrant. The position was either that there was no misjoinder, in which case the trial would proceed with both the proper plaintiffs upon the record; or that there was a misjoinder in which case the name of one of the plaintiffs must be removed or struck out of the record in default of their counsel making the necessary election as directed in, *e.g.*, *Stroud* v. *Lawson*, [1898] 2 Q.B. 44. In other words, unless the situation was cured by r. 123 the Court had no

jurisdiction to try what were really two distinct causes of action at the same time; the place for separation of them was primarily upon the record and there could not be a proper trial of one cause upon a defective record of two causes. Before the trial could proceed of either the formal separation of both must be made, and there could in law be no separation in fact while both were allowed to remain upon the same record.

Turning then to r. 123, what is necessary here to determine is can the two sales of shares in question be viewed as "arising out of the same transaction or series of transactions," and does "any common question of law or fact" arise? Beyond all question the sales of these two parcels of shares to the two Allans were two entirely distinct matters, or as Claud Allan puts it, his "transaction" was "an independent one" made "with Martin alone" and his brother Bryce "bought his shares quite irrespective of (me)." Claud Allan purchased his shares on or before June 22, 1912; Bryce Allan did not buy his till July 4, and there was no connection whatever between the two transactions. At the meeting with the former, Martin went into the matter at length, and made statements and shewed and discussed letters from the president of the bank that were not made to or discussed with the latter, who frankly says that he knew of the prior sales to Claud Allan and various other people and "I assumed like a fool that they had made inquiries regarding the bank and all that sort of thing;" and that he was "lax in not inquiring regarding Martin's representation. . . I was relying on someone else doing it." He, Martin, did, however, make the same substantial representation to both of them that these were new issue shares. These being the facts, what is the state of the law upon them? I have examined many authorities, and I think the leading case upon the point is now *Stroud* v. *Lawson*, *supra*, a unanimous decision of the Court of Appeal, reversing Darling, J., and wherein is to be found, in my opinion, the clearest exposition of the rule. In that case it was decided that even where there was only one plaintiff in name upon the record yet he could not be allowed to sue in two capacities on separate causes of action which did not arise out of the same transaction or series of transactions and he would in law be regarded as two separate plaintiffs. It was pointed out that there were two conditions precedent to the application of the rule, *viz.*: existence of the "same transaction or

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series of transactions," and "the common question of law or fact," and it was laid down that the presence of a "common feature" does not make two transactions the same.

This language contemplates a continuous thread of interest carried through the "entire" series from begining to end. In the case at bar it is clear the "transaction" is not the same, and the only hope for success lay in presenting it as one of "a series of transactions" which it certainly is not within said definition, but two disconnected sales of different shares. Can it be said that the rule contemplates the joinder of two such distinct causes of action, as, *e.g.*, where the travelling salesman of a Victoria publisher sold on a false representation a set of Shakespeare's works to John Doe in Victoria, and next week, on another and different representation, sold a set of Ibsen's works to Richard Roe in Prince Rupert? *Stroud* v. *Lawson*, not so strong a case, clearly shews it does not, and the principle would not be altered even if another copy of the same edition of Shakespeare had been sold to the second purchaser on the same representation. A succession of disconnected transactions of the same kind, each complete in itself, is not, legally speaking, turned into a "series" simply because the representation in each case was the same because the necessary thread of continuity "from beginning to end." If it is, what is to be said of a situation of, say, three similar transactions, the first made on one representation, the second on a different one, the third on the same as the first? Clearly there is no series in such case, which demonstrates the soundness of the "continuous thread" test. Yet if we hold the case at bar is within the rule then the said disconnected sales of books would be a "series of transactions," as also on the same principle would be the sale of bad cheeses of the same kind over the same counter by a grocer to different customers on different, or the same, misrepresentations. The "transaction" is the sale itself, brought about by the salesman, and is not the direction to and sending forth of the servant by the master. As Vaughan Williams, L.J., said, "the transaction consists in deceiving the plaintiff by false declarations into becoming a shareholder." I am not at all prepared to go to such unsuspected, not to say preposterous lengths, and give a meaning to "series" which is foreign to the subject matter of the rule and the amendment sought to be affected thereby.

In *Univ. of Oxford & Cambridge* v. *Gill*, [1899] 1 Ch. 55; and *Walters* v. *Green*, [1899] 2 Ch. 696, Stirling, J., applied *Stroud* v. *Lawson* and held that the rule covered the joinder of plaintiffs as being an action arising out of the "same transaction or series of transactions;" and Byrne, J., applied the same case in *Drincqbier* v. *Wood*, 68 L.J. Ch. 181. I see no reason to differ with these applications on the facts of those cases when carefully examined, but in none of them do I find anything that interferes with my view of the case at bar, but if there should be anything then it is not in accord with the governing decision of *Stroud* v. *Lawson*, and should not be followed. I only add as regards *Drincqbier* v. *Wood* that it is clearly, in any event, distinguishable from this case, because the decision there turned upon the express point that it was the "same transaction," Byrne, J., saying:—"All the plaintiffs allege the right to relief to arise out of the issue of the prospectus containing false statements and therefore out of the same transaction."

But it is admitted here that the transaction is not the same and the question depends on the meaning of "series of transactions," upon which the *Drincqbier* case sheds no light, though a safe guide is to be found in *Stroud* v. *Lawson*, already cited. It should also not be overlooked that Byrne, J., admitted there was "some difficulty" in finding that the action was properly brought, and it must be confined to the facts then before him as the Lord Chancellor laid it down in *Quinn* v. *Leathem*, [1901] A.C. 495 506.

I note, by way of precaution, that the difference between the cases of r. 123 and r. 131, relating to representative actions, is pointed out by Fletcher Moulton, L.J., in *Markt* v. *Knight S.S. Co.*, [1910] 2 K.B. 1021.

The result is that the appeal should be allowed, the judgment set aside, and the case referred back to the trial Judge to follow the course indicated in *Stroud* v. *Lawson*, instead of proceeding with the trial without jurisdiction. The question of the costs below should, I think be determined by him. It is worthy of notice that in the *Drincqbier* case the objection to the misjoinder was raised as a preliminary one at the opening of the trial, as it was here.

McPHILLIPS, J.A.:—The trial Judge held against rescission and dismissed the action as against the bank, but gave judgment

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for the plaintiffs severally against the appellant McLennan as and for damages in deceit. Against this judgment the appellant McLennan appeals, and the respondents cross-appeal from that judgment dismissing the action as against the bank.

Counsel for the respondents in his very careful and clear argument stated that he was content with the judgment of the trial Judge but that the cross-appeal was brought to cover any possible eventualities in the appeal.

The first point that needs consideration is the question as to whether the plaintiffs were rightly joined in the one action and this involves the consideration of r. 123 (Eng. O. 16, r. 1) and the case that requires consideration is *Stroud* v. *Lawson*, [1898] 2 Q.B. 44.

Markt & Co. v. *Knight S S. Co.*, [1910] 2 K.B. 1021.

Now in the present case the action is in respect of the sale of shares, no doubt separate contracts, but contracts made by the plaintiffs with the agent of the appellant McLennan and upon representations made by the agent who received his instructions and the *data* upon which to make the representations directly from the appellant McLennan, the only apparent difference upon the evidence in respect to the two plaintiffs is that more was said perhaps to one plaintiff than to the other but in the main the same representations were made, the salient facts may be said to be the same, the representation common to both causes of action in the plaintiffs was the representation that the shares were "new issue shares" and the money paid therefor would be add tional capita of the bank. This likens the present case to *Drincqbier* v. *Wood*, 68 L.J. Ch. 181.

The present case may be said to fit in exactly with the language of Vaughan-Williams, L.J.:—"I do not read these words as meaning that the whole transaction or the whole series of transactions must be involved in both actions."

In my opinion there has been no misjoinder of plaintiffs in the present case, but were I wrong in this, the appellant McLennan is late in taking the objection, his course was to promptly apply by summons for an order that the proceedings be set aside on the ground that the plaintiffs were improperly joined or that they be stayed unless the plaintiffs elected which of them would proceed and that the other be struck out. See *Smurthwaite* v.

Hannay, [1894] A.C. 494; and *Sandes* v. *Wildsmith*, [1893] 1 Q.B., 771. Further, the course adopted by counsel (Mr. Woodworth) for the appellant McLennan at the trial precludes this point being now pressed.

For having arrived at the point that the action rightly proceeded to trial, the question is whether the judgment of the trial Judge arrived at the right conclusion in allowing damages as and for an action in deceit, being the alternative claim, to that of rescission.

It may be said that upon the facts a case was made out for rescission, as I think it was possible to place the parties *in statu quo*. I am not though to be understood as in any way disagreeing with the course the trial Judge pursued, or his holding that it was not a case for the removal of the respondent's names from the share register of the bank. The rescission of course in any case would only have been as between the respondents and the appellant McLennan. There was no contract between the respondents and the defendant bank to rescind.

However, the respondents brought the action in the alternative form, and cannot be now heard to complain that one rather than the other relief has been granted.

In *Clarke* v. *Dickson* (1) (1858), El. Bl. & El. 148, 155 (120 E.R. 463), and *Clarke* v. *Dickson* (2) (1859), 6 C.B. N.S. 453 (141 E.R. 533), we have two actions which in the end resulted in the relief being granted which has been granted in the present case.

In the report of *Clarke* v. *Dickson* (No. 1) in 120 E.R. at p. 463, the following footnote appears:—Approved, *Urquhart* v. *Macpherson* (1878), 3 App. Cas. 831. Approved *Oakes* v. *Turquard* (1867), L.R. 2 H.L. 347. Referred to *Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 451; *Sheffield Nickel Co.* v. *Unwin* (1877), 2 Q.B.D. 223; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1278; *Houldsworth* v. *Glasgow Bank* (1880), 5 App. Cas. 339; *Re Duncan*, [1899] 1 Ch. 392.

I am in complete agreement in the present case with the trial Judge upon the facts, and do not think it necessary to review those facts. There was in the language of Cockburn, C.J., in *Clarke* v. *Dickson* (2) *supra*, at p. 470, an "important misrepresentation" made by the agent of the appellant McLennan, that the shares sold were "*new issue shares*" and the moneys would be

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new capital going to the bank, and that misrepresentation was made upon instructions and letters going directly from the appellant McLennan to his agent with the intention to be communicated as they were to possible purchasers, and these misrepresentations were made to the plaintiffs and they were in the language of Cockburn, C.J., 470, in the last case above cited, "calculated to exercise a material influence upon the minds of persons who became shareholders, is too plain to admit of doubt."

The evidence is clear that the plaintiffs relying upon the representations which were false and fraudulent were induced to purchase the shares and the contention upon the part of the respondents is that the shares are in fact of no worth or value whatsoever.

The law which requires consideration in the present case is well stated in Hals.' Laws of England, vol. 20, p. 740.

With great respect I am of the opinion that the trial Judge went wrong in his judgment when he said:—

> There will be judgment against McLennan for the difference between the amount of money paid by each plaintiff plus interest at 5% from the date of such payment and the present value of the shares held by each plaintiff.

As I understand it, counsel for the respondents admitted in argument in the appeal that the Judge was in error in so deciding.

As we have seen in *Clarke* v. *Dickson* (1), Lord Campbell, C.J., said, "he will recover not the original price but whatever is the real damage sustained."

Also, with great respect, I cannot agree with the trial Judge when he says:—

> McLennan must indemnify plaintiffs against all liability that may attach to them or either of them in the liquidation because of their ownership of the said shares.

In granting the relief alternatively claimed, it must be based upon the premise that the respondents elected "to adhere to the contract" (Hals.' Laws of England vol. 20, p. 740), but that notwithstanding this, the respondents were entitled to damages for the fraudulent representations, and these damages have to be assessed upon the basis of the respondents having elected to retain the shares, and in the assessment of damages, what is to be found is "the real damage sustained" (Lord Campbell, C.J., *Clarke* v. *Dickson* (1) *supra.*)

The damages will have to be assessed upon the correct principle, the cross-appeal to be dismissed. *Appeal allowed.*

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Judicial Committee of the Privy Council, Viscount Haldane, Lord Atkinson, Lord Shaw and Lord Parmoor. October 23, 1916.

STREET RAILWAYS (§ I—3)—ALTERATION OF ROUTE—MUNICIPAL CONSENT.

The Toronto and York Radial Railway Co., by the terms of its franchise and by legislation, is authorized to deflect its line from Yonge St. in the City of Toronto, to a private right of way owned by it; the deflection is for the purpose of enabling it to operate the railway already located and constructed, and therefore the consent of the municipal council is not necessary.

Statement.

APPEAL from 26 D.L.R. 244, 35 O.L.R. 57. Reversed.

The judgment of the Board was delivered by

Lord Parmoor.

LORD PARMOOR:—The appellants applied, under sec. 250 of an Act respecting Railways, R.S.O., 1914, ch. 185, to the Ontario Railway and Municipal Board for the approval of certain plans to provide the necessary switches and turnouts to the appellants' property required by them for the purpose of operating their railway. The proposal was, in effect, to provide terminal accommodation on a site which the appellants had purchased, and to cross for this purpose a portion of the sidewalk on the west side of Yonge St. by a spur line on the level. Although the appellants had authority to construct or extend their railway upon any highway or part of a highway, sec. 250 prohibits them from beginning the construction of their railway or of any extension thereof upon any highway or part of a highway without having first obtained the permission and approval of the Board. The section does not confer any additional powers on the appellants, but imposes a limitation to protect public interest. Sec. 105, sub-sec. 8, enacts that the Board shall not have power or authority to require or permit a company, without the consent of the corporation of the municipality, to construct or lay down within the municipality more tracks or lines than, in its agreement with the corporation or the by-law of the council of the corporation of the municipality, it has authority to construct and lay down, but the agreement or by-law shall govern as to the number and locality of the tracks and the streets or highways upon which the railway may be constructed.

The Board approved of the plans of the appellants, subject to any modification that might appear proper to be made after hearing the objections of the respondents on engineering grounds. The plans were amended to comply with the objections on engineering grounds, made by the respondents, and, as amended,

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were finally approved on September 2, 1915. The respondents appealed to the Appellate Division of the Supreme Court of Ontario on two grounds: (1) that the appellants had no franchise in respect of the street and adjoining land proposed to be used, and (2) that in any event the consent of the municipal council of the city was necessary. After the general argument had concluded, a memorandum was sent by the registrar of the appellate division, saying that the Court would sit on November 13, 1915, to hear what counsel had to say, if anything, on the point "what jurisdiction had the County of York under the circumstances" stated in the memorandum "over the portion of Yonge St. in question." On November 13 the counsel for the respondents asked for an adjournment and the counsel for the appellants objected that the question should not be determined without an opportunity to give evidence. On November 15 the respondents informed the Court that they had decided not to submit any further argument in the matter of the question of the franchise of the appellants. In view of this notification the counsel for the appellants assumed that it would not be necessary to appear further before the Court. No argument was addressed to their Lordships in support of the opinion expressed in the judgment of Hodgins, J.A. Their Lordships think that the question of the franchise of the appellants was not properly before the Appellate Court, and they are unable to entertain a question not raised at the trial, and on which, if it had been raised, it was open to the appellants to have called evidence in answer to the case made against them.

On the first ground of appeal, that the appellants had no franchise in respect of the street and adjoining land proposed to be used, Garrow, J.A., with whom Maclaren and Magee, JJ.A., agreed, does not pronounce a final opinion. The Metropolitan Street R. Co. of Toronto was incorporated in 1877. This company had no authority to construct or operate their railway along streets and highways within the jurisdiction of the corporation of the City of Toronto, and of any of the adjoining municipalities, except under and subject to an agreement thereafter to be made between the councils of the city and of the municipalities and the company. In 1884 an agreement was made between the Metropolitan Street R. Co. of Toronto and the municipal council of the County of York. This agreement is

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scheduled to an Act of 1893 which changed the name of the company to the "Metropolitan Street Railway Company." In August, 1894, a further agreement was made between the municipal corporation of the County of York and the Metropolitan Street R. Co. This agreement is scheduled to an Act of 1897. The agreement and the privileges and franchises thereby created are confirmed in the Act, and declared to be existent and binding upon the parties to the same extent and in the same manner as if the several clauses and agreements were set out as part of the Act. The rights conferred under this agreement have been transferred to and are now vested in the appellants. There is a provision in the Act that, in the event of the City of Toronto extending its limits so as to include any portion of the railway, such extension of limits should not affect the rights of the company at the date of such extension, or its property then situate within such extended limits, and that the powers conferred on the company by the Act should remain as if the city limits had not been extended. The City of Toronto was subsequently extended to include the portion of Yonge St. across which it is proposed to construct the spur line, and the ambit of the franchise which the appellants claim and the conditions of its user, so far as are material to the present appeal, are to be found in the terms of the agreement of 1894.

The section of the agreement which determines the extent and nature of the appellants' franchise for the purpose of operating their railway—as distinct from its location and construction—is sec. 7. There is a difference in the sections which give powers to the appellants to locate and construct their railway and those which give powers to the appellants to operate the railway when located and constructed. For the purpose of operating the railway, sub-sec. (3) of sec. 7 confers a wide authority. It authorises not only the construction and maintenance of such culverts, switches, and turnouts as may from time to time be found necessary for operating the appellants' line of railway on Yonge St. or leading to any of the cross streets leading from Yonge St., but also for the purpose of leading to any track allowances or rights of way on lands adjacent to Yonge St., where the line deflects from Yonge St. or to the appellants' power-houses and car-sheds. The plan, which the Board approved, shews that the turnouts, or spur lines, which cross a portion of the sidewalk on the west

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side of Yonge St., are for the purpose of leading to track allowances or rights of way on land which is the property of the appellants, and to which there is a proposed deflection of the line from Yonge St. The works approved are therefore within the terms of the franchise which has been vested in the appellants under the statutory agreement, if they are acquired for the purpose of operating the railway of the appellants. There can be no doubt under this head, but in any case the finding of the Board would be conclusive on a question of fact. It is not necessary to decide whether the spur line in question is for the purpose of leading to power-houses and car-sheds of the appellants, and the evidence under this head is not satisfactory. Sec. 11 further gives a considerable power of constructing turnouts for the purpose of deflecting the line of railway from Yonge St. in order to operate the same across and along private properties after expropriating the necessary rights of way. It was argued on behalf of the respondents that their Lordships had decided in the case of the *Toronto and York Radial R. Co.* v. *Corporation of the City of Toronto*, 15 D.L.R. 270, in a sense contrary to the franchise which is claimed on behalf of the appellants. The decision of their Lordships in the above case was given on different grounds and is in no way inconsistent with their Lordships' construction of the franchise conferred by sub-sec. (3) sec. 7 of the agreement of 1894. Lord Moulton, in delivering the judgment of their Lordships, says, at p. 273:—

> On May 11, 1911, the proceedings in this matter were commenced by an application being made to the Ontario Railway and Municipal Board on behalf of the appellants for the approval by the Board of "a plan to deviate the track on the Metropolitan Division from Yonge St. to a private right of way," which was described as being about 125 feet to the west, running parallel with Yonge St. On looking at the plan, it is obvious that this is a misdescription of the proposal, in that the proposed line lies only partially upon land proposed to be acquired by the railway company, and that it crosses in four or five places public highways which are not and necessarily cannot be described as portions of a private right of way.

Their Lordships, therefore, find that, for the purpose of operating the railway, the appellants have the franchise which they claim in respect of the street and adjoining lands proposed to be used, and determine in their favour the question on which Garrow, J.A., preferred not to give a final opinion.

The second point, that in any event the consent of the municipal council of the city was necessary before the Board could

approve the plans submitted to them, remains to be considered. Garrow, J.A., bases his judgment on the necessity of such approval and holds that such approval is the very basis of all the work to be afterwards undertaken on Yonge St. The relevant sections of the 1894 agreement, which determine the rights of the respondents in reference to works proposed to be constructed on Yonge St. at the site in question, and to which attention was directed during the argument on behalf of the respondents, are secs. 2, 3, 4, 5, 8, 9, 10, 17, 27, 28. Secs. 2, 3, 4, and 5 apply to the location and construction of the railway and not to works which, after the location and construction, are required for the purpose of operating the railway so located and constructed.

It is clear that, before the work of construction is commenced, plans setting forth the proposed location of the tracks must be approved by the committee appointed by the council, and that such location cannot subsequently be altered without the consent of the committee. There is a further protection that the line shall not be put in operation upon any section until the county engineer has certified that such section has been constructed in compliance with the terms of the agreement. Stringent limitations of a similar character are inserted in the agreement of 1884 scheduled to the Act of 1893. It must be assumed that all these conditions were fulfilled before the line of the appellants was put in operation. Sec. 8 authorises the appellants to change the location of its lines of track to any portion of Yonge St. with the consent of the committee of the council, but there is no proposal in the approved plans to change the location of any lines of track already located and constructed to a different portion of Yonge St. Secs. 9, 10, 17, and 27 relate to the method and conditions under which the appellants shall carry out works within their authority. They come into operation in the construction of works after approval, and it cannot be assumed that the appellants will not in every way adopt the prescribed method and comply with the prescribed conditions. Sec. 28 comes within the same category. It provides that the alignment of the tracks, the location of the switches, and the grades of the roadbed shall be prescribed by the county engineer.

In the present case the Board, before approving the plans of the appellants, took care to ascertain whether they were satisfactory on engineering grounds to the City of Toronto. They

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considered the objections of the City of Toronto on engineering grounds, procured a report thereon of their own engineer, and before approval amended the plans of the appellants to comply with the objections made on behalf of the City of Toronto. In effect, there was no difference on engineering grounds between the City of Toronto and the appellants when the Board finally approved the plans for carrying a spur line on the level across the sideway on the west side of Yonge St. In the event of any difference arising between the city and the appellants as to any matter or thing to be done or performed under the terms of the agreement, the agreement contains an ample arbitration section.

Their Lordships are of opinion that the appellants succeed, and will humbly advise His Majesty that the appeal be allowed, with costs here and in the Court below. *Appeal allowed.*

ONT.

S. C.

O'GRADY v. CITY OF TORONTO.

Ontario Supreme Court, Middleton, J. May 12, 1916.

TAXES (§ III J—165)—MISTAKE OF LAW—RECOVERY BACK.

Money voluntarily paid for taxes under a mistake of law cannot be recovered.

Statement.

ACTION to recover sums paid for taxes to the defendants, the Corporation of the City of Toronto.

Irving, for plaintiff; *I. S. Fairty*, for defendants.

Middleton, J.

MIDDLETON, J.:—The plaintiff seeks to recover taxes paid to the City of Toronto upon a house erected upon certain lands owned by the University of Toronto and leased on the 15th May, 1878, for a term of 39 years, to be reckoned from the 1st October, 1877, at an annual rental of $150; the tenant paying the taxes. The lease was assigned to the plaintiff in 1904.

After the making of this lease, the University Act, 1906 (6 Edw. VII. ch. 55 (O.)), was passed. By this statute, sec. 18, the property of the University shall not be liable to taxation, but the interest of every lessee and occupant of its real property shall be liable to taxation.

Neither the defendants nor the plaintiff had knowledge of this change in the law, and the property continued to be assessed as theretofore upon the basis of its actual value, and the plaintiff paid the taxes upon the assumption that he was liable to pay as before.

In 1914, or early in 1915, the mistake was discovered, and the

defendants refunded to the plaintiff the difference between the tax upon the fee and the tax upon the leasehold interest for the year 1914, but refused to make any further concession. This action is now brought to recover the taxes paid for the years 1907 to 1913, but it is conceded that in any aspect of the case the Statute of Limitations would prevent a recovery save for the years 1910, 1911, 1912, and 1913.

I have come to the conclusion that the plaintiff must fail, for the payment was made voluntarily, the defendants assuming there was the right to demand the taxes, and the plaintiff assuming that there was the obligation to pay; both parties being ignorant of the statutory amendment to the law.

Mr. Irving relies largely upon the summary of law found in the 5th edition of Benjamin on Sale, pp. 113 and 114; but it is to be observed that what is there being discussed is not the right of action to recover back money voluntarily paid, but the power of the Court to relieve from a contract made in ignorance of the law; and, although there undoubtedly has been some tendency to relax the stringency of some of the older cases, Equity has never yet gone so far as to afford relief by enabling an action to be brought, directly or indirectly, to recover money paid under mistake of law. This is laid down without qualification by Pollock (Contracts), 5th ed., p. 437: "Money paid under a mistake of law cannot in any case be recovered;" and in a careful article by M. M. Bigelow, 1 L.Q.R. 298, where he says that money paid under mistake of law presents "the one permanent exception to the right of relief for mistake."

In *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149, Lord Westbury suggests an exception in cases where the ignorance is not of the general or ordinary law of the country but of some private right or *jus*.

In the first place, it is quite clear that the law concerning which there was ignorance here cannot be regarded as being other than part of the general law of the land. But, even if this were not so, the right to recover money paid is by no means clearly established by the dictum referred to. Pollock, in the work already referred to, controverts the existence of even this exception. In Halsbury's Laws of England, the rule is stated as being subject to qualification (vol. 21, para. 67); the exception suggested being

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cases in which there is some ground which makes it inequitable for the party who received the money to retain it. This must mean something more than the mere fact that the defendant has received and retains money which, save for the voluntary payment, he had no right to have. It is, I think, intended to be confined to cases in which there is some fraudulent conduct on the part of the defendant, or where he has actively misled the plaintiff, and cases in which there was confidential or fiduciary relationship between the parties. None of the cases cited justify the maintenance of this action.

In *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256, money was paid under the supposition that the payers were obliged to make payments under the terms of a supposed license. This supposition was erroneous. Warrington, J., says: "No authority has been cited, and I am satisfied that no authority can be produced, in support of the proposition that a voluntary payment made under a supposed legal liability creates in law any obligation at all."

In our own Courts, the case of *Cushen* v. *City of Hamilton* (1902), 4 O.L.R. 265, appears to be conclusive authority against the plaintiff. The municipality passed a by-law which was invalid, and on the strength of this it exacted license fees. Upon the by-law being quashed, those who had paid fees sought to recover the money paid. At the trial they succeeded; the trial Judge holding that the payments, under the circumstances disclosed, could not be regarded as voluntary; but on appeal this finding was reversed and the action dismissed; Osler, J.A., quoting from Dillon: "Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot without statutory aid be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine, could not have been legally demanded or enforced."

The case *Durrant* v. *Ecclesiastical Commissioners* (1880), 6 Q.B.D. 234, strongly relied upon by Mr. Irving, is, as pointed out in *Trusts Corporation of Ontario* v. *City of Toronto* (1899), 30 O.R. 209, 213, a case not of mistake in law but of mistake in fact.

The action therefore fails and must be dismissed with costs.

Action dismissed.

FURNESS, WITHY & CO. v. VIPOND.

QUE.

K. B.

Quebec King's Bench, Sir Horace Archambeault, C.J., Lavergne, Cross, Carroll and Pelletier, JJ. March 6, 1916.

1. CARRIERS (§ III G 5—467)—LIMITATION OF LIABILITY—EFFECTS OF CLIMATE—FREEZING—INSURANCE.
A stipulation in a bill of lading against liability for damage from "effects of climate" and "perils of the sea," or any damage or loss "capable of being covered by insurance," includes damage from "freezing."

2. PARTIES (§ I B—55)—JOINDER OF PLAINTIFFS—PARTNERS.
The shipment of goods to a person who is in fact trading as a partnership entitles him to sue in his own name, without joining a dormant partner, for damage to the goods in course of transit.
[Appealed to Canada Supreme Court.]

Statement.

APPEAL by defendant from the judgment of the Court of Review, reversing the judgment of Weir, J., Superior Court. Reversed.

On December 1, 1910, the respondent surrendered 765 packages of lemons to the General Steam Navigation Co., for furtherance to Montreal. These same fruits were at London transferred to the appellants for shipment. It came forward on a through bill of lading. The lemons arrived at Montreal in a frozen condition and otherwise damaged. The respondent sued the appellants for $2,283 damages and alleged negligence, fault, and carelessness upon land and water.

The defence was based on several grounds, but the decision of the case rested on the following:

No responsibility under the bill of lading, because this latter contained a clause of immunity covering the damages claimed; because by another stipulation therein, this clause was extended to transhipment or forwarding on in addition to, but not in substitution for the above clause.

The material parts of the respondent's answer to plea were that he was not a party to the bill of lading; and that the appellant could not lawfully stipulate in the contract, immunity for its own negligence or that of its servants.

The Superior Court dismissed the action:

Considering the said admission and evidence and that partnerships are judicial entities, distinct from the individual members who compose them, and that the partnership assets constitute an estate separate and apart from the assets of the partners individually;

Considering that the claim set forth in the declaration is a claim of the partnership existing between the plaintiff and Thomas A. Vipond and cannot be demanded, except on behalf of said partnership.

This judgment was reversed by the Court of Review for the

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reasons that the respondent, even if he had a dormant partner, was the proper partner to enter suit on the bill of lading, and that the damages were caused by the fault and negligence of the appellant who did not show that the damages did not occur when the goods were in his possession.

This last judgment of the Court of Review was reversed and the action dismissed on its merits by the Court of Appeal for the following reasons:

Considering, in view of the said exceptions, that the appellant is not responsible for the damage by freezing alleged in the action;

Considering that there is error in the judgment appealed from, to wit, the judgment rendered by the Court of Review, whereby the appellant was condemned to pay the said sum of $2,283;

Considering, for the reason aforesaid, that there is no error in the adjudication (*dispositif*) made by the judgment rendered by the Superior Court sitting in first instance at Montreal, whereby the respondent's action was dismissed;

Doth maintain the appeal, doth reverse and set aside the judgment appealed from, to wit, the said judgment rendered by the Court of Review at Montreal, on April 30, 1915, and now, giving the judgment which the said Court of Review ought to have rendered, doth restore and confirm the adjudication (*dispositif*) made by the judgment of the Superior Court sitting in first instance at Montreal on January 17, 1913, whereby the respondent's action as against the appellant was dismissed (but without adopting the reason therein set forth), and doth condemn the respondent to pay the appellant its costs in the Superior Court in first instance, in review and in appeal in this Court.

Casgrain & Mitchell, for appellant. *Vipond & Vipond*, for respondent.

CROSS, J.

CROSS, J.: By the judgment appealed against, the appellant has been condemned to pay the respondent $2,283 as damages arising from the fact that 761 boxes of lemons were damaged by frost while being carried by sea in the appellant's ship "Shenandoah" from London, to St. John, N.B., in January 1911, consigned to the appellant.

In his declaration, the respondent alleges that a through bill of lading for shipment of the lemons from a seaport in Italy to Montreal was issued by the General Steam Navigation Co., but he

does not allege that the appellant became a party to that bill of lading or adopted it in any way. Accordingly, his action is to be treated as an action grounded upon the general averments that the appellant took the lemons on board ship at London for carriage by sea for the respondent to St. John, and that it negligently allowed them to be frozen in transit.

As regards the person in whose name, as plaintiff, the action has been brought, I consider that the appellant's objection and the decision of the trial Judge are not well founded.

It has been correctly pointed out both by the trial Judge and by counsel for the appellant that a trading co-partnership is a personality (*un être moral*) distinct from the personality of its members. That legal personality can sue, and, in the present action, it has sued by its name—the only name which it has, viz: "Herbert E. Vipond." It would have been more regular, if the plaintiff had been described in the writ as the co-partnership Herbert E. Vipond composed of Herbert E. Vipond and Thomas A Vipond, but the objection that the membership of the partnership is not disclosed was not specifically pleaded, and the action as a partnership action has been validly taken.

Apart from that, I would say, with the Court of Review, that the appellant, having contracted to deliver the lemons to H. E. Vipond could validly be sued by H. E. Vipond, if a contract relation can be shewn to have existed between him and the appellant, and in its plea it admits having received the lemons for transportation "consigned to the plaintiff," and it seems to admit the existence of a contract relation.

The main issue upon this appeal is as to the legal effect and adequacy of the exonerating clauses relied upon by the appellant.

The general proposition put forward on the respondent's behalf is that conditions, providing for immunity against responsibility for damage caused by negligence of the carrier's servants, are void. The opposite of that proposition must now be taken as established, except where, as by the Railway Act or the Water Carriage of Goods Act, such conditions have been struck at by legislative enactments.

The majority of the Judges who sat in review, however, considered that it was for the appellant to show legal cause for not having fulfilled its undertaking to deliver the lemons in good condition; that the bill of lading relied on by the appellant did not

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in clear terms exempt or free it from all responsibility for damages arising from its negligence or that of its servants; and that the damage is not covered by any of the exceptions or reservations contained in the bill of lading.

I take it that there can be no doubt that the covenants and conditions according to which the lemons were to be carried by the appellant are those set forth in its own bill of lading. It is true that the respondent repudiates that bill of lading and has discoursed at length in his printed and oral argument upon the first or Italian bill of lading as "covering" (whatever that may mean), the shipment "from Milazzo, Italy, to Montreal, Canada," but it is not proved or even alleged that the appellant signed or adopted that bill. It may be that where there is a through bill of lading of goods,

> The carrier in whose hands they were when the breach was committed is also generally liable, if the through contract was made for his benefit and with his authority, Carver, 5th ed., Carriage of Goods by Sea, par. 107;

but there is neither averment nor proof of such facts.

The appellant's undertaking was to carry the lemons to St. John, at which port its responsibility was to cease, though the lemons were to be taken by rail thence to Montreal and there delivered to the holders of the "original through bill of lading." That is the only mention of the through bill of lading in the contract to which the appellant was a party.

The appellant was free to bargain with the person who offered it the lemons at London, namely, the General Navigation Co., as to the terms and conditions of further transport. Being offered lemons for carriage across the North Atlantic in midwinter in a cargo boat, it is not surprising that it should stipulate against liability for damage caused by climate. It did so stipulate. If it had not done so, it would have been liable as a carrier in terms of art. 1675 C. C., or under English Common Law.

Accordingly, we are brought to consider whether the exonerating clauses have provided in clear terms for immunity of the carrier from liability for the damage by freezing of the lemons which happened at sea.

In the lengthy list of perils and other occurrences set out in the bill of lading, in respect of which the carrier is relieved from the obligation to safely carry and make right delivery, there are mentioned:

Injurious effects of other goods, effects of climate, insufficient ventilation, or heat holds, perils of the seas, rivers or navigation, of whatsoever nature or kind, and howsoever caused, whether or not any of the perils, causes or things above mentioned or the loss or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, pilot, whether compulsory or not, officers, mariners, engineers, refrigerating or otherwise, crew stevedores, ship's husband or mariners, or other persons whomsoever. . . . or by or from any accidents to or defects, latent or otherwise, in hull tackle boilers or machinery. . . . etc.

And there is also a covenant worded as follows:

The shipowner is not to be liable for any damage or loss to any goods which is capable of being covered by insurance.

In the event which happened, I consider that these exceptions clearly relieved the appellant.

The damage was due to freezing. The condition which relieves from responsibility is "effects of climate." The case falls clearly within the exception. But counsel for the respondent says that an exception of that kind does not relieve the carrier, if his servants have been negligent, and that pretension would be well-founded, if negligence were not also one of the things excepted, though, as pointed out by counsel for the appellant.

If a loss apparently falls within an exception, the burden of shewing that the shipowner is not entitled to the benefit of the exception, on the ground of negligence, is upon the person so contending. Carver, 5th ed., 78.

And the respondent has made no evidence on that point. Nevertheless though that contention may be well founded, it cannot apply, if there is also a covenant excluding liability for loss due to negligence. There is such a covenant in this case. It is true that this covenant is made part of a clause which commences with the words: "perils of the seas" and in a sense freezing is not a peril of the sea, and it may be in that view that the Court of Review considered that, as regards negligence of servants, the bill of lading did not "in clear terms" exempt the appellant, but it appears to me when we go on to read in the clause the words "whether or not any of the perils, causes or things mentioned or the loss or injury arising therefrom," etc., it is made clear that effects of climate are brought into the class of perils of the sea for the purposes of the covenant. It follows then that the appellant has brought the case within the exception respecting effects of climate and the exception respecting negligence of the master or crew.

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I also consider that the appellant has brought the case within the exception respecting losses which could be insured against.

Respecting these excepting conditions and covenants it may be added that, if, in themselves they are unequivocal, the fact that they have been printed amongst a large number of other exceptions or restrictions is not a reason for saying that they are equivocal or not expressed in clear terms. Clauses of the purport of those above quoted, in fact, are very commonly found in shipping bills of lading, and have been given effect to by the Courts. Carver, 101 and 105, *Rosin and Turpentine Import Co. Ltd.* v. *Jacobs and Sons*, 102 L. T. 81.

In regard to the exception respecting losses which could be insured against, it may be said generally that insurance may be made against all losses by events over which the insured has no control. Art. 2476, C.C.

At the trial the respondent admitted that an insurance had been effected, but he seemed to take the ground that it was not against such a peril as damage by freezing, and he hinted rather than asserted that insurance of that kind was not procurable. He did not exhibit the particulars of his insurance contract, though pressed to do so. If it be the fact that lemons in transit across the Atlantic cannot be insured against damage by freezing, it would have been easy for the respondent or any Montreal fruit importer to have proved it. That has not been done, and it was upon the respondent to make that proof.

I refer to the proof on this point, because it may be considered that the covenant relates to the practical or commercial possibility of effecting insurance against that kind of risk rather than the technical or legal possibility of it.

I have reached the above stated conclusions on the footing that the appellant's obligations are those created by its bill of lading. I consider that the same result would be reached if the covenants of the through bill of lading were applicable, because exonerating clauses of the same import as those above quoted are to be found in it. It may be said that, in the last mentioned instrument, the covenant excluding responsibility for weather damage is limited to damage caused during loading and unloading and is not made clearly applicable to damage caused in transit. I consider, however, that the clause such as it is, read with the other exonerating clauses, relieves the appellant.

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The respondent, in claiming the benefit of the through bill of lading as he did at the argument and having failed in his contention that the exempting covenants are null, is left in the untenable position of a contracting party trying to avail himself of covenants favourable to himself while repudiating those which are favourable to the other party.

Upon the whole, the appellant has proved its defence on the points above dealt with and its appeal should be maintained and the action dismissed. *Appeal allowed.*

QUE.

C. C.

BELL TELEPHONE CO. v. ZARBATANY.

Quebec Circuit Court, District of Montreal, Purcell J. November 18, 1916.

TELEPHONES (§ I — 4)—KNOWLEDGE OF CONDITIONS — CANCELLATION OF CONTRACT—LIQUIDATED DAMAGES.

The signer of a telephone contract is presumed to know all the conditions appearing therein, and is bound by a stipulation that in case of cancellation of the contract through the default of the subscriber the balance due for the unexpired term shall become payable as liquidated damages.

[*Bell Telephone Co.* v. *Duchesne*, 21 D.L.R. 822, referred to.]

Statement.

ACTION for $41.50 claimed under a contract for telephone service at Montreal made by the defendant with the plaintiff. Judgment for plaintiff.

S. L. Dale Harris, for plaintiff; *P. C. Ryan*, for defendant.

Purcell, J.

PURCELL, J.:—Of the amount claimed $8.15 represented telephone service actually furnished and the balance of $33.35 was claimed for liquidated damages for the unexpired portion of the contract. The contract, which was of the standard form used by the plaintiff, contained certain terms and conditions on its back, and in particular the following:

2. For non-payment of any charge due, the service may be discontinued after written notice is given by the company.

8. The company reserves the right to cancel this contract at any time should the subscriber make default in payment of any of the charges provided for herein, or makes or permits to be made any use of the telephone or lines contrary to the terms of this contract.

9. In case the company cancels this contract or discontinues service hereunder by reason of any default of the subscriber, or is through the fault of the latter prevented from continuing service hereunder, or in case the subscriber becomes insolvent or makes an abandonment of his property or an assignment for the benefit of his creditors, the charges for the current calendar quarter shall be forthwith payable to the company without deduction or abatement for the unexpired portion of the current calendar quarter, and should any of such events happen within the initial period of the present contract, there shall forthwith become due and payable to the company the unexpired portion of the initial term of the present contract, all sums

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becoming due under the terms of this section to be considered as liquidated damages and not by way of penalty.

The contract was for one year's service subject to tacit renewal and by it rental was payable quarterly in advance. The defendant having made default on one of the quarterly payments, the plaintiff after notifying him discontinued the service and claimed the balance of the first year's rental as liquidated damages.

The defendant admitted liability for the sum of $8.15, but denied liability for the remainder, alleging that he was a Syrian and unable to read English, that the contract was not understood or explained to him and was signed in error and through fraud practised by the representatives of the plaintiff, that the conditions on the back of the contract were never brought to his notice and that the plaintiff had no right to claim unearned profits under the name of liquidated damages.

It was established at the trial that one of the plaintiff's representatives had canvassed the defendant and had obtained his signature to the contract, but no proof of fraud was made. After the contract was signed the defendant held it for some weeks before making up his mind to pay the first quarterly instalment in advance and the telephone was only installed after the first payment was made. The defendant declared that he did not speak English, that he had not read the contract before signing it and that he was not aware of its terms. He admitted having received telephone service under it and having made default in one of the quarterly instalments.

The plaintiff in support of its contentions cited *Bell Telephone* v. *Duchesne*, 21 D.L.R. 822; *Dean* v. *Furness Withy*, 9 Que. Q.B. 81; *Ram* v. *Boston & Maine Railway Co.*, 41 Que. S.C. 68, 13 Can. Ry. Cas. 370; *Beaumont* v. *C.P.R. Co.*, 5 Que. S.C. 255; *Chartier* v. *G.T.R. Co.*, 17 L.C.J. 26; *Robichaud* v. *C.P.R. Co.*, 8 L.N. 314; *Gelinas* v. *C.P.R. Co.*, 11 Que. S.C. 253.

Seeing the contract and the proof;

Considering that the defendant having signed the contract is presumed to have known its conditions both on back and front, the front thereof referring to the conditions on the back; *Dean* v. *Furness Withy*, 9 Que. Q.B. 81;

Considering that a part of the amount claimed is due as liquidated damages;

Judgment for plaintiff for $41.50 with interest and costs.

Judgment for plaintiff.

Re D. & S. DRUG CO.

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Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. November 3, 1916.

CORPORATIONS AND COMPANIES (§ VI F 2—357*a*)—PREFERRED CLAIM FOR RENT—POSSESSION—INVALID LEASE.

By taking possession under a lease entered into in pursuance of an invalid resolution, a corporation accepts the tenancy upon the terms set forth in the resolution, and the lessor, upon liquidation of the corporation, is entitled to rank as a preferred creditor for the arrears of rent distrained for.

Statement.

APPEAL from the judgment of the Master at Edmonton. Reversed.

J. F. Lymburn, for claimant, appellant; *S. W. Field*, for defendant, respondent.

Scott, J.

SCOTT, J.:—The directors of the insolvent company were W. D. Donald, the claimant, Sydney L. Smith and Shirley Smith. They were the original incorporators and are the only shareholders of the company. Only 20 shares were subscribed for, viz.: the claimant 10 shares, Sydney L. Smith 9 shares and Shirley Smith 1 share. At a meeting of directors held on June 10, 1915, at which only the claimant and Sydney L. Smith were present the following resolution was passed:

On motion by S. L. Smith it was resolved to accept the offer made by Dr. Donald (the claimant) of a building on lot 12, block 4, Hudson's Bay Reserve on Main St., Peace River Crossing, at a monthly rental of $85, an office to be reserved free for Dr. Donald's use. The D. & S. Drug Co., Ltd., to pay the insurance on the building.

There is no record of the company ever having ratified or adopted this resolution. No formal lease or agreement was put into writing. The company, however, in pursuance of the arrangement set forth in the above resolution, on or about July 1, 1915, entered into possession of the premises in question and remained in possession under the same until the date of a seizure made at the instance of the claimant on or about February 1, 1916, under distress for arrears of rent.

The company having subsequently made an assignment for the benefit of its creditors, the claimant gave up possession of the goods seized to the assignee upon the assignee agreeing to pay the arrears of rent and costs of and incidental to distress preferably out of the estate. A winding-up order was subsequently made and the assignee appointed liquidator. No rent was ever paid under the lease, the company not being in a position up to the time of liquidation to pay same.

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The case stated then proceeds as follows:

It being admitted that the company's occupation of the premises was referable to the arrangement expressed in the above resolution and that the distress was regular, the questions for the determination of the Court are whether or not under the circumstances: (1) The claimant is entitled to be paid the arrears of rent preferably out of the proceeds of the goods seized. (2) If not whether the claimant is entitled to rank upon the estate as an ordinary creditor for the said arrears of rent.

Par. 19 of the articles of association of the company which were made part of the case is as follows:

No director shall be disqualified by his office from contracting with the company either as vendor, purchaser, manager, solicitor or otherwise, nor shall any such contract or any contract or arrangement entered into by or on behalf of the company in which any director in any way interested be avoided, nor shall any director so contracting or being so interested be liable to account to the company for any profit realized by any such contract or arrangement by reason of such director holding that office or of the fiduciary relation thereby established, but it is declared that the nature of his interest must be disclosed by him at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case, at the first meeting of the directors after the acquisition of his interest, and no director shall, as a director, vote in respect of any contract or arrangement in which he is interested as aforesaid, and if he do so vote, his vote shall not be counted, but this prohibition shall not apply to any contract by or on behalf of the company to give the directors, or any of them, security by way of indemnity and it may, at any time or times be suspended or relaxed to any extent by a general meeting.

The Master held that the resolution was invalid though it was one which might have been ratified and adopted by the shareholders, that it could not be treated as an agreement for a lease, that the company were in possession as mere licensees, that it was liable only for use and occupation and that therefore the claimant had no right to distrain. He disallowed the claimant's claim to rank as a preferred and ordered that he rank as an ordinary creditor of the estate.

It is clear that under par. 19 of the articles of association the resolution accepting the claimant's offer is void by reason of the fact that it was not passed by a majority of the directors present who were entitled to vote on it, and such being the case, it can not be relied upon by the claimant as an acceptance of his offer contained in it, but it, however, may be referred to as evidencing the fact that he made an offer to the company to lease the premises to it upon certain terms, and under the provisions of that paragraph both he and the company were authorized to enter into a lease of the premises upon these terms.

The admission in the stated case that the company entered into possession of the premises in pursuance of the arrangement set forth in the resolution I cannot construe otherwise than an admission that the company entered into possession upon the terms of the claimant's offer contained in the resolution and, having so entered, their taking possession must in my view be held to be an acceptance by the directors of the claimant's offer and that the company is therefore bound by such acceptance.

It has been suggested that in making the admission referred to the liquidator admitted more than he intended, and that he intended to admit merely that the company went into possession of the premises but as the admission is not ambiguous in its terms I think this Court must interpret it in the manner in which it is clearly expressed.

I am of opinion that in the absence of any such admission, and nothing being shewn to the contrary, it must be presumed that the company took possession pursuant to the terms of the offer contained in the resolution. I think it may reasonably be assumed that all the directors of the company are cognizant of at least the more important of their acts and the acquiring of premises for carrying on the sole business of the company is not an act of minor importance. The resolution would appear in the ordinary course in the minutes of the directors' meetings and the only director who was not present at the meeting at which the claimant's offer was considered had access to the minutes and must be taken to have been aware before the company took possession that the offer had been made.

Smith v. *Hall Glass Co.*, 11 C.B. 897, at 926 (138 E.R. 729, at 741, 742).

The taking of possession of the premises by the company in the present case must have been with the knowledge not only of all the directors but of all the shareholders, as the directors held all the shares issued by the company, and the only authority given by the claimant to take possession was upon the terms stated in his offer. If the directors were unwilling to take possession upon these terms they were in duty bound to give him notice to that effect before taking possession.

The Master in his reasons for judgment expressed the view that even if it were held that the directors had accepted the lease

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Scott, J.

of the premises upon the terms offered by the claimant, the liquidator by reason of his powers being more extensive might be held not to be bound by their act and he cites *Re National Funds Assur. Co.*, 10 Ch.D. 118, in support of that proposition.

That case appeared to me to hold merely that where an act is done by the directors which is *ultra vires* but which they or the company cannot repudiate the liquidator may do so in the interests of the shareholders.

In my view that principle has no application in the present case. There cannot be any question as to the authority of the company and of the directors on its behalf to enter into such a contract, and it appears to me that the only question which this Court has to determine is whether such a contract was entered into. If it was, the liquidator as well as the company is bound by it and if before the company went into liquidation the claimant had the right to distrain for rent, and did distrain for it, the fact that the company subsequently went into liquidation cannot affect or prejudice that right.

I would allow the appeal with costs and direct that the claimant rank upon the estate as a preferred creditor in respect of the rent due at the time of the distress and the cost of and incidental thereto; the claimant to have the costs of the stated case.

Stuart, J.

STUART, J., concurred.

Beck, J.

BECK, J. (dissenting):—I think that the Master was right; that Donald is entitled to rank only as an ordinary creditor for a sum to be ascertained on the basis of the value of the use and occupation of the premises and not as a preferred creditor for the amount of the rent fixed by the lease and distrained for.

To my mind it is quite clear on the stated case that besides the invalid resolution accepting Donald's offer to grant a lease there was no act of the company as such established showing a deliberate ratification of the directors' act with full knowledge of the irregularity.

The settled principle, which I think is applicable, is stated in Lindley on Companies, 6th ed., p. 213. The question of what is essential to ratification by the company is treated at pp. 231, *et seq.*

I would affirm the Master's decision and dismiss the appeal with costs. *Appeal allowed.*

BELLER v. KLOTZ.

SASK.

S. C.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Lamont and Elwood, JJ. November 18, 1916.

1. CONTRACTS (§ I E 3—75)—STATUTE OF FRAUDS—PERFORMANCE WITHIN YEAR—EMPLOYMENT.

A contract to serve for one year, the service to commence on the next day after that on which the contract is made, is not a contract which is not to be performed within a year, within the meaning of sec. 4 of the Statute of Frauds, and is enforceable though not in writing.

2. MASTER AND SERVANT (§ I C—13)—WAGES—QUITTING SERVICE DURING TERM.

A servant who without just ground quits his employment before the expiration of his term of service cannot recover for his services.

Statement.

APPEAL by plaintiff from the judgment of Hannon, D.C.J., in an action for work done and services performed for the defendant for a period of 10½ months, at the rate of $315 a year. Varied.

Blain, for plaintiff; *Hoffman*, for defendant.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—On November 26, 1914, the defendant met the plaintiff in Regina and hired him for 1 year, and took him with him to his farm that afternoon. The plaintiff in his evidence said he was to begin work the next morning. He worked until September 6, 1915, when, on account of illness, he went to the hospital. He returned from the hospital on September 21, and worked until October 14, 1915, when he left his employ. He left, he says, because on September 26 he had given notice that he would leave after the 14th. He says he gave the notice because the defendant compelled him to work on Sundays, although in his pleadings he set up that the reason he left was because he was incapable through illness of performing the work required:

The action was tried before Hannon, D.C.J., who found that there had been no Sunday work to speak of, and that it was not for that reason that the plaintiff quitted his employment. He also found against his contention that he was unable to perform his work, because the plaintiff admitted that immediately after he ceased working for the defendant he hired himself to work on a threshing machine, and did work there the rest of the season. With the threshing gang the plaintiff was getting $3.25 per day, whilst from the defendant he was receiving wages only at the rate of $26.25 per month. A comparison of these wages, in the light of the findings of the trial Judge, would probably

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afford a clue to the real cause which led the plaintiff to quit the defendant's employ.

It was contended that as the plaintiff stated he was to begin work the next morning after the hiring, the contract was one not to be performed within a year, and therefore was unenforceable under the Statute of Frauds because not in writing, the plaintiff was entitled to succeed on a *quantum meruit*.

The trial Judge expressed the view that, notwithstanding the plaintiff's statement that he was to begin work the next morning, the contract began with the hiring.

Under the facts of this case it was open, in my opinion, to the Judge to come to that conclusion. The plaintiff was a foreigner and his evidence was given through an interpreter—and, as pointed out by the trial judge—his mind, when he made the statement above referred to, was directed to the manual activity, which certainly began the next morning.

Where a man meets another and hires him for a year, and immediately takes him away to his farm, the contract, in the absence of clear evidence to the contrary, may well be said to commence upon the hiring. But even if it were clearly established that the defendant hired the plaintiff on the 26th to commence work on the morning of the 27th, the same result would follow.

In *Cawthorne* v. *Cordrey*, 143 E.R. 161, 13 C.B.N.S. 406, there are *dicta* by both Willes and Byles, JJ., that a contract of hiring made on March 24, for a year's services to commence on the 25th, is not void by sec. 4 of the Statute of Frauds for want of a memorandum in writing.

In *Britain* v. *Rossiter* (1879), 11 Q.B.D. 123, at 125, Brett, L. J., referred to *Cawthorne* v. *Cordrey*, *supra*:—

The *dicta* above referred to was dissented from by Darling, J., in *Dollar* v. *Parkington*, 84 L.T. 470. But in *Smith* v. *Gold Coast & Ashanti Explorers*, [1903] 1 K.B. 285, the Court of Appeal in England approved of the *dicta*, and explicitly held that:

A contract to serve for 1 year, the service to commence on the day next after that on which the contract is made, is not a contract which is not to be performed within a year, within the meaning of the Statute of Frauds, sec. 4.

See also 20 Hals., at p. 76; Anson on Contracts, 12th ed., p. 79.

The plaintiff's contract was, therefore, an enforceable one in any case. It was, however, an entire contract for a year's service.

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The plaintiff left his employment before the expiration of his term of service, and without any just ground for so doing. Under these circumstances, he cannot recover.

The defendant counterclaimed for moneys advanced and goods supplied to the plaintiff, but at the trial the counterclaim was withdrawn. Subsequently, on application, the Judge gave judgment on the counterclaim for the defendant. On argument before us, counsel for the defendant did not press to retain this judgment. Under all the circumstances I am of opinion that, the counterclaim having been withdrawn, its withdrawal should stand.

The appeal on the claim will, therefore, be dismissed, and the appeal on the counterclaim allowed. *Judgment varied.*

SCOTTISH TEMPERANCE LIFE ASSUR. CO. v. JOHNSTONE.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. November 7, 1916.

JUDGMENT (§ VII C—282)—EXCESSIVE DEFAULT JUDGMENT—FORECLOSURE—SETTING ASIDE.

A personal judgment for an excessive amount, obtained by default in a foreclosure action, warrants the Court, where there are other grounds, to set aside the whole judgment, with leave to defend generally.

[*McKinnon* v. *Lewthwaite*, 20 D.L.R. 220, 20 B.C.R. 55, referred to.]

APPEAL by defendant from the judgment of Morrison, J. Reversed. Statement.

A. D. Taylor, K.C., for appellant; *Sir Charles Hibbert Tupper*, K.C., for respondent.

MACDONALD, C.J.A.:—This is a foreclosure action in which a personal judgment was also sought against the defendant. The defendant failed to appear to the writ and a statement of claim was filed to which defendant failed to plead. The plaintiff then moved on notice, the defendant being unrepresented, before a Judge in Chambers for judgment on the pleadings and obtained an order for foreclosure, the appointment of a receiver, and judgment upon the covenants for principal, interest, taxes and insurance moneys in arrear, with a reference to take accounts. Shortly afterwards the defendant made an application to a Judge in Chambers to set aside the judgment on two grounds, only one of which is, in my opinion, worthy of consideration; that one is that the personal judgment was entered for too large a sum. The Judge dismissed the application and from that order the defendant appeals.

Macdonald, C.J.A.

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It appears from the material before us that about 2 weeks prior to the commencement of this action the plaintiff obtained a judgment in the County Court for some instalments of interest which were afterwards included in the judgment in this action. The plaintiff's rights under the covenants in respect of these instalments were merged in the judgment of the County Court, and it is therefore quite clear to my mind that the personal judgment obtained in this action is an excessive one. The plaintiff has not moved to rectify the wrong, but on the contrary, stands by it.

If this were the ordinary case of judgment entered in the registry for default in pleading, there would be no difficulty about its decision; the judgment would have to be set aside and the defendant allowed in to defend. Counsel on both sides have treated it as if it were such a case, and I propose to treat it in the same way. In the absence of objection and of argument upon the true construction of r. 15, O. 27, of our Rules, I do not feel called upon to construe that rule, but I wish to guard myself against appearing to have acquiesced in the practice adopted in this case.

It may be said that the whole judgment should not be set aside but only the personal judgment. I think, however, in this case justice will be better served by setting aside the whole judgment. I notice, though the matter has not been discussed before us, that the notice of motion for judgment does not specify that a decree for foreclosure would be asked for. The notice states that personal judgment will be asked for, and the appointment of a receiver, and such other order "as upon the statement of claim in this action this Court may consider the plaintiff entitled to."

I do not think that is specific enough, and while I should not, because of the failure to raise the point specifically, set aside the judgment on that ground alone, yet as it must be interfered with on another ground, I would let the defendant in to defend generally.

The appeal, in my opinion, should be allowed. The appellant should have the costs here and below.

Galliher, J.A.

GALLIHER, J.A., concurred.

Martin, J.A.

MARTIN, J.A.:—This is not a judgment which has been

irregularly signed, in the true sense of that term, but it is submitted by "an error arising therein" under r. 319, as defined recently by *Oxley* v. *Link*, [1914] 2 K.B. 734, it has been signed for $139 too much, and it could have been reduced by that amount upon the motion to set it aside under r. 308 which contemplates, as the Court of Appeal said in *Re Mosenthal*, 54 S.J. 751, that the judgment "may be set aside either wholly or in part." The plaintiff later made an offer to reduce its judgment by said $139, but it was refused, and the offer was renewed before us and again refused, the point being insisted upon that as the judgment was signed for too much it was for the plaintiff company to make a special application to reduce it in order to prevent its being set aside, which it did not do when the motion came on before the Judge who *ex mero motu*, apparently, offered to reduce the judgment but we are informed that no answer was made to this offer, which is tantamount to refusing it. This Court recently decided in *McKinnon* v. *Lewthwaite*, (1914), 20 D.L.R. 220, 20 B.C.R. 55, after reviewing the authorities, that it was not necessary (as I ventured to think it was, pp. 61-3), for the plaintiff to make a substantive motion to amend his default judgment (in other words, to "elect to put it right"), when it was sought to set it aside, as having been signed for too much, it being held that his offer to reduce the judgment to the proper amount is equivalent to such a motion, and therefore the position of the present appellant is untenable in this respect, and it would have been open to the Judge, if the case were on the facts brought within the "slip" rule, 319, quite apart from any specific application by the plaintiff, to offer as he did to amend the judgment by reducing it to the proper amount. But unfortunately for the plaintiff, no facts were brought forward on its behalf to shew that there had been any mistake, error, slip, or omission, which, as I pointed out in *McKinnon* v. *Lewthwaite*, *supra*, must be before the Court, either by proof or admission, and which facts are essential before relief can be given under said rule. The affidavits filed on its behalf really indicate the contrary. I therefore agree that the appeal should be allowed and the motion below effectuated to the extent indicated by my brothers.

MCPHILLIPS, J.A.:—I would allow the appeal. McPhillips, J.A.

Appeal allowed.

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S. C.

F. X. ST. CHARLES & CO. LTD. v. FRIEDMAN.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. October 14, 1914.

LANDLORD AND TENANT (§ II B 1—10)—TERMINATION OF LEASE UPON SALE OF PREMISES.

On a sale of property subject to an unregistered lease containing a clause that "The lessor will have the right, in the event of the property being sold, to bring the lease to an end at any time, whether during the said term of 3 years or afterwards—by giving the lessee 3 months 'notice in writing to that effect," the purchaser takes all the rights of his vendor, and on a re-sale by him may exercise the right of termination by giving proper notice.

[21 Rev. Leg. 96, affirmed.]

Statement.

APPEAL from a judgment of the Court of Review, 21 Rev. Leg. 96. Affirmed.

The facts of the case are as follows:—

On March 4, 1907, H. Vineberg leased to one Sharkey, a building on Windsor St., in the City of Montreal, for a term of 5 years from May, 1907, to May, 1912. This lease contained a clause whereby the lessor could cancel the lease by giving 3 months' notice, in writing, to the lessee, on paying an indemnity of $10,000 as liquidated damages. Subsequently, Sharkey transferred to the appellants, F. X. St. Charles & Co. Ltd., all his rights in this lease.

On June 29, 1909, whilst the appellant was in possession of the premises under the lease granted to Sharkey by H. Vineberg, the latter made a new lease of the same property with the appellant for 3 years, to wit: from May 1, 1912, to May 1, 1915. In this lease of June 29 was the following clause:—

> And the lessor will have the right, in the event of the property being sold, to bring the lease to an end at any time, whether during the said term of three years, or afterwards, by giving the lessee three months' notice in writing to that effect.

On June 5, 1911, H. Vineberg sold the property to M. A. Vineberg subject to the aforesaid leases, the vendor subrogating the purchaser in all his rights, privileges and obligations flowing from the lease.

M. Vineberg as a matter of fact, accepted the appellant as its lessee, and accepted unreservedly all payments of rent.

On January 20, 1913, M. A. Vineberg resold the property to Friedman and Workman, the respondents herein, and these parties were subrogated in all the rights, privileges and obligations of the lease of June 29, 1909.

On the same date, M. Vineberg, wrote the appellant notifying

it of the sale of the property to the respondents, and advising it to pay the rent to these parties in the future.

On May 1, 1912, by notarial protest, the appellant was notified of the sale from H. Vineberg to M. Vineberg of June 5, 1911. On the following day a similar protest was served on the appellant on behalf of M A. Vineberg. Notwithstanding these two protests H. Vineberg and M. Vineberg allowed August 3, 1912, to go by without doing anything, and left the appellant in peaceful possession of the property until the institution of this suit in 1913.

On January 29, 1913, H. Vineberg and M. Vineberg, by protest to the appellant, notified it of the sale of January 20, 1913, from M Vineberg to the respondents, and that the lease in question was to be cancelled according to the terms thereof. The respondents themselves gave no notice.

The appellant pleaded that the lease of June 29, 1909, with a clause stipulating cancellation, ought to be registered according to the terms of art. 1663 of the Civil Code; that this had never been done; that the respondents had accepted the appellant as its lessee; and that in any event the notices given were not sufficient in law.

The Superior Court (Dunlop, J.), by judgment of June 16, 1913, maintained the action and declared the lease cancelled.

The appellant inscribed in review, and judgment was rendered on October 21, 1913, unanimously confirming that of the Superior Court (Sir Charles Davidson, C.J., DeLorimier and Greenshields, JJ.) 21 Rev. Leg. (N.S.) 96.

The appellant obtained leave to carry the case before the Supreme Court where the argument was heard during the March term, 1914

Lafleur, K C., and *A. Perrault*, for appellant; *S W. Jacobs*, K C., and *G. C. Papineau-Couture*, for respondents.

SIR CHARLES FITZPATRICK, C.J :—I would dismiss the appeal with costs. Fitzpatrick, C.J.

IDINGTON J. (dissenting):—Harris Vineberg by a writing dated June 29 1909, "let and leased" to appellant the property in question herein for the term of 3 years to be reckoned from May 1, 1912 The appellant happened to be in possession of the premises on the date of this lease but as nothing, so far as I can see, turns upon the terms of that holding, I will avoid the confusion apt to be created by referring thereto. Idington, J.

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The inducement to the making of a lease nearly 3 years ahead of the time from which it was to run would seem to have been that the lessee agreed by this lease "to put up a new front to the stone building on the property according to the plans prepared, to cost at least $2,800, and to have the said improvement done forthwith" failing which the lessor had the right to demand cancellation of this lease.

Nothing unusual appears in this lease save the foregoing and the following clause —

> The lessee will have the right to continue the present lease from year to year after the expiration of the said term, and until the property will be sold, upon the same conditions and for the same rental as hereinbefore mentioned; and during the continuation of this lease, will have the right to bring the lease to a termination at the end of any year; by giving the lessor three months' notice in writing of its intention, as well to continue this lease, as aforesaid of terminating it. Failing such notice at the end of the said term, the lease will continue, and the lessor will have the right, in the event of the property being sold, to bring the lease to an end, at any time, whether during the said term of three years, or afterwards, by giving the lessee three months' notice in writing to that effect.

It is upon the last sentence of this clause that the various questions arising herein must turn.

H. Vineberg sold the property to M. Vineberg on June 15, 1911, over a year before the last sentence of this clause could become operative.

Having regard to the expected expenditure of $2,800 on the erection of a front in 1909, it could hardly be supposed that anyone could conceive of this clause on behalf of the lessor becoming operative before the term began to run. Besides that, the express language used as to bringing the lease to an end is "at any time whether during the said term of 3 years or afterwards." I am, therefore, of the opinion that it never was competent for the lessor to bring the lease to an end by 3 months' notice until after the term had begun to run. Then, by the time the term had begun to run, the original lessor had ceased for nearly a year to have any interest in the matter.

At that time the only person having a right to interfere with the appellant, the tenant was the vendee, M. Vineberg.

According to some notions prevalent in the minds of those concerned and indeed put forward in argument herein it was only the original lessor who could give notice or act in the matter. But such does not seem to me to be a position either in accord with

the law when viewed historically or with the construction of this lease.

What has to be borne in mind is that it was originally the law that the vendee upon the sale taking place had the right to enter as a matter of course. It was for him to determine whether or not he should avail himself of this right. There was nothing binding him to do so. It might be for his advantage to continue the lease.

It is not necessary for our present purpose to define accurately the relative rights of such parties, which varied in many cases by custom and otherwise.

All I am concerned with here is to indicate the general nature of the relation which was existent before the code, in order to appreciate the term of the word "lessor" in this lease and also the provisions of the code which modified the relative rights of the landlord and tenant in such cases as sale by a lessor.

Now, in this case I may observe that the term "lessor" is used throughout the lease in relation to a number of things to be enjoyed by him as well as in the clause above quoted, and I see not the slightest reason to construe it in one sense in one place and in another sense in other places. It means the owner who is landlord for the time being in relation to any of the other things to be done or submitted to.

It cannot therefore be construed as meaning only the original landlord who may have died or disappeared. Hence I think H. Vineberg had nothing to do with what M. Vineberg or any succeeding landlord might do or wish to be done.

From this it seems to me that M. Vineberg had the right to give the notice which he gave on May 2, 1912, declaring the lease terminated in August following and in the language of the clause in question "to bring the lease to an end." The only condition precedent to his doing so was that there must have been a sale and that sale having taken place gave this vendee that right which he exercised at the earliest possible moment specified in the instrument. Supposing the sale had taken place only a week before or the same day, he was the man to declare his intention and right and what difference can it make that the sale had taken place a year before? There must be some lapse of time long or short between the sale and the declaration of the vendee's intention.

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I was, at first blush, inclined to think that only a sale within the term might be effective, but I do not think that view is tenable. Let us observe the provision binding the appellant, the lessee, to erect the new front in 1909, and the condition therein contained that in default "the lessor" could demand the cancellation of this lease, and ask ourselves what would have been the rights of M. Vineberg in relation thereto in case of default had he purchased in 1909 soon after the execution of the lease.

Can there be a doubt that he would have had on such default the right in 1909 before the term had begun to run to insist upon the cancellation of the lease?

It seems to me there could not, and that illustrates the position of these parties in relation to each other at any time after M. Vineberg became the landlord. By one term of it, cancellation could have been insisted on by him before the term, or after for that matter, but by another term it clearly was not intended such a thing as termination upon notice was to take place until another time which must occur within the term.

Then it was argued that he had become bound by the deed to him to maintain the leases when subsisting as if that forbade him or his successor giving notice to terminate.

But the provision is only "to maintain the leases of the premises now subsisting *until the due termination of the same under the provisions thereof.*" And the question simply is whether or not the notice given on May 2 was a due termination thereof. I think it was, and there the matter should end, but for what transpired later. It may well be that the parties in truth intended something else but if I understand English they have not so expressed it.

It seems nothing more was said. The appellant stayed in possession, paid monthly the rent to M. Vineberg till January following. Five months' rent was thus paid and accepted after the lease had effectually been brought "to an end" in the terse language of the term providing therefor.

What right has anyone to say that it was restored? There was absolutely nothing in the conduct of the parties from which to imply a waiver of the notice. There simply arose as between them that relation which the law implies from the actual condition of things when a lease is at an end. It was not argued that

this was a "*tacite réconduction*," and probably to do so would not have helped in any view of this case.

I shall presently revert to the legal situation thus created in light of the provisions of the code. M. Vineberg sold the premises in question to respondents on January 20, 1913, and conveyed same to them by notarial deed of that date. And then on the same day served on appellant written notice of said sale requesting it to pay its rent in future to the respondents "as I have nothing more to do with the rents."

In the vendor's declarations contained in the said deed is the following clause:—

(4) That he hereby transfers to the said purchasers the rental of said premises as and from the date hereof hereby subrogating and substituting them in all his rights under the lease of said premises.

This is followed by the following provision under the caption "Possession":—

The purchasers will be the absolute owners of said property with immediate possession, subject to the existing lease which, however, the vendor undertakes to cancel not later than the first of May next, and have the present tenant vacate on or before that date.

Under such facts and circumstances the said H. Vineberg and M. Vineberg on January 29, 1913, gave notice, as if given pursuant to the clause above quoted from the lease, to the appellant to quit on May 1, then next. It is upon such notice that this action is founded.

This action was begun on May 5 following. The appellant tenant proceeded to pay the rent monthly as it had been requested to the respondents, getting receipts from them which made no reference to the notice to quit or recognized it in any way. The notice to quit contained the following —

That by deed of sale passed on the day of January instant the said Moses Vineberg sold and transferred the said property to Charles Workman and David S. Friedman.

This reference to deed of sale probably refers to the deed of January 20, but does not so expressly state for no date is given but "on the day of January instant." And in terms it is otherwise inaccurate in referring thereto for that deed only contained the provision above quoted as to cancellation of the lease which might have bound the grantors to procure it in various other ways.

The provision is treated as if the respondents had been empowered thereby to give notice as agents of the vendors or as if

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the vendors had been authorized to give notice in name and on behalf of the vendees.

I assume it might have been quite competent for the vendor and vendees to have had the vendor constituted as between them the vendees' agents to use the name of the vendees or that of the vendors and vendees in giving notice, and to have provided for the vendor assuming the burden of the expense of giving proper notice and all that was needed to possession. But it has not expressly done so, and, with deference I submit, has not impliedly done so.

It is quite obvious the parties concerned had some such notion as I have already adverted to, that the notice had to be given in the name of the vendors who were no longer lessors and did not fall within the terms of the clause enabling the lessor to give notice in writing to put the lease at an end.

I have already given my reasons for thinking that it is only the actual lessor at the time who can under this lease give notice. Such is the express term of the provision and it seems, I respectfully submit, a perversion of the language used to try and make it express something else.

Besides that, the tenant is entitled to have in black and white what his landlord demands and to know exactly with whom he is dealing and to have the lessor (*i. e.*, the actual landlord) clearly bound to abide by what is profferred.

If, by May 1, the advantages of the situation had been reversed so that the respondents did not wish to eject the tenant and the appellant did not wish to continue tenant, how could it have availed itself of this notice as an answer to the continuation of the tenancy?

Though holding the opinion that H. Vineberg had after his conveyance to M. Vineberg no longer power to give notice, yet I can conceive of an interpretation of this peculiar contract which intended that the clause for termination was only to become operative by him and in his name in the event of a sale by him, and upon any such hypothesis he carefully eliminated himself and his personal power by the express stipulation that the leases were to be maintained by his vendee to whom he transmitted such rights as he had and reserved nothing for himself.

I think this notice was void and even the institution of this action cannot give it vitality. But the many complications of

this maze of going the wrong way about a very simple business are not yet ended. The situation created by the first notice and what ensued thereupon after August 2, has to be viewed in light of the obvious fact that thenceforward from that date the appellant held on sufferance.

To that situation art. 1608 of the Civil Code may apply. But if we have regard to the acts of the parties they seem to have created a situation in which art. 1642 is applicable and a monthly tenancy is to follow. In either case art. 1657 is made applicable and no notice in accord therewith has ever been given.

It is answered that the notice of January is sufficient. I reply again there was no notice by the landlord at all; and that a landlord entitled to give a monthly notice cannot give one unsuitable to the tenancy and which would not bind both himself and the tenant. It is a notice that both can rely upon which the law requires if confusion is to be avoided.

Lastly, we have, if what I have said regarding the termination in August or otherwise is unfounded, the express language of art. 1663, as follows:—

1663. The lessee cannot, by reason of the alienation of the thing leased, be expelled before the expiration of the lease, by a person who becomes owner of the thing leased under a title derived from the lessor; unless the lease contains a special stipulation to that effect and be registered.

In such case notice must be given to the lessee according to the rules contained in art. 1657 and the articles therein referred to; unless it is otherwise specially agreed.

I am unable to see why this very clear and express language is to be changed or discarded. With that accepted, there is a complete answer to the respondents' contention in any way it can be presented as there does not seem to have been registration of this lease.

With great respect, I cannot think that there is anything which renders it necessary to import art. 2128 into the discussion. That was adopted for the very obvious reasons assigned, and finds its proper place under the title 18 of the Code which is devoted to the registration of real rights and has its analogy in, I suppose, all of such systems of registration.

This art. 1663 is found in another place where the subjects of lease and hire dealt with are of an entirely different character.

I see no inconsistency and there is much that is cogently put

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forward in the argument of Mr. Lafleur to show that the ground taken in the judgment of DeLorimier, J., is not satisfactory.

I think the appeal should be allowed with costs.

DUFF, J., agreed that the appeal should be dismissed.

ANGLIN, J. (dissenting):—For the reasons stated at some length by DeLorimier, J., in upholding the validity of the notice given on behalf of M. Vineberg on May 2, 1912, I agree in his view that the right to terminate the lease in question was not personal to the original lessor, H. Vineberg, but passed with the ownership of the property first to M. Vineberg and afterwards to the plaintiffs, who became, each in turn, the "lessor" within the meaning of that term as used in the clause of the lease providing for resiliation. But I incline to think that the notice of May, 1912, was ineffectual because it was given in respect of a sale which had taken place 11 months before the term of the lease began and before the notice itself was given. The resiliatory clause provides that the lessor may terminate the lease "in the event of the property being sold—at any time, whether during the said term of 3 years or afterwards," by giving notice, etc. The notice could only be given during the term or afterwards. M. Vineberg recognized that to be the case and therefore deferred giving notice in respect of the sale of June 5, 1911, until May 2, 1912. It cannot have been in contemplation of the parties to the lease that the lessee should be kept in uncertainty for 11 months whether the landlord intended to exercise his option to cancel or meant to continue the lease. It was, I think, the clear intent that the option should be exercisable only at the time of the sale—a reasonable delay being allowable for the giving of notice. The fact that the notice could be given only during or after the 3 year term affords a strong indication that it could not be given at all in respect of a sale which took place before the commencement of the term.

But, if I should be mistaken in thinking that the notice of May 2, 1912, was never effectual, I agree with the Court of Review that it was waived and the lease continued by mutual consent. The plaintiffs recognized it as subsisting on January 20, 1913, by the very deed which they put in evidence to establish their title, and by the notarial notice of January 29, 1913, on which they also rely. The defendants plead that it is still in

force. As put by the respondents themselves in their factum:—"The notices of May, 1912, are of little importance as nothing was done in furtherance thereof and the appellant was allowed to continue its occupation until the sale to the present respondents." On the whole evidence I am satisfied that after August 3, 1912, the occupation of the defendants was not under a tacit renewal (art. 1609 C.C.), or under a tenancy by sufferance (art. 1608 C.C.) There was a waiver of the notice and a continuance of the 3 years' lease by mutual consent.

Applying the reasoning of DeLorimier, J., as to the rights of the purchaser under the clauses of the lease which provides for its resiliation, on the sale from M. Vineberg to the present plaintiffs, they became the lessors of the defendants and entitled to cancel the lease under that clause. The right to give the notice only arose on the sale, by which full ownership was vested in the purchasers. On the very day of conveyance, January 20, 1913, M. Vineberg notified the defendants of the sale and of the subrogation of the plaintiffs to his rights as landlord. Thereafter his status as landlord or lessor to the defendants was completely at an end. Assuming that the notarial notice of January 29, 1913 was in time and otherwise sufficient (it abounds in mistakes and misrecitals) in my opinion it could not be lawfully given by or on behalf of M. Vineberg but could be so given only by or on behalf of the plaintiffs, who were then the lessors. The notice does not purport to be given on behalf of the plaintiffs and there is nothing in evidence to shew that M. Vineberg had any power or authority to give a notice on their behalf. On the contrary, the special clause as to possession in the deed from M. Vineberg to the plaintiffs, above quoted, is an undertaking by the former on his own account to cancel the lease and to have the tenant vacate the premises. I cannot regard the notarial notice of January 29, 1913, as something done by Vineberg on the plaintiffs' behalf which they might ratify and adopt and thus obtain the benefit of. On his own behalf, M. Vineberg had not the right to give the notice. His undertaking to cancel the lease and secure possession of the premises for the plaintiffs did not empower him to exercise rights which had passed to them and for any abuse of which they would be accountable. Harris Vineberg's right had ceased on June 5, 1911.

But, if the notice of January 29 could be deemed an exercise

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of the right of resiliation conferred by the lease, I would regard art. 1663 C.C. as presenting a fatal obstacle to its efficacy.

The requirement of registration in this article is, no doubt, difficult to understand. But the text is explicit and I am, with great respect, unable to restrict its application in the case of immoveables to leases for a term not exceeding 1 year, as De-Lorimier, J., thinks should be done. (See Mignault, Droit Civil, Can., vol. 7, p. 357.) The reference in paragraph 2 of the article to "art. 1657 and the articles therein referred to" was relied upon at bar as indicating that the application of art. 1663 should be so restricted, because, it was said art. 1657 and the articles therein referred to, deal only with leases for 1 year or less. But, on reference to art. 1657, it will be seen that it deals with leases where the term is uncertain, or where the lease is verbal, whatever its duration. Sir Francois Langelier, C.J., in his "Cours de Droit Civil," vol. 5, at p. 239, discussing art. 1663, says:—

C'est par erreur que les rédacteurs de notre code ont exigé cet enregistrement; il n'y avait aucune raison de la faire.

This view of the learned commentator may be correct. Mignault says in his valuable work, vol. 7, at p. 356, "Il y a une contradiction du moins apparente, entre les articles 1663 et 2128." The latter article is as follows:—

2128. The lease of an immoveable for a period exceeding one year cannot be invoked against a subsequent purchaser unless it has been registered.

Explicit as is the text of this article, that of art. 1663 is equally so. I cannot find any satisfactory ground for holding that one must yield to the other, or that art. 1663 should receive a construction which will confine its operation to leases not within art. 2128. To so restrict its application would be to introduce into the article a qualification which there is nothing in the text to justify. As put by Mignault, at p. 357 of vol. 7 of this work:—

Dans ce cas, l'article 1663 est une disposition inutile, puisque le tiers-acquéreur ne saurait avoir plus de droits que son auteur, le bailleur, et que celui—ci n'aurait pu expulser le locataire sous un bail annuel avant l'expiration de l'année.

It was by art. 1663 that the purchaser's right to expel his vendor's tenant, recognized in the old jurisprudence, was done away with. If art. 1663 applies in the case of immoveables only to leases for terms not exceeding 1 year, does the old right of expulsion still exist in regard to other leases? Was it the purpose

of art. 2128 to extinguish that right? In their report the codifiers tell us that by the adoption of art. 1663 leases became charges on immoveables and, like other charges, should be subjected to the publicity of registration. Hence, they say the introduction of art. 2128. The statement is scarcely intelligible if the leases dealt with in art. 2128 are not covered or affected by art. 1663, since on that assumption, they do not become charges on the immoveables leased and the reason assigned for requiring their registration does not exist.

The more art. 1663 is considered, the more apparent does it seem to be that its application cannot be restricted to leases for one year or less.

The contradiction between art. 1663 and art. 2128 is only apparent. Both may be given full effect although they do, no doubt, partly overlap. One makes registration a condition of the exercise of the right of resiliation by those claiming under the the lessor; the other makes it a condition of the lessee and his assigns or sub-tenants claiming the protection of a lease for more than 1 year as against a transferee of the lessor's title, apart from any contractual provision requiring him to respect or maintain it. *McGee* v. *Larochelle*, 17 Q.L.R. 212, 216.

It may be, as Mr. Mignault suggests in his note at the foot of p. 356, that the legislature in enacting art. 1663 had in mind the protection of assigns and sub-tenants of the lessee and inadvertently made use of language broad enough to cover the lessee himself; it may be, as Sir Francois Langelier says, that the provision requiring registration was inserted in art. 1663 by mistake. But we may not on mere surmise deny to the lessee the advantage to which the plain and unambiguous words of the article entitle him.

In the present case art. 2128 C.C. cannot be successfully invoked by the plaintiffs. In the first place they do not in their declaration rest their case on that article. No reference is made to the non-registration of the defendant's lease. On the contrary, they treat the lease as subsisting and binding on them and they claim relief not against it, but under it. Nor could they have done otherwise, because, by the deed on which they base their title and claim to possession, they expressly took "subject to the existing lease" and had themselves subrogated and sub-

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stituted to all the rights of their grantors under that lease. While mere notice or knowledge of the lease before they acquired title would not prevent the plaintiffs taking advantage of its non-registration (art. 2085 C.C.), having taken their title expressly subject to it, they cannot invoke art. 2128 C.C. against it. They cannot thus escape from their express assumption of it. *Dunn* v. *Wiggins*, 4 Dorion's C.A., 89. For these reasons I would, with the most profound respect, allow this appeal with costs in this Court and in the Court of Review and would direct judgment dismissing the action with costs.

Brodeur, J.

BRODEUR, J.:—This is an action in ejectment against a lessee by a subsequent purchaser. The action was maintained by the Superior Court, and the Court of Review confirmed this judgment. The defendant has appealed from the decision of the Court of Review. As there is no mention in the appellant's factum of certain points raised in the Courts below, I take it for granted that these are abandoned. I shall, therefore, only refer to the questions discussed in the written and oral arguments made before this Court.

The 3 points urged by the appellant are:—(1) The subsequent proprie or had no right to eject the lessee inasmuch as the lease was not registered according to the requirements of art. 1663. (2) The privilege of cancellation stipulated in the lease was a personal one and could only be exercised by the original lessor. (3) The notices of cancellation required by law and by the agreement were not given.

1. The lease is made in authentic form and covers a period of 3 years. It has not been registered. It contains a stipulation that the lessor may cancel the lease in the event of the property being sold. The subsequent purchaser relying on this covenant prays for the ejectment of the appellant, but the latter answers, "You cannot have me ejected because the lease is not registered." And it invokes the terms of art. 1663 C.C.

The contention of the appellant on this point is unfounded. Lack of registration of a lease could only be invoked by the subsequent purchaser, and not by the lessee. Registration is required for the protection of third parties. This is the underlying principal of the system of registration. The registration of a lease is required in order that it may be exposed to the subsequent purchaser. But if the lease has not been registered, there

is nothing to prevent the third party from availing himself of the cancellation clause stipulated therein, and demanding the ejectment of the lessee.

Cursory examination of the legislation on this subject carries conviction on this point. Under the Roman law, by virtue of the *lex emptorem*, the lease only created a personal relationship between the lessor and the lessee; it only created personal obligations and a new owner could eject the lessee. The contract of lease came to an end by the sale which the owner made of the thing leased.

The Roman law on this point obtained in France until the Code Napoleon, and in the Province of Quebec until the Civil Code. The old French law and the Canadian law, however, although maintaining the right of the subsequent purchaser to eject, compelled him to allow the lessee to continue his enjoyment during the current year. He could not eject him immediately. Pothier. Louage, No. 297; Troplong. Louage, No. 505.

The Code Napoleon adopted a different rule from that of the Roman law and enacted that the sale of the thing leased did not necessarily end the lease, but on the condition that the lease be an authentic one or have a date certain; or unless the lessor had reserved unto himself the right of cancellation. Art. 1743 of the Code Napoleon lays down this rule in the following terms:—

Si le bailleur vend la chose louée, l'acquéreur ne peut expulser le fermier ou le locataire qui a un bail authentique ou dont la date est certaine, à moins qu'il ne se soit réservé ce droit par le contrat de bail.

When the codifiers presented their report on February 20, 1863, they recommended the adoption of the rule of the C.N., but the article which was suggested by them, differed from the art. 1743.

But the article which they suggested differed in the terminology, and by the omission of the words restricting the rule to leases in writing and having a date certain. "This restriction" they add "appears useless." The method of ascertaining the true date should be left subject to the operation of the general principles of evidence. It is most important to read the article which the codifiers then submitted, for therein we find the solution of the apparent contradiction between the terms of art. 1663 and 2128. Here is the article as originally drafted:—

The lessee cannot, by reason of the alienation of the thing leased, be expelled before the expiration of the lease by a person who becomes owner

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of the thing leased under a title derived from the lessor, unless the lease contains a stipulationn to that effect.

(Report of the codifiers, ed. 1863, vol. 2, p. 96.) There is no mention at all of registration of the lease.

In their subsequent report of July 1, 1864, on registration, the codifiers, after stating that under the title of lease they had suggested that the sale of property should no longer end a lease, added:—

L'adoption de cette disposition ferait du bail une charge sur l'immeuble qu'on doit soumettre, comme toute autre charge, à la publicité.

Il est donc suggéré d'amender l'article 39a en étendant la règle à tout bail pour un terme excédant un an.

And they proposed the following amendment, which was adopted and became the text of our Civil Code, art. 2128:—

The lease of an immoveable for a period exceeding one year cannot be invoked against a subsequent purchaser unless it has been registered.

In the 2nd edition of their report published in 1865 we find the codifiers make the same observations on art. 1663, that is to say—that the sale did not necessarily terminate the lease, but that it was not expedient to adopt the rule of the C.N. requiring an authentic lease. (Report of codifiers vol. 2, 2nd ed., 1865, p. 29). But when we open this very same volume at p. 92, we find that 3 words have been added to the text of the article giving it a sense contrary to that which the codifiers propose. These words deal with the registration of the lease, so that the article there reads:—

The lessee cannot, by reason of the alienation of the thing leased, be expelled before the expiration of the lease by a person who becomes owner of the thing leased under a title derived from the lessor, unless the lease contains a stipulation to that effect and be registered.

How have these 3 words slipped in? I have been unable to find out. Is it a printer's error? Possibly. For with this addition the article no longer reproduces the intention of the codifiers as expressed in their report.

And, furthermore, this article seems irreconcilable with art. 2128 which deals with the same matter under the title of Registration. The codifiers, as is well known, after the submission of their first 7 reports on the different parts of the Civil Code, had prepared, on November 21, 1864, a supplementary report to explain certain corrections which they wanted to make, and this is what they stated at the beginning of their supplementary report:—

Les Commissaires, ayant terminé leurs travaux en tant que le Code Civil est concerné, auraient regardé ce travail comme imparfait s'ils ne l'eussent revisé en entier et avec soin, dans le but de faire au texte imprimé et soumis successivement de temps à autre les changements et additions nécessaires. . .

Le texte de ces changements proposés se trouve ci-après dans l'ordre qui devra être finalement donné aux livres et aux titres du code.

Now, if we examine the changes made under the title of lease nothing appears concerning art. 1663 which then bore in their report No. 56. So we may very reasonably conclude that this reference to registration under art. 1663 is due to an error.

Our commentators, Mignault and Langelier, find this article very unsatisfactory. It would appear that the difference between the original text and the last text which I have just pointed out is unknown to them, at least they do not mention it in their works. This is not surprising, as the first edition of their report is very little known. This edition is not to be found in the Parliamentary Library at Ottawa, and the Supreme Court has only recently been able to obtain it after a great deal of trouble, but it now possesses a copy which seems to have belonged to Beaudry, J., one of the codifiers.

But art. 1663 has found its way into the Code with these 3 words added, and we must interpret and conciliate these dispositions, if possible, with the other dispositions of the law and especially with art. 2128.

When we read art. 1663 literally, we find that the lessee cannot be expelled by a subsequent purchaser unless the lease contains a stipulation to that effect, and unless it be registered.

Does this mean that if the lease does not contain a stipulation of expulsion in the event of sale, the lessor will be unable to expel the lessee? Certainly not. The lessee is entitled to remain in the property unless there be a clause allowing him to be expelled. This clause is stipulated in the interest of the proprietor, and if there is no such clause in the lease, then the subsequent purchaser cannot expel the lessee immediately.

As this clause is stipulated in favour of the proprietor, the latter alone can avail himself thereof. This is the teaching of Beaudry-Lacantinerie in the first volume of his Traité du Louage, No. 1296, where he says:—

Lorsque le bail contient la réserve du droit d'expulser le preneur au cas de vente, la clause ne peut être invoquée que par l'acquéreur; elle ne peut pas l'être par le preneur.

The same principle must apply as regards registration. Only

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the new proprietor can avail himself of the lack of registration of the lease.

At the argument, counsel for appellant wished the Court to interpret art. 1663 according to its purely grammatical and literal sense.

I prefer to interpret this art. according to the general principles of our Code, and in so doing, follow the opinion of Mr. de Chassat, Interprétation des Lois, p. 101, where he says:—

L'interprétation grammaticale et l'interprétation logique étant admises, quelle est celles des deux qui, dans le doute, doit l'emporter?

Lorsqu'elles concourent pour nous retracer les mêmes objets, la solution est facile; le sens naturel des mots étant aussi la pensée de la loi, il suffit à l'esprit d'en obtenir la certitude. Mais lorsqu'elles ne concourent pas, quelle est celle des deux qui est obligatoire pour le juge? Il est évident que les mots ne font pas le droit; c'est la volonté du législateur; les mots ne servent qu'à les manifester: *Non enim lex est quod scriptum est, sed quod legislator voluit, quod judicio suo probavit et recepit.*

L. de quibus ff. de legibus. Toutes les fois donc qu'il y aura une différence entre le sens des mots et la pensée du législateur, il faudra abandonner les mots, puisque ce n'est pas là qu'est le droit. De là obligation pour le juge de rechercher le vrai sens de la loi.

Whether these 3 words of art. 1663 are the result of an error, or whether it was intended thereby to enunciate the rule of the C.N. as regards authenticity, I am of opinion that the dispositions of art. 2128 must prevail over those of art. 1663 and that we must *solely decide that in the case of the lease of immoveable property for one year the subsequent purchaser is obliged to respect the lease; but that if the lease is for a period of more than 1 year, then it can only be invoked against the subsequent purchaser if it is registered.*

The appellant, therefore, fails in its first argument. The learned and elaborate opinion of DeLorimier, J., who pronounced the judgment of the Court of Review, is well founded.

2. Is the right to demand the cancellation of the lease personal to the owner who granted the lease?

This is the second question submitted by the appellant which contends that the right is one personal to the original lessor, that is to say to Harris Vineberg. The lease contains the following clause:—

The lessor will have the right, in the event of the property being sold, to bring the lease to an end at any time, whether during the said term of 3 years or afterwards, by giving the lessee 3 months' notice in writing to that effect.

It has been argued that the words "at any time," in this clause, gave the lessor the right to bring the lease to an end at

any time after the sale; that he could allow 6 months, a year or more to elapse after he had sold the property and then give notice of cancellation.

I agree with the appellant that these words "at any time" refer to the event of the sale of the property by the owner either during the 3 years of the lease or subsequently. But I cannot agree with the proposition that the original lessor alone can exercise this privilege of cancelling the lease, and that he cannot in the event of sale transfer this privilege to the new purchaser. The authorities all agree that the rights stipulated in the lease pass to the subsequent purchaser if he desires to continue the lease. Laurent, vol. 25, No. 395.

When H. Vineberg, on June 5, 1911, sold to M. Vineberg, he could perfectly well stipulate cancellation of the lease with the buyer. But on the contrary, it was declared in the deed of sale that the purchaser obliged himself "to maintain the leases of the said premises now subsisting until the due termination of the same under the provisions thereof." Therefore the rights and obligations flowing from the lease at issue in this case became vested in the purchaser and from that moment M. Vineberg became the creditor of the right to put an end to the lease should he not in turn sell the property.

3. The appellant contends that the notices required by law in the agreement were not given.

As I have already stated, when M. Vineberg became owner of the property, he became owner of all the rights and privileges of his vendor; as a result he could cancel the lease whenever he sold.

On January 20, 1913, he did sell to the respondents Friedman and Workman, and in the deed of sale it was stipulated that the lease should come to an end, and this in the following terms:—

> The purchasers will be the absolute owners of the said property with immediate possession, subject to the existing lease, which, however, the vendor undertakes to cancel not later than the 1st of May next, and have the present tenant vacate on or before that date.

The new purchasers would have been perfectly entitled to proceed themselves to the resiliation of the lease; but they preferred to have it a condition of their purchase that this should be done by their vendor. They were quite ready, I presume, to acquire the immovable and to pay the high price agreed upon but on condition that the lease should disappear.

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The vendor had represented that the lease could be terminated and so assumed the task of bringing it to an end between the date of the sale and May 1, 1913. Besides, this covenant was absolutely in accordance with the lease which had stipulated that in event of sale the lessor could bring the lease to an end.

The lease, however, was to continue until May 1. It could not be brought to an end before that date as the lease required a notice of 3 months. So M. Vineberg, the original lessor, gave notice of cancellation of 3 months to the appellant company by notarial protest. In this protest M. Vineberg alleges the sale made a few days previously to Friedman and Workman, and adds:—

> That it is one of the conditions of the said sale that the said F. X. St. Charles & Co. Limited, the tenant of the said property, will by notification be obliged to vacate the same under the terms of the said lease.

In giving this notice it is quite evident that H. Vineberg and M. Vineberg acted just as much in their own interest as in that of the new purchasers. There is no doubt but that the intention of all the lessors, past and present, was to bring the lease to an end. The appellant, therefore, cannot successfully contend that notice of the termination of the lease was not duly given. For all these reasons, the appeal should be dismissed with costs.

Appeal dismissed.

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KUUSISTO v. CITY OF PORT ARTHUR.

Ontario Supreme Court, Clute, J. May 17, 1916.

1. STREET RAILWAYS (§ III B—26)—PROTRUDING RAILS—COLLISION WITH AUTOMOBILE—MUNICIPALITY.
   A municipal corporation operating a street railway is liable for a collision of a street car with an automobile which had become stalled owing to rails protruding at a highway crossing.
2. LIMITATION OF ACTION (§ II H—70)—MUNICIPAL STREET RAILWAY—NEGLIGENT CONSTRUCTION AND OPERATION.
   The limitations of time for bringing actions against a municipality for its negligent construction or operation of a street railway, are governed by the Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 265; and the Municipal Act, R.S.O. 1914, ch. 92, the Public Utilities Act, R.S.O. 1914, ch. 204, and the Public Authorities Protection Act, R.S.O. 1914, ch. 89, have no application in this respect.
3. MUNICIPAL CORPORATIONS (§ III G 5—260)—NOTICE OF ACTION—SUFFICIENCY.
   Claiming damages against a municipality "for smashing plaintiff's automobile by car No. 46 on Cumberland St. North this morning" is a sufficient notice of action, if any be necessary.

Statement.

ACTION for damages for injury caused to the plaintiff's automobile by its being run into while stalled upon a highway by a car of the Port Arthur and Fort William Electric Railway, owned

by the defendant city corporation and operated or managed by the defendant commission.

W. F. Langworthy, K.C., for the defendants.

CLUTE, J.:—The plaintiff has a repair-shop and runs automobiles for hire in the city of Port Arthur; the Corporation of the City of Port Arthur owns the Port Arthur and Fort William Electric Railway, with its track on Cumberland street. Cumberland street is crossed by Stevens street.

On the day in question, the plaintiff, driving his own car with three other occupants, passed easterly down Cumberland street on the southerly or lake side of the track. On approaching Stevens street, he turned the car still further to the south to give him room to make the turn on Stevens street at the crossing. The front wheels of the car passed over the south rail, but were unable to pass over the north rail. Thereupon, the plaintiff attempting to increase the power of his motor, his car became stalled, and the defendants' car ran into and smashed the motor-car while it was so stalled.

The plaintiff charges that the injuries were occasioned by the negligence of the defendants: (a) in not having the space between the rails on the said tracks filled in so as to make the same safe for automobiles and other vehicles crossing them; (b) the lack of a proper system in handling its cars by the defendants in approaching the street crossing, especially in the unsafe condition of the one in question; (c) that the car in question was being run at a great speed and was not under proper or sufficient control; (d) the improper and negligent running of the car.

I find that the crossing formed by the junction of Cumberland and Stevens streets, at the time of the accident, did not have the space between the rails on the said track filled in so as to make the same reasonably safe for automobiles and other vehicles crossing them; but, on the contrary, there was no covering above the ties, nor was it filled in between the ties to the top of the ties at the crossing. I find that at the crossing there was a space unfilled, both between the rails and on the outside of the rails, of from four to five inches, and that this space never had been properly filled in, and that in this respect there was negligence in the construction. I find that the defendants' car was running, at the time of the collision, at from fifteen to eighteen miles an

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hour, and that this was a dangerous speed at the place and on the occasion in question. I further find that the motor-car would have passed over safely had the crossing been in a reasonably safe and proper condition. I find that the plaintiff was a competent, careful driver, and not guilty of contributory negligence on the occasion in question. I find that the defendants were guilty of negligence that caused the accident, and assess the damages at $650.

It was hardly contended by the defendants' counsel that the crossing was in a safe condition. The principal defence was rested upon the want of sufficient notice, and that the action was brought too late.

The notice of action given by the plaintiff's solicitor on the 3rd June, 1914, is as follows:—

"To The Corporation of the City of Port Arthur.

"Gentlemen: I am instructed by Messrs. Kuusisto & Sunberg to claim damages from you for the smashing of their automobile by car number 46 on Cumberland street north this morning. I am writing you at this early date so that you may have notice of the claim to be in a position to institute the necessary inquiries. "John Reeve."

To this the following reply was sent:— "June 17th, 1914.

"Dear Sir: In further reference to yours of June 3rd regarding claim of Kuusisto & Sunberg, we have had a report of this from the street railway department, and find that there was no negligence on the part of the employees, and therefore cannot consider your claim. "J. J. Hackney, Commissioner Utilities."

It is evident that the notice was sufficient to identify the time, place, and occasion, and the street car which it is complained caused the injury. The defendants evidently understood its full import, promptly made inquiry, took the position that they were not guilty of negligence, and refused settlement. In my opinion, the notice was sufficient under the statute, if notice be necessary.

The principal defence is that the action is not brought in time. The accident occurred on the 3rd June, 1914, and the writ was issued on the 24th April, 1915. It is contended (1) that, the action having been brought against the municipal corporation, it is barred by sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, sub-sec. 2 of which provides that no action shall be brought

against a corporation for the recovery of damages occasioned by *such default* (that is, want of repair), whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained. (2) That the Public Utilities Act, R.S.O. 1914, ch. 204, applies to this case, and, the action not having been brought within six months, the claim is barred under sec. 29 of the Act, the Act having been passed in 1913. (3) That the Public Authorities Protection Act, R.S.O. 1914, ch. 89, also applies to this action, which is barred by sec. 13, which provides that no action, prosecution, or other proceeding shall lie against any person for an act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such statute duty or authority, unless it is commenced within six months next after the act, etc., complained of, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

The plaintiff contends that these statutes have no application to the present case, and that the Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 265, governs. The limitation provided in this section is that any action (subject to certain exceptions which do not affect the case) for damages sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases. Sub-section 3 declares that the company is not relieved from responsibility by inspection etc. "for anything done or omitted to be done by such company, of for any wrongful act, neglect or default, misfeasance, malfeasance or nonfeasance, of such company." This section is taken from the Railway Act of Canada, R.S.C. 1906, ch. 37, sec. 306.

In *Glynn* v. *Niagara Falls*, 15 D.L.R. 426, 29 O.L.R. 517, the defendants, a municipal corporation, owned and operated an electric street lighting plant. The plaintiff, standing in the street, leant against one of the defendants' poles; the back of his head touched a chain suspended on that pole, and he received a shock which seriously injured him. The chain was connected by pulleys with the arc light hung in the middle of the street, and was there fastened, when not in use, by a ring at the end of

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the chain hooked on a spike in the pole. The jury found that the plaintiff was injured because something was wrong in the defendants' line, namely, that the chain was attached to the pole too near the ground; that the defendants had notice of the defect; that it might have been remedied; and that there was no want of care on the part of the plaintiff. It was held that so placing and keeping the chain was misfeasance, and that sec. 460 (2), doing away with the distinction between nonfeasance and misfeasance, was not retroactive and not applicable to the action, which was begun before it came into force. Semble, "that the electric light danger is not a matter within the purview of the Municipal Act in the clauses relating to the liability to repair roads and bridges." Held, also, that the Public Authorities Protection Act of 1911, 1 Geo. V. ch. 22, sec. 17, does not apply to a municipal corporation; and the Public Utilities Act, 1913, 3 & 4 Geo. V. ch. 41, was not in force when the action was begun.

The judgment of the Chancellor was affirmed upon all points (1914), 16 D.L.R. 866, Riddell, J., observing that he is not to be taken to assent to the proposition that either of the Acts would apply in the present case, even if the negligence were after the commencement of the Act.

In my opinion, the three months' limit within which action must be brought, mentioned in sec. 460 of the Municipal Act, has no application to the present case.

Then with reference to the Public Utilities Act. Section 29 provides that "no action shall be brought against any person for anything done in pursuance of this Act, but within six months next after the act committed, or in case there is a continuation of damage, within one year after the original cause of action arose." This action is not brought for anything done in pursuance of the Act. In constructing the road a nuisance was created, which has continued ever since, and this action is for damages for the injury sustained by reason of such improper construction and operation of the railway, and falls, in my opinion, expressly within sec. 265 of the Railway Act, where the limitation for bringing the action is one year.

But it is said that, even if the Public Utilities Act does not apply, the Public Authorities Protection Act, ch. 89, sec. 13, does apply, and that, as this is an action instituted against "a person" for an act done in pursuance or execution or intended

execution of a statute or in respect of neglect or default in the execution of such statute, duty or authority, the six months' limit would apply; and *Parker* v. *London County Council*, [1904] 2 K.B. 501, following *The Ydun*, [1899] P. 236, is relied on. In the *Parker* case it was held that the Public Authorities Protection Act, 1893, extends to county councils or other public authorities in their capacity as owners of a tramway acquired and worked by them under statutory powers, and an action to recover damages for injuries sustained by a passenger on one of their tramcars in consequence of the alleged negligence of their servants must therefore be commenced within six months of the act, neglect, or default complained of. This case was followed in *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K.B. 1, where a municipal corporation constructed and worked an electric tramway under the authority conferred on them by an order made by the Light Railway Commissioners, in pursuance of the Light Railways Act, 1896, and having the force of a statute. A passenger, while travelling, was injured by the fracture of the conducting-rod, which fell upon him. In an action brought for damages it was held that the action was in substance founded on breach of the defendants' duty as a public authority under the Light Railways order, and they were entitled to the protection given by the Public Authorities Protection Act, 1893; and that, as the action had not been brought within six months from the happening of the injury, it must fail, following the two cases referred to.

Are these authorities applicable to the present case? I think not.

By sec. 17, the Act shall not apply to a municipal corporation, and it was upon this ground that the Chancellor, in *Glynn* v. *City of Niagara Falls*, held that the Act did not apply to that case.

The wording of the English Act differs somewhat from our statute, but in substance I think they are the same, except that the Ontario Act expressly declares that it does not apply to a municipal corporation.

The short title to the Act is a key, I think, to its meaning and application. It is true that in sec. 13, where the limitation is mentioned, it is declared that no action, prosecution or other proceeding shall lie or be instituted against any person for any act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or in respect of any

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alleged neglect or default in the execution of any such statute, duty or authority, unless it is commenced within six months next after the act, neglect or default complained of.

The heading to sec. 13 is, "Actions against Public Authorities," and the marginal note is, "An action against a person for any act done under public authority to be begun within six months." I do not find "Public Authorities" mentioned in the other sections of the Act.

In the *Ydun* case, the owners of a barque issued a writ against the defendants (the mayor, aldermen, and burgesses of the borough of Preston, constituted by statute the port and harbour authority for the port and harbour of Preston) for damages sustained by the grounding of their vessel. It was held by the Court of Appeal, affirming the decision of the President, that the defendants were acting in pursuance of their public duties, so that sec. 1 of the Public Authorities Protection Act, 1893, applied. The President delivered a considered judgment, pointing out ([1899] P. at p. 239) "that the language does not in terms refer to a municipal or public authority, the words only are 'any person,' and, limiting one's view to the enacting words of the Act, it is not easy to see why a railway company, for example, a corporation which certainly does acts in pursuance or execution of an Act of Parliament, is not included. This, clearly, however, is not what the Act means, and, as has been pointed out in the case of *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1, in the Court of Appeal, it must be gathered from the short title of the Act, 'The Public Authorities Protection Act, 1893,' that it is only public authorities that come within the purview of the Act. But the question is, Are the public acts of a public authority protected when it is acting in pursuance of trade or business which in private hands would be of a private character? . . . If Parliament decides that a public authority should be so authorised, if it confers on a municipality the right and duty to assume the functions of a trader, it clothes those functions with a public character, and makes them just as much public duties of a public authority as those for the performance of which that authority was created."

It is not necessary to limit one's views to the words of a particular section. The title is now to be read as forming part of the enactment; as was said by Lindley, M.R., in *Fielding* v. *Morley Corporation*, [1899] 1 Ch. at p. 3: "I read the title ad-

visedly, because now, and for some years past, the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the Act, and is so treated in both Houses of Parliament." And Romer, L.J., in *Jeremiah Ambler & Sons Limited* v. *Bradford Corporation*, [1902] 2 Ch. 585, at p. 594, said that "in construing the Act the Court may and ought to look to the general scope of the Act as expressed in its title." And Kekewich, J., in *Attorney-General* v. *Margate Pier and Harbour Co.*, [1900] 1 Ch. 749, at p. 752, held that the title was of supreme importance in indicating the intention of the Legislature and the object aimed at in passing the Act. And, *per* A. L. Smith, M.R., in *Milford Docks Co.* v. *Milford Haven Urban District Council* (1901), 65 J.P. 483, at p. 484: "It shews that the persons whom the Act is intended to protect are public authorities, and public authorities only." "Although the language is wide," said Lindley, M.R., in the *Fielding* case ([1899] 1 Ch. at p. 4), "the key to the enactment is that it is intended, as the title shews, to protect public bodies from expense when they are unsuccessfully sued in respect of acts done, or omitted to be done, in the exercise of statutory powers or duties." And in *The Johannesburg*, [1907] P. 65, at p. 72, Sir Gorell Barnes, President, said: "I think it is clear that the Act relates to public authorities."

What did or did not constitute a public authority within the Act was settled in *Attorney-General* v. *Margate Pier and Harbour Co.* (*supra*), in which it was held that profit-seeking for particular individuals was the test: see Chartres' Public Authorities Protection Act, 1912, pp. 7 to 10.

Applying these authorities to the present case, I am of opinion that the Act does not apply. It has no application to a railway as such, and our Act excludes its application to a municipal corporation. Here the corporation is authorised to own the railway, and, the Act not applying to either the corporation or the railway as such, the fact that the two are included in the one corporate body cannot give it application where it does not apply to either.

The plaintiff is entitled to judgment for $650 with costs of action. *Judgment for plaintiff.*

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HOCHBERGER & SONS v. RITTENBERG.

Quebec King's Bench, Trenholme, Cross, Pelletier, Charbonneau and Mercier, JJ. April 28, 1916.

BILLS AND NOTES (§ III B I—60)—LIABILITY OF INDORSER—FRAUDULENT PREFERENCE.

Where creditors agree to give an extension of time to a debtor upon condition that he give them promissory notes for the debts due them, an indorsement of notes given to one debtor, without the knowledge or consent of the others, to procure his consent to the agreement, is void on grounds of public policy, as constituting a secret advantage over other creditors.

Statement.

APPEAL from the judgment of Dunlop, J., dismissing an action on 7 promissory notes, in the total amount of $3,192.50, signed by one Grossman and indorsed by the defendant. Affirmed.

The plea is that the indorsements of these notes are null and void for the following reasons: S. M. Grossman, of Toronto, being in financial difficulties obtained an extension of time from his creditors. The condition of this agreement was that he would give to each of them his notes for the full amount of his liability, with the right of renewal to the limit of the extension granted. It was also specially stipulated amongst other conditions the following:—

The first party agrees that he will not, during the currency of this extension and until these liabilities are paid off, give any preference or security on any of his assets, no matter where situate, without the consent of the second parties.

The defendant alleges:—

That by ruse and fraud, the plaintiffs obtained from said Grossman the seven promissory notes in question, without the knowledge of the other creditors of said Grossman and without the defendant being informed of same; that the indorsement on said notes constitutes a preference towards the plaintiffs, which is unfair and unjust and not in accordance with the writing above mentioned.

The Superior Court maintained the plea and dismissed the action; and this judgment was affirmed by the majority of the Court of Appeal:—

Considering that the respondent's (defendant's) indorsement of the promissory notes sued on in this action was obtained and taken by the appellants (plaintiffs), in consideration that the latter would join with other creditors of one Grossman in agreeing to and signing an agreement with the said Grossman whereby the latter was given an extension of time in which to pay his creditors;

Considering that the appellants did not disclose to the other creditors who did not stipulate for any security or guarantee the

fact of their having taken the said indorsement, which in fact constituted a secret advantage to them over other creditors taken illegally and in violation of public order;

Considering that the appellants cannot maintain an action upon the endorsement so obtained;

Considering for the reasons aforesaid, that there is no error in the adjudication (*dispositif*) made by the judgment appealed from;

Doth dismiss the appeal and confirm the said adjudication with costs in the Superior Court and in appeal. Mercier, J., dissenting.

Lamothe, Gadbois & Nantel, for appellants; *R. G. de Lorimier*, K.C., for respondent.

CROSS, J.:—The appellants contend that they were not parties to the deed of extension of time granted to Grossman by his principal creditors. Amongst the names of creditors set out in the agreement is that of Eisen. Eisen was appellants' sales agent in Toronto. He did not have authority to bind the appellants to the agreement. But the appellants' own representative, Julius Hochberger, went to Toronto, authorized on their behalf either to take 50c. in the dollar in full settlement or promissory notes for the entire sum due them, but such notes were to be satisfactorily endorsed. He could not get the cash payment. He refused to accept Grossman's notes without indorsements and threatened proceedings. Grossman offered the respondent's indorsement. The appellants agreed to take the notes so indorsed and they received them, whereupon Julius Hochberger signed the extension agreement in the appellant's name. Cross, J.

It is clear, therefore, that the contention that the appellants were not parties to the agreement is unfounded. It is also proved that the consideration of the appellants' signature to the extension agreement was respondent's indorsement of the notes.

Grossman had other creditors besides the four who signed the extension agreement, but as their claims were relatively small and the debts were all to be paid in full, it was decided not to bring them in. The extension agreement was in fact acted upon, and instalments amounting to about thirty per cent. were paid by Grossman in execution of it.

The ground particularly set out in the respondent's plea is that his indorsement was procured by deception and fraud practised upon himself, but he has no defence on that ground. He

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was neither deceived, not defrauded by the appellants. He consented to indorse on being told by Grossman (who was his brother-in-law) that unless he did so, the creditors would not give the extension of time.

The important question which is disclosed in the action is whether or not the respondent's indorsement is void on the ground of public policy, as having been procured by the appellants in execution of an agreement to join with Grossman's creditors in the extension agreement, in consideration of obtaining for themselves a secret advantage over the other creditors.

On this ground, I consider that the appeal fails, and that the action should stand dismissed.

I can see no difference in principle between this case and *Brigham* v. *La Banque Jacques Cartier*, 30 Can. S.C.R. 429; *Kirouac* v. *Maltais*, 18 Que. S.C. 158, is a decision in the same sense. It was insisted upon, for the appellants, that the respondent was a third party, and that it was Grossman himself and not the appellants who had procured him to indorse, but it was pointed out in *Brigham's* case that:—

> Upon a principle well established by the English Courts, such a payment by a third person is just as much a fraud on the general body of creditors as a payment or an agreement to pay by the insolvent debtor himself.

And it was also pointed out that the grounds of the principle so established by the English Courts were equally applicable under the Quebec Code.

The act of creditors in making an arrangement of the kind in question is referred to in Pollock on Contracts, 8th ed., p. 295, as a quasi-judicial proceeding, and the author adds (p. 296):—

> Public policy, therefore, as well as private right, requires that such a proceeding should be conducted with good faith and that no transaction which interferes with equal justice being done therein should be allowed to stand.

Reference might also be made to the decisions cited in support of the propositions in the following extract:—

> Although the additional inducement to the creditor to sign does not come from the debtor himself, but from some third person, it is nevertheless a fraud on the creditors, and the effect on the composition is the same as if the debtor himself had given the inducement.
>
> If the secret agreement is for better security or better terms than the other creditors receive, it is void as if it were for more money. Am. & Eng. Enc. of Law, 2nd ed., vol. 6, p. 396.

I would dismiss the appeal.

Mercier, J.

MERCIER, J., dissented. *Appeal dismissed.*

RIACH v. ELLIOTT.

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Saskatchewan Supreme Court, Newlands, Lamont, Brown and Elwood, JJ. November 18, 1916.

MORATORIUM (§ I—1)—VOLUNTEERS AND RESERVISTS ACT—ACTION FOR POSSESSION OF LAND.

An action by the vendors for possession of lands upon a default by the purchaser under an agreement of sale is not prohibited by the Volunteers and Reservists Act, Sask., Acts 1916, ch. 7.

APPEAL by defendant from a judgment in an action under an agreement of sale for the amount due them thereunder, and in default for cancellation and possession. Statement.

A. A. Fisher, for appellant; *M. McCausland*, for respondents.

The judgment of the Court was delivered by

NEWLANDS, J.:—After the writ was served defendant enlisted as a volunteer for overseas service, and, as such, came under the protection of the Volunteers and Reservists Relief Act, ch. 7 of Acts 1916. Newlands, J.

The plaintiffs thereupon abandoned all other claims, excepting for possession, and, the defendant not having appeared, applied for and obtained, *ex parte*, an order for immediate possession.

The defendant subsequently moved before the master to set aside this order and allow him to enter an appearance on the ground that, being a volunteer, the plaintiffs were not entitled to possession. This application was refused by the master, and an appeal was also refused by the Chief Justice and defendant now appeals to this Court.

The question for us to decide is whether, where an agreement of sale is in default, an action for possession of the lands in question is prohibited by the above Act.

Sec. 3 of said Act provides that no action on an agreement of sale or mortgage shall be commenced against any volunteer during the continuance of the war or for 6 months thereafter, for cancellation, sale or foreclosure, or upon a personal covenant contained in any such instrument.

Sec. 4 provides that in case any such action or other proceeding for foreclosure, sale or judgment already begun, no judgment shall be recovered and no order for sale or foreclosure shall be made.

The words "such an action," in sec. 4, refer to the actions mentioned in sec. 3, *i. e.*, an action on agreement of sale or mortgage for cancellation, sale or foreclosure, or on a personal covenant,

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and the words "no judgment shall be recovered" refers to a judgment for cancellation or on a personal covenant in such an action, sale or foreclosure being expressly provided for.

Now, in an action on a mortgage, possession may be taken by virtue of sec. 93 (2) of the Land Titles Act, where there is a covenant to that effect in the mortgage. This proceeding, however, is not to be considered an action on a personal covenant, as it is expressly provided by sec. 7 of the Volunteers and Reservists Relief Act that the taking possession of lands mortgaged and encumbered and receiving the rents and profits thereof shall not be held to be a proceeding upon a personal covenant within the meaning of sec. 3.

Now, if where there is a covenant in a mortgage under which the mortgagee is entitled to enter into possession, and proceedings under such a covenant are not to be considered a proceeding upon a personal covenant and are, therefore, not forbidden by that Act, how much more should the plaintiffs be allowed to take such proceedings on an agreement of sale, not upon any personal covenant therein, but upon the vendor's common law right to enter into possession on the purchaser's default.

In the first place, I am of the opinion that in this action the claim for possession is not an action on a personal covenant, and is not, therefore, forbidden by the Act, and in the second place, if it was necessary to bring an action on a covenant for possession, sec. 7 shews that it was not the intention of the legislature to forbid such action.

As the defence defendant wishes to set up is no defence, the order for possession should not be set aside so as to allow him to enter an appearance, but this appeal should be dismissed with costs. *Appeal dismissed.*

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BEZANCON v. G.T.P. DEVELOPMENT CO.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. November 3, 1916.

APPEAL (§ III E—94)—CRIM. CODE—SUFFICIENCY OF NOTICE—SERVICE—SIGNATURE—DEPOSIT—LEGAL TENDER.

A notice of appeal from a magistrate's order under the Masters and Servants Ordinance (Alta.) is sufficient, if it sets forth with reasonable certainty the order or conviction appealed from, as required by sec. 750 of the Criminal Code; it need not signify whether the appeal is from the adjudication of the issue or the sentence and penalty. If served on the magistrate and respondents it is immaterial to whom it is addressed. Signature to the notice is not important, nor is an omission of the Judge's name a fatal irregularity. Unless objected to as legal tender, a cheque

which is paid when presented is a sufficient deposit of the adjudged sum required by the section.

STATED case by Crawford, J.

N. D. McLean, for defendant, appellant; *G. E. Winkler*, for complainant, respondent.

The judgment of the Court was delivered by

BECK, J.:—The question submitted being whether the notice of appeal from an order under the Masters and Servants Ordinance made by a magistrate is sufficient in form, and, secondly, whether a deposit with the magistrate fulfilled the requirements of the Code sec. 750, sub-sec. (*a*). I deal with the several objections to the notice of appeal.

(1) That the order appealed from is not sufficiently set out in the notice of appeal.

The notice is intituled:—

In the matter of the Masters and Servants Ordinance and in the matter of a notice of intention to appeal from the order made herein by Percy H. Belcher, one of His Majesty's Justices of the Peace in and for the Province of Alberta, and in the matter between Maurice Bezancon, complainant, respondent, and the G.T.P. Development Co. Ltd., defendant, appellant.

Then the notice proceeds:—

Take notice that, pursuant to the provisions of secs. 749 and 750 of the Can. Crim. Code, being ch. 146 R.S.C. 1906 and amending Acts, the defendant appellant being a party who thinks itself aggrieved by the order made herein by the above mentioned Justice of the Peace hereby gives notice of its intention to appeal and does hereby appeal from the order made by the said Percy H. Belcher and dated October 2, to, etc.

Then follow a number of grounds which quite clearly shew that Bezancon was the servant and the company the master and that the complaint was made by the former against the latter for wages.

Sec. 750 (*b*) requires the notice of appeal to set forth with reasonable certainty the conviction or order appealed from. No form is provided.

I think there was in the notice an abundance of particularity with refe ence to the order appealed from—more than would suffice to fulfil the requirements of reasonable certainty.

(2) It was contended that a conviction or order consists of two parts, the adjudication on the issue and the sentence or penalty and that the notice should signify whether both or only one, and if so which of these two parts is appealed from.

I see no ground for any such contention.

(3) The notice is addressed to the Justice only. The statutory

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provision as it now stands (sec. 750 *b*) requires both the Justice and the respondent to be served. In my opinion a notice of appeal need not be *addressed* to anyone. It is a question only of who is served with it and though addressed to one, that cannot, it seems to me, prevent effective service on another person entitled to notice. This view is contrary to that of the Court *en banc* of the North West Territories in *Keohan* v. *Cook*, 1 Terr. L.R. 125; *Cragg* v. *Lamarsh*, 3 Terr. L.R. 91, 4 Can. Cr. Cas. 246, and in *Hostetter* v. *Thomas*, 4 Terr. L.R. 224, 5 Can. Cr. Cas. 10.

All those cases were decided at a time when the Criminal Code provided a form of notice and the form of notice contained words which indicated that it should be addressed to the parties to be served and this seems to have been the ground of decision as against contrary decisions and in *Cragg* v. *Lamarsh*, Scott, J., then a member of the Court, dissented.

(4) It was contended that the notice being subscribed only with the name of a firm of solicitors, "solicitors for the above-named defendant (appellant)" is insufficient.

I can see nothing in this objection. I would indeed go as far as Charlton, J., in *R.* v. *Bryson*, 10 Can. Cr. Cas. 398, in which he holds signature to the notice to be unnecessary.

(5) By the notice the appeal is to "His Honour Hedley C. Taylor at the sittings of the District Court of the District of Edmonton, to be held at the Court House at the City of Edmonton on Tuesday, October 17, 1916." The notice is intituled "In the District Court of the District of Edmonton." The Code (sec. 749 *f*.) designates the Court as "the District Court at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose."

Omitting the Judge's name, the Court and the sittings thereof were properly designated in the notice in accordance with the foregoing provision and sec. 750 which fixes the particular sittings. Both parties appeared in accordance with the notice at the time and place designated and no suggestion was made by the appellant that his appeal was to a particular Judge but he attempted to enter his appeal before Crawford, J., who chanced to be sitting.

All I can say as to this objection is that it would be scarcely credible that anyone could be misled by the insertion of a par-

ticular Judge's name in the notice, and that at all events the respondent not having been misled in the present case the objection ought not to be given effect to as the notice fulfilled its purpose. I put it on the ground that though there was an irregularity, it did not mislead. In such cases the irregularity I think ought to be disregarded. These are the objections to the notice of appeal. As against them all I think the notice, though very badly drawn, ought to be held sufficient.

There remains the question of the deposit.

Sec. 750 (*c*) in such a case as this requires that "the appellant shall within the time limited for filing the notice of intention to appeal . . . deposit with such Justice an amount sufficient to cover the sum so adjudged to be paid together with such further amount as such Justice deems sufficient to cover the costs of appeal."

The Justice did in fact fix the amount at $221.20. The original notice of appeal has endorsed upon it these words: "Received the sum of $221.20 herein which was duly paid to me on behalf of P. H. Belcher, J.P., on Oct. 12, 1916, at 3.50 p.m. City Police Court, Per Chas. Wm. Sandles, Clerk of Court." The facts are that this payment was made by an unmarked cheque, which was subsequently endorsed by the Justice and, still unmarked apparently, was sent to the Clerk of the District Court, by whom at some time later it was cashed.

It seems to me that it ought to be assumed that the Police Court Clerk accepted the cheque of the appellant as the equivalent of money with the assent of the Justice—he certainly signified his assent afterwards—and that it should therefore be taken to have been equivalent to the personal act of the Justice. The Justice could not dispense with the deposit; he could not accept anything that customarily does not pass as money, such as a diamond ring; but it has been held, no doubt rightly, that the tender of a cheque is a good tender unless objected to on the ground that it is not legal tender. *Jones* v. *Arthur*, 8 Dowl. 442. I think, therefore, it appearing that the cheque when presented was paid, that it was a deposit fulfilling the requirements of the statute. I think, therefore, the refusal to enter the appeal on any of the grounds above mentioned was not justified and that the appellant has a right to apply to have it entered at the next regular sittings of the District Court at Edmonton.

The appellant should have the costs of the stated case.

Appeal allowed.

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Re TORONTO ROWING CLUB.

Ontario Supreme Court, Boyd, C. April 20, 1916.

CORPORATIONS AND COMPANIES (§ VI D—335)—WINDING-UP—MISFEASANCE —DISCOVERY OF BOOKS AND DOCUMENTS.

Statement. APPEAL from an order of the Master in Chambers requiring discovery of documents upon a reference for the winding-up under the Dominion Winding-up Act, R.S.C. 1906, ch. 144.

J. F. Boland, for appellant.

Harcourt Ferguson, for liquidator,

Boyd, C. BOYD, C.:— The proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action, or proceeding within the jurisdiction of the Court: R.S.C. 1906, ch. 144, sec. 108. Section 117 provides for the examination of any person whom the Court deems capable of giving information concerning the dealings, estate, or effects of the company; and any such person may be required to produce before the Court any paper, book, deed, writing, or other document in his custody or power relating to the company: sec. 119.

The Master has already made an order to proceed under the misfeasance clause of the statute, as to the directors (past or present) of the company: sec. 123.

Upon the examination of one of the directors it appears that a deal took place by the officers of the insolvent company whereby the real estate of the company was transferred in January, 1914, to another company, formed, as it appears, in order to take over that property, and that such company, the Security Realty Company, sold and made a large profit out of that land in February, 1914. It is in evidence that the same individuals were in whole or in part directors of both companies (the Toronto Rowing Club and the Security Realty Company). This *primâ facie* aspect of affairs indicates that an investigation is required in the interests of the creditors of the insolvent company. The Master has issued an order, at the instance of the liquidator, calling for the production and inspection of all books, papers, &c., in the power, possession, custody, or control of the said Security Realty Company.

An appeal is taken by that company, and is put on the ground that the Master had no jurisdiction so to order, which, it is alleged, he did in pursuance of a new Rule of the Supreme Court of

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Ontario, No. 350. That provides that when a document is in possession of a person not a party to the *action*, and the production of which might be compelled at the trial, the Court may, at the instance of any party, direct the production and inspection thereof.

The pith of the objection is, that this winding-up proceeding is not an "action." No decision has yet been given on the effect and scope of the Rule.

I think, to advance the interests of justice and to simplify procedure, it would not be an unnatural construction to hold that the Act, sec. 108 (cited already), practically incorporates this Rule within its purview.

The matter is carried even further and directly by secs. 117 and 119 of the Act, by which any person deemed capable of giving information may be required to attend and be examined and make production of pertinent documents. "*Person*," by the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34 (No. 20), includes any body corporate and politic unless the context otherwise requires. I do not read this context as narrowing the meaning of "person" in its full statutory compass.

The cases cited by Mr. Boland were all in relation to getting inspection of bankers' books by an outsider. And the cases shew that the order may be made when the discovery appears to be material to the case of the applicant, and the application is made *bonâ fide*. These requisites appear on the present application.

It has been decided that a person against whom no proceedings are pending is bound to go before the examiner, though he may conceive that the examination is required for the purpose of afterwards proceeding against him: *Re Contract Corporation, Hakin's Case* (1871), 25 L.T.R. 552.

There was jurisdiction to make the order, and the appeal should be dismissed with costs. *Appeal dismissed.*

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

1. APPEAL (§ VII L 2—480)—REVIEW OF FACTS—EXPROPRIATION AWARDS—VALUES.

Upon an appeal from an award under sec. 209 of the Railway Act it is competent for the Court to decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction, subject to the following rules: (1) An appeal upon a question which is merely one of value should be discouraged. (*Musson* v. *Canada Atlantic R. Co.*, 17 L.N. 179, followed).

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(2) There must be such a plain and decided preponderance of evidence against the findings of the arbitrators as to border strongly on the conclusive. (3) The latter rule should be more strictly followed where the arbitrators are experienced in such matters, have local knowledge and the great advantage of a personal view of the premises, and of seeing and hearing the witnesses.

[*Lemoine* v. *City of Montreal*, 23 Can. S.C.R. 390; *Kearney* v. *The Queen*, Cam. S.C. Cas. 344, followed.]

2. DAMAGES (§ III L 6—280)—EXPROPRIATION—ADVANTAGES—PRESENT OR FUTURE.

In eminent domain proceedings what is to be ascertained is the value to the owner as it existed at the date of the taking, not to the taker; such value consists in all the advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

[*Cedars Rapids Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, followed; 19 D.L.R. 841, 31 O.L.R. 329, 6 O.W.N. 272, reversed. See also 15 D.L.R. 918, 29 O.L.R. 608, 16 Can. Ry. Cas. 375.]

Statement.

APPEAL from 19 D.L.R. 841. Reversed.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—In this case arbitrators were appointed under the Railway Act to determine the compensation to be paid the respondent for lands taken by the railway company appellant and for depreciation of the value of his adjoining lands.

The majority of the arbitrators awarded for the lands taken $6,215; for a strip of land 100 ft. in width on each side of the land injuriously affected by the construction of the railway $3,107.50, making in all $9,322.50.

From that award an appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that Court raised the total amount to $15,842.30. Their Lordships allowed for the lands taken $9,797.50, for damages to adjoining land $1,890, for a clay bank on the part expropriated and which the owner claimed could be used to level up the lower portion of his property to be sold for building purposes $4,154.80, and from that judgment this appeal is taken.

The property in question is situate about a quarter of a mile south to the southern boundary of the city of Ottawa and contains 1.49 acres. The land is described in the pleadings as a "hog-back" through which a cutting was made for the railway track. On each side of the track the hill slopes down to the level of the Rideau river, where the low-lying land is much exposed to flooding from freshets. A country road, referred to in the evidence, either through error or design, as "Bank Street" runs through the property. In fact, that road is merely the prolongation out into the country of a street which ends at the city limits.

A great many witnesses were examined on both sides, and, as unfortunately too frequently happens in expropriation cases, the evidence was of a most contradictory character, both as to the value of the land taken and the injury caused to the remainder of the property. The arbitrators, in the exercise of their right under the Railway Act, sec. 201, entered upon and inspected the premises.

All the witnesses on both sides, with the exception of one Barbour, valued the land taken at varying prices per foot frontage, which is the accepted basis of valuation for city property in the city of Ottawa.

The misuse of the term "Bank Street" to describe the country road which runs through the property is calculated to mislead those who are not familiar with the locus, some knowledge of which is necessary, as I read the record, to appreciate the evidence in its true perspective. It is quite certain that the plaintiff's farm cannot in any sense be considered as city or suburban property. It was at the time of the taking actually in use as a farm or market garden; no building was going on in the neighbourhood and no land was being sold or used there for residential or business purposes; the owner had not found it necessary or advisable to subdivide his land into lots to suit intending purchasers. His witnesses, however, based their estimate of its value on the assumption that some day the limits of the city will be extended so far as to include this farm, and that, when this is done, and the necessary expenditure made to level off and bring into use the low-lying portions there will be a demand for the property which will justify dividing it into lots; and their forecast is that, when all these things have come to pass, the property may be sold at the prices they give. There is, however, no evidence of any present public demand to extend the city limits nor that the respondent was disposed or able to make the necessary outlay. He was not even called as a witness to give the value of the property to him at the time of the taking, or to say if any offer had been made for it at its present market value, or to describe and explain the present or future advantages which it possessed, nor how he could reasonably expect, at the present time, to dispose of it at the city or suburban prices given by the witnesses.

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One Rogers, a land speculator largely interested in property in the immediate neighbourhood of respondent's farm, is the chief witness, and, after having carefully read his evidence, which bears intrinsic marks of laborious preparation for the purpose of giving the landowner all that in his wildest moments he could expect, I am in absolute uncertainty as to the basis upon which he fixes his estimate of the compensation to which the respondent is entitled. As Hodgins, J., says, in delivering the judgment appealed from: "It is somewhat startling to find that the value of $75 or $80 per ft. (given by Rogers), works out at $34,000 per acre."

To bring the property in the market a revetment wall must be built, a creek must be diverted, and then the land must be levelled, and as I have already said, no attempt is made to prove that the respondent ever even contemplated any such outlay. There is no proof either of any actual sale of land in the locality except a portion of the adjoining lot, as hereinafter mentioned, and of a small corner lot to one Hunt to which no value can be attached for the reasons given by Idington, J. The other witnesses on both sides, with the exception of Barbour, seem to have followed Mr. Rogers' lead and their evidence is not more satisfactory.

Barbour, the land agent of the appellant company, valued the land on an acreage basis as farm land, which it really is, giving as the justification for his valuation of $3,500 per acre, the price paid by the appellant company a short time before to the respondent's brother for a portion of the property immediately adjoining and in all respects similarly situated, except that it is not crossed by the highway. That property was, as the witness explains, specially adapted for the purposes of the railway, a fact which was taken into account in fixing the price.

On his evidence all the arbitrators came to the conclusion that the opinions expressed by the witnesses as to the value of the land at so much per foot frontage could not be accepted, substantially, I believe, for the reasons given above. The majority held that the valuation by reference to sales which had taken place within the city limits could not be maintained, and they accepted the valuation given by Barbour, based as it was upon the actual sale a short time before of the adjoining property

under circumstances specially favourable to the landowner, as I have said.

The company's arbitrator, with whom the third arbitrator agrees, states the principle upon which in his opinion compensation is to be awarded in these words:

> As I understand the effect of the legal decisions, the proprietor is not entitled to have the value of the lands taken, based on what he might sell them for at a problematical sale in the future, as city or town lots, but he is entitled to the present value of the lands based on what a reasonable purchaser would give for them at the present time, keeping in view their potential value and the opportunity of making money out of them later on by sub-dividing,

adopting in substance the rule subsequently laid down by the Privy Council in the *Cedars Rapids* case, 16 D.L.R. 168, and on this basis he reached the conclusion that the claimant was entitled to receive for land taken $5,215.00 and for damages $3,107.50.

The third arbitrator gave an additional sum of $1,000 for damages, in order, as he puts it, "to fully compensate the claimant, as his land was a little better situated with respect to the highway than the adjoining property" the price paid for which was accepted by the company's arbitrator as the basis of his valuation, and in the result an award as above stated was made of $9,350.

From this award an appeal was taken and the amount of compensation increased to the extent already given.

The Court of Appeal appears to have rejected the estimates of the experts based on the foot frontage value of the property except for the 200 ft. on Bank St., and adopted a price of $3,500 per acre, following in that respect the arbitrators. But Hodgins, J., allows for what he calls the "Bank St. lots," by which he means the 200 ft. bordering on the public highway, $30 per ft. frontage; for the clay *in situ* he allows 20 cents per c. yd., and for damages to the 100 ft. strip on each side of the railway in rear of the "Bank St. lots," 25 per cent. of its present market value.

Assuming the whole question of value to be absolutely at large on that appeal, while I think it was not, for reasons I will presently give, it appears to me, with all deference, absolutely impossible to justify, with respect to any portion of this property, an estimate of value based on the foot frontage. There is no evidence to support it except the false assumption that Bank St. one of the busy thoroughfares of the city of Ottawa, runs through the property and that it is subdivided and marketable in lots.

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The evidence of the landowner is clearly based on pure hypothesis. The future possibilities of development upon which his witnesses rely as justification for the values they give are, no doubt, elements to be considered in determining the present market value of the property, but it is the present value of those expectations that is to be considered. They are to be looked at in the light of bare possibilities and not as realized expectations. All the uncertainties of the future have also to be taken into account. The rule is, I submit, very clearly expressed in Picard, Traite General de l'Expropriation, vol. 1, p. 216:—

> The actual value is the first element of the selling value of an expropriated property. The future value is the second: it will be dealt with more fully in the following paragraph:— . . . When the question is about land in the neighborhood of a city, still at the present time being cultivated, but destined to be transformed into building lots in a more or less remote time, is the plus value actual or is it only future? It may be answered that in either supposition, especially in the second, the event with which the plus value is connected is future, but that such plus value itself is actual, not with all the intensity that it will have some day, but at least in a certain proportion. It is such present element of such future plus value that the purchasers take into account and which constitutes, properly speaking, the future value, distinct as such from the actual value, which comprises what has been completely acquired and realized.

Hodgins, J., who delivered the judgment of the Court of Appeal says (19 D.L.R. at 843):—

> While much testimony was given of individual sales on and near Bank St. at considerable distances from the appellant's property, and, therefore, of no specific value, the result of it all is to establish a gradual and noticeable rise in values in the district south of Rideau river . . . I think the arbitrators might well act upon this evidence in arriving at a general basis of value in the locality.

As I have already pointed out, the individual sales referred to took place within the limits of the city, and there is no evidence of any sales in or near the locality of the lands in question except the one referred to by the witness Barbour. There is undoubtedly evidence of a rise in land value in the vicinity of Ottawa, and the price fixed by the arbitrators in majority, based as it is, upon an actual sale under circumstances more favourable to the landowner, is evidence that the rise in value was very fully taken into account. The arbitrators were also obliged to bear in mind that there is an abundance of free land just as advantageously situated for building purposes as the respondent's. On the whole I am of opinion that the principle applied by the company's arbitrator as the basis of his valuation had the support of their

Lordships of the Judicial Committee, who said in *Cedars Rapids Co.* v. *Lacoste*, 16 D.L.R. at 171, [1914] A.C. 569, at 576:—

(1) The value to be paid for is the value *to the owner* as it existed at the date of the taking, not the value to the taker; (2) The value to the owner consists in all advantages which the land possesses, present or future, *but it is the present value alone of such advantages that falls to be determined.*

It seems to me possible that Hodgins, J., may have been under a misapprehension with respect to the situation of the property. It is not in the city of Ottawa, there is free land in abundance in the neighbourhood, there is no building going on and there is no evidence of any actual demand for this kind of property.

As I said before, the possibility of an extension of the boundaries of the city in the direction of the respondent's property is an advantage to be taken into account, but it is impossible to fix as a present price a future value dependent upon that contingency.

Referring now to the amount allowed for the clay *in situ*, surprise is expressed in the Court of Appeal that this was not taken into consideration by the arbitrators. I fear that his Lordship here again overlooked the evidence of Barbour, who, speaking of the price paid for the adjoining property, said that the value of the clay for filling was considered and the price fixed accordingly. Therefore, the value placed upon the respondent's land, based upon the sale of the adjoining land, necessarily includes the value of the clay for filling. I cannot usefully add anything to what Davies and Idington, JJ., say as to this.

As to the land injuriously affected, the company's arbitrator says that he estimates the damages to be the difference between the price at which the land would likely sell for before the expropriation and what it would sell for after the railway had taken its right of way. This seems to have been accepted as a proper measure of damage.

There is no doubt that upon the hearing of the appeal below it was competent for the Court to decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction, sec. 209 Railway Act. But I submit with all deference that on such appeals certain rules have been laid down by which we are bound: First, an appeal from a decision of arbitrators upon a question which is merely one of value should be discouraged. Sir Richard (Lord) Couch in *Musson*

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v. *C. A. Rly.*, in the Privy Council, 17 L.N. 179, at 181; second, in cases of this nature the Court, as in reviewing the verdict of a jury, or a report of referees, upon questions of fact, cannot reverse unless there is a plain and decided preponderance of evidence against the finding of the arbitrators or commissioners as to border strongly on the conclusive. And that rule should, perhaps, be still more strictly adhered to on an arbitrators' award than on a verdict of a jury, as the arbitrators are generally chosen not only because of their well-known integrity, but also because of their experience in such matters and previous local knowledge. They also view and review the premises as often as they may think it necessary to enable them to form a correct estimate, and must surely be in a better position to determine the exact amount than any Court can be, and than were any of the witnesses who gave their opinions in this case. Taschereau, J., in *Lemoine* v. *City of Montreal*, 23 Can. S.C.R. 390, at 392. *Vide* also *Kearney* v. *Queen*, Cam. S.C.C. pp. 344, 347.

I have not overlooked the judgment of their Lordships in *James Bay R. Co.* v. *Armstrong*, [1909] A.C. 624, 10 Can. Ry. Cas. 1.

The award of the arbitrators in the majority proceeds, as I have attempted to shew, upon principles laid down by the Judicial Committee, and I can find no justification for reversing the conclusion as to the value of the land, reached with the approval of the third arbitrator, the County Court Judge, for this county, a man of wide experience, great prudence and possessed of an exceptional knowledge of the locality.

I would allow the appeal with costs.

Davies, J.

DAVIES, J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario increasing the compensation awarded to the respondent by the arbitrators appointed under the Railway Act for 1.49 acres of land taken by the railway company for its track. A majority of the arbitrators had awarded for the lands taken $3,500 an acre, which amounted to $5,215. They added $1,000 for the situation of the lands fronting on Bank St. road and also $3,107.50 for "loss, inconvenience and damage to lands not taken," making a grand total of $9,322.50.

The Court of Appeal determined that the award should be increased in the following way:—200 ft. taken on Bank St., at

$30 per ft., $6,000; rest of land taken, 1.025 acres at $3,500 per acre, $3,797.50; filling, 20,774 cubic yards, at 20 cents, $4,154.80; damage to 100-ft. strip on each side of railway in rear of Bank St. lots, 2.16 acres on the basis of 25% of its value, $1,890; total, $15,842.30.

The arbitrators had the great advantage of having had a view of the locality, especially provided for by the statute, and of the lands taken from the respondent and those not taken.

These lands are not within the limits of the city of Ottawa which only extend to the Rideau River. They are situate about a quarter of a mile south of this river, and a road which is a continuation of Bank St. in the city runs through the property taken. There is a subway at this point and the highway, therefore, is not affected.

The evidence of a number of land agents was given before the arbitrators. It was largely based upon the opinion held by each witness on the value of these lands which would follow the extension of the city across the river southwards and as to when this extension would take place, and, therefore, depended largely upon the temperament of the witness. The values were purely speculative and of course depended largely, if not entirely, upon the correctness of the several ideas of the witnesses as to when the extension of the city boundaries would reach and cross the Rideau river.

They varied naturally a good deal and the arbitrators did not adopt any of their estimates. Evidence was, however, given of a *bonâ fide* sale made to the railway company from the adjoining lot to that for which compensation was being fixed.

This adjoining land consisted of the high ridge and the low lands from its base to the river, and was said to be of "exactly the same character" as that in question, excepting for the fact that the road or street, so called, ran through the latter.

No other sale in the neighbourhood was proved, as I understand, because none had been made. A sale of a corner lot at the junction of Riverside Ave. and Bank St., in the little village near the river, on which was a general store, was referred to by counsel at bar, but the arbitrators properly thought that such a sale was no test or guide whatever as to the value of the lands in question. The arbitrators, unable, apparently, to accept the speculative estimates, varying as they did, of the land agents,

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adopted the price paid by the railway company for the adjoining property as a fair price on which to base their award, adding, however, $1,000 for the "better situation" of the land taken having a frontage on Bank St. road.

Mr. Macdonnell in his reasons, in which MacTavish, J., concurred, for adopting this sale as the fairest test of the value of the lands, stated that "it would not seem reasonable to allow anything for the extra claim for the value of the clay in the high ridge, as that was, no doubt, taken into account in the sale of the adjoining land," which he adopted as the fair test of value.

If he was justified in adopting this test, as I think, under the circumstances, he was, I agree that it would not have been reasonable for him to have allowed for the value of this clay a second time on the presumption that it would be used for filling up or raising the low lands between the ridge and the river or could be sold to others.

The Court of Appeal allowed for this "filling," as it was called, $4,154.80. I am quite unable to see any ground why this extra claim should be allowed.

For reasons best known to himself the respondent did not go into the witness box. He never had during the many years he had owned this farm attempted to raise these low lands by cutting down the ridge of higher land taken. He did not call witnesses to shew whether, in case such a scheme was attempted, a revetment wall would be necessary along the river bank to support the raised land or prevent its being washed away, or, if necessary, what its cost would be, or that he ever had entertained any such idea. It was a purely speculative idea, physically practicable no doubt, but from a pecuniary standpoint not shewn to be one which the owner ever had the slightest idea of adopting or which any prudent man would adopt. I take it that it never would be adopted to make market-garden lands and was only considered feasible on the assumption that the city would at some future time extend so as to make the land available for city sites or building lots.

Apart from the suggested plan of using the clay on the ridge, the claimant had already been allowed for the full value of the land, and I fail to see the justice of allowing him compensation a second time for the same soil.

Looking at the evidence as a whole, I conclude that the

award of the arbitrators erred, if at all, as being, if anything, too liberal and generous to the owner.

I do not think the members of the Court, in the absence of a view of the locality and the lands taken, and without having seen or heard the witnesses, are as competent to form a judgment as to the reasonable compensation claimant should have as the arbitrators were. At any rate, I do not feel that I am as competent. I think they had ample evidence in the sale made of the adjoining lands of the same character as those in question on which to base a valuation of these latter and the advantage which these latter possessed over the former in having a double frontage on the road was amply allowed for. The damages assessed for loss, inconvenience and damage to lands not taken may be, as the Appeal Court thought, too large. I express no opinion. The railway company have not appealed against the award, but no one could contend successfully that they were not liberal and generous.

I do not at all challenge the right and jurisdiction of the Appellate Division to review the award of arbitrators under the Railway Act as if it had been the judgment of a subordinate Court and to decide whether a reasonable estimate of the evidence has been made or whether any erroneous view of that evidence has been taken. But it was not authorized by the clauses of that Act to disregard the award and deal with the evidence *de novo* as if it had been a Court of first instance. The true rule is no doubt that laid down by The Judicial Committee in *Atlantic & North West R. Co.* v. *Wood*, [1895] A.C. 254, approved of in the case of *James Bay Ry. Co.* v. *Armstrong*, [1909] A.C. 624, 10 Can. Ry. Cas. 1, that the Appeal Court should deal with the award as they would with the judgment of a subordinate Court when under appeal.

If the arbitrators had proceeded upon a wrong principle in making their assessment of damages, the Court would, of course, discard their award and make a new one such as the evidence justified. But if it is a mere question of valuation, as it is in the case before us an appeal Court will be very slow, not having the advantages of a view of the locality and the lands taken and of having seen the witnesses and heard their evidence, to set aside the award of those who had these advantages.

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Idington, J.

Under all the circumstances, I would allow the appeal with costs in both Courts and restore the award of the arbitrators.

IDINGTON, J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, increasing the award by the arbitrators under the Railway Act fixing $9,327.50 as the compensation due respondent by reason of appellant's expropriation of land for right-of-way to the sum of $15,842.30.

I am, with great respect, unable to assent to such increase, or find any good reason therefor. There does not seem to have been on the part of the arbitrators any misapprehension (unless in the way I am about to refer to) of the legal principles upon which they should proceed, or very apparent disregard of the evidence presented.

They had the enormous advantage which a personal view of the premises and seeing and hearing witnesses gave them over any Appellate Court in weighing the evidence and thus arriving at a right conclusion. It is admitted they had a right to inspect the premises and did so.

The notice of expropriation offered $6,720. The required statutory certificate of a provincial land surveyor which states that he was a sworn surveyor, knew the land in question, and damages likely to arise from the exercise of the power asserted, and that said sum of $6,720 was a fair compensation, was filed with said notice as foundation for the proceedings.

Both are dated August 23, 1911, and I submit as no evidence was given of the date of the filing of the railway plan or of possession being taken, it should be presumed that the date of the notice is that to which attention ought to have been directed in putting forward evidence of value.

The Railway Act requires the deposit in the Registry Office of the plan of the railway, and by sec. 192, makes such deposit notice to all concerned, and by sub-sec. 2, provides as follows:—"The date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained."

This was amended by the following addition in 1909, by 8-9 Edw. VII. ch. 32, sec. 3:—

Provided, however, that if the company does not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation or damages shall be ascertained.

It was not until May, 1913, that the arbitrators heard the witnesses. It is abundantly clear from the evidence of the chief witness of the respondent that there had been feverish speculation in Ottawa and vicinity relative to land and that such state of things coloured the opinions of the witnesses.

The values put forward by those testifying seemed to be chiefly directed to the time when the arbitrators were sitting, and hence probably the award was higher than it might have been if attention had been directed to the law which ought to have governed those conducting the proceedings.

The onus rested upon respondent in this regard and I think he failed to comply with the statute in that behalf. He is fortunate that no cross-appeal has been taken on that ground, for when values or apparent values are, by reason of a temporary rage for speculation, liable to shift up or, at its end, down, some closer regard ought to be observed than was done in this case as to the exact date for ascertainment of the true market value, and compensation given according therewith.

The amendment was no doubt intended to meet the case too frequently happening, formerly, of railway companies filing plans but failing to give notice to treat or do anything in the way of taking possession, and for that reason I suggest the date of the serving of the notice by which the company became bound is, in the absence of anything else, to be presumed to be the proper date for ascertainment of compensation.

It is possible the peculiar wording of the amendment in using the phrase "acquire title to the lands" may give rise to much litigation before its exact meaning is judicially settled.

In another case presented to this Court during the current session it was made apparent that some Judges in a Court below held this to mean the taking of possession by the railway company. I cannot say that is an unreasonable holding. The complete acquisition of the title in any other sense would mean, sometimes, perhaps years after the hearing. That would seem rather absurd. It is not, however, necessary for me to form a final opinion herein as to that possible phase of the matter and I desire to reserve same for the present.

I am quite clear, however, going only so far as I need, that the respondent failed to discharge the burden cast upon him by

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definitely directing the evidence he tendered, and thus having failed, there was a very cogent reason therein alone for not being allowed to succeed on appeal. That objection, however, was not taken below and the only practical purpose I desire to serve is to call attention to the condition of the law and the possible consequences of its non-observance.

The appeal should be allowed with costs.

DUFF, J., concurred in the result.

ANGLIN, J.:—No reason has been shewn for disturbing the valuation of $3,500 per acre placed on the lands other than the Bank St. lots by the arbitrators and confirmed by the Appellate Division. This item of $3,559.50 must, therefore, stand.

The arbitrators allowed $1,000 additional for the Bank St. frontage. This allowance the Court of Appeal increased to $4,582.50, making the award for the Bank St. lots $6,000. With deference, I fail to find the evidence enough to justify an appellate Court in interfering with the award of the arbitrators on this item. They had the benefit of a view, for which the statute expressly provides. They had a knowledge of local circumstances—an inestimable advantage in weighing the testimony of real estate speculators in regard to present and potential values. They saw and heard the witnesses. I am far from being satisfied by the evidence that the sum they awarded for the lands taken was not an excessive allowance. But there is no cross-appeal. Having regard to the circumstances to which I have adverted, it would certainly require a much stronger case than the claimant has made to justify an appellate Court in substituting their estimate of the value of the frontage of the property on Bank St. for that of the arbitrators.

In fixing $3,500 per acre as the value of the respondents' lands the arbitrators made what they deemed a proper allowance for the value of the clay on the high land taken by the company which might have been advantageously used for filling. In the reasons assigned for making their award we find these paragraphs:—

> The land bought from H. B. Billings was said to be of exactly the same character as the land in question. It contained, as the land in this case, a certain quantity of high land and a certain quantity of low land where the extra clay on the high land could be used to fill in the low land, and it seems to be in all respects similar to the land in question.
>
> A claim was made by the owner for clay, which could be removed from

the high land taken from him, but if we value the present land on the basis of the lands bought from H. B. Billings, it would not seem reasonable to allow anything for this extra claim, as the value of the clay was no doubt taken into account in the sale of H. B. Billings' lands. This at least was not disputed by the owner, and no suggestion was made that it is not correct.

The sale from H. B. Billings was at the rate of $3,500 per acre, and although the railway claimed that a speculative price was paid for the land. I think this sale is the best evidence we have to go on to determine the value of the lands in question.

As to any low land taken by the railway company there is no doubt that, in the compensation awarded, the claimant was allowed for the value of such clay as might have been advantageously used in raising its level. But, as to low land not taken and for which, to render it marketable, filling may be required, no allowance has been made for any surplus clay that might have been available for that purpose. I cannot think, however, that this clay was worth, at the time of the expropriation, 20c a c. yd. *in situ*, whatever it might have become worth when the time should arrive, if ever, that it would be economically desirable to raise the level of the low-lying land. It may be that a person requiring filling material and not able to obtain it elsewhere would be willing to pay that price, but it is common knowledge that much material suitable for filling can frequently be obtained for nothing.

Moreover, though the raising of the claimant's low-lying land is, no doubt, physically practicable, that it would be economically feasible or advantageous has not been shewn. What expenditure it would entail has not been proved or considered. There is not a tittle of evidence to shew that the claimant contemplated making any such change in the character of his property. It is left wholly in the region of speculation that it would have become desirable within any reasonable time to use for this purpose the clay on the high land taken.

The arbitrators allowed for inconvenience and damage to lands not taken $3,107.50. This item the Appellate Division reduced to $1,890 on a basis which I accept as, on the whole, more reasonable than that on which the arbitrators proceeded. There is no appeal by the claimant against this reduction. But the $1,217.50 thus deducted may, perhaps, not unfairly be allowed him for the value of the clay on the land taken by the company which, but for the expropriation, might have been used advantageously on his adjacent low land not taken.

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On the whole, I think no sufficient ground has been shewn for disturbing the award of the arbitrators.

The appeal should be allowed with costs in this Court and the Appellate Division, and the award should be restored.

Appeal allowed.

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Re SMITH AND THE LAND REGISTRY ACT.

British Columbia Supreme Court, Macdonald, J. October 25, 1916.

MORATORIUM (§ I—1)—WAR RELIEF ACT—COMMISSIONED OFFICERS—"PROCEEDINGS"—REGISTRATION.

Commissioned officers, though not in a sense "enlisted" soldiers, are "volunteers" within the protective provisions of the War Relief Act, 1916 (B.C.), ch. 74, and an application for the registration of a final foreclosure order is a "proceeding outside the Court" suspended by the Act.

Statement.

APPLICATION to register final foreclosure order. Refused.

J. C. Gwynn, for district registrar; *H. N. Lidster*, for appellant.

Macdonald, J.

MACDONALD, J.:—John M. Smith in an action against Percy H. Smith obtained, on January 29, 1916, a final order of foreclosure against the defendant, with respect to a lot in the municipality of South Vancouver. On July 10, 1916, he made application to the District Registrar of Titles at Vancouver, B.C., to register the final order and obtain title to such lot thereunder. The District Registrar declined to register for the following reasons:—1. No notice has been served on parties cut out by the foreclosure—and required. 2. Declaration that the defendants in the foreclosure action are not protected by sec. 2, War Relief Act.

It is evident that if the defendant does not come within the protection afforded by the War Relief Act then that notice under sec. 134 of the Land Registry Act would be issued and served, so that in due course registration would be completed and the applicant become the registered owner of the property. It is contended by the applicant that the War Relief Act does not, under the circumstances, apply and that the registrar should be directed to proceed with the registration without reference thereto. It is admitted that the defendant is a captain in the 29th Batt. C.E.F., and that he left British Columbia with his battalion for England in May, 1915, and has been in France since November of that year fighting for his country.

The first point taken is that the defendant was an officer and that "officers" do not "enlist" but receive commissions and consequently the War Relief Fund Act does not apply to them. I

do not think this decision reasonable nor tenable. The preamble to the Act states that, whereas a great number of residents of British Columbia have "volunteered" to serve in the forces raised by the Government of Canada in aid of His Majesty during the war and it is desirable to pass the Act "For the protection and relief of all such persons and their families from proceedings for the enforcement of payment by all such persons of debts, liabilities and obligations." I see no reason to limit the application of the Act so as to deprive officers of its benefit. They volunteered the same as privates and were prepared to make a similar sacrifice for the cause. It is true that the term "enlistment" is not usually applied to officers, but in this Act I think its meaning should not be restricted and that the Act is intended to apply to all "volunteers." In the Imperial Foreign Enlistment Act 1870 "enlistment" would seem to include both officers and men, as by sec. 4 of the Act, illegal enlistment exists:—

> If any person without the license of Her Majesty being a British subject within or without Her Majesty's Dominions accepts or agrees to accept any *commission* or *engagement* in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty.

The Militia Act, R.S.C. ch. 41, sec. 10, provides that:—

> All the male inhabitants of Canada, of the age of 18 years and upwards, and under 60, not exempt or disqualified by law, and being British subjects, shall be liable to service in the Militia: Provided that the Governor-General may require all the male inhabitants of Canada, capable of bearing arms, to serve in the case of a *levee en masse*.

Such Act declares that the active militia of Canada shall consist of corps raised by volunteer enlistment and corps raised by ballot. While the latter mode of raising forces might be adopted, under the "emergency" existing, and is a form of compulsory service, still I do not suppose this was considered. I think it was the purpose of the legislature to give special protection to those who were not compelled to go but had *voluntarily* enlisted for service overseas. This legislation, thus granting protection, does not differ from similar enactments that have been passed for the same purpose in other provinces. While it is, to a limited extent, an interference with civil rights, the purport and object of the Act is quite apparent. It is not strictly speaking a remedial measure, while it savours of such legislation. It is intended that residents of our province who have gone abroad in defence of the Empire shall not have their property in jeopardy

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of being lost through foreclosure or otherwise during their absence. I feel satisfied it was intended to include volunteer soldiers of all ranks and is applicable to the defendant herein. In coming to a conclusion on this point and the one presently to be considered, I think the War Relief Act should at this period in the history of our country receive such "fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act."

The next point to be decided, is whether the application to register the title is a "proceeding" outside of a civil Court of the province and consequently requiring evidence to prove that the War Relief Act is not applicable. It is contended that the applicant having obtained a final order of foreclosure is the owner of the property and that the effect of such order is that the title has thus become vested in him. If the applicant were not required to resort to the Land Registry Office in order to perfect his title there would be a great deal of strength in the contention as to the Act not being applicable. In *Heath* v. *Pugh*, 6 Q.B.D. 345, the effect of a final order of foreclosure is fully discussed. It was there decided that the land had by virtue thereof become for the first time the property of the mortgagee. That he had a title newly acquired and from that time indefeasibly given so that the Statute of Limitations began to run. The applicant as mortgagee, however, is not satisfied with the order of the Court and deems it necessary to apply to the District Registrar of Titles to strengthen his position. The end he desires to accomplish is to render it well nigh impossible for the mortgagor to redeem his property should any grounds exist for enabling him to do so in the face of the final order. The question then is, what interpretation is to be placed upon the word "proceeding" in the Acts. If a matter be in Court a "proceeding" might be "any step taken in a cause by either party," see Eng. Dict. nom.—proceeding. The effect and meaning of the word was discussed in *Neil* v. *Almond*, 29 O.R. 63, at 69.

Bearing in mind that the basis of the registration system in our Province is a registration of title, as distinguished from registration of instruments, these definitions are particularly applicable. The applicant deems it necessary to obtain registration of his title "in order to obtain a given end." In this connection I have considered the following authorities cited in

argument: *Re Lancashire Cotton*, 35 Ch. D. 656, at 661; *Re Perkins Beach Lead Mining Co.*, 7 Ch. D. 371; *Brigham* v. *McKenzie*, 10 P.R. (Ont.) 406; *Cole* v. *Porteous*, 19 A.R. (Ont.) 111—but they do not afford much assistance in deciding the question. In my opinion the application for registration is a "proceeding outside the Court" which the War Relief Act intended should not be taken to the prejudice of any of those persons entitled to its protection. The registrar was thus entitled to issue the notice referred to and require compliance therewith before registration. As this was apparently impossible, it follows that registration should in the meantime be refused.

Application refused.

BIRCH v. PUBLIC SCHOOL BOARD OF SEC. 15, TOWNSHIP OF YORK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. June 9, 1916.

SCHOOLS (§ IV—70)—PURCHASE OF SCHOOL SITE—DEBENTURES—NULLITY. An attempted purchase of a school site by a rural school board, to be paid for by debentures, before the proposal for the loan has been submitted to and sanctioned at a special meeting called for that purpose, and the debentures duly issued in pursuance thereof, does not comply with sec. 44 of the Public School Act, R.S.O. 1914, ch. 266, and is therefore invalid and nugatory.

[*Smith* v. *Fort William School Board*, 24 O.R. 366; *Forbes* v. *Grimsby Public School Board*, 6 O.L.R. 539, approved.]

Statement.

APPEAL from the judgment of Middleton J. on motion by plaintiffs to continue an interim injunction, and for leave to appeal to the Supreme Court of Ontario from an order of the Judge of the County Court of the County of York.

The judgment appealed from is as follows:—

Middleton, J.

MIDDLETON, J.:—The plaintiffs in this action seek to restrain the school board from proceeding with the purchase of a school site and the erection of a school building, upon various grounds, which, put shortly, resolve themselves into the contention that the proceedings at the meeting authorising an application to the council for funds were irregular and unfair, in that the questions were submitted in such a form as to preclude any vote against borrowing; and, secondly, that the purchasing of the lands and the entering into of the contract before any by-law had been passed by the township was irregular and improper.

Upon a motion for an interim injunction, Mr. Hellmuth, who then appeared as senior counsel for the defendants, objected that this Court had no jurisdiction, as the case was one falling within

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the provisions of sec. 20 (3) of the Public Schools Act, R.S.O. 1914, ch. 266. Mr. Grant, for the plaintiffs, on that occasion, did not seriously resist Mr. Hellmuth's contention, and accordingly I dissolved the interim injunction; retaining the action, however, so as to be satisfied upon the question raised by Mr. Grant that it might be found necessary to have a judgment in the action vacating certain conveyances if he succeeded upon his contentions before the County Court Judge in proceedings which he said he intended taking under the statute referred to.

Upon these proceedings being instituted, there was a change in the personnel of counsel, and Mr. McPherson, who succeeded to Mr. Hellmuth's brief, contended successfully before the County Court Judge that the section in question had no application to the matters in controversy. Mr. Grant now renews his motion in this Court, and Mr. McPherson asks that this action be dismissed; Mr. Grant at the same time seeking leave to appeal to the Supreme Court of Ontario from the order of the County Court Judge.

Before considering the statute and the cases, it is, I think, desirable to elaborate a little the precise matters involved. The question concerns the purchase of a school site. The school board selected a site, and a meeting of ratepayers was called to consider it. At this meeting, it is said, and not denied, the purchase of the selected site was approved. Without having obtained any by-law from the township, the trustees proceeded with the purchase, and subsequently a special meeting of public school supporters was called for the purpose of considering a proposal of the school board to apply to the municipal council for the issue of debentures for such amount as might be deemed adequate for the purpose of erecting a twelve-roomed school upon the selected site. At that meeting a vote was taken upon a question framed thus, "for the issue of debentures to the extent of $87,500," and as an alternative "for the issue of debentures to the extent of $22,500 for the purpose of paying for land already contracted for by the school board." The ratepayers were asked to sign either one or other of these, no opportunity being given to vote in the negative on either.

An appeal was had by the plaintiffs to the inspector under the provisions of sec. 54 (11); and, after considering the matter, the inspector determined that the proceedings were in substantial conformity with the Public Schools Act.

The theory presented on behalf of the majority was that the purchase of the land had been decided upon at the earlier meeting, and that the only question open for discussion at the meeting in question was, not "purchase or no purchase," but merely the purchasing and holding of the site on the one hand as against the purchase and erection of the building on the other.

Turning now to the statute, I think that the County Court Judge was right in construing sec. 20 (3) as he did. The attack is not made on the first meeting, at which the selection of the school site was adopted, and there is no by-law of the council of any municipal corporation yet in existence. This exhausts the jurisdiction conferred by that section of that statute, and I should not, therefore, give any leave to appeal to the Supreme Court.

Reliance is placed upon the decision of my Lord the Chancellor in *McGugan* v. *School Board of Southwold* (1889), 17 O.R. 428, for the contention that this Court has jurisdiction to declare the proceedings at the later school meeting invalid, in that the vital matter voted upon had not been properly placed before the meeting. I have had the privilege of conferring with my Lord upon this case, and he agrees with me in thinking that the aspect of the matter discussed before me was not presented to him. We think that where there is any complaint as to the proceedings at a school meeting the only remedy which those aggrieved have is an application to the inspector, and that his decision is final. Moreover, I am quite clear that, if there is an alternative tribunal, and it is open to the party who deems himself aggrieved to resort either to the Supreme Court or to the inspector, he cannot go first to one tribunal and then to the other. Having gone to the school inspector, the decision of the inspector is conclusive.

Furthermore, if I had jurisdiction to investigate the matter, I would, as at present advised, agree with the conclusion arrived at by the inspector. The purchase of the site had been determined upon at the earlier meeting, and all that remained to be done was to determine the amount which should be demanded from the township council for the purpose of completing the purchase and erecting the building if it was decided to erect a building.

One other matter remains for consideration. In the case of *Smith* v. *Fort William School Board* (1893), 24 O.R. 366, it was determined that a school board could not contract for the building of a school house until the necessary funds had been provided for

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the erection of the school. That decision was referred to in *Forbes* v. *Grimsby Public School Board* (1903), 6 O.L.R. 539, as establishing a salutary rule that the trustees should not undertake to build in excess of funds actually provided by the council.

With much deference, I am unable to see any foundation for reading into the Public Schools Act any such limitation. The section of the statute 45 (1) enables the school board to require the council to raise the money necessary for the purchase or enlargement of a school site and the erection of a school thereon; and I cannot see anything in the statute or any reason which compels the school trustees, if they can find vendors and contractors who will give them credit, to wait until the township has passed its by-law before making a contract for the purchase or erection. It is well established that the right of the school trustees to demand the amount they see fit to require, and compel the passing of the by-law and the raising of the money by the township, is absolute. This is the only question which remains to be disposed of in this action, and I think that I should turn this motion into a motion for a judgment, so that the question may now be finally disposed of; and, as I entertain the view above expressed with reference to the decided cases, it is my duty to enlarge the hearing of this motion before a Divisional Court, where these decisions may be reviewed.

If the view that I have expressed should prevail as against the decided cases, the action would of course be dismissed, but some consideration should be given to the question of costs, in view of the change of attitude of those representing the plaintiffs.

The motion was accordingly set down for hearing by a Divisional Court of the Appellate Division.

R. McKay, K.C., for plaintiff.

W. D. McPherson, K.C., for defendant school board, and *R. G. Smythe*, *F. H. Barlow*, *H. A. Newman*, for other defendants.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This is not an appeal, but a case referred to us under the provisions of the Judicature Act because the learned Judge who made the reference thought the case of *Smith* v. *Fort William School Board*, 24 O.R. 366, followed in the case of *Forbes* v. *Grimsby Public School Board*, 6 O.L.R. 539, was wrongly decided and ought to be overruled; and, accordingly, we are asked by the defendants to overrule the *Fort William* case, a case decided nearly 23 years ago, and a decision

which, as far as I know, has never been called in question either in the law Courts or in legislative halls, although few judgments of consequence that are open to objection very long escape being called in question; and alterations in the law, especially upon questions affecting municipal corporations and public schools, in the legislation of this Province, are freely and frequently made; so that a ruling which stands so long unchallenged is hardly likely to have much that is objectionable in law or in fact in it; and is one that should not be disturbed unless plainly wrong.

Instead of that decision being plainly wrong, it appears to me to be plainly right.

The fundamental error, as it seems to me, underlying the opinion of the learned Judge who has thus reopened the question here lies in the assumption that a school board has power to compel the municipal council to issue debentures. The board has power to require the council to levy the amount required by the school board for all proper purposes, in the one year to which the board's estimates relate, but has no power to create debts extending beyond the year without the sanction of the ratepayers and on debentures issued by the township council, safeguards which the Legislature has necessarily provided.

It must be remembered that we are dealing with a public school, the board of trustees of which, to some extent, is changed every year, and so, almost necessarily, is not endowed with power except for special purposes and in the manner specially provided in the school laws, to incur debts which its successors would be obliged to pay: the general power is, to have found by the council means to meet the expenses of the schools under their charge, for the current year: sec. 73(*o*) of the Public Schools Act.

I feel bound to say that the judgment in the case in question seems to me to be as plain as anything can be, and that the statute is equally plain; indeed, it is difficult for me to perceive how this proposition could be made plainer: you, an annual board, cannot contract so as to bind yourselves and your successors in office for years to come, until you have done all that without which you cannot be sure of your legal power to make that contract binding; you cannot make a binding contract in a case in which you may really never have the right to make a contract; you cannot make a contract so as to bind the school board, whether you do or do not get or attempt to get

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the authorisation to make it which the statute requires; you can bind your successors only through debentures issued by the municipality; if you could make a binding contract, such as those in question, before the debentures were issued, you would bind them to pay for any breach of that contract though debentures should or could never be issued, and though indeed you should never attempt to get them. Take this case as an example: two of the Judges of this Court are firmly of opinion that the sanction of the ratepayers to the issue of the debentures has not been obtained; and, if the plaintiffs were not entitled to succeed upon a wider ground, it might well be that eventually it should be held, in this or some higher Court, that they are entitled to succeed on this ground also, that is, that the sanction of the ratepayers had not been obtained, and it might also be that it never could be obtained, and yet the contract would be valid and binding on future boards, as well as the present board; a state of affairs intolerable.

To refuse to overrule the case of *Smith* v. *Fort William School Board* is to hold that the plaintiffs are entitled to have the defendants restrained from taking any steps towards carrying out the contracts in question unless and until the necessary debentures are issued, the contracts not being conditioned upon the issuing of them in due course, and being contracts involving the expenditure of moneys extending over a number of years.

And so it may not be necessary to consider the other important questions argued before us, but it is advisable to do so, because the view of the main one expressed in the Court below seems to me to be entirely wrong; that is, that it is entirely wrong to consider that a ruling of merely a county public school inspector, under sec. 54(11) of the Public Schools Act, is finally binding upon all parties, on the question, which is also involved in this action: whether the provisions of sec. 44 of the Act have been so complied with that the council of the township is bound to issue the debentures.

To say that a ruling, under that sub-section, involving in this case more than $22,000, and which may in other cases involve hundreds of thousands of dollars possibly, is to oust the jurisdiction of the Courts and finally bind all parties concerned, placing a heavy burden of taxation upon many for years to come, and without a word in the sub-section providing that any ruling

under it shall be final, or shall be subject to any appeal, seems to me to be self-evidently erroneous.

A stronger section contained in the Separate Schools Act, and one in which the appeal was to the Minister of Education and from him to the Lieutenant-Governor in Council, "whose award shall be final in all cases," in the case of *Arthur Roman Catholic Separate School Trustees* v. *Township of Arthur* (1891), 21 O.R. 60, was held to be inapplicable in a case such as this, to be applicable rather to the internal economy of the school.

Having regard to all the circumstances of the case, and to the provisions of sec. 53(7) of the Public Schools Act, the inclination of my mind would be to hold that the proceedings at the October meeting were valid; but, as some of my learned brothers take an opposite view of the question, and as it is not one that need be decided now, it is enough to say that the better course may be to get a new sanction of the ratepayers to the issue of the needed debentures.

The case may be finally disposed of now: granting an injunction to the plaintiffs, restraining the defendants from further action upon the contracts in question until the debentures are issued. If any further relief really be needed, the question of the form of the judgment may be mentioned at any time before the judgment is signed. It is not a case for costs—that is, as it has to be determined—because at present the only probable result seems to be a temporary halt at the instance of the very few against the wishes of the many.

MASTEN, J.:—The principal defendant is a rural school board, governed by the Public Schools Act, R.S.O. 1914, ch. 266. The question relates to the acquisition of a site for a new school building at a proposed cost of $22,500. The choice of the proposed site appears to have been regularly approved pursuant to sec. 11 of the Act, and the matter in issue relates to the subsequent action in regard to the purchase of the lands.

Masten, J.

The writ of summons is endorsed with a claim that the offers made by the defendants Badams, Harman, Cappellazzo, Bussato, Lamont, Vigor, Myers, Upfield, Nisbet, Wardrope, Blyth, Kirkman, Green, Waters, and Gynane, to sell to the defendants the school board certain lands in the endorsement mentioned, which offers purported to have been accepted by the defendants the Public School Board of Section No. 15 of the Township of

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York, in the County of York, and which offers and acceptances respectively bear date about the month of September, 1915, be set aside.

(2) To recover from the various defendants above named the moneys heretofore paid to them out of school funds on account of the respective purchases from each of them.

(3) Or, in the alternative, to recover the sum so paid from the defendants Wilcox, Hocking, and Hood, as having been improperly and illegally paid by them.

(4) For an injunction to restrain the defendants the Public School Board of School Section No. 15 of the Township of York, in the County of York, from making any further payments on account of the purchase-money of said respective agreements, or of applying for or prosecuting any application made to the Municipal Corporation of the Township of York, for the passing of a debenture by-law to raise the sum of $22,500 for the purpose of purchasing the said lands hereinbefore mentioned and other lands for a school site.

On the 4th April, 1916, an *ex parte* injunction was granted by Mr. Justice Middleton, containing the following provisions:—

"This Court doth order that the defendants the Public School Board of School Section No. 15 of the Township of York, in the County of York, and John R. Wilcox and Thomas Hocking, two of the members of said school board, and each of them, be and they are hereby restrained until Wednesday the 12th day of April, 1916, or until the motion then to be made to continue this injunction shall have been heard and disposed of, from entering into any agreement with the other defendants for the purchase of any lands for a site for a public school, and from paying to any of the other defendants any sum on account of purchase-money of the said lands, and from applying to or prosecuting any application to the Municipal Council of the Township of York for debentures for the sum of $22,500, or for the passing of a debenture by-law to raise the sum of $22,500, or any other sum, for the purpose of acquiring the lands mentioned in the writ of summons, or any of them, for a site for a public school within the limits of the said school section, or from receiving from the Municipal Council of the Township of York the proceeds of any issue of debentures for the purpose of acquiring the said site in the said school section, or from doing any other act toward acquiring, or raising

money necessary to pay for, a site for a public school in the said section."

"3. And this Court doth further order that all the above named defendants except the public school board and John R. Wilcox and Thomas Hocking be and they are hereby restrained from completing any contract of purchase for the lands mentioned in the writ of summons herein with the said public school board, or from in any way assigning, hypothecating, pledging, or otherwise dealing with, any alleged contract of purchase made between the said public school board and the defendants and any of them."

On the same day a notice of motion was given to continue this injunction until the trial.

The motion having been argued before Mr. Justice Middleton, he gave judgment on the 1st day of May, dealing with certain phases of the question raised; and, finding conflicting decisions, or at least decisions which conflicted with his own view in another phase of the matter, he concludes his judgment as follows: "This is the only question which remains to be disposed of in this action, and I think that I should turn this motion into a motion for judgment, so that the question may now be finally disposed of; and, as I entertain the view above expressed with reference to the decided cases, it is my duty to enlarge the hearing of this motion before a Divisional Court, where these decisions may be reviewed."

In this way the motion comes before us.

As the new school was not to be paid for out of the rates for one year, but was to be paid for out of money to be raised upon debentures under the provisions of sec. 44 of the Act, it was necessary that the steps provided for in that section should be taken before the board could have the required means for the purchase of the site and erection of the school.

A condensed history of the preliminary proceedings is as follows. At a meeting of ratepayers holden on the 4th September, called for the purpose of approving of the school sites selected by the school board, it was "moved by Mr. Camp, seconded by Mr. Barrowes that the trustees be empowered to purchase the site selected by them," and this resolution was adopted. It is quite probable that the ratepayers meant no more by this than that they approved of the site selected, and probable, too, that

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no one present at the time knew definitely the provisions of the Act or precisely by what steps the matter of acquiring a site and utilising it by the erection of a school house—for it was all one inseparable scheme—would be effected. A further meeting of ratepayers was called for the 27th September, to obtain the authority provided for by sec. 44 to apply to the council for the money required for site and building. At this meeting, the ratepayers, by a vote of 41 for and 20 against the resolution, decided not to do anything for six months. Another meeting was immediately called for the 6th October, 1915, "to reconsider the motion passed at a special meeting held on the 27th September, 1915, declining to give the trustees of school section 15 power to issue debentures to the amount of $87,500 to cover cost of site and school building." Up to this time the separate purchase of the school site had not been mooted. It was at this meeting that the separate votes were taken, when 54 voted to authorise the application for which the meeting was called and 60 to apply to the council for $22,500 to pay for the site. I think that the proceedings were not only illegal but distinctly unfair as well. However it was brought about, it is beyond doubt that some, and possibly many, of those who voted were under the impression that all they had was a choice between the two proposals. Mr. Deacoff, the secretary-treasurer, upon examination was asked: "Was your understanding that any ratepayer could come up and vote on both papers, vote for each proposition or against both of them?" His answer was: "No; my understanding was that they must vote for one or the other—that is the way I understood it." It can hardly be thought that the ratepayers were in a better position to grasp the situation than the secretary-treasurer.

The selection and acquisition of a site and the erection of a school house thereon are parts of one entire scheme. It would be folly to obtain a site if this were not to be promptly followed by building. The site alone costs $22,500, and any long delay in building, after the site is paid for, would result in a very considerable loss.

The meeting of ratepayers held on the 6th October, 1915, was, according to the notice, for the purpose of authorising the school board to apply to the municipal council "for the issue of debentures to the extent of $87,000." This sum was intended to

provide funds to pay for the site and the estimated cost of building.

The meeting could lawfully deal only with the specific question for which it was convened—the declared purpose of the meeting. It was obviously called under sec. 44. There is no authority to the council to act upon the application until "the proposal for the loan has been submitted to and sanctioned at a special meeting of the ratepayers *called for the purpose*." A proposal for a loan of $87,000 for erection of a school house, whether it did or did not include the site, is manifestly an essentially different thing from a proposal to provide money for the site alone; and I am of opinion that for this cause the vote taken, so far as the $22,500 is concerned, was not a legitimate exercise of the powers conferred by sec. 44, and was and is irregular, unauthorised, and illegal. There is more than this: the defendants argued, and quite convincingly to my mind, that the proposal to borrow $87,000 was in effect negatived—that is to say, the proposal to borrow which the ratepayers were summoned to sanction was not approved.

I refer to this to emphasise the fact that, beyond the selection of the site, no legal or effective step has been taken to provide the money required for the purchase of a site for the buildings. It goes beyond the objection that the debentures have not been issued; there is as yet no legal sanction for an application to the council.

Without discussing in further detail the proceedings at the October meeting of ratepayers, it appears to me that there are good grounds for believing that a substantial number of the ratepayers voted at that meeting under the mistaken belief that a legal and binding contract to buy the site had theretofore been entered into by the board of trustees, and that the only course open to the meeting was to vote for the resolution to raise the purchase-price by the issue and sale of $22,500 of debentures, while the fact is that on that date there was no legal and binding contract to buy the site. On this ground, apart from anything else, I think the resolution passed at the October meeting of the ratepayers was not effective.

In the year 1893, it was plainly adjudged in the case of *Smith* v. *Fort William School Board*, 24 O.R. 366, that the trustees could not make a binding and unconditional contract to purchase or build until they were assured of the means to pay, through the issue of debentures.

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In that case Street, J., after quoting the provisions of the Public Schools Act then in force, says (p. 370): "An examination of these provisions shews that while the trustees of urban school boards may require the municipal council to levy and pay over to them the amounts needed for the ordinary expenses of the schools in their charge, their right to obtain money for the purpose of building a school house, or buying a school site, is not an absolute one, but is dependent upon their being able to obtain the consent of another body, which may be the municipal council, or may be the general body of public school supporters, according to circumstances. It is plain that, however urgent they may deem their need to be that a school house should be built, unless they can obtain the assent of the council or the electors to the scheme, they are absolutely without any power to obtain the necessary funds. I think the natural effect of such a limitation upon their powers, must be the same as if the Legislature had in direct terms enacted that no urban school board should enter into any contract to build a school house until they had obtained the passing of a by-law of the municipal council for the purpose of raising the money with which to build it. It cannot be assumed that the Legislature intended to allow them to contract a debt without any means of paying it. If allowed to contract the debt, and if they can manage to build the school house, the fact that it has been built, will almost compel the municipal council to pay for it, in many cases where they would have refused and the electors would have refused to authorise the expenditure in advance, and thus the plain object of the Legislature, of enabling the council or the electors to consider it upon its merits, would be defeated. I think it highly necessary that none of the safeguards which the Legislature has thought fit to interpose between the zeal or the possible extravagance of the school board, and the public which is to find the money, should be disregarded."

I agree in these views; and, quite apart from that case and the general practice following it, I should now reach a like conclusion. That decision was made in respect to urban schools; but it appears to me that the same principle applies equally to the boards of rural school sections. The words of sec. 44 (1), empowering the board to requisition an issue of school debentures, end as follows: "Provided always that the proposal for the loan has been

submitted to and sanctioned at a special meeting of the ratepayers called for the purpose."

If a school board could make a binding and unconditional contract for the purchase of land or the erection of buildings without regard to the safeguards which the law provides in the interests of the ratepayers, the very purpose of these safeguards could be easily defeated. The contract would be binding and could be enforced, though never sanctioned as the law requires.

For this reason, I am of opinion that the attempted purchase of the site by the trustees before the debentures to pay for it had been issued was invalid and nugatory.

For these reasons, I would propose that judgment should go restraining the defendants and each of them from taking any action in pursuance of the resolution complained of, or otherwise proceeding towards the proposed purchase, unless and until the proposal for the loan in question has been submitted to and sanctioned at a further special meeting of the ratepayers (which meeting should be promptly called), and until in pursuance thereof debentures have been duly issued.

As the ratepayers at the meeting to be held may regularly determine to issue the necessary debentures, the other questions raised in this action ought not now to be determined, and in regard to them the action should be dismissed, without prejudice to any action which may hereafter be taken with respect to such questions after such meeting of ratepayers has been regularly held.

Having regard to all the circumstances, there should be no costs.

I should add that the views which I have expressed do not preclude the trustees from securing options on sites or from making contracts to buy conditional upon the lawful issue of the debentures necessary to provide the purchase-price.

I should add further that, in my view, the ruling of the inspector respecting the October meeting of ratepayers does not preclude the Court from granting relief in the form here proposed.

LENNOX, J.:—I agree in the result. Lennox, J.

RIDDELL, J. (dissenting):—Public School Section No. 15 of the Township of York had been formed—or reformed—and the question arose as to the site of a school to be built for the section. In 1914, the trustees had obtained an option on some land north Riddell, J.

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of Eglington; but the annual meeting, on the 14th January, 1915, disapproved, and a resolution was then passed "that the trustees be instructed to secure options on new school sites in the future."

The trustees took the matter up, consulted some of the ratepayers, and selected what they thought to be suitable sites: they instructed one of their number to secure options, and upon his report that he could not get the options without cash, they voted him $100 to secure the required options. This he did, and the school board, on the 31st May, 1915, considered the options, decided on one site as the best, and resolved "that pending the acceptance by the ratepayers, we herewith hand the sum of one hundred dollars ($100) to form the first payment on the purchase-price, and that we herewith offer to purchase the property for the sum of $25,000." The proposed vendors, the Colonial Realty and Securities Corporation, after consideration, determined to accept the amount; and, on the 14th June, the school board determined to call a school meeting "to sanction the purchase of a school site."

On the 25th June, the meeting was held, the several proposed sites considered, that advised by the board amongst them, and it was decided to postpone the consideration of the matter pending the result of the arbitration going on concerning the division of the section—"sites in option be retained until such matters were settled."

On the 10th July, instructions were given to obtain further options: the section was divided by township by-law, the county council approved the award of arbitrators confirming the division, and a school meeting was duly called to consider the site. At this meeting, on the 4th September, it was decided (the ratepayers voting by show of hands) "that the trustees be empowered to purchase the site selected by them."

The trustees met on the 8th September, and decided to instruct their solicitors to carry out the purchase of the lots (they did not accept the Colonial corporation's lot). On the 10th September, the options, 17 in all, were accepted in writing, and some money, it is said, was paid by the board.

On the 18th September, it was decided to call a school meeting "for the purpose of considering the proposal of the board of trustees . . . to apply to the municipal council of the township . . . for the issue of debentures for such amounts as

the ratepayers may deem adequate for the purpose of enabling the board to provide a school site and build a 12-roomed school on Harvey avenue."

On the 27th September, the meeting was held, and by a vote of 41 to 21 it was decided to "let the matter of issuing debentures stand over for six months."

On the request of a number of ratepayers, it was determined by the board to call a special meeting "to reconsider the motion passed at" this special meeting, "declining to give the trustees . . . the power to issue debentures to the amount of $87,500 to cover cost of site and school building."

On the 6th October, the ratepayers met, the notice was read, and the solicitor for the board was asked to explain the position of affairs: he stated that the lands had been arranged for, and the money must be provided (or something to that effect), and the question came up whether the amount of money to be placed at the disposal of the trustees should be the $87,500 they asked for, to pay for the land and build the school house, or only $22,500, to pay for the land they had arranged for.

In addition to a motion, which was carried, that every one voting should sign his name either for or against the motion he was voting upon, there were two motions, on separate pieces of paper, one (which was carried) limiting the authority of the board to debentures to the amount of "$22,500 for payment only on the land already contracted for by the board," the other "for the issue of debentures as aforesaid to the extent of $87,500:" it is perfectly plain that all present supposed that in voting for the one they were voting against the other motion. Accordingly, while there was no formal putting of each motion to the vote "Yes" or "No," what was done was the equivalent. It is equally clear that it was understood that the land had been contracted for, and the money would have to be provided to pay for it.

On the 25th October, 1915, the solicitors were given $250 to pay on the options, in addition to some $1,791 already paid for the same purpose, which sums were paid to the vendors accordingly.

An appeal was taken to the public school inspector, under sec. 54 (11) of the Public Schools Act, R.S.O. 1914, ch. 266, by those dissatisfied with the purchase: that official decided that the proceedings at the school meeting were regular.

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On the 31st March, 1916, the writ in this action was issued—the plaintiffs are a dissatisfied trustee and a dissatisfied ratepayer, the defendants are the school board, the other trustees, and the vendors. The claim is to set aside the offers to sell by and to recover the instalments paid to these vendors, to recover the money so paid from the offending trustees, to restrain them from paying any more, and to restrain them from applying for the passing of a debenture by-law by the Township of York.

The next proceedings are (to employ Mr. Justice Middleton's language) as follows:—

"The plaintiffs in this action seek to restrain the school board from proceeding with the purchase of a school site and the erection of a school building, upon various grounds, which, put shortly, resolve themselves into the contention that the proceedings at the meeting authorising an application to the council for funds were irregular and unfair, in that the questions were submitted in such form as to preclude any vote against borrowing; and, secondly, that the purchase of the land and the entering into of the contract before any by-law had been passed by the township was irregular and improper.

"Upon a motion for an interim injunction, Mr. Hellmuth, who then appeared as senior counsel for the defendants, objected that this Court had no jurisdiction, as the case was one falling within the provisions of sec. 20 (3) of the Public Schools Act, R.S.O. 1914, ch. 266. Mr. Grant, for the plaintiffs, on that occasion, did not seriously resist Mr. Hellmuth's contention, and accordingly I dissolved the interim injunction; retaining the action, however, so as to be satisfied upon the question raised by Mr. Grant that it might be found necessary to have a judgment in the action vacating certain conveyances if he succeeded upon his contention before the County Court Judge in proceedings which he said he intended taking under the statute referred to.

"Upon these proceedings being instituted, there was a change in the personnel of counsel, and Mr. McPherson, who succeeded to Mr. Hellmuth's brief, contended successfully before the County Court Judge that the section in question had no application to the matters in controversy. Mr. Grant now renews his motion in this Court, and Mr. McPherson asks that the motion be dismissed; Mr. Grant at the same time seeking leave to appeal to the Supreme Court from the order of the County Court Judge."

My learned brother Middleton considered the County Court Judge right in his conclusion, turned the motion into a motion for judgment, and referred the case for decision to this Court, under sec. 32 of the Judicature Act, thinking as he did that the judgment in *Smith* v. *Fort William School Board*, 24 O.R. 366, was wrong, but considering that it was binding upon him and that it covered this case.

In *Smith* v. *Fort William School Board*, the school board applied to the town council for a by-law to be submitted to the people for debentures to the amount of $12,000 for the purpose of building a new school house; the by-law was submitted, carried and passed. The board, instead of keeping within the limit, let a contract for $18,860 for part of the new school house, and paid out of the $12,000 some $2,625 on account of the contract. It was expected that the whole building would cost $21,216; and the trustees believed that the town would be compelled to supply the balance, over $12,000. Mr. Justice Street held that the trustees had no power to enter into this contract, and enjoined them from proceeding with it: and he also ordered the repayment of the $2,625 paid.

In *Forbes* v. *Grimsby Public School Board*, 6 O.L.R. 539, Boyd, C., at p. 541, says: "*Smith* v. *Fort William School Board* . . . decides that school trustees should not undertake to build in excess of funds provided by the council, and that is a salutary rule;" and he held that the board was not restricted to the money voted by the council under sec. 76 of the Public Schools Act of 1901, but might turn in the other moneys they had under control in the shape of rent and the proceeds of the old school house and site.

I venture to think that the real decision in *Smith* v. *Fort William School Board* has been misunderstood. The very learned Judge pointed out (24 O.R. at p. 371) that, "however urgent" the trustees "may deem their need to be that a school house should be built, unless they can obtain the assent of the council or the electors to the scheme, they are absolutely without any power to obtain the necessary funds. I think the natural effect of such a limitation upon their powers must be the same as if the Legislature had in direct terms enacted that no urban school board should enter into any contract to build a school house until

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they had obtained the passing of a by-law of the municipal council for the purpose of raising the money with which to build it."

What the learned Judge was considering will appear from an examination of the statute (1891) 54 Vict. ch. 55, especially sec. 116, substantially the same as the present R.S.O. 1914, ch. 266, sec. 43 (3).

It will be seen that when an urban school board applied for the issue of debentures for the erection of a new school house, etc., they did not obtain the assent of ratepayers in advance—they applied to the council, and, if the council approved the scheme, a by-law was at once passed. If the council did not approve the scheme, then the school board might have the question submitted to the ratepayers, and, if they approved, the council must pass a by-law accordingly: 54 Vict. ch. 55, sec. 116 (1).

What is meant by the language quoted is simply this: the school board is not the final judge of the propriety of any such scheme—if the council agrees with it, the scheme is approved and finally—if not, the people's consent must be obtained, and, if they approve, that is final—in any case final approval is shewn by the by-law passed by the council.

Reduced to its simplest form, it means that trustees are not to incur such liabilities without the approval of another body elected by the people to guard their interests, or that of the people themselves.

It may be put thus: trustees are not to act against the wishes of those for whom they are trustees (in the absence of special statutory or other authority).

In the *Smith* case, the council had agreed with the board that $12,000 should be spent on the building—neither council nor ratepayers that $18,000 or $21,000 should or might: and it was a plain breach of trust to use $18,000 or $21,000 for that purpose.

In the *Forbes* case it was unsuccessfully contended that the school board was limited to the amount voted by the council—the Chancellor thought otherwise—he in effect held that any money which the board could, without breach of trust, apply in the building, might be so applied.

The case of a rural school board was and is different in particulars—the board, if it wants an issue of debentures for such a purpose as has been mentioned, calls a special school meeting to consider the matter, and, if that meeting sanctions the applica-

tion, the council cannot refuse to pass the necessary by-law: 54 Vict. ch. 55, sec. 115 (1); R.S.O. 1914, ch. 266, sec. 44 (1). But the principles governing both cases are the same.

The language of Mr. Justice Street must not be taken too literally: it is not necessary that when the assent of the people has been obtained, and all that remains to be done is what must legally follow, i.e., the passing of the by-law, the actual passing of the by-law must be awaited before the board can act upon it —the question is, has the final authority passed upon the matter favourably?

The present case is widely different from the *Smith* case—the ratepayers (the final authority) had directed the school board to procure options, the board had done so, and had called the ratepayers to a special meeting to consider these options, the ratepayers had decided the matter and given express directions to carry out the purchases proposed. Instead of a breach of trust being imputable to the board in their accepting the options, it would have been a breach of trust for them to have acted otherwise: they were doing their simple duty, and I see no reason for considering that they had not the power to enter into these contracts. It would certainly be a monstrous result if we must hold that a school board had not the power to enter into contracts for land necessary for the erection of a school house which their ratepayers had expressly directed them to enter into. There is no authority binding us so to hold, and I decline so to hold in the absence of such authority.

If the ability of the board to pay for the school site is to be considered a test, it must not be forgotten that the board may, without any mandate or approval by a school meeting, require the council to raise the money by one yearly rate: sec. 45.

It is perhaps not necessary to say that the express duty is case upon the board by sec. 73 (*e*) of the Act; and that, when the choice of the board is ratified by a special meeting under the provisions of sec. 11, the board can, in my opinion, make a binding contract.

That being so, the statements of the solicitor at the meeting complained of were substantially correct—and I do not think that it is open to any one now to complain of the resolution to apply to the township council for $22,500.

I would dismiss the action with costs.

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I do not think myself called upon to express any opinion as to the finality of the decision of the inspector—the position of a public school inspector is one of great usefulness, his duties are arduous, most of those occupying that office are of the highest character, great diligence, and prudence, ripened by experience, and I would be loath to interfere with their judgment or discretion unless forced so to do by imperative law. *Judgment for plaintiffs.*

MAN.
C. A.

REX v. ROBLIN.

Manitoba Court of Appeal, Richards, Perdue, Cameron and Haggart, JJ.A. February 10, 1916.

DEPOSITIONS (§ I—6)—FOREIGN COMMISSION—CRIMINAL CASE—CR. CODE, SEC. 997.

A commission to take evidence *ex juris* in a criminal case may be ordered in respect of an expert witness if the Court is satisfied that his evidence is material and that it is improbable that he would voluntarily attend within the jurisdiction.

Statement.

APPEALS by both the prosecution and the defence from an order of Metcalfe, J.

An application was made on behalf of the accused for an order to take the evidence in Chicago on commission of E. C. Shankland, civil engineer, the members of his staff, and of an eminent engineer, one Mojeski, for use in accordance with section 997 of the Code, on the ground that the evidence of these witnesses was material, that they resided in the United States and that they would not come here voluntarily to testify at the trial. The following decision was given by

Metcalfe, J.

METCALFE, J.:—Regarding the expert witness Mojeski, I do not think the applicant has made a sufficient case for an order to examine him on commission.

Regarding all other witnesses, I am satisfied,—

(1) That they reside out of Canada.

(2) That they are able to give material information on behalf of the accused relating to the offence for which they have been committed for trial.

(3) That it is highly improbable that any of them will voluntarily attend the trial to give evidence.

Considering the material and the special circumstances, I think there should be an order for their examination on commission.

I therefore appoint William F. Perkins, Court Stenographer,

to take the evidence on oath of all the parties named in the application, excepting the said Mojeski.

The Crown appealed against the order, and the defence to add the name of Mojeski as an additional witness.

A. J. Andrews, K.C., for respondents.

THE COURT (Cameron, J.A., dissenting), gave judgment dismissing the appeal of the Crown, and allowing the appeal of the defence.

Appeal by Crown dismissed; appeal by defence allowed.

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Saskatchewan Supreme Court, Sir Frederick Haultain, C.J. and Brown and McKay JJ. June 15, 1916.

PHYSICIANS (§ I B — 26) — UNLAWFUL PRACTICE BY A CHIROPRACTOR — SASKATCHEWAN MEDICAL ACT.

Chiropractic treatment for disease is within the prohibition of the Medical Profession Act, R.S.S. 1909, ch. 106, sec. 64, if given by an unlicensed person for hire, gain or hope of reward; and a chiropractor doing business for gain is properly convicted if he has not been registered under the provisions of that Act.

Statement.

THIS was a case stated by a magistrate at Humboldt, and argued before the Court *en banc*.

The case stated was as follows:—

In the matter of the King, upon the information of George A. Carter, of Regina, in the Province of Saskatchewan, against H. M. McSloy (accused).

Case stated by F. G. Bailey, Esquire, one of His Majesty's Justices of the Peace in and for the Province of Saskatchewan, under the provisions of sec. 761 of the Criminal Code of Canada and the Rules of the Supreme Court of Saskatchewan applicable thereto.

Whereas, on the 19th day of May, 1916, an information and complaint was laid on oath before me by the above-named George A. Carter, of the city of Regina, in the Province of Saskatchewan, constable, for that the said H. M. McSloy did, at the town of Humboldt, in the said province, between the 1st day of February, 1916, and the 10th day of May, 1916, being then and there an unregistered person within the provisions of the Medical Profession Act and a person not registered pursuant to such Act, unlawfully, for hire, gain and hope of reward, treat a disease or ailment in the person of one Mrs. John Waddell, of the said town of Humboldt, by a form of treatment called chiropractic, con-

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trary to the provisions of sec. 64 of the said Act, being ch. 106 of the Revised Statutes of Saskatchewan, 1909, and amendments thereto.

And whereas, on the 20th day of May, 1916, the accused duly appeared before me and pleaded not guilty to the charge contained in the said information and complaint.

And whereas, upon the application of the said George A. Carter, I duly adjourned the hearing of this case until Tuesday, the 23rd day of May, 1916.

And whereas, on the 23rd day of May, 1916, at the said town of Humboldt, the evidence of the said charge was duly heard before me, in the presence of both parties and Mr. Frame of counsel for the said George A. Carter, and of Mr. Gardner, of counsel for the accused, and, after hearing the evidence adduced and the statements of counsel for the said George A. Carter and the accused, I found the said H. M. McSloy, the accused, guilty of the said offence, and convicted him thereof, but, on the application of counsel for the said H. M. McSloy, made to me in writing on the 25th day of May, 1916, I state the following case for the opinion of this Honourable Court.

It was shewn before me:—

That the said Mrs. John Waddell, between the 1st day of February, 1916, and the 10th day of May, 1916, was sick and confined to her bed with paralysis.

That the said H. M. McSloy was, during the time of the alleged offence, in attendance upon the said Mrs. John Waddell as a medical attendant.

That the treatment given to the said Mrs. John Waddell consisted in the adjusting of her spine.

That the accused, in the course of the said treatment, took his hands and went down the vertebræ with his fingers, and at a certain point he stopped and put his other hand down and pressed on the hand that he had on the spine.

That this treatment was given to the said Mrs. John Waddell some times when she was in bed and some times upon a kind of table which the accused always brought with him.

That this table was used exclusively for giving the adjustment to the spine.

That, after the giving of such adjustment on such table, the

said Mrs. John Waddell, who was unable to walk, was lifted back into her bed.

That the accused said that this treatment would help the said Mrs. John Waddell and that she would get better by-and-by.

That during the said attendance of the accused upon the said Mrs. John Waddell there was no registered medical practitioner in attendance.

That no evidence was given that the accused prescribed or recommended or used any drug or medicine or appliance other than the said table to which I have before referred.

By evidence of one M. E. Cornell, the partner of the accused, which evidence was not disputed, that the accused treated the said Mrs. John Waddell for hire, gain or hope of reward. That the accused gave treatment to the said Mrs. John Waddell between the 1st of February, 1916, and the 10th day of May, 1916. That the form of treatment given to the said Mrs. John Waddell was exclusively limited to the spine, and consisted in the application of the hands to the spine or some portion of the spine, and that the ultimate purpose of the said treatment was to cure Mrs. Waddell of some disease or ailment she was suffering from and to restore her to health, and that such disease or ailment might be named as a species of paralysis.

That the said M. E. Cornell and the accused were, since the month of September, 1915, practising the profession of chiropractic at the said town of Humboldt.

That the treatment given by the chiropractors is not accompanied by the use of drugs.

A certified copy of the depositions taken on the hearing of this case is hereto attached.

The counsel for the said H. M. McSloy desires to question the validity of the said conviction on the ground that it is erroneous in point of law, the question submitted for the judgment of this Honourable Court being:—

(1) Whether the facts as above set forth disclose any violation of the provisions of sec. 64 of the Medical Profession Act of Saskatchewan, and if the conviction made by me on the above-named facts was correct.

E. Gardner, for accused (appellant).

J. F. Frame, K.C., for informant (respondent).

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REX v. MCSLOY.

The Court, at the conclusion of argument, unanimously held that the acts proved to have been done by the accused came within the matters prohibited by sec. 64 of the Medical Profession Act (R.S.S. 1909, ch. 106), and confirmed the conviction with costs. *Conviction affirmed.*

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C. R.

FAIRBANKS v. MONTREAL STREET R. CO.

Quebec Court of Review, Archibald, A.C.J., Monet and Mercier, JJ. March 18, 1916.

STREET RAILWAYS (§ III B—28)—COLLISION WITH AUTOMOBILE—THEATRES —SPEED.

Running a street car at a high rate of speed at a place where people were leaving a theatre, thereby colliding with an automobile proceeding out from thereabouts, is negligence for which the railway company is responsible; where both are at fault the company may be condemned to pay half of the damages claimed.

Statement.

APPEAL from a judgment of the Superior Court in favour of plaintiff. Affirmed.

On December 6, 1913, plaintiff drove a party from His Majesty's Theatre to the Regis Hotel for supper. He was turning his automobile from the curb in order to proceed further east along St. Catherine St., when the vehicle was struck by a street car and sustained damages which cost $314 to repair. The Superior Court ruled that there had been fault on both sides and condemned the company to pay one-half of the damages claimed. The company appealed, submitting that the plaintiff was solely responsible for the accident: a majority of the Judges confirmed the judgment of the Superior Court.

Campbell, McMaster & Papineau, for plaintiff; *Meredith & Macpherson*, for defendant.

Monet, J.

MONET, J.:—I myself consider that, according to the proof, the company defendant ought to have been condemned to pay not one-half of the damages, but the full amount claimed. The weight of evidence is that the car was proceeding at a speed of eight or ten miles an hour, and it must not be forgotten that this was at a time when people were leaving the Princess Theatre and the Orpheum, that the sidewalks were crowded, and there were several automobiles on the roadway at this point, which is somewhat narrow. In the circumstances, how can anyone pretend that the motorman was not at fault in travelling at a speed of 8 or 10 miles an hour? The company defendant should think it has got off well in having to pay only one-half of the

damages caused by an accident which, in my opinion, was caused by the fault of its employee.

MERCIER, J., concurred.

ARCHIBALD, A.C.J. (dissenting):—The principles upon which these cases are decided are, at the present time, clearly determined. The Tramways Company is granted the right to operate its cars upon certain streets in the city at a certain fixed speed. It has a privilege over ordinary traffic to the extent that it has a right to continue at its rate of speed, and other traffic must not go on its lines unless it can clear them without stopping the car. In the exercise of this right the tramways' officer must, of course, exercise prudence.

Foot passengers, or vehicles must, before coming on the tracks, stop, look, and listen to see whether there is a car approaching from the one direction or the other. If a pedestrian comes suddenly upon the track when a car is so close that it cannot be stopped before an accident happens, the cause of the accident is easily that of the person suffering it. If, however, the motorman has seen, or ought to have seen, the person or the vehicle approaching the track in a manner indicating an intention to cross in front of the car, he ought to reduce the speed of the car and obtain complete control over it so as to avoid the accident.

In this case the plaintiff's automobile was the centre one of three standing along the curb. If, when the plaintiff was about to get out from between the two others, he had then looked, he would have seen the tramcar at a distance not exceeding twenty feet, and he would have known that it was madness to attempt to cross. At that stage he did not look. I think the proof is overwhelming that no danger appeared until the tramcar was within 20 feet of the place where the accident happened, and I believe the proof is absolute that the motorman did all that was possible for him to do to avoid the accident. I can see no evidence of fault on the part of the motorman. The pretence made by the chauffeur that he had started first and that the tramcar came from a standstill for a distance of 125 feet while he was going 10, is fantastic, and is not in accordance with scientific possibility. As a matter of fact, it is to me evident that the chauffeur looked at the wrong time and did not look at a time when it would have been useful for him to do so—that is just when he was about to enter upon the track. *Appeal dismissed.*

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GEORGE WESTON LIMITED v. BAIRD.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. June 28, 1916.

1. CONTRACTS (§ III E 2—287)—RESTRAINT OF TRADE—REASONABLENESS—SPACE—MISREPRESENTATION.

A covenant by a cake salesman not to engage in the sale of cakes or confectionery within 12 months after the termination of his employment, within a city of a half million inhabitants, is reasonable as to time, but unreasonable as to space, and is unenforceable, particularly when obtained under a misrepresentation that other employees have signed a similar contract; where the reasonable and unreasonable parts are not separable the contract is wholly unenforceable.

2. CONTRACTS (§ I C 2—20)—RESTRAINT OF TRADE—CONSIDERATION—EMPLOYMENT.

The employment forms a sufficient consideration for a covenant by an employee in restraint of his trade.

Statement.

APPEAL by the defendant from the judgment of one of the Judges of the County Court of the County of York, in favour of the plaintiffs, in an action for an injunction and damages in respect of the defendant's alleged breach of an agreement or covenant "that he will not during his employment" (as cake-salesman and driver for the plaintiffs), "or within twelve months after its termination, whether by mutual consent or otherwise, drive a cake-waggon or sell or deliver or serve or solicit orders for any cakes, confectionery, pastry, or other bakery products, within the city of Toronto, for himself or for any other person, firm, or company than the" plaintiffs, etc. By the judgment appealed from the plaintiffs were awarded an injunction and $5 damages.

E. B. Ryckman, K.C., for plaintiffs, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—There are two substantial questions involved in this appeal: namely, whether the restraint upon trade contracted for and sought to be enforced, in this case, is a reasonable one; and, if so, whether it was obtained under such circumstances that it ought not to be enforced. The third question, whether there was a sufficient consideration for the restraint contracted for, is an unsubstantial one; there was a *quid pro quo* in the employment of the defendant by the plaintiffs; and the question of *quantum* was one resting entirely in the judgment of the parties, not of the Court.

Whether the restraint contracted for in this case was such a restraint upon the defendant's means of earning his livelihood as was reasonable or unreasonable, depends, of course, upon the circumstances of the case: and they were somewhat peculiar.

It was not the ordinary case of hiring and service for wages. The defendant's position became that rather of a pedlar of the plaintiffs' wares: he was one of a dozen or so of such salesmen in the like employment: the pastry sold was carried by means of horse and waggon supplied by the plaintiffs, and each salesman seems to have had a restricted locality allotted to him. The wares were pastry of various kinds. The quantity required each day by each salesman had to be bespoken the second day before it was wanted, and all that was bespoken and supplied had to be paid for by the salesman.

When the defendant entered the plaintiffs' employment, he took the place of another, who was leaving, and had the benefit of the trade which had been worked up in one locality, subject of course to the competition of other pastrymen's salesmen and trade generally: but he had before been a salesman in this locality for other pastrymen, and had what might be called a personal trade; and was expected to increase and did increase the plaintiffs' trade in the locality. The defendant was supplied with the plaintiffs' wares at wholesale prices, and sold them at retail, the profit, or loss when all were not sold, was his: he received no pay in any form from the plaintiffs.

After continuing for more than a year as such salesman, on such terms, the defendant left the plaintiffs and entered into the employment of a competing firm, or company, of pastrymen, whose service he had been in before going to the plaintiffs. He had apparently been in this occupation of a pastry pedlar in the same locality for about three years, ever since coming to the country.

The restraint which the contract in question puts upon the defendant is, as to time, limited to one year, and is not unreasonable in that respect; but, as to locality, it covers the whole of the city of Toronto, with its nearly half a million inhabitants, and covers selling, delivery, serving or soliciting orders for, any cakes, confectionery, and pastry, or other bakery products, for himself, or for any other person, firm, or company, except the plaintiffs: and so, as it seems to me, is far too wide to be needful for the plaintiffs' protection, or to be reasonable from any point of view.

In the first place, what need to cover the whole city of Toronto; what justification for any restraint beyond what would prevent the defendant taking advantage of the trade to which his con-

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nection with the plaintiffs introduced him, or, more plainly put, those who were really the plaintiffs' customers? Merely because some man may be guilty of a breach of a reasonable restraint, is not a good reason for imposing an unreasonable restraint; the proper remedy is in enforcement of the reasonable contract.

Then why include "confectionery?" As pastry and cakes are also included, confectionery would probably include sugar confectionery, which has no part in the plaintiffs' trade. And why other bakery products? The plaintiffs did not make or deal in any other.

I cannot find any justification for this contract, which would either drive the defendant out of his home in Toronto altogether, or out of his trade altogether; and so consider the contract invalid, that is, unenforceable in the Courts of this Province, because contrary to public interests—against the welfare of the country; and unnecessary for the plaintiffs' reasonable protection.

On the other substantial question too, this action, in my opinion, should be dismissed.

The plaintiffs had a much more reasonable contract of this character, but were not content with it apparently, and had the more stringent one, which is in question in this action, prepared for them. When the defendant was asked to sign the contract in question, he was told that all the other salesmen had signed an agreement the same as it: but that was not so; seven were still serving under the early and much more reasonable contract; six only, including the defendant, had signed the later one.

Upon that misstatement the defendant signed the agreement in question; and, that being so, how could any Court compel the defendant, at the instance of those who misled him, to perform the onerous terms of that contract so obtained? The evidence of the plaintiffs' agent who procured the defendant's signature to the contract in question is quite as strong as that of the defendant in regard to the misstatement upon which the contract was signed.

The appeal must be allowed and the action dismissed, both with costs. The case is plainly not one in which the reasonable and unreasonable parts of a contract are separable, so that the reasonable may be enforced without affecting the unreasonable and without prejudice to any rights of the parties: see *Allen Manufacturing Co.* v. *Murphy*, 23 O.L.R. 467.

Nothing which I have said conflicts with anything that was decided in the case of *Skeans* v. *Hampton*, 31 O.L.R. 424. The only question considered in it, besides the question of valuable consideration, was: whether the defendant had committed a breach of the contract in question in that action.

LENNOX, J.:—The plaintiff company are engaged in the manufacture and sale of cakes and biscuits in the city of Toronto. The company use cake-waggons, and effect sales through agents or salesmen, to whom are assigned defined routes. Each agent is in charge of a waggon, and from day to day works within the area assigned to him, solicits orders, and, when he effects a sale, makes an immediate delivery from the waggon, and collects payment. The salesmen are paid for these services by a commission of 9 per cent. upon the amount of cash turned in from night to night. The company allege that in this way their trade covers the whole of the city of Toronto. It is not claimed that salesmen become possessed of trade secrets, in the strict sense of that term, or acquire a knowledge of secret processes or methods of production; but it is claimed, and it is the fact, that a salesman necessarily gets to know the names and residences of the people who occasionally or generally buy goods from his waggon along his route. I judge from the very limited number of customers upon a single route, 28 on this route, that the percentage of those who buy is not very high, and the same would be true of the whole city, based upon the total number of householders, hotels, etc.; and it is reasonable to infer, too, that many of the sales are in a sense casual; that the company are constantly losing old customers and getting new ones.

The defendant swears that he is by occupation a cake-salesman, and by this I understand he means that this is his regular and only calling. He came to Canada about three years ago and entered the service of the Eclipse Baking Company in the city of Toronto, as a cake-salesman, and remained in the service of that company until he became employed by the plaintiff company, about the beginning of February, 1915. He got some assistance for the first few days from one of the company's other employees. On the 6th February, he signed an agreement, not executed by the company, in the following terms:—

"Agreement, made this 6th day of February, 1915, between

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James Baird, hereinafter called the "employee," and George Weston Limited, hereinafter called the "employer."

"The employee hereby agrees to enter the service and employment of the employer as cake-salesman and driver, at and for a commission of not less than 9 per cent. on all cash taken in by him in trust for and received by the employer.

"In consideration of such employment, the employee covenants and agrees with the employer that he will not during his employment, or within twelve months after its termination, whether by mutual consent or otherwise, drive a cake-waggon or sell or deliver or serve or solicit orders for any cakes, confectionery, pastry, or other bakery products, within the city of Toronto, for himself or for any other person, firm, or company than the employer, and that he will not interfere with or prejudice in any way, either directly or indirectly, any present or former customers or the business of the employer, and that he will during his employment devote all his time, ability, and energy to advancing honestly the interests and business of the employer.

"The employee agrees to guarantee payment of all outstanding accounts for goods sold or delivered by him or to customers secured by him; and that he will abstain from the use of intoxicating liquors while on duty.

"The employment may be terminated by either party at any time without notice, and thereupon an accounting and payment accordingly shall be made.

"In consideration of the aforesaid covenants and agreements, the employer hereby agrees to take the employee into its service, and to give him steady employment so long as his conduct and services are satisfactory."

There is nothing in the fact that the defendant was in a sense in the service of the company before he signed the agreement. He was making trial trips only, his engagement was conditional upon his proving to be efficient and satisfactory, and the authorities are clearly and uniformly against the defendant in such circumstances; and it is so, generally, even where there has been previous service of a permanent character.

The restraint provided for, having regard to the extent and character of the company's business, is reasonable as to time, and the area is not too wide to be embraced in an effective agreement if properly confined to the actual connection of the defend-

ant with the company's business and customers, and limited to what is reasonably necessary to prevent prejudice to the company's proprietary rights arising out of the employment. There was legitimate scope for an effective restrictive agreement of a limited character; it could have been framed, entered into, and enforced, but I am of opinion that the agreement in question is not of this character, attempts too much, is unfair to the defendant, prejudicial to the public interest, and not enforceable in whole or in part. In its terms, and upon the evidence, it goes to an attempt to prevent competition of a character not arising out of, and throughout an area wider than the proposed or actual scope of, the defendant's employment.

What is reasonably necessary for the protection of the covenantee is allowable. It is not a question of the adequacy of the consideration. There must be a consideration, but its nature and quantum, if valuable, is for the parties to determine: *Hitchcock* v. *Coker* (1837), 6 A. & E. 438, and many subsequent cases; Halsbury's Laws of England, vol. 27, p. 565, para. 1097; mere employment is sufficient, and this although the servant may be dismissed at any time: *Skeans* v. *Hampton*, 31 O.L.R. 424. But, in considering a contract restraining the exercise of industry or skill, or the acquisition of a livelihood, Courts do not ignore the fact that only employment of temporary or uncertain duration is secured.

In *Herbert Morris Limited* v. *Saxelby*, [1916] 1 A.C. 688, the plaintiff company specialised in hoisting and moving plants, had establishments in many of the chief cities in the United Kingdom and a world-wide trade connection. The defendant entered their service when he left school, and everything he knew as an engineer and about machinery or trade business was acquired while in the company's service. By the agreement sued on, the second he had entered into after coming of age, he covenanted not, directly or indirectly, for himself or others, to engage in Great Britain and Ireland in manufacturing or dealing in certain machinery of a class manufactured and sold by the defendant company, for a period of seven years after termination of his services with the company. The company sought to restrain him from engaging in the service of a rival concern, specialising in the same lines, and failed in all the Courts. In the House of Lords the authorities are reviewed and the principle upon which the

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Courts act elaborately discussed. Lord Atkinson, at p. 699, quoted the following statement of the law from the judgment of Lord Macnaghten in the *Nordenfelt* case, [1894] A.C. 535: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interest of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford *adequate protection to the party in whose favour it is imposed*, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities."

The application of this principle, just as stated, defeats the claim of the plaintiff company.

Until the defendant (Baird) entered the service of the plaintiff company, his only knowledge of Toronto trade was acquired in the service of their trade rival, the Eclipse Baking Company, and by canvassing for them on a route in the east end; and, whether by accident or design, it happened that the plaintiffs' previous salesman was then sent elsewhere, and the defendant, in the new service, was put to work and kept upon the same route; and at that time and under these circumstances the company exacted from the defendant the drastic conditions now in question.

Can it be said in this case that the restraint proposed is not prejudicial to the public interest and "affords to the person in whose favour it is imposed *nothing more than* reasonable protection against something which he is *entitled to be protected against*?" Was it reasonably necessary to impose upon the defendant conditions directly calculated to prevent him from earning an honest living in the only calling he could efficiently exercise, to shut him out from 95 per cent. of the whole highway mileage of the city of Toronto, to him unexplored, and wholly untouched in the service of the company; to debar him not only from soliciting orders for

or selling goods of the class dealt in by the company, to customers of the company with whom the defendant came in contact in the service, but also to debar him from selling these goods or other bakery products not dealt in by the company over the counter at any point in the city of Toronto, "or deliver or serve" by vehicle or otherwise these "or (any) other bakery products" whatever, upon a sale made by anybody to any inhabitant of this city or temporary sojourner therein, known or unknown to the defendant; was it necessary for the fair protection of the company to paralyse the activity of the defendant, deprive the public of the benefit of his industry, stifle legitimate competition, and induce at least the possibility of increased charges upon public and private charity?

The defendant learned his trade in the old country, and brought it with him when he came to Canada; and he developed his aptitude as a salesman and acquired a knowledge of Canadian conditions in the service of city rivals of the plaintiff company. It was otherwise with Mr. Saxelby, who acquired all his training and technical knowledge in the service of the Herbert Morris company.

"In *Mason* v. *Provident Clothing and Supply Co.*, [1913] A.C. 724, it was argued, apparently for the first time in this class of case, that an employer might reasonably say 'I will not have the skill and knowledge acquired in my employment imparted to my trade rivals,' and that the validity of the restraint did not depend upon personal contact with the employer's customers, but upon the fact that the employee gained that general knowledge which put him into a position to compete with his master and made him a source of danger, against which the master was entitled to protect himself. The argument was rejected by your Lordships' House, and the restraint in question was held bad, as being wider than was necessary to protect the employer from injury by misuse of the employee's acquaintance with customers or knowledge of trade secrets."

The paramount consideration is always the public interest. Subject to this consideration, the recognised aim is freedom of trade and freedom of contract. "Sanctity of contract" is not literally an issue in these cases. If the Court refuses to enforce the attempted restraint, it is simply that in point of fact there has been no contract in law—no legally effective contract to hamper

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freedom of action. The ultimate question, too, always is, how will it affect the public interest; and this not merely as to the effect in the particular instance, but how would restraints of the kind and type proposed affect the public, if they became general? See Lord Shaw in the *Herbert Morris* case, at p. 716. The covenantee can only protect that which is his, the product of expenditure of some kind or what he has acquired by foresight, industry, energy, enterprise, or skill; something paid for in some way by himself or those whose title he has; he will not be allowed to appropriate or destroy the rights of the State to the benefit which should accrue from the industry, education, skill, capacity, or aptitude of its people. He must not, with the restraints which he can lawfully obtain, the legitimate protection of his own interests, combine an attempt to stifle competition, paralyse individual effort, or run counter to the public good. The onus is upon him to shew that the restriction is no more than is necessary for legitimate protection; and this not by assertion of witnesses at the trial, but by evidence of the nature and extent of his business, and upon a fair construction of the agreement in the light of the facts and circumstances of the particular case. See Lord Haldane in the *Mason* case, p. 782.

It is true that some of the restrictions may be enforced and others disregarded, if the provisions are distinctly severable: *Baines* v. *Geary* (1887), 35 Ch. D. 154; *Chesman* v. *Nainby* (1727), 1 Bro. P.C. 234; *Mallan* v. *May* (1843), 11 M. & W. 653. I gave effect to this rule and restrained the defendant from soliciting custom along the trade route he had travelled for the plaintiff, in *Skeans* v. *Keegan* (1916), 10 O.W.N. 225. But Courts are reluctant to exercise this power, and will only do so, if at all, where the valid are clearly severable from the invalid restrictions. The Court should not be asked to devise or frame an *ex post facto* contract.

I have not overlooked Mr. Ryckman's well-presented argument, or the hazy suggestions in the evidence, of the need for a strenuous and far-reaching agreement to prevent information or suggestions to a subsequent employer, communications between drivers, or other possible or theoretic difficulties of this character. It might be enough to say that no breach, actual or contemplated, has been shewn, and that the agreement does not stop at this point. The action is for an injunction; and as yet there has been

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no breach of this nature committed, and there is none in sight—nothing to enjoin. But, aside from this, is there a tangible possibility even of substantial inconvenience to the employer? *De minimis non curat lex* is not to be flippantly affirmed or invoked in disregard of proprietary rights, even if involving only comparatively trifling individual sacrifice. But, while Courts are bound to endeavour to safeguard the individual *right* of every litigant, yet, in the construction of a statute or the enunciation or perpetuation of a principle of law, when a question of public policy is also involved, possible or conjectural individual inconvenience should be subordinated to what must always be the paramount consideration in cases of this character: a steady aim to secure "the greatest good to the greatest number." It is not a question of denying or sacrificing individual *right*, but whether, having regard to the public interest, *the right set up* can be allowed to arise and vest—*a created right of the covenantee*. Considerations, pointedly distinct from those arising on the sale of a business or goodwill, are presented in the case of an attempt to restrain unduly the right to earn and the duty to toil—in pursuance of the Divine command.

It is not enough to say that the defendant can seek employment in Montreal or Ottawa or Hamilton; subject to the restrictions already pointed out, he has the right to live and labour here, and the people here have the right to the gain resulting from industry and legitimate competition. The plaintiff company had no right to attempt to prevent it.

The appeal should be allowed and the judgment set aside, with costs here and below.

RIDDELL and MASTEN, JJ., concurred. *Appeal allowed.*

Riddell, J.
Masten, J.

NORTH AMERICAN LIFE ASSURANCE CO. v. MORRIS.

ALTA.

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Alberta Supreme Court, Harvey, C.J. November 6, 1916.

MORTGAGE (§ VI E—90)—MORATORIUM—VOLUNTEERS AND RESERVISTS RELIEF ACT—RENTS.

A proceeding by a mortgagee to collect rent from tenants under the terms of the mortgage is not suspended by the Volunteers and Reservists Relief Act (Alta., 1916).

[*Canada Life Ass. Co.* v. *Dickson*, 30 D.L.R. 301, considered. See also *Nicholson* v. *Gregory* (Man.) 31 D.L.R. 235.]

APPLICATION for injunction under Volunteers and Reservists Relief Act, 1916. Refused. Statement.

L. F. Mayhood, for plaintiff; *E. C. Coleman*, for defendant.

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NORTH AMERICAN LIFE ASSURANCE CO. v. MORRIS.

Harvey, C.J.

HARVEY, C.J.:—The defendant mortgaged certain lands to the plaintiff on October 24, 1913. The mortgage having become in default, the mortgagee served notice on the tenant of the lands to pay the rent to it. The defendant, who comes within the protection of the Volunteers and Reservists Relief Act of 1916, applies for an injunction to restrain the plaintiff from recovering the rents and profits until 1 year after the end of the war, or of his discharge.

I am referred to my decision in *Canada Life Assurance Co.* v. *Dickson*, 30 D.L.R. 301, in which case I held that an order for the appointment of a receiver to recover rents in an action brought to enforce the mortgage, and the action itself should be set aside. In that decision I pointed out that the mortgagee's rights of collecting the rents, if any existed, are not taken away by the Act.

It is provided by a clause in the mortgage in this case that in the event of default the mortgagee may enter upon the lands, and whether in or out of possession may collect and receive the rents. It is under this provision that the mortgagee rests his notice to the tenant and his right to receive the rents of the land. It is not necessary to determine whether his action in serving notice on the tenant demanding payment of the rents to him is or is not a proceeding within the meaning of the Act. In the widest sense of the word proceeding, it is probably a proceeding, but I think there is much room for argument that it is not a proceeding within the meaning of the Act which prohibits proceedings being taken, but if it is I see no way whereby the mortgagee can enforce his right to collect the rents without some such proceeding and as the right is expressly given to him by the mortgage contract it is clear from the terms of the Act that it is not taken away and he must therefore be permitted to take such proceeding. *Application dismissed with costs.*

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MARTIN v. JARVIS.

Ontario Supreme Court, Boyd, C. May 25, 1916.

1. SPECIFIC PERFORMANCE (§ I A—3)—CERTAINTY OF TERMS—MANNER OF PAYMENT.
Where the terms of a contract are reasonably certain and complete so far as essentials are concerned, though the manner of payment is left open for adjustment between the parties, specific performance will be decreed.

2. EVIDENCE (§ VI E—537)—PAROL EVIDENCE—TERMS OF PAYMENT—STATUTE OF FRAUDS.
Parol evidence is admissible to explain the terms of payment under a

contract for the exchange of lands whether under the Statute of Frauds or otherwise.

3. BILLS AND NOTES (§ IID 1—30)—"NEGOTIABLE PAPER"—MEANING.
The phrase "negotiable paper or cash" contemplates, not a mere personal note, but a documentary security which could be discounted for cash.

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MARTIN v. JARVIS.

Statement.

ACTION to set aside and vacate a conveyance of land by the plaintiff to the defendant and its registration by the defendant, on the ground that it was made without consideration, and that it was fraudulently obtained and registered. The defendant counterclaimed for specific performance.

R. McKay, K.C., for plaintiff.

H. Guthrie, K.C., for defendant.

Boyd, C.

BOYD, C.:—This action is brought to set aside and vacate a conveyance of land and its registration by the defendant, on the ground that the deed was made without consideration, and that it was fraudulently obtained and registered. At the trial, on the allegations of fact the plaintiff was completely overborne by opposing and satisfactory testimony. The case was launched originally as upon a valid contract of sale by which the defendant was to take in exchange the plaintiff's land, being a farm called "Janefield," near Guelph, for land owned by the defendant at Port Huron, known as the "Canning Plant." Upon that footing, an interlocutory injunction was obtained, restraining the defendant from dealing with the land and chattels sold therewith. On motion to continue the injunction, it was made to appear that the defendant had a good title to the Port Huron property, and was ready and willing to carry out the contract, and had not refused to complete, as was alleged in the statement of claim and affidavits. Thereupon the injunction was modified by my brother Middleton—as to the land the plaintiff was left to his *lis pendens*, and as to the chattels he was to give security to answer in damages in case his interference had injured or would injure the defendant.

Upon this new aspect of the contention being developed, the plaintiff, after the statement of defence had been delivered, amended his claim under Rule 127, setting up no longer a good contract, but "an alleged agreement," and claiming that the same was void for uncertainty, not binding on the plaintiff as dealing with an interest in land, and not complying with the Statute of Frauds, R.S.O. 1914, ch. 102, sec. 5. In his reply of the same date, the 4th May, the plaintiff indicates more clearly

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the point of complaint, thus: "The said agreement is void and not binding on the plaintiff, among other things for uncertainty in that no period of time is specified for maturity of the negotiable paper mentioned in the agreement." This was indeed the one point argued by Mr. McKay, for the plaintiff, that the agreement was too vague for specific enforcement because of the uncertainty and indefiniteness of the expression in this term of the contract, viz., that the defendant was to take from the plaintiff "negotiable paper or cash for the balance due on the property" of Jarvis, the defendant.

Waiving the anomalous condition of a plaintiff using the Statute of Frauds as a weapon of attack, and assuming that it is rightly set up, the point arising on that statute, or it may be apart from that statute, on the ground of infirmity inherent in the terms of the contract—i.e., that it is so vague as to be inoperative—this point appears to be the only serious question in the controversy.

The plaintiff calls himself a farmer, but the evidence shewed that he knew more about dealing in and exchanging lands than he did about cultivating the soil. Both parties are shrewd, intelligent men of business, and knew what they were about in exchanging properties. Prices were ascertained of the various articles purchased with the Port Huron place, and the total, including land, was $17,466. The plaintiff's farm and some commodities specified to go with it were taken over at $8,500, leaving the balance to be paid in negotiable paper or cash at $8,966. There was much discussion as to how this balance was to be met. The plaintiff then held two documents which were treated as negotiable paper, and which were to be applied on the balance. One was a promissory note for $1,650 made by Westbrook and held by the plaintiff, and the other was spoken of as the Black mortgage, for about $1,900. The plaintiff, at the defendant's instance, made inquiries as to these, and on report that they would be taken by the bank it was settled that this "negotiable paper" should be applied in part payment of the balance. This would reduce the balance to be met by the plaintiff to about $5,400. The plaintiff stated more than once that he would pay the rest remaining due in cash. I think it is well proved that the plaintiff knew that what the defendant wanted was cash or the equivalent of cash, and the plaintiff knew that

this was essential to the carrying out of the contract, having regard to the state of the Port Huron title. The plaintiff knew at an early stage and before entering into the formal contract of sale, dated the 21st October, 1915, that the defendant had an option to purchase from the Sherman estate—in which the title was vested—between $5,000 and $6,000 in cash was needed to clear the Sherman claim, and on payment of this the Shermans were ready to convey. This state of the title the plaintiff was satisfied with; and, having looked over and examined the place, he purchased. The plaintiff was told again and again that the negotiable paper must be such as would be taken by a bank, and it was never suggested till after the time for completing the transaction on the 5th November, that the plaintiff could or would give only his personal note for the ultimate balance. Such a note being tendered was refused *instanter* as not being according to contract, and it was upon this crisis arising that the defendant gave directions to have the deed of the Janefield property registered, which he had the right to do, according to the evidence of the lawyer who had prepared the conveyance and seen to its execution, on the 4th November. The conveyance was held subject to the defendant's direction, and he directed it to be registered, which was done on the 11th November. The real crux, according to all the evidence, was the inability of the plaintiff to make payment according to the mutual understanding of the parties.

Now, these words used in the contract, "negotiable paper or cash," are as to the former not of inflexible import. They have not an absolute fixed meaning, not susceptible of explanation. For the interpretation of all writings, parol evidence may be received to explain the position of the parties and of the subject-matter and other surroundings, so that (as it has been said) the Court may be placed in the situation of the parties themselves —may see with their eyes, and may understand the force and application of the language employed by them. Then, if the terms, so interpreted, are reasonably certain, it is enough to justify the interposition of the Court. See Pomeroy on Contracts, 2nd ed., pp. 226, 227, 228. To the same effect, Mr. Justice Fry says: "The certainty required must be a reasonable one, having regard to the subject-matter of the contract, and the circumstances under which and with regard to which it is entered into:" Fry

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on Specific Performance, 4th ed., p. 164. The final word is spoken by the Privy Council in *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182, where Lord Davey says: "Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about" (p. 187).

Mr. McKay, in his able argument, urged that the alleged uncertainty was within the rule laid down in some of our own cases as to mortgages to be given for the balance of purchase-money. Thus in *Reynolds* v. Foster (1913), 9 D.L.R. 836, 4 O.W.N. 694, the stipulation was, that the balance of the price, $4,000, was to be secured by a mortgage upon the land in question. It was held that the time for payment should have been specified and set out in the contract. The vendor wished the mortgage to run three years, and the purchaser would have been content with five; but the holding of the Court was, that the parties intended that it should be a matter of agreement between them, and, failing such agreement, the contract was left at loose ends in an important and essential detail, and could not be specifically enforced. This case, as decided originally in the same way by Mr. Justice Teetzel, *Reynolds* v. *Foster* (1912), 3 D.L.R. 506, 3 O.W.N. 983, was followed by my brother Kelly in *Clement* v. *McFarland* (1912), 8 D.L.R. 226, 4 O.W.N. 448.

In *Reynolds* v. *Foster*, the appellate Court refers to opinions expressed in *McDonald* v. *Murray* (1883), 2 O.R. 573, 581, as plainly not in accord with the conclusion arrived at in *Reynolds* v. *Foster*, but treated as mere expressions of opinion. They are only adverted to in order to be overruled. In *McDonald* v. *Murray*, 2 O.R. 573, the balance of $15,000 was to remain on mortgage, and it was contended that it was uncertain because no time for payment was specified. On this contention the expressed opinion of Wilson, C.J., was, that he did "not consider the contract to be void or to be incapable of effect being given to it; and if possible contracts should be maintained according to the intent of the parties, if the Courts can do so by placing a reasonable construction upon them" (p. 581). Galt and Osler, JJ., concurred in the result.

In appeal, *McDonald* v. *Murray* (1885), 11 A.R. 101, Patterson, J.A., says it is "anything but plain how this mortgage matter was understood by the parties to the contract. The words are,

'the balance, $15,205, to be on mortgage at seven per cent.' Had we been told that there was a mortgage already on the property for that amount, we should have understood the words to mean that the buyers were to assume the payment of it. But nothing of that sort being told us, I suppose the meaning must be that the buyers are to give a mortgage for the amount to somebody, *primâ facie* to the vendor; and the terms not being defined, the Court was doubtless correct in holding that they were to be in the discretion of the mortgagors" (p. 122). Mr. Justice Rose, at p. 142, recognises the agreement as to the mortgage as valid, and so does Mr. Justice Burton, at p. 112, who remarks, at p. 111: "We must . . . gather the intent and meaning of the parties from the instrument itself, and by our knowledge of the ordinary affairs of life, and, as Tindal, C.J., says in *Stavers* v. *Curling* (1836), 3 Bing. N.C. 355, by the application of common sense to the particular case in hand."

This case is, to my mind, a direct decision on the validity of the contract, despite the alleged uncertainty, for the Courts below and in appeal both agree that it may well be the foundation of an action to recover money payable thereunder.

The decisions do not rest here, for in a case not noticed in *Reynolds* v. *Foster—Lightbound* v. *Warnock* (1882), 4 O.R. 187—Armour, J., treated *McDonald* v. *Murray* as a decision that the contract in that case was not void for uncertainty because of no time being mentioned for the payment of the mortgage-money. And he proceeds: "The mortgage in the case in judgment was to be given as security for the debt, and whether it should bear interest or not, there being no agreement on the subject, or when it should be payable, there being no agreement as to this, were details which the law would supply, and the agreement being silent as to them would not render it incapable of being enforced" (p. 196). Mr. Justice Cameron agreed.

In view of these authorities, I am not prepared to accept the authority of the cases in 9 D.L.R. 836 as decisive in this case, even though they were directly applicable.

I may note that the two cases in 2 O.R. and 4 O.R. are cited and followed, as to the principle of decision under the Statute of Frauds, in *Christie* v. *Burnett* (1886), 10 O.R. 609, 619. I also note that *McDonald* v. *Murray* was finally tried out, with success

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to the plaintiff and in validation of the contract: *McDonald* v. *Murray* (1884), 5 O.R. 559.

There appears to be a growing inclination in the Courts to carry out contracts which are complete so far as essentials are concerned, and yet leave something (e.g., as to manner of payment) to be adjusted between the parties. For instance, in 1884, Pearson, J., held a contract sufficient under the statute which provided that the "balance" was "to be paid and the deeds passed over at such time as shall be mutually arranged." He held that in its terms the contract was a final one, and this term was only a subsidiary stipulation: *Ozd* v. *Coombes* (1884), 28 Sol.J. 378. That observation solves some of the difficulties raised in the reasons for judgment in *Reynolds* v. *Foster*. And on the same line is a recent decision of Astbury, J., in *Morrell* v. *Studd & Millington*, [1913] 2 Ch. 648.

However, in the present case, on the evidence, I take it that no business, or commercial man, banker, or land-dealer, could mistake the meaning of "negotiable paper." "Negotiate," when applied to a bill of exchange or an ordinary promissory note, would be generally understood to mean to sell or discount it: Sir R. Couch in *Jonmenjoy Coondoo* v. *Watson* (1884), L.R. 11 Ind. App. 94, 108; and "negotiable paper" would appear to include or mean "a contractual document . . . such that by virtue of its delivery (or endorsement), all the rights of the transferor are transferred and can be enforced by the transferee against the original contracting party, but it may yet fall short of being a completely negotiable instrument, because the transferee acquires by mere delivery no better title than his transferor:" Bowen, L.J., in *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch. 270, at p. 294. This definition was discussed by the House of Lords on appeal and its general correctness recognised, though Lord Macnaghten rather suggested that it contained a refined distinction either not understood or ignored by the Stock Exchange: *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, at p. 225.

Now it was never intended or contemplated that the sole personal note of the plaintiff was such negotiable paper as would be accepted. It would not be made negotiable unless by the act of the defendant procuring its discount on the strength of his own signature. No evidence is given as to what substance the

plaintiff is possessed of; the defendant lived in the United States, and needed something more tangible and satisfactory than the personal engagement of the purchaser. The deal could not be carried through without cash or its equivalent, and this the plaintiff knew as well as the defendant. His refusal to do more than give a personal note was, in my opinion, a refusal to complete the contract. The kind of securities that would be regarded as negotiable was discussed and acted on in the case of two documents —but the plaintiff apparently could furnish no more of like value, and had no cash.

The "paper" contemplated was something held by the plaintiff on which another was liable or which was secured substantially as by mortgage on land. It was not something made by this plaintiff, extemporised for the occasion, and leaving the defendant to find the money to answer it. Even if the evidence did not point to the nature of the negotiable paper, I should say the contract was not incomplete; it can easily be made certain by the evidence of financial men; and, in my opinion, the plaintiff can in no way evade the performance of his contract.

I take the fair meaning of the terms to be that, in so far as the plaintiff was unable to supply proper and substantial negotiable paper, such, for example, as had been discussed and approved of during the currency of the contract—he was to pay cash.

The material question is not one as to specifying exact periods of time for the maturity of the negotiable paper; but the requirement of the contract, as interpreted by the surrounding evidence, is, that substantial paper should be furnished by the plaintiff which could be converted into cash forthwith or without unreasonable delay. If the parties cannot agree as to the kind of paper, the Master can mediate their differences—taking such further and other evidence as he may be advised to clear up the real meaning of the words used by both.

The plaintiff's action has to be dismissed with costs, including all reserved costs and costs of interlocutory proceedings up to this judgment. The defendant is entitled to a judgment for specific performance, with a reference to the Master at Guelph to report as to title and to inquire as to the condition of the chattels and commodities in question, and to report what is due to or payable by either party under the contract, and having regard to any

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changes or deteriorations that have taken place pending litigation, and is also to ascertain what, if any, damages are payable to the defendant on the plaintiff's undertakings.

Costs of the reference and further directions are reserved till the Master has reported. *Judgment accordingly.*

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PACIFIC LUMBER CO. v. IMPERIAL TIMBER & TRADING CO.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Gallihe and McPhillips, JJ.A. November 7, 1916.

1. BILLS AND NOTES (§ III B I—60)—LIABILITY OF INDORSER—TO PAYEE.
A person endorsing a promissory note not indorsed by the payee may become liable as an indorser to the payee.
[Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 131; *Robinson* v. *Mann*, 31 Can. S.C.R. 484, followed.]

2. COURTS (§ VD—310)—RULE OF CANADIAN PRECEDENT.
The Supreme Court of Canada primarily settles the law of Canada, being only subject to review by the Judicial Committee of the Privy Council, and save as aforesaid, it may, if it sees fit, disregard the opinion of any other Court in the Empire, including the House of Lords, which only settles the law of the United Kingdom; where the facts are the same, it is the duty of provincial Courts to give effect to the decisions of the Dominion appellate tribunal.
[*Trimble* v. *Hill* (1879) 5 App. Cas. 342, distinguished.]

Statement.

APPEAL from the judgment of Clement, J., holding the appellants liable as endorsers upon the promissory notes sued upon. Affirmed.

O'Neill, for appellant; *Mayers*, for respondent.

Martin, J.A.

MARTIN, J.A.:—Though the law of Canada on the point now raised has for over 15 years been settled by the decision of the Supreme Court of Canada in *Robinson* v. *Mann*, 31 Can. S.C.R. 484, it has nevertheless been submitted to us by the appellants' counsel that the question was wrongly decided by that Court, and certain decisions in certain English cases are relied upon in support of the submission. But, as pointed out by the Divisional Court of Ontario in *Slater* v. *Laboree* (1905), 10 O.L.R. 648, where a similar attempt was made in regard to the same case, we cannot entertain such a suggestion because the Supreme Court of Canada primarily settles the law of Canada, being only subject to review by the Judicial Committee of the Privy Council, and save as aforesaid, in its determination of that law the said Court may, if it sees fit, disregard the opinion of any other Court in the Empire, including the House of Lords, which only settles the law of the United Kingdom. It is our duty, therefore, where the facts are the same, as they are here, to avoid all unprofitable discussion, and simply respectfully give effect to the decision of our immediate

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appellate tribunal by dismissing this appeal. The observations of their Lordships of the Judicial Committee of the Privy Council in *Trimble* v. *Hill* (1879), 5 App. Cas. 342, on the duty of colonial Courts of appeal in general and the Supreme Court of New Zealand in particular have no application to the three great Dominions, Canada, Australia and South Africa, which are composed of a federation of self-governing colonies with a federal Supreme Court. There is only one colony (New Zealand), officially established in 1840, and styled a Dominion since Sept. 26, 1907, and no corresponding Court which is on the same plane in these respects as our oldest colony, Newfoundland, being greater only in the amount of population, but almost 60,000 miles smaller in area. I note that the population of one of the federated provinces of Canada, Ontario, is, by the same census of 1911, more than twice as large as that of New Zealand and its area is nearly four times greater.

Macdonald, C.J.A., and Galliher, J.A., concurred.

Macdonald, C.J.A.
Galliher, J.A.
McPhillips, J.A.

McPHILLIPS, J.A.:—Counsel for the appellant in a very able argument endeavoured to distinguish the case from *Robinson* v. *Mann*, 31 Can. S.C.R. 484, and contended that the appeal should succeed upon the law as laid down in *Steele* v. *McKinlay*, 5 App. Cas. 754, and *Jenkins* v. *Coomber*, [1898] 2 Q.B. 168, an action under sec. 56 Bills of Exchange Act, 1882 (Imp.). *Robinson* v. *Mann*, *supra*, was a decision upon the Bills of Exchange Act (sec. 56, Bills of Exchange Act, 1890, R.S.C. 1906, ch. 119, sec. 131), and a decision based upon the construction of the Act. *Steele* v. *McKinlay*, *supra*, was before the Bills of Exchange Act 1882 (Imp.), it was considered and distinguished by the Judicial Committee in *Macdonald* v. *Whitfield*, 8 App. Cas. 733, see Lord Watson at p. 748, but is in no way helpful to the decision of this appeal. *Jenkins* v. *Coomber*, *supra*, was considered and distinguished in *Glenie* v. *Tucker*, 77 L.J.K.B. 193, in the Court of Appeal, and in the later case of *Shaw* v. *Holland*, [1913] 2 K.B. 15. The Court of Appeal distinguished *Glenie* v. *Smith*, [1908] 1 K.B. 263, and followed *Jenkins* v. *Coomber*, indicating some indecision at least in the Court of Appeal in England upon the question—a question upon which the Supreme Court of Canada pronounced no uncertain opinion. There is no decision of the Judicial Committee upon the Dominion Bills of Exchange Act in regard to the point under consideration, nor have we been re-

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ferred to any decision in the House of Lords since *Steele* v. *McKinlay, supra*, a decision before the Bills of Exchange Act 1882 (Imp.). It is to be noted that *Steele* v. *McKinlay* was cited in *Robinson* v. *Mann*, 31 Can. S.C.R. 484, therefore it must be conceded that the Supreme Court of Canada gave full consideration to that case. See Maclaren on the Bills of Exchange Act (5th ed., 1916) pp. 332, 334. Chalmers on Bills of Exchange (7th ed., 1909), p. 208.

It is clear upon the evidence that the respondents are the holders in due course of the promissory notes sued upon and that they were negotiated to them, but the contention of the appellants is that notwithstanding this case the controlling decisions are *Steele* v. *McKinlay*, 5 App. Cas. 754, and *Jenkins* v. *Comber*, [1898] 2 Q.B. 168. Of course, the decisive answer to this contention is that *Robinson* v. *Mann*, 31 Can. S.C.R. 484, is an authority which is binding upon this Court, being the decision of the ultimate Court of Appeal for Canada and a decision based upon the Dominion Bills of Exchange Act which in terms differs from that of the Imperial Bills of Exchange Act.

Further, with the profoundest respect for the English Court of Appeal, there has not yet been a decision of the House of Lords or the Judicial Committee to the effect that the Imperial Bills of Exchange Act has not brought about a change in the law and that the effect has been as determined by the Supreme Court of Canada in *Robinson* v. *Mann*.

It would seem to be in consonance with what might have been expected that the Imperial Parliament in enacting sec. 56 of the Imperial Act, following *Steele* v. *McKinlay*, intended to introduce the liability known as an "aval" which according to Lord Blackburn meant an "underwriting;" that certainly, in my opinion, was the intention of the Parliament of Canada, and further words were added in the Dominion Act to, if anything, make it still more clear. The law of "*pour aval*" was well known and applied in Quebec previous to the enactment of the Dominion Bills of Exchange Act and the intention was to continue the law, as after the enactment of the Dominion Bills of Exchange Act, the law as to bills of exchange, promissory notes, cheques and negotiable securities was to be as defined and set out in the Act. Previously in Quebec the laws of that province governed, save in unprovided cases, then recourse had to be had to the laws of England. This

is seen by reference to what Lord Watson said in *Macdonald* v. *Whitfield* (1883), 52 L.J.P.C. 70, at 79.

See also *Knechtel Furniture Co.* v. *Ideal House Furnishers Ltd.*, 19 Man. L.R. 652.

Robinson v. *Mann*, *supra*, being a decision upon the Dominion Bills of Exchange Act, besides being a binding and conclusive decision upon all the Courts of Canada, is a decision upon an Act which is in different terms to the Imperial Bills of Exchange Act, and upon that ground *Jenkins* v. *Coomber*, [1898] 2 Q.B. 168, and the cases following it may be distinguished. Lord Parmoor in *City of London Corporation* v. *Associated Newspapers*, [1915] A.C. 674, at 704, said:—

> I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends.

In my opinion the appeal should be dismissed.

Appeal dismissed.

RE D'ANDREA.

Ontario Supreme Court, Boyd, C. April 25, 1916.

INFANTS (§ I C—11)—CUSTODY—CHILDREN'S PROTECTION ACT—WELFARE OF CHILD.

The custody of a child having been awarded under the Children's Protection Act R.S.O. 1914, ch. 231, will not be granted to a parent unless it is shewn that the welfare of the child would enure therefrom.

[Apprentices and Minors Act, R.S.O. 1914, ch. 147, secs. 3, 4, considered.]

Statement.

APPLICATION by the father of the infant Lilli D'Andrea, upon the return of a writ of *habeas corpus*, for an order for the delivery of the infant into his custody by the Children's Aid Society of Toronto and foster-parents with whom the society had placed the child.

Frank Denton, K.C., for applicant.

W. B. Raymond, for the society and foster-parents.

Boyd, C.

BOYD, C.:—This is an application by the father for the delivery to him of his infant daughter Lilli D'Andrea, now in the home of foster-parents appointed by the Children's Aid Society of Toronto. The daughter was born on the 6th September, 1907, and is now about 8½ years of age. Her birth was three months after the father had deserted her mother and family in Boston, U.S.A. The father says that the separation was due to "general infelicity" and not to any immoral or improper conduct on the part of either. In June, 1914, they came together again, and since then they have lived together in a commendable manner, according to the affidavits of various persons.

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In June, 1913, while yet the father was absent and the mother was undergoing a three months' imprisonment in the Mercer Reformatory "for shooting," she authorised Michael Basso to look after the child, and he suggested, with her assent, the Children's Aid Society. The mother says this was merely a temporary provision, as she expected that on her release the child would be returned. This is contradicted by Mr. Basso, who says he explained to her that the society would do what they thought was best and proper with the child.

On the 11th June, 1913, Basso brought the case formally before Mr. Commissioner Starr in the Juvenile Court, and testified that the mother left her husband in Boston, and had since been living in immoral relation with another man, and that the child had been brought up in these surroundings; that the mother was then serving a term of three months in the Mercer Reformatory —had served time before—and that she "shot the man she was living with some time ago."

On the same day the Commissioner noted his decision thus: "On evidence child found to be neglected and order made committing child to Toronto C.A. Society."

The order for delivery of the child to the society declares that "I do find that the said Lilli is a dependent and neglected child within the meaning of the Act for the Protection and Reformation of Neglected Children so as to be growing up without salutary parental control and education and in circumstances exposing such child to an idle and dissolute life." It is ordered that the "child be delivered into the custody of the Children's Aid Society and that now she be taken to the temporary home or shelter to be kept until placed in an approved foster-home."

Pursuant to the provisions of the statute in that behalf, the society proceeded to place the child out in a suitable home with foster-parents, and by proper documents completed all arrangements to that result on the 19th November, 1913.

The indenture executed by the society and the foster-parents constituted them the legal guardians of the minor, and they agreed to support, educate, and assume the duties of parents towards the child. Strict and explicit directions are therein given and undertaken by the foster-parents as to the physical, moral, and religious up-bringing of their ward.

There is evidence in the affidavit of the Revd. W. Ryan, local agent of the society in the district of Nipissing (in some part of which the child is living), that the obligations of the foster-parents have been properly observed, and that the child is much better than when she first came there, and that in February, 1914, she was in excellent health. It is now proposed, after 2½ years, to disturb this relationship and to have the child restored to the applicant, her father.

The father returned to his home in June, 1914; and on the 25th November of that year the first application was made to the society for a return of the child. The president of the society, after some investigation, satisfied himself that the child should not be interfered with. Then in March, 1915, legal proceedings began. These were somewhat delayed because the officers of the society examined refused to disclose the names and place of residence of the foster-parents. An order was made by Mr. Justice Britton on the 1st April, 1915, that the questions should be answered by the society. Mr. Justice Britton's order, upon appeal by the society to the Second Divisional Court of the Appellate Division, was discharged. There is no published note of the grounds of this decision; but, on inquiry of Mr. Justice Riddell, I learn that the Court, in the circumstances of the case as disclosed, did not think it proper to order discovery to be made, and so in effect decided that there was a qualified privilege exercisable by the society in suitable cases, with which the Court will not interfere. There is, therefore, no absolute right in the parent or applicant to compel a disclosure of the whereabouts of the foster-home and the names of the foster-parents, but the right is subject to the sound and reasonable discretion of the society, controlled of course by the Court, as to when the applicant is to be assisted in this direction. Here the society undertake to appear for the foster-parents; and so the matter, after some delay, was brought on for final disposition, with the addition of further and fresher affidavits, in the early part of this year.

The affidavits for the applicant go to shew that since his return he has for less than a year and a half lived with his wife and family in domestic order and comparative comfort; that he has gathered a little money together, and is a good worker, as is also his wife, and that they are able and willing to provide for this youngest child, and seek her return.

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Having laid this foundation of restored domestic relations suitable for the return of the girl, coupled with the ability and the willingness of the parents, the stress of the argument is, that the natural right of the father as a parent to the custody of his child is paramount, or should at least be preferred to the claim of the society and the foster-parents. The normal well-ordered home is unquestionably preferable to the foster-home, however well-ordered.

Had the applicant always lived in his home as now, no removal of a child could have taken place. But both the parents by their conduct opened the door for the benevolent work of the Children's Aid Society to act *in loco parentis* to the deserted child. Their intervention has duly reached its culmination in finding a new and suitable home for the waif so rescued. And the Court ought not, on general principles, lightly to interfere with the *status quo*.

This brings me to the next question, whether, the removal having rightly taken place, and the child having been legally taken over by the statutory guardian and legally transferred to foster-parents, who stand, by the act of the law, *in loco parentis*, she should be taken away from an unexceptionable home, in a healthy locality, and transferred to the crowded life of a city, with no reasonable assurance that the well-being of the child will be in any wise bettered by such a change. The antecedents of both parents are not reassuring—though both may have turned over a new leaf and made a better beginning in life. Still the Court, having regard to the claims of the child, should not act on a peradventure, and perhaps undo many good and wholesome qualities cultivated by the foster-parents. This is the *crux* of the controversy. Is it not the better policy, contemplated by the Legislature, to leave well alone? There is no evidence that the foster-parents have for these two years and a half failed in their duty; the contrary is the present aspect of the situation. There is no assurance that the contemplated change will work for the benefit of the child—will make for the improvement of her physical, moral, and religious condition.

This whole situation being the outcome of paternal legislation, and the functions and attitude of the Judge being also of paternal character, according to the venerable jurisdiction of the Court of Chancery, it is fitting to consider the statutes which control

and the state of the law as interpreted by its masters and exponents.

The position of the society to which a child is committed, and that of the foster-parents to whom the child is transferred by the society, are legally defined. The society becomes the legal guardian of the child: Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, sec. 14 (1); and the foster-parent, who agrees to assume the duty of a parent and to whom the society hands over the person of the child, is also constituted legal guardian of the child: Apprentices and Minors Act, R.S.O. 1914, ch. 147, sec. 3 (1).

From the custody of such foster-parents and from the protection of such foster-home the child shall not be removed by the parent unless it be made clear to the Judge and he is satisfied that the removal will tend to the advantage and benefit of the minor: R.S.O. ch. 147, sec. 4; R.S.O. ch. 231, sec. 14 and sec. 27. That legislation is the embodiment of a principle well recognised and followed in the exercise of the Court's paternal jurisdiction in regard to infants. As expressed by Lindley, L.J., in *In re McGrath*, [1893] 1 Ch. 143, 148, the duty of the Court is "to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken;" and he goes on to explain that the word "welfare" is read in its widest sense—that "the moral and religious welfare of the child must be considered as well as its physical well-being."

As to the affidavits filed by the applicant touching his present domestic conditions, we must, as said by Pollock, B., in *In re Goldsworthy* (1876), 2 Q.B.D. 75, 84, apply to this phase "our general experience of life, and (to) remember . . . how easy it is for a man to find persons ready to speak in his favour, when they can know nothing of his inner life." This home is that of a foreigner, and those who speak of its commendable character can be only superficially informed. But, granting full measure of acceptance to what is said, we have on the other side no suggestion by the applicant that the foster-home is other than it ought to be. True it may be that the applicant, not knowing the names and residence of the foster-parents, cannot supply any evidence on that head; yet we have the assurance by the direct evidence of the local agent of the Children's Aid Society that all the obligations of the foster-parents have been observed,

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and we have the moral effect of the supervision of the society itself to see that the child is well cared for. The situation, as contemplated by the Legislature and interpreted by the Courts, is, that there is a certain measure of privilege extended to these foster-parents, that they shall not be disturbed by the interference of parents who have been judicially determined to be unfit custodians of their children, and that the even tenour of the child's life in the new home should not be interrupted by outside undesirable influences. This being the situation, it is to be assumed that the present custody of the child is salutary and in every way convenient and proper in itself, and the onus is on the applicant to shew that a change is desirable in the interests of the child.

Our law is to some extent based on the English Custody of Children Act of 1891 (54 Vict. ch. 3); and before that Act the law was laid down in England that it was necessary for one who, by reason of his parental right, sought to take his child out of custody otherwise unobjectionable, to satisfy the Court that the child migh be removed and restored to him without imperilling the safety or welfare of the child in some serious and important respect: *In re Goldsworthy*, 2 Q.B.D. 75.

It occurred to me during the argument that it might be well to speak with the child. "Up to a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. . . . The law has now fixed upon certain years—as to boys the age of 14, and as to girls the age of 16—up to which, as a general rule, the Court will not inquire upon a *habeas corpus*, as between the father and the child, as to the consent of the child to the place, wherever it may be. But above the age of 14 in the case of a boy, and above the age of 16 in the case of a girl, the Court will inquire whether the child consents to be where it is:" Brett, M.R., in *In re Agar-Ellis* (1883), 24 Ch. D. 317, 326. That is "the age of discretion:" Eversley on Domestic Relations, 3rd ed., p. 510. This question of age is discussed in *In re Connor* (1863), 16 Ir. C.L.R. 112, 118; and there is an interesting case of *In re O'Hara*, [1900] 2 I.R. 232, in which a girl of 11 was examined by the Judge below, but in appeal the case was decided on parental rights, as the case did not fall within the Custody of Children Act. In Ontario, the sense of the community has changed these figures so that the age of

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discretion, as of consent, stands at 14 for a boy and 12 for a girl: R.S.O. 1914, ch. 147, sec. 3 (1); and see *Smart* v. *Smart*, [1892] A.C. 425, at p. 435.

In the light of what has been said as to age, the last clause of sec. 27 of the Children's Protection Act may be explained. It reads: "Nothing in this section shall affect the power of the Judge to consult the wishes of the child in determining what order ought to be made or any right which a child now possesses to exercise its own free choice:" R.S.O. 1914, ch. 231, sec. 27, sub-sec. 5.

In the first part of the sub-clause, "the power of the Judge" refers, I take it, to the discretionary power exercised by a Judge in Equity to inform himself as to the child's mind and wishes, even if of comparatively tender years; the last part, "the right of the child," refers to the power of vetoing or consenting given by the Apprentices and Minors Act to boys of the age of 14 and girls of the age of 12: R.S.O. ch. 147, sec. 3 (1).

The age of the girl in this case, not yet 9 years old, is not such as to require me to ascertain her views, which, whatever they are, could, I think, throw little, if any, light on the matter to be decided.

The applicant has to prove or to shew in some satisfactory way that the removal of the child from the custody of the foster-parents will enure to the welfare of the child. The onus on the parents has not been discharged. In my best judgment, after much consideration of all the aspects presented, it does not seem to me, in the interest of the minor, that any change is desirable.

The application is refused, but it is not a case for costs, even if any be asked. The parent should not be penalised in any *bonâ fide* attempt, though it may appear ill-advised, to get back his child.

LYMAN v. ROYAL TRUST CO.

QUE.

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Quebec Superior Court, Maclennan, J. June 5, 1916.

WILLS (§ III D—100)—CHARITABLE BEQUEST—VAGUENESS.

Bequests made under the terms of a holograph will, whereby the testator designates as beneficiaries "the Tuberculosis League or *other similar work*," and "for missionary purposes," are too vague and uncertain to admit of performance, and will be declared as null and void at the suit of the residuary legatees.

Statement.

Casgrain & Mitchell, for plaintiffs; *Perron & Taschereau*, for defendants.

ACTION for the construction of a will.

Maclennan, J.

MACLENNAN, J.:—The female plaintiff is a niece and one of

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the heirs at law of the late Henry Herbert Lyman who died on May 29, 1914. The Royal Trust Co. is trustee with which is associated two of the testator's brothers as executors, who are the defendants. Under the terms of a holograph will the late Mr. Lyman gave his entire estate in trust to the trustee and executors and from the trust so constituted made certain bequests after payment of which the residue is to be divided according to law. The testator died without leaving issue. The female plaintiff is entitled to receive part of the residue and she contends that three of the bequests in the will are void on the ground of uncertainty and inasmuch as the legatees are not sufficiently designated.

The bequests in question are made in the following terms:—

1. To aid in the establishment of a Montreal Public Library, free from all civic or ecclesiastical control, the sum of $25,000 is to be set aside in high class securities and allowed to increase from the annual revenue till such time as a sufficient amount has been subscribed and paid in to responsible trustees to make with the bequest not less than $1,000,000 when the amount of my bequest with all increment may be handed over to the said trustees. 2. Tuberculosis League or similar work, $1,000; 3. For missionary purposes, $10,000.

Persons benefitted by a will must be in existence at the death of the testator and be clearly known to be the persons intended by him. It is not necessary that the legatees be mentioned by name provided the class to which they belong be sufficiently designated to enable their identification to be made. A will must dispose of property in such a manner that the trustee or executor can be compelled to carry out its provisions if he does not voluntarily do so, and if the will does not clearly specify the legatees to whom the property is left and legatees who can compel its execution, the bequest is null on the ground of vagueness and uncertainty.

When a will fails on the ground of vagueness and uncertainty it is the duty of the Court to annul and set aside the bequest for the benefit of the legal heir or heirs.

It is admitted by the parties that the Tuberculosis League is extinct and the bequest to it therefore had lapsed. What did the testator mean by the words "or similar work?" He does not say who was to carry on the similar work or where it was to be carried on and the expression is so vague and indefinite that there is no reasonable certainty as to what was intended by the testator.

The bequest to a Montreal public library was not to become

effective until such time as a sufficient amount with the bequest to make $1,000,000 had been subscribed and paid in to responsible trustees, and the library was to be free from all civic or ecclesiastical control. No such library exists or is in sight and there is no reasonable certainty that such a library will be established in Montreal within any reasonable time. What can be said in support of the bequest of $10,000 "for missionary purposes?" The word "missionary" as used here is too vague and uncertain to have any definite meaning attached to it. To give effect to this bequest it would be necessary to add what the testator did not add, namely, the denomination of the missions to receive the bequest. The Court cannot make a will for the testator; that privilege belonged to him alone. The different denominations, Anglican, Methodist, Presbyterian, Congregational, Roman Catholic and other Christian churches all maintain missions and when a testator leaves a sum of money for missionary purposes without any indication of what particular missionary enterprise he intended to benefit, how can the trustee, executor, Court or any other person definitely say who was intended by the testator to be the recipient of the bequest. If the Court were to say it should be given to any particular church for the missionary purposes of that church, the Court would to all intents and purposes be making a will for the testator for the disposition of $10,000 of his property. The Court has no such power, and the bequest is therefore void.

The Court therefore adjudges and declares that the said bequests in the will of the late H. H. Lyman, to aid in the establishment of a Montreal public library, to the Tuberculosis League or similar work and for missionary purpose are null and void on the ground of vagueness and uncertainty and inasmuch as the legatees entitled thereto are not sufficiently designated. The three amounts form part of the residue of the estate and belong to the legal heirs of the testator. The costs of the submission are ordered to be paid out of the estate funds.

ALTMAN v. MAJURY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Magee and Hodgins, JJ.A. and Lennox, J. September 19, 1916.

NEW TRIAL (§ II—5)—DENYING DEFENCE OF JUSTIFICATION—PROBABLE CAUSE IN FALSE ARREST.

In an action against a police constable for false arrest without warrant, in which the defendant was not permitted to set up reasonable and

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probable cause in justification for making the arrest without a warrant a new trial will be granted.
[Sec. 30 Crim. Code, referred to.]

ALTMAN v. MAJURY.

Statement.

APPEAL by the defendant from the judgment of CLUTE, J., in an action tried before him with a jury at Toronto on the 27th and 28th April, 1916. Reversed.

The plaintiff lived at No. 70 Beverley street, in the city of Toronto, and brought the action against the defendant, a police constable, to recover damages for forcible entry upon her premises on the 23rd October, 1915, and arresting and assaulting her on that occasion.

The jury found, in answer to questions submitted to them, that the defendant did forcibly enter the plaintiff's premises and arrest her as alleged; that she was not keeping a common bawdy-house when the defendant entered her premises; and assessed the damages at $1,500. On these answers, CLUTE, J., gave judgment for the plaintiff for $1,500 with full costs.

The defendant appealed on several grounds, among others that the damages were excessive, and that new and material evidence had come into his possession since the trial.

H. H. Dewart, K.C., for appellant.

E. G. Morris and *G. R. Roach*, for respondent,

The judgment of the Court was delivered orally by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The trial of this case was not conducted in a manner which was quite satisfactory. It does not seem to me to have tended to a determination of the actual rights of the parties.

The acts complained of by the plaintiff were the acts of the defendant, a police constable; and he desired to set up the defence that all he did was done in the belief, on reasonable and probable grounds, that the plaintiff had committed an offence against the Criminal Code for which she might be arrested by him without a warrant; and, if that were so, he may have been justified in making the arrest, whether the offence had been committed or not. But such a defence was not permitted to be relied on.

It may be that there was some misunderstanding on the part of all concerned in the trial; it may be that counsel for the defence did not state their point as clearly as it ought to have been stated; but that I cannot think a sufficient reason for depriving the defendant altogether of any defence he desired to make based

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Meredith, C.J.C.P.

upon the 30th section of the Criminal Code,* of any defence he really has under it.

That which ought to be done in all cases is to determine all the real matters in question between the parties, and that was not done in this case.

The defendant should have been allowed to rely upon the provisions of the Criminal Code, and, if necessary, leave to amend, so that he might, should have been given.

The application for a new trial is also based on the ground of the discovery of new evidence. If that were the only ground upon which it could be granted, I should not be in favour of granting it; yet it is a matter of some satisfaction that in this respect also the parties may have a fuller and better trial.

The judgment and verdict must be set aside so that there may be a new trial of the real, and the whole, matters in difference between the parties; and each party may now amend the pleadings so as to set up any substantial cause of action or defence that she and he may be advised to plead respectively.

All costs to be costs in the action. *New trial ordered.*

*R.S.C. 1906, ch. 146, sec. 30: "Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not."

R. v. DRUGGIST SUNDRIES CO.

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Saskatchewan Supreme Court, Lamont, J. November 28, 1916.

INTOXICATING LIQUORS (§ III D—70)—UNLAWFUL SALES—PATENT MEDICINE ACT.

A manufacturer registered as a proprietor of a patent medicine under the Proprietary or Patent Medicine Act (Dom. Statutes 1908, ch. 56) cannot be prosecuted under the Sales of Liquor Act (Sask.) for selling it, even if it contains a higher percentage of alcohol than that permitted by the Proprietary or Patent Medicine Act. The proper course would be a prosecution under the latter Act.

Statement.

APPEAL from a prosecution for unlawful sale of liquor.

W. M. Rose, for prosecution; *W. B. Willoughby*, K.C., for respondent.

Lamont, J.

LAMONT, J.:—The questions involved in this appeal are: 1. Can the manufacturer of patent medicine who holds from the Dominion Government a license under the Proprietary or Patent Medicine Act to sell such medicine be prosecuted under the Sales of Liquor Act for selling the same? 2. If so, has the Crown

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established that the mixture known as "Kennedy's Tonic Port" is not in accordance with the requirements of sec. 7 of the Proprietary or Patent Medicine Act?

The respondent is registered under the Proprietary or Patent Medicine Act, being ch. 56 of 1908 (Can.), as the manufacturer of the tonic port in question. The certificate of registration contains the following provisions:—

> Under the authority of this certificate the medicines mentioned in the application therefor, dated July 13, 1915, or which may be subsequently added to such application under sec. 3 of the Act, may be disposed of by Druggist Sundries Co. Ltd. until March 31, 1916, providing all other provisions of the Act with respect thereto have been complied with.

Sec. 239 of the Sales of Liquor Act, R.S.S. 1909, reads as follows:—

> Nothing in this Act contained shall interfere with the right of any person to buy or sell proprietary or patent medicines as provided by an Act of Parliament of Canada, intituled the Proprietary or Patent Medicine Act.

Provision is made in said Act (*i. e.*, the Proprietary or Patent Medicine Act) for the punishment of any person who fails to observe the provisions of this Act, and also for the cancellation of the certificate of registration.

Counsel for the prosecution contended that the license to sell under said certificate extended only to such medicines as were shown to comply with sec. 7 of the Proprietary or Patent Medicine Act, while counsel for the defence contended that sec. 239 excluded from the provisions of the Sales of Liquor Act all sales made under the authority of the certificate given under the federal Act, and that as long as the certificate is continued, a vendor of "Patent Medicines" is subject to a prosecution for selling the same only under the Federal Act.

I am of opinion that the contention on behalf of the respondents is correct to the extent at least that a prosecution will not be under the Sales of Liquor Act. By sec. 239, above quoted, the Sales of Liquor Act is not to interfere with the right of any person to buy or sell patent medicines as provided by the federal Act. It is the right to buy or sell that is not to be interfered with, and it is the right to sell which is provided for in the federal Act. The right to sell implies a correlative right on the part of someone else to buy. The words "as provided by an Act of the Parliament of Canada intituled the Proprietary or Patent Medicine Act" in my opinion relate to the right to buy or sell,

and were not intended to be a limitation upon the words "Proprietary or patent medicines."

That such was the intention of the legislature seems to be borne out not only by the language of sec. 239 itself, but also by a consideration of the result which would follow the adoption of the view contended for by the prosecution. If that interpretation were adopted, it would mean that every druggist or druggist's clerk who sold patent medicines and every person purchasing such patent medicines would be guilty of a violation of the provisions of the Sales of Liquor Act if the patent medicines contained a larger amount of alcohol than was required as a solvent or preservative, although none of them might have been aware and could not, with reasonable diligence, have ascertained that it contained an excess of alcohol.

Under sec. 14 of the Proprietary or Patent Medicine Act, where a person is charged with selling a patent medicine which is not in conformity with the provisions of that Act and he proves that upon the package there appears the name and number under which the medicine is registered, with the words: "Proprietary or Patent Medicine Act," and also the manufacturer's name and address, and if the person so charged also proves that he sold the said medicine in the same state as when he purchased it and that he could not, with reasonable diligence, have obtained knowledge of such medicine being of a character contrary to the provisions of the Act, he shall be discharged. To give effect to the contention of the prosecution would be to deprive a vendor of the protection afforded by this section. In my opinion the legislature is not competent to take away such protection. The protection is given by the Parliament of Canada, legislating upon a subject which, it is not disputed, was within the legislative competence of parliament. Such an enactment cannot be overborne by provincial legislation.

In the Sales of Liquor Act there is, in my opinion, not only no attempt to override the Proprietary or Patent Medicine Act but there is an express declaration that the right to sell given by the federal Act shall not come within the scope of the provincial Act. I am therefore of opinion that, so long as a manufacturer is registered as the proprietor of a patent medicine and holds a certificate giving him the right to sell such medicine, he cannot be prosecuted under the Sales of Liquor Act for selling it, even although it does

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contain a higher percentage of alcohol than is permitted under the Proprietary or Patent Medicine Act. If the medicine he sells does not comply with the provisions of the last mentioned Act, the proper course is to prosecute him under that Act. On a second conviction he is liable to have his certificate of registration cancelled. After cancellation of the certificate he would have no protection under the federal Act. 2. In reference to the second question all I need say is that the evidence, in my opinion, did not establish that the tonic port in question contained a larger quantity of alcohol than was allowed by sec. 7 of the Proprietary or Patent Medicine Act. That section in part reads as follows:—

> 7. No proprietary or patent medicine shall be manufactured, imported, exposed, sold or offered for sale (*b*) if it contains alcohol in excess of the amount required as a solvent or preservative, or does not contain sufficient medication to prevent its use as an alcoholic beverage.

There was, as is not uncommon in cases of this kind, conflicting opinions among the experts called. It was, however, admitted by Dr. Parker, who, along with Dr. Charlton, gave evidence for the prosecution, that he was not prepared to say that there was more alcohol in this tonic port than was necessary to preserve it from deterioration while a package was being used, if the medicine was to be put up in packages the size of those produced, which were what is known as "quart bottle size." But he gave it as his opinion that the mixture could be put up in much smaller bottles; say, bottles containing only one dose each, and that in such case a much smaller quantity of alcohol would be required.

I agree with him that if the mixture was put up in bottles containing only a single dose a much smaller quantity of alcohol would be necessary as a preservative, but I cannot see that the respondents are called upon to put their mixture in smaller packages. Packages of this size are common for mixtures of this kind. The evidence, I think, discloses that such tonic ports as Wincarnis, the invalid port sold by the Saskatchewan Government, and others of the same class are all sold in the quart bottle package. There is nothing before me from which it could be inferred that packages of this size, which evidently are suitable to the trade, were not in the contemplation of the department when it issued the certificate of registration to the respondents.

It is, therefore, in my opinion, not shewn that the tonic port

in question contained more alcohol than was necessary to preserve it. As to the medication, I accept the testimony of the local physicians who have had experience with the effect of the mixture on their patients and who have testified that the medication is sufficient to prevent its being used as a beverage.

The appeal will, therefore, be dismissed. *Appeal dismissed.*

WOOD v. WOOD.

Ontario Supreme Court, Garrow, Maclaren, Magee and Hodgins, JJ.A. June 12, 1916.

CONFLICT OF LAWS (§ II—152)—DIVORCE AND ALIMONY—PUBLIC POLICY.

A permanent alimony judgment embodied in a foreign divorce decree is not of a penal nature, and is enforceable in the Courts of Ontario for arrears of payments thereunder; the fact that because of re-marriage of the husband its enforcement would result in contributing to the support of a divorced wife while a wife was living does not contravene the morals upheld by English law.

Statement.

APPEAL by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff in an action upon a foreign judgment. Affirmed.

F. J. Hughes, for appellant.

The judgment of the Court was delivered by

Hodgins J.A.

HODGINS J.A.:—Appeal by the husband from the County Court of the County of York in an action on a foreign judgment pronounced by the Supreme Court, State of New York, Erie County, on the 16th January, 1912. This judgment dissolved the marriage between the appellant and respondent and forbade the appellant to marry again during the lifetime of the respondent. It gave the respondent the care and custody of the child born of the marriage, and ordered "that the defendant pay to the plaintiff the sum of $50 per month for the support of herself and said child as provided in the order entered herein September 15th, 1911." The latter order was made on consent and contained this provision: "It is hereby ordered that the plaintiff be and she is hereby allowed the sum of fifty dollars ($50) per month, beginning September 15th, 1911, for the support and maintenance of this plaintiff and the child of the parties hereto, born May 16th, 1908, during each and every month hereafter, and that defendant pay to the plaintiff the sum of fifty dollars ($50) per month in payments of twenty-five dollars on the first and fifteenth of each month hereafter, beginning September 15th, 1911, such payments being for the support and maintenance of this plaintiff and the said child allowed as aforesaid."

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The amount claimed, and for which judgment has been entered, is $605, being about twelve months' arrears up to the 15th January, 1916. The appellant married again, in Ontario, on the 11th November, 1915.

The appeal was substantially on two grounds: first, that the judgment was recovered in a penal action; and, second, that, having married again, to enforce the judgment would be to compel a man to support two wives, and that this was contrary to the moral rules upheld by English law. This last ground was the best definition I could get from counsel in explanation of the ground of appeal (d), "that the plaintiff has no cause of action in the Province of Ontario except upon a foreign judgment, which is against natural justice, and therefore invalid."

In *Robertson* v. *Robertson*, 16 O.L.R. 170, also a case of absolute divorce, a judgment for arrears of alimony past due upon a foreign judgment was held by the Chancellor to be enforceable here. His decision is founded upon the judgment of a Divisional Court in *Swaizie* v. *Swaizie*, 31 O.R. 324. In that case the jurisdiction of the foreign Court was contested, but here no such question is raised; and, if it were, the jurisdiction is established by the evidence given at the trial. An additional authority of some interest regarding the right to recover the damages given by a foreign judgment of divorce against the co-respondent is *Phillips* v. *Batho* (1913), 29 Times L.R. 600.

The want of finality attributed to the English decree for alimony (see *Robins* v. *Robins*, [1907] 2 K.B. 13) is not apparent in the foreign judgment sued upon here, although it is not expressed in the same ample way as in that proved in the *Swaizie* case; but it appears from the evidence at the trial that the New York Court can revise its adjudication upon the quantum allowed.

It may be that, if alimony had been ordered in an action in Ontario, the power reserved under sec. 34 of our Judicature Act, R.S.O. 1897, ch. 51, to deal with the permanence of the grant, might affect the finality of the judgment; but, even if so, no Ontario Court could interfere with the New York judgment except by refusing to enforce it, for which no reasons are suggested except those already mentioned. This view is in consonance with that expressed by Jeune, J., in *Moore* v. *Bull*, [1891] P. 279.

The requirements set out in the judgment of the House of Lords in *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1, at p. 9, that "it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt, of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties," appear to be met in this case, so far as the arrears are concerned; for the testimony given by Mr. Madden, a practising attorney in New York State for over sixteen years, does not in any way indicate, but rather the reverse, that the Court could revise the amount past due. It may be added that under the procedure in New York State the judgment now sued on is a final one, pronounced three months after the preliminary and interlocutory decree for dissolution had been made.

Permanent alimony is defined and the right to it described as "that legal proportion of the husband's estate which by sentence of the Ecclesiastical Court is allotted to the wife for her maintenance after sentence of divorce (i.e., *â mensâ et thoro*) by reason of the cruelty or adultery of the husband, as the permanent allowance to be paid by the husband to the wife during the period of their separation."

This definition is quoted with approval in *Leslie* v. *Leslie*, [1911] P. 203, by Sir Samuel Evans, President, and is practically identical with the explanation given by Mr. Madden of the meaning of the alimony granted by the final order of the Supreme Court of New York.

The objection that the judgment is one recovered in a penal action cannot be sustained: *Huntington* v. *Attrill*, [1893] A.C. 150; *Raulin* v. *Fischer*, [1911] 2 K.B. 93.

As to the other objection, it appears to leave out of consideration the fact that the judgment sued upon effectually terminated the bond of matrimony, as is evidenced by the marriage of the appellant, based upon the divorce thereby obtained. Hence the appellant is not, by satisfying this judgment, while married to his present wife, contributing to support two wives, but rather paying the legal penalty for those acts which, while enabling him to re-marry, entail a yearly reminder of his past delinquencies.

While the jurisdiction of the New York Court to grant permanent alimony following an absolute divorce was questioned at the trial, nothing was elicited to cause difficulty on that point in

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this case. But, as the jurisdiction here and in England appears to depend on statute law, which is not the case, apparently, in New York State, according to Mr. Madden, it is necessary to say that this decision is not to be taken as indicating that this Court has finally considered and adjudicated upon that point if it should be raised under circumstances which require its determination. *Appeal dismissed with costs.*

ALTA.

S. C.

LINEHAM v. McNEILL.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. November 3, 1916.

EXECUTION (§ I—11)—FORECLOSURE—LAND OUTSIDE PROVINCE—STAY OF EXECUTION.

Sec. 62 of the Land Titles Act (Alta.) as amended in 1916, providing that no execution shall issue upon a personal judgment obtained under power of sale or covenant contained in a mortgage or agreement for the sale of lands, until sale or foreclosure of the lands is first ordered and had, does not apply with respect to an execution upon lands situate outside the province. The Court has inherent power, however, in cases where it appears just and convenient, to order a stay of any execution proceedings.

Statement. APPEAL in re application before Simmons, J. Granted.

H. P. O. Savary, for plaintiffs; *A. M. Sinclair*, for defendant.

The judgment of the Court was delivered by

Beck, J. BECK, J.:—The plaintiffs obtained judgment in this Court against the defendant on a covenant for payment contained in an agreement for the purchase of lands in British Columbia. Execution was issued. The defendant made an application to Simmons, J., to set aside the execution or alternatively to stay the execution and all proceedings in aid of execution until the lands comprised in the agreement should be sold. The motion was referred to this Division.

The motion was based upon an amendment made to the Land Titles Act by the Statute Law Amendment Act, 1916, ch. 3, sec. 15, which amended sec. 62 by adding thereto two provisions of which the second is as follows:—

> Where any action or proceeding has before the date of the passing of this subsection (April 19, 1916) been taken or shall thereafter be taken in any Court either under the provisions of this section or to enforce the observance of the covenants, agreements, stipulations or conditions contained in any agreement for the sale of any land, and personal judgment has been or shall be obtained therein, no execution shall issue thereon until sale of the land mortgaged or encumbered or agreed to be sold has been had or foreclosure ordered and levy shall then be made only for the amount of the judgment or mortgage debt remaining unsatisfied with costs.

The full title of the Land Titles Act is an Act respecting real property in the Province of Alberta, and an examination of its many provisions and of the various items of legislation, which led up to the provision above quoted, being inserted in the Land Titles Act, and a comparison of the terminology of these recent enactments with the Act itself leaves no doubt in my mind that the provision above quoted has no application in the case of lands situate outside of the province. I think therefore that the motion must be refused.

On the other hand, the Court has a very wide *inherent* power to stay proceedings. The power to stay without limit of time or condition is usually exercised only where the proceedings sought to be stayed are obviously frivolous, or vexatious or an abuse of the process of the Court. A temporary stay for certain purposes or under conditions is much more readily granted and I think it is correct to say that such a stay may properly be granted when under all the circumstances, in the exercise of a reasonable discretion, the Court or Judge decides that it is just and convenient.

The question of the inherent power to stay is dealt with in the following cases: *Reichel* v. *Magrath*, 14 App. Cas. 665; *Logan* v. *Bank of Scotland*, [1906] 1 K.B. 141; *Egbert* v. *Short*, [1907] 2 Ch. 205; *Re Norton's Settlement*, [1908] 1 Ch. 471.

I think the present case is one in which a stay might very well be granted on the ground that the legislature has quite clearly evidenced its intention that residence in this province shall not be subjected to execution upon covenants in mortgages or agreements for sale so long as the land, if available, has not been realized upon and then, of course, only in respect of any deficiency and that it is scarcely fair and equitable that non-residents who have purchased lands in Alberta should receive the benefit of the Act while actual residents for whose benefit the Act was no doubt passed should not get the benefit because they happen to have dealt in land outside the province.

I think, however, a motion on this ground can be much more conveniently and satisfactorily dealt with by a single Judge to whom all the facts and circumstances can be made known and before whom the details of the terms of an appropriate order can be discussed in the light of further information than

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is before us. The applicant will have liberty to make such a motion.

As to the costs of the application so far, I think there is no reason why they should not be ordered to be paid by the defendant forthwith. In this connection I call attention to r. 645 which obviates the necessity for another writ of execution; and these costs should be treated as comprised in the execution and as being part of the subject matter of the motion to the Judge. The costs of the motion when made should be left to the discretion of the Judge. *Application granted.*

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KELLY v. O'BRIAN.

Ontario Supreme Court, Middleton, J. June 5, 1916.

CONFLICT OF LAWS (§ I G—125)—GUARDIANSHIP—LOCUS OF PROPERTY.

The Courts in this province will recognize the authority of a foreign guardian under the foreign law with respect to trust funds situated within this province.

Statement.

ACTION by a tutor (appointed by a Quebec Court) to recover from the defendants' executors the sum of $8,000.

M. J. Gorman, K.C., for plaintiff.

C. G. O'Brian, K.C., for defendants the executors.

J. F. Smellie, for Official Guardian.

Middleton, J.

MIDDLETON, J.:—The plaintiff is "tutor" of the infant defendants, and sues in this action to recover from the executors of the late John Butler the sum of $8,000, which, by his will, the testator directed to be divided and distributed equally among the children of his late nephew Daniel Murphy, the infant defendants.

Butler resided at the village of L'Orignal, and died there on the 18th October, 1914. The infants are domiciled and resident in the Province of Quebec; their father in his lifetime having lived at the village of Carillon, in the county of Argenteuil.

On the 5th February, 1912, proceedings were taken in the Superior Court before a Notary Public, by which the plaintiff was appointed tutor of the infants. According to the law of the Province of Quebec, the tutor of an infant represents the minor, and is authorised and bound to collect and get in all the property of the minor. Security is not required, but the property of the tutor stands charged in favour of the minor, and upon default the tutor is liable to imprisonment. The right and obligation of the tutor with respect to the personal property of the minor

applies not merely to the property within the Province of Quebec, but to property outside the Province.

The law is fully discussed in the case of *Hanrahan* v. *Hanrahan* (1890), 19 O.R. 396—a case which is admittedly on all fours with this case save that there the fund originated from the estate of a testator domiciled in Quebec. The testator was here domiciled in Ontario.

I do not think that this makes any difference. The question does not relate to the estate from which the funds originate, but does relate to the rights of the tutor of the infants, and his rights depend entirely upon the law of the domicile of the infants. These infants residing in Quebec, it devolved upon the Legislature and the Court of that Province to care for the property of its wards, and inter-provincial comity demands that our Court should give full effect to the law of that Province and to the pronouncements of its tribunals upon a matter which is peculiarly within its jurisdiction.

In *Re Berryman* (1897), 17 P.R. 573, the present Chief Justice of Ontario recognised the *Hanrahan* case as finally disposing of all possible doubt concerning the status of the Quebec tutor, although he held that the Ontario Insurance Act, in speaking of "a guardian," referred only to a guardian appointed by a Surrogate Court of this Province.

In some earlier cases it had been assumed that our Courts ought to exercise a judicial discretion in determining the extent to which recognition should be given to the acts of foreign Courts with respect to the property of their citizens, and that we ought not to permit the handing over to foreign guardians of funds, out of the control of our Courts, unless satisfied that to do so was in the interest of the foreign subject according to our standards.

In England the situation was fully reviewed in the case of *Thiery* v. *Chalmers Guthrie & Co.*, [1900] 1 Ch. 80. There Mr. Justice Kekewich, notwithstanding the fact that in the earlier case of *In re Chatard's Settlement*, [1899] 1 Ch. 712, he had refused to recognise the rights of a French guardian without evidence that the money to be received would be used for the benefit of the infants, formulated very clearly the principle that, where the foreign guardian is entitled by the law of the domicile, the fund ought to be paid to him, even when it is a trust fund under

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the control of the Court; distinguishing this from his earlier decision upon grounds not readily apprehended.

The subject was further discussed by Mr. Justice North and the Court of Appeal in the case of *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15. After examining the earlier cases in which the discretion was supposed to exist, it is said (pp. 50 and 51) by Lindley, M.R., delivering the judgment of the Court: "A person absolutely entitled to trust money is entitled to have it paid to him or to any one duly appointed by him to receive it, and the trustees or the Court acting for them have no discretion to refuse payment. The same principle is, in our opinion, applicable to the case in which trust money belongs to a lunatic and a person is duly appointed by a competent authority to get in such money for the lunatic. If the title of the lunatic is clear, and the authority to act for him is equally clear, we fail to see what discretion the Court, acting for the trustees, has in the matter. . . . Here we are dealing with an alien domiciled abroad, and over whom the Courts of this country have no jurisdiction except such as is conferred by the fact that she has property here. All that the Court here has to do is to see that the person claiming it is entitled to have it. . . . On general principles of private international law, the Courts of this country are bound to recognise the authority conferred on him (the committee) by the Belgian Courts, unless lunacy proceedings in this country prevent them from doing so."

In the recent decision of *Re Lloyd* (1914), 19 D.L.R. 659, our Court did not have before it the authoritative decision from which I have just quoted; and cited, as being still the law, the language of Mr. Justice Kekewich in the earlier case. The *Hanrahan* decision is quoted with approval, and apparently the refusal to recognise the right of the Texas guardian was entirely based upon the fact that it was affirmatively shewn that that guardian intended to use the fund in a way that was not deemed proper.

It should be borne in mind that where a foreign Court deals with the estate of a domiciled Englishman, who is insane, asserting jurisdiction either by reason of his temporary residence abroad or his ownership of property abroad, the situation is entirely different, and the English Court, not being bound by comity to recognise the jurisdiction of the foreign Court over an English

subject, has a discretion. This is pointed out in the case of *New York Security and Trust Co.* v. *Keyser*, [1901] 1 Ch. 666.

The tendency of legislation is entirely in favour of throwing the responsibility upon each country to care for its own citizens. See 4 Geo. V. ch. 21, sec. 67 (O.), authorising payment of moneys of foreigners to the consuls of their respective countries. This statute was preceded by proclamations issued by the Imperial authorities, which may be found reprinted in the Canadian Gazette.

The words of James, L.J., seem appropriate. He says: "The Courts of this country have no right . . . praising themselves . . . to say, 'We will administer the law better, and do more justice than the other Court will.' . . . Courts must respect each other:" *Fletchers* v. *Rodgers* (1878), 27 W.R. 97.

The judgment will therefore be for the plaintiff for the recovery of the money in question, out of which he may pay his own costs and those of the Official Guardian. The executors should pay their own costs out of the general estate of the testator.

Judgment for plaintiff.

BOLSTER v. SHAW.

Alberta Supreme Court, Scott, Beck, Stuart and Walsh, JJ. November 3, 1916.

ALTERATION OF INSTRUMENTS (§ II B—16)—PROMISSORY NOTE—ADDING NEW MAKER—MATERIALITY.

An alteration of a promissory note, after its issue, by the addition of the name of another maker, a member of a syndicate, who signed the note in accordance with the evident intention of all the signatories, does not invalidate the note; signature of an additional maker is not a "material alteration."

[33 W.L.R. 577, reversed.]

APPEAL by the plaintiff from a judgment of Hyndman, J., and cross-appeal by defendant Weatherly in an action on a promissory note. Statement.

G. B. O'Connor, K.C., for plaintiff, Bolster; *H. H. Hyndman*, for defendants, Creighton, Asmussen & West; *N. D. Maclean* for other defendants, except Weatherly.

The judgment of the Court was delivered by

BECK, J.:—Mr. Justice Hyndman found as a fact that the note was complete and had been issued before the signature of Weatherly was subscribed, and held as a matter of law that the addition of his name constituted a material alteration and that the note was thereby voided by virtue of sec. 145 of the Bills of Exchange Act. Beck, J.

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The signatories to the note were all members of a syndicate. They had a meeting. The Judge says:—

In consequence a meeting of the members was called together at Stettler at which the matter was discussed. All the makers of the note, with the exception of Gilbert and Weatherly, were present. It was agreed that *in view of the extension of time for payment* all the members present should sign the note and that Bentley should arrange to have as many signatures as possible among the members of the company. I think the evidence is clear that it was the intention of all present at this meeting that, although it might be impossible to arrange for the signatures of all shareholders, an endeavour should be made to have as many as possible sign. The note was not signed that night, but next day it appears all signed but Gilbert, who resides in Edmonton, and Weatherly, who refused to sign unless all members of the company did so. The note was then taken to Edmonton by Bentley and Shaw. Before going to Perkins and Hamilton they obtained Gilbert's signature. Shaw and Bentley then delivered it to Perkins—it was later endorsed by Perkins & Hamilton and finally taken by Shaw and Perkins to Bolster's office, and handed to him, for which he gave the following receipt:—

Received from Perkins and Hamilton fifteen thousand six hundred twenty-seven 19-100 dollars, this being the second payment that was due on April 3rd, 1913. "This" (*sic*) s. ½ 29, 52, 25, west of the 4th mer. $15,627.19. (Sgd.) U. S. Bolster.

About a month or six weeks after this the defendant Weatherly went to plaintiff's office and asked if the note in question was there and if so, he would sign it. There is no certainty as to what was actually said as the evidence is contradictory but at any rate Bolster produced the note and Weatherly signed it as the foot after Gilbert.

The defendants now contend that this was a material alteration which vitiated the note as no consent or authority was ever given by any of the parties to it.

Bentley in effect says that at the meeting referred to the situation was explained to those present by Shaw and himself; that all those present except Weatherly, signed the note then or the next day; that it was understood that it was left to him to get enough more members of the syndicate to sign "to make it good;" that there were, he thinks, 18 members in the syndicate, all interested in the transaction in respect of which the note was given.

Weatherly says that Bentley came in contact with him and asked him if he had signed the note; that he replied that he had not and did not know where the note was; that Bentley said it was in Bolster's office; that he went there and asked Bolster if he had the note; that Bolster produced it and he signed it.

It is clear on the evidence that Shaw was as largely interested as Bentley. The origin of the transaction was a purchase under agreement from Bolster by one Burns who agreed to sell to

Perkins & Hamilton, who agreed to sell to Shaw & Bentley, both of whom got those who subsequently became members of the syndicate to take an interest with them under the agreement. It is also clear upon the evidence that with respect to getting a note signed by as many of the syndicate as could be got to sign it and in satisfying Bolster with such a note, Shaw as well as Bentley was acting in the interests of and with the knowledge of the other signatories to the note; in other words, Shaw and Bentley were agents in this respect for the other signatories. Bolster says distinctly that when Shaw came to his office along with Perkins and brought in the note, Shaw said there was another man to sign it. He is contradicted as to this by Shaw and also by Perkins. It seems to me, however, that it is not material to know which is telling the truth, for it seems to be clear as a matter of law that if an alteration in a bill or note is made in pursuance of the original intention of the parties who claim that it is void by reason of the alteration, it is not such an alteration as has that effect and, indeed, I think this principle is covered by the words of the section "without the assent of all parties liable."

Daniel on Negotiable Instruments, pp. 1403-4; *Brutt* v. *Picard*, R. & M. 37; 27 R.R. 727; *Clark* v. *Blackstock*, 1 Holt 474; 3 C.L.R. 159; *Byron* v. *Thompson*, 9 L.J. Q.B. 26; *Fitch* v. *Kelly*, 44 U.C.R. 578; *London & Provincial Bank* v. *Roberts*, 22 W.R. 402, and it also seems clear to me that as a matter of fact the alteration made by the addition of Weatherly's name was made to carry out the original intention of those signatories who are now seeking to take advantage of it, Perkins knew of the plan to get as many as possible of the members of the syndicate to sign the note and Hamilton was his associate who stood in the same relation to Bolster and Shaw and Bentley, as Perkins, and is therefore, I think, equally bound.

I think in applying this "rule of law" the widest interpretation should be given to the word intention; that it should be taken in the wide sense of understanding. There is no question of contract but merely of a state of mind. And the word "assent" used in the section of the Act quoted is a word of much looser and wider signification than consent. See Crabb's Synonyms, where it is said:—

> Assent may be given to anything whether positively proposed by another or not, but consent supposes that what is consented to is proposed by some other person.

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I think it clear that all the signatories to the note (except Weatherly) had the understanding that Shaw and Bentley should carry through an arrangement with Perkins and Hamilton and Bolster, which would result in their getting time for the payment of the liability of the syndicate; that they understood the plan to be the giving of a note with as many of the members of the syndicate as members as could be got to sign; that it was not altogether a question of Bolster being satisfied that the note was good, but largely that all members liable should, as far as possible, be got to become liable on the new form into which the transaction was being put and consequently there was no understanding that any signatures offered should be refused though offered after the issue of the note; that Shaw and Bolster were, it was understood, to carry the matter through; that it was not the understanding that Shaw or Bentley should have no authority at all after the note should be handed to Bolster (though perhaps this is not important, inasmuch as neither of them did anything of consequence after that time except this that after the issuing of the note, and I suppose after its maturity, Shaw paid $1,500 on account of the note, of which he got $500 from Weatherly, and this payment was obviously for the benefit of all the signatories to the note, and perhaps Shaw's action in this respect may be taken to be an action on behalf not only of himself but also of the other signatories and consequently a subsequent assent to the so-called alteration.

On this ground alone, that is, that the so-called alteration was assented to by all the signatories, I think the note was not invalidated. It of course was binding on Weatherly.

But I am strongly inclined to the opinion that the addition of a signature to a note as maker is not such a material alteration as is contemplated by the section quoted. It does not and cannot injuriously affect or prejudice the mutual rights or liability of the other makers except to reduce their liability. Then what does it matter? Leake on Contracts, 6th ed., p. 591. One of the cases cited for this is *Suffell* v. *Bank of England*, 7 Q.B.D. 270; reversed on appeal, 9 Q.B.D. 555.

The opinion expressed in Daniel on Negotiable Instruments, pp. 1388-9, is that the mere addition of the name of another maker is not a material alteration.

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In conclusion, I would allow the plaintiff's appeal with costs and dismiss the appeal of the defendant Weatherly with costs and direct judgment to be entered for the plaintiff for the amount claimed with costs. *Appeal allowed.*

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Re ARNOLD v. COOK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ. June 28, 1916.

JUDGMENT (§ VII A—270)—POWER TO SET ASIDE—PARTIES ABSENT WHEN ENTERED.

There is no authority for giving judgment in favour of either party when neither is present when an action comes on for trial; where a judgment has thus been irregularly entered, the Judge has power, under the Division Courts Act, R.S.O. 1914, ch. 63, secs. 104, 226, to set it aside and order a trial, which, however, is not a new trial.

[*Arnold* v. *Cook*, 31 D.L.R. 269, 36 O.L.R. 504, affirmed.]

Statement.

Appeal by the defendants from the order of KELLY, J., in Chambers, 31 D.L.R. 269, 36 O.L.R. 504. Affirmed.

G. T. Walsh, for appellants; *C. H. Porter*, for respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:— This appeal, in respect of a Division Court case in which less than $20 was involved, has arisen out of a series of errors of procedure in that Court, for some of which errors every one concerned in such procedure is blamable.

The plaintiff brought his action in the wrong Division Court; the defendants objected; and that error was promptly cured by a transference of the case to the proper Division Court, under the provisions of sec. 79 of the Division Courts Act.

Due notice of the transfer of the case was given, by the Clerk of the Court to which the case was transferred, with notice of the sittings of the Court at which the action should be tried, as required by the provisions of that section of the Act.

The Clerk of the Court also notified the plaintiff that the payment of fees, amounting to $1.60, was required in order that the case might be put upon the list of cases to be tried on the day named in the notice—the 27th May, 1915; but no notice of this was given to the defendants.

These costs were not paid; and no one appears to have attended the Court on the 27th May, 1915, for either of the parties.

By mistake, the Clerk of the Court entered the case in the docket of cases for trial at a sittings of the Court held on the 20th May, 1915: when, no one appearing for any of the parties, the

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presiding Judge directed that judgment be entered for the defendants, without costs.

In that the Judge, I have no doubt, erred: I know of no authority for the giving of judgment in favour of either party when neither is present; and there is nothing in any of the several provisions of the Act respecting judgment by default, or otherwise, that gives any countenance to any such procedure. Section 99 provides for judgment against a defendant, in certain cases, without proof of the plaintiff's claim, but it contemplates the plaintiff being present, or represented, and seeking judgment.

The case should have been struck out of the docket; or adjourned until the next sittings of the Court.

This happened on the 20th day of May, 1915, yet no fault was found with the procedure by any one, nor was any offer made to pay the costs demanded, by the Clerk of the Court from the plaintiff, until nearly ten months afterwards.

On the 9th day of March, 1916, the plaintiff gave notice of a motion for an order setting aside the judgment for the defendants, directed to be entered, as I have mentioned, on the 20th day of May, 1915: and the Judge who made that direction heard this motion, and, upon it, on the 13th day of March, 1916, made a direction in these words: "On the ground of irregularity, new trial granted;" and the misuse of the words "new trial" has, I have no doubt, led to these proceedings, taken for the purpose of prohibiting a new trial, and so taken on the ground that there was no power to grant a new trial, at the most, after the lapse of 28 days following the trial: and it is, or should be, quite plain that, if this were a case of granting a new trial, this appeal ought to be allowed.

But it is not a case of a new trial; there has not been any trial of the case. It is a case of setting aside a judgment, irregularly directed to be entered, and providing for a trial of the case: and that the Judge, whose order in that respect is in question here, had power to do under secs. 104 and 226 of the Division Courts Act: and, he having that power, this appeal fails: we cannot concern ourselves with the question whether he should or should not have made the order which he did make, further than to say that he should not have called his action in the matter the granting of a new trial: see *Anlaby* v. *Prætorius* (1888), 20 Q.B.D. 764.

Under all these circumstances, especially the plaintiff's indifference to the due prosecution of his action, and dilatoriness in the payment of the fees demanded, Kelly, J., very properly, I think, dismissed the motion for prohibition without costs. It was only the defendants' neglect to attend on the day when the case should have been dealt with—the 27th May, 1915—which prevented a regular dismissal of the action, a dismissal which would be final if no application were made for a new trial within the prescribed time. But, though the plaintiff would have no good cause for complaint if he had lost his action altogether, the defendants ought to have been content with the order made below; and, not having been so content, but making an appeal in a pretty plain case, they ought to pay the costs of this appeal.

Riddell, J.

RIDDELL, J.:—The plaintiff sued the defendants, a firm of solicitors, in the 7th Division Court of the County of York, by special summons dated the 29th December, 1914. The defendants filed a note disputing the claim, and also disputing the jurisdiction of the Court, dated the 4th January, 1915. Judge Coatsworth, on the 12th January, transferred the case to the 10th Division Court: that Court received the papers on the 14th; notice was given by the Clerk of this transfer, and that the court-day would be the 27th May.

By some error, the case was put on the list for the 20th May; on that day it was called, and, no one appearing, judgment was given for the defendants without costs. The case was not put on the list for the 27th May or any subsequent day until the 23rd March, 1916.

On the 9th March, 1916, the solicitor for the plaintiff attended the 10th Division Court office to pay the fees which he had been (in the notice of transfer to that Court) required to pay, and to have the case entered for trial. Then for the first time he discovered that the case had been disposed of.

He forthwith applied, on notice, to the Judge, "for an order setting aside the judgment entered in favour of the defendants and for an order directing trial of the action." The Judge endorsed on the summons: "On the ground of irregularity new trial granted. Costs reserved. 13th March, 1916." He subsequently added a reference to "sec. 79, sub-sec. 2, of ch. 63, R.S.O.," and stated: "My reason for granting a new trial is that the case was improperly on the list for trial, and I consider my judgment a

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nullity—and the 14-day rule as to applying for a new trial does not, in my opinion, apply."

A motion was made in Chambers, before my brother Kelly, for an order prohibiting further proceedings in the action; and that learned Judge, on the 5th April, dismissed the application without costs. The defendants now appeal.

It is quite clear that the Clerk had no right to place the case on the list for trial on the 20th May; the statute is specific that he "shall place the action on the list for trial at the next sittings of his Court which commences six clear days or more after he receives the papers:" R.S.O. 1914, ch. 63, sec. 79 (2); and the 20th May is not "six clear days or more after" the 14th May. The case was, against the express direction of the statute, put on the list for trial: and it must be treated as though it was not there at all. The Judge had no power to try the case at that time—the statute is imperative—and I agree with His Honour that what he did was in violation of the statute.

There has been no "trial" in law, and sec. 123 does not apply. It is unnecessary to express any opinion as to whether *Re Nilick* v. *Marks*, 31 O.R. 677, was rightly decided, as it is not at all applicable. (The rule laid down in that case has been frequently and consistently followed ever since Morrison, J., in *Mitchell* v. *Mulholland* (1877), 14 C.L.J. 55, reversed his own judgment in the same case (1877), 13 C.L.J. 224.)

I do not see that any of the many cases cited has the least relevance to the present case.

The appeal should be dismissed with costs.

Lennox, J. Masten, J.

LENNOX and MASTEN, JJ., concurred.

Appeal dismissed with costs.

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RISK v. C.P.R. CO.

Manitoba King's Court Bench, Curran, J. November 27, 1916.

TRIAL (§ III C 1—286)—MAJORITY VERDICT IN CIVIL ACTIONS—SPECIFIC FINDINGS.

Under the provisions that on trial of issues of fact in civil actions the verdict of nine or more out of twelve jurors shall be the verdict of the jury (R.S.M. 1913, ch. 108), it is essential that when specific questions are answered the same nine or more jurors shall agree in the answers. There is no statutory provision (in Manitoba) for asking specific questions, though it has been practised, and its legality is doubtful.

Statement.

MOTION by defendant for judgment. Dismissed.

Anderson, K.C., and *W. C. Hamilton*, for plaintiff.

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

CURRAN, J.:—This action was tried before me with a jury in March, 1913. The plaintiff was an employee of the defendant company in the capacity of a brakeman, and while so employed and engaged in the performance of his duties, was accidentally injured when going ahead of a locomotive to open a switch.

A number of written questions were put to the jury to answer. Of these Nos. 1, 3 and 5 were answered in the negative; the others were not answered, and did not require to be answered, in view of the answers given to those referred to.

Had the same 9 jurors concurred in these answers, it was admitted that the defendant would have been entitled to a verdict. Unfortunately, it transpired that the same 9 jurors had not so concurred but that a different set of jurors, identical in personnel as to some but not all, had answered each question.

On motion for judgment by the defendant's counsel, I reserved the question as to what should be done in pursuance of these findings, counsel for both parties consenting, and agreeing to argue the matter at a later and more convenient time. The jury was then discharged.

The matter now comes before me at the instance of the defendant company, who contend that a verdict in its favour should be entered. The plaintiff's counsel objects to this course, and contends that there was in fact a disagreement of the jury, necessitating a new trial.

The point is certainly a novel one to me, and seemingly was so to the counsel engaged, for no authorities directly in point have been submitted to me by either side.

I may say, in passing, that the propriety of the practice of submitting questions to be answered by a jury in civil actions instead of directing them to bring in a general or special verdict has been questioned (not, however, in this case), because of the absence of any express statutory provision or rule of Court permitting it. Such a provision exists in Ontario, but not in this province, and I refer to the matter in the hope that the question may be authoritatively settled. The King's Bench Act, sec. 51, provides that the presiding Judge may direct the jury to give a special verdict except in libel actions, and that where such direction is given to a jury it shall not be lawful for the jury to give a general verdict. Does this imply that a special verdict

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may take the form of answers to specific questions. I would assume not, because, in Ontario, where an enactment identical in terms with our sec. 51 of the King's Bench Act is in force, there is also a provision, sec. 112 of the Judicature Act, that upon a trial by jury in any case, except certain specified actions, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for that purpose, and in such case the jury shall answer such questions and shall not give any verdict and on the finding of the jury upon the questions which they answer the Judge shall direct judgment to be entered. There is no such provision in this province, and I recall that during the progress of the assizes in which this case was tried, the Chief Justice of Manitoba called my attention to the absence of such a provision, and suggested that where questions were put, the jury should be required to find as their verdict that judgment which the trial Judge, in accordance with the answers given, thought proper to be entered. I followed this suggestion then and have since, although the point has never been raised by counsel to my knowledge.

If any real doubt exists as to the legality of the practice owing to the absence of statutory authority for it, it seems to me it ought to be set at rest either by express decision or by amendment to the King's Bench Act.

Now, to return to the matter directly under consideration. Sec. 68 of the Jury Act, R.S.M. 1913, ch. 108, reads as follows:—

> For the trial of issues of fact in civil actions to be tried by a jury, whether common or special, there shall, except in the cases provided for in the next section (which exception does not affect this case), be empaneled and sworn 12 jurors; but the verdict of 9 or more of them shall be sufficient and shall be the verdict of the jury.

Defendant's counsel lays stress upon the use of the plural "issues of fact" in the section just quoted, and contends, as I understand him, that several separate issues of fact were actually raised by each of the questions 1, 3 and 5, and that it was not imperative that the same 9 jurymen should concur in answering each of such questions.

I do not so view the language used in this section, at all events as applied to the present case. I do not think the use of the plural "issues" instead of the singular has any other than grammatical significance in relation to the expression "actions,"

also plural, which follows. One would not say "issue of fact in civil actions." Plurality of actions necessarily imports plurality of issues, and I think as the section is speaking generally of the trial of certain classes of civil actions the use of the plural and not the singular was the proper and only grammatical mode of expression.

But, even if this were not so, what follows? Take a case where there were several separate issues to be tried by a jury upon the determination of which in one way or another depended the outcome of the action. It surely could not be that such separate issues might be found by different groups of 9 of the same jury. I think the substitution of the finding of 9 for the unanimous finding of a jury formerly required makes no change in the nature of the concurrence in fact required now by 9 instead of 12 as formerly. The change was probably made to lessen the danger of, or to prevent disagreements in civil actions and thus facilitate finality by one trial.

Here there was only one issue to be determined, so far as the plaintiff's case was concerned, to fix the defendant with liability, that of negligence at common law. Owing to the state of the law, the negligence of the master with respect to his servant might assume different phases in respect of the duty owed by such master to such servant, or, perhaps to put it more clearly, there might be different breaches of duty, all or some of which would constitute negligence on the part of the master, but all of which would be included in the legal term negligence.

To ascertain the mind of the jury in the present case on the rather comprehensive subject of negligence, I put the questions in three different ways:—1. Was there negligence on the part of the defendant in respect of their system of laying out F. yards (where the accident occurred)? 2. Was there negligence on the part of the defendant in respect of their system or practice of switching or shunting cars in said yards? and 3. If 1 and 2 are answered in the negative, then were the employees or servants of the defendants guilty of negligence in the way they shunted the cars down on to Track 7?

The issue of contributory negligence was, of course, raised by the defendant and constituted a separate issue; but on the same question of negligence. It might be that the jury would answer questions 1, 3 and 5 in the affirmative and yet the defendant be

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exonerated by an affirmative answer to q. 8 and a negative answer to q. 9. But surely all of these answers must be the result of a concurrence of view of the evidence by the same 9 jurymen and not by diverse groups of 9 from the whole number. I take it that the same 9 jurymen must concur in all findings of fact necessary to determine the action.

It might not be so if there were separate issues in the sense of separate and unrelated causes of action where the finding upon one such might implicate the defendant in liability and upon the others exonerate him. In such a case possibly a verdict could be entered for plaintiff on the issue in which he secured a favourable finding from one set of jurors, and for the defendant upon the others in respect of which the defendant secured a favourable finding from perhaps different groups of nine jurors. As to this feature of the discussion, I express no opinion, though I am strongly inclined to the view that even in such an hypothetical case the same 9 jurors, as representing what was formerly the unanimity of the jurors, should concur in all of the findings, otherwise I think there would be a disagreement if not indeed an actual conflict rendering a new trial necessary.

No authorities directly in point have been cited to me, but the case of *Faulkner* v. *Clifford*, 17 P.R. (Ont.) 363, seems to support the opinion I have formed as to the need of concurrence. This was an action brought by the widow and children of Thomas Faulkner deceased, who lost his life in consequence of an accident which occurred while working in the defendant's employment in the excavation of a tunnel.

Questions were put to the jury,—1. Did the deceased Thomas Faulkner, with knowledge of the danger to which he would be exposed by continuing in the employment in which he was engaged on the night in question, voluntarily incur the risks of the employment?

The jury disagreed and did not answer this question, but agreed in answering affirmatively q. 2, which was: Were the defendants guilty of any negligence which caused the accident? and 3: If so, in what did such negligence consist? by answering: "In not sloping the banks."

The plaintiffs moved for judgment notwithstanding the failure of the jury to answer the first question, but the Judge, after consideration, refused to direct judgment. The matter was

finally referred to the Court of Appeal, which sustained the trial Judge in his refusal to direct judgment, holding that under the circumstances judgment could not be entered for either party, and that a finding in the defendant's favour in answer to the first question would have been a complete answer to the action notwithstanding the other findings in favour of the plaintiff. There was evidence to support such a finding, but the jury disagreed and have not answered the question. The trial was, therefore, incomplete and no judgment could be given.

In principle does not the same difficulty arise here? Has there not been in effect a disagreement of the jury in answering the questions put to them? It seems to me there has been such a disagreement, and that the trial was therefore incomplete and no judgment can be given.

The defendant's motion for judgment will, therefore, be dismissed, leaving it open to the parties, if so desired, to proceed to another trial of the action.

There will be no costs of this motion to either party as the question raised is entirely novel. *Motion dismissed.*

MAGRATH v. COLLINS.

Alberta Supreme Court, Appellate Division, Scott, Beck and Hyndman, JJ. November 3, 1916.

DISCOVERY AND INSPECTION (§ IV—31)—"*Persons*" *employed —Officer of corporation—Knowledge.*]—Appeal from the judgment of Walsh, J., 28 D.L.R. 723. Reversed.

Wallbridge, K.C., for respondent.

S. W. Field, for appellant.

The judgment of the Court was delivered by

BECK, J.:—Walsh, J., reversed the decision of Blain, M., who had held that under the rules the defendant was entitled to examine for discovery an officer of the Edmonton Real Estate Co. which company was the employee of the plaintiff and had some knowledge touching the questions in issue. Rule 3 reads:

R. 3. As to all matters not provided for in these rules the practice as far as may be shall be regulated by analogy thereto.

This rule was implicitly but not explicitly referred to by the Master. It was not called to the attention of Walsh, J., and I understand was not present to his mind.

In view of this rule we think the Master's conclusion was right and that his order should be restored. The appeal will therefore be allowed with costs. *Appeal allowed.*

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WILLIAMS v. DOMINION TRUST CO.

British Columbia Supreme Court, Murphy, J. November 1, 1916.

CORPORATIONS AND COMPANIES (§ VI E—344)—*Powers of liquidator—Authority to carry on business—Right of retainer.*]—Case under the Winding-up Act.

W. E. Burns, for plaintiff; *Martin*, K.C., for defendant.

MURPHY, J.:—The liquidator is an officer for the time being of Court and except in minor acts entirely under its direction. *Re. Ont. Bank; Massey & Lee's Case*, 8 D.L.R. 243, 27 O.L.R. 192. He could not therefore part with the right of retainer of the Dominion Trust Co. unless authorized by the Court to do so. An order was obtained under sec. 34 of the Winding-Up Act authorizing him to carry on the business of the company so far as is necessary to the beneficial winding-up of the same. It is contended this order is void as no previous notice was given to creditors, etc., but as it has been passed and entered and has not been set aside by appeal or otherwise I must, I think, treat it as operative. *Brigman* v. *McKenzie*, 6 B.C.R. 56. But, in my opinion, authority to carry on the company's business does not empower the liquidator to part with the company's right of retainer. On the facts here parting with this right means materially reducing the assets, and falls, I think, under sec. 36 of the Act, requiring a substantive approval by the Court. In *Massey & Lee's case, supra*, at p. 251, it is laid down that under sec. 36 the liquidator cannot without the consent of the Court lawfully accept less than payment in full of *inter alia* debts. The same case disposes of the argument founded on estoppel. The attempt to distinguish between the act of the Dominion Trust Co. as executor and as a corporate entity is not, in my opinion, sound. Once the winding-up order was made all its activities were under the control of the Court, and acts such as parting with its right of retainer, involving the consequences resulting here, must have express Court sanction. This being my view, it is unnecessary to decide the other question submitted.

CANADIAN FINANCIERS TRUST CO. v. ASHWELL.

British Columbia Supreme Court, Morrison, J. October 31, 1916.

JURY (§ I A—1)—*Special jury—Costs.*]—Application by defendant for a jury trial.

M. Craig, for defendant; *Donald Smith*, for plaintiff.

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MORRISON, J.:—The defendant applied for a jury herein and upon hearing counsel I ordered that the issues be tried by a special jury. Counsel now appearing to particularly settle the terms of that order I am of opinion that the costs of the special jury should be costs in the cause. It follows, then, the defendant in order to secure a jury will be obliged to pay in the interim the fees therefor. To this counsel for the defendant strongly objects, contending that the plaintiff who supplemented his request for a jury by a demand for a special jury should bear the costs thereof, and that that has been the practice, citing the case of the *Royal Bank* v. *Pound*, in which Murphy, J., made an order for a "common" jury and refused to order a "special" jury, which order was varied on appeal by striking out the word "common." That is all that appears from the formal order of the Court of appeal as filed. The judgment in question appears to have been oral and has never been transcribed, assuming the reporter took cognizance of it. I cannot get any light from that decision to guide me in this matter and counsel have not furnished me with any other cases. In this instance before me, the plaintiff opposed application for a jury, contending that the issues herein were not such as were triable by a jury. I had some doubt as to whether he was not right in regard to some of the issues. However, against his strong submission, I ordered a jury, whereupon he asked that the jury if ordered should be a special and I then so ordered, and that the costs thereof be costs in the cause. O. 36, r. 7 (*d*) and sec. 49 of the Jury Act (Acts 1913, ch. 34). It seems to me that this is the only order that should be made in circumstances such as appear in this matter. Were I to order the plaintiff to pay the costs, he might well fail to deposit with the sheriff the necessary sum required or indeed fail altogether to serve the requisite notices required by sec. 50 of the Jury Act. The plaintiff does not "*desire*" a jury at all—the jury is forced on him by the necessities of the case. The defendant on the other hand not only requires a jury but demands one. It is easily conceivable, in a state of practice which of course does not exist at this bar, that counsel desiring a special jury but not desirous of paying in the interim for one, might apply simply for "a jury" which in his mind would be a common jury, knowing full well that if an order were made for a jury, that his opponent would then ask for a special jury, for which, if the practice were as

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counsel for the defendant now contends for, his opponent would have to pay. He would thus secure a special jury, which he really desired, at the expense of his unwilling opponent. If this contention is the right one, then the Act in my opinion is susceptible of such a construction. I do not think the legislature so intended. I could readily have made it a term of my order that the plaintiff should pay the excess jury fees necessary for a special jury. However, I think this is a favourable opportunity to take a step towards settling, I hope, the practice, about which there appears to be a conflict of opinion in the profession.

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McINTOSH v. CRAMB.

Manitoba King's Bench, Prendergast, J. September 18, 1916.

PHYSICIANS AND SURGEONS (§ II—37)—*Compensation—Services rendered under contract—Special work.*]—Action by a physician and surgeon for medical and surgical services rendered to the defendant.

E. A. Cohen, and *R. W. McClure*, for plaintiff; *C. H. Locke*, for defendant.

PRENDERGAST, J.:—The main ground of defence is that the plaintiff was under contract with the Foundation Company to render all necessary medical attendance to such of their employees as should be injured by accident, and that he was paid from time to time out of a fund made up of a portion of the said employees' fortnightly wages which he received in full satisfaction of any claim for services to be thereafter rendered.

The plaintiff says that his agreement with the Foundation Co. was that he should look after the men that were sick in camp, supply them with medicine and superintend the refuse and general sanitation of the camp. As to surgical cases he says he was only to supply first aid.

This, however, is fully established, that the plaintiff knew of the fund and of its nature, as also of the fact that it was raised to compensate him for medical services (using these two terms broadly) to be rendered to the men; and as he received the money from that fund knowing what its source was, it seems to me that the onus is upon him to shew the exceptions or limitations, if any, in the contract which, would relieve him from the obligation of supplying his services generally without further remuneration.

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Nor do I think that there is evidence to support the plaintiff's statement that the defendant recognized his liability and promised to pay him for his services. *Action dismissed.*

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BERLINER GRAMOPHONE CO. Ltd. v. SCYTHES.

Saskatchewan Supreme Court, Lamont, J. July 17, 1916.

CONTRACTS (§ I C 2—20)—*Consideration for covenant in restraint of trade—Reasonableness—Injunction.*]—Action for injunction restraining defendants from selling talking machines contrary to terms of contract.

F. L. Bastedo, for plaintiffs.

R. W. Hugg, for defendants.

LAMONT, J.:—The plaintiffs are the owners of the patent right to all Victor disc machines, Berliner gramophones, records, etc., for the Dominion of Canada, and the defendants are dealers at Regina, selling the plaintiffs' instruments.

By an agreement bearing date February 26, 1913, and entered into between the plaintiffs and W. G. F. Scythes, who was then carrying on the business owned by the defendant company, Scythes agreed in consideration of the right to purchase Victor talking machines, Berliner gramophones, records, etc., that he would accept all the terms and conditions set out in the agreement, and that he would carry in stock a representative line of the plaintiffs' goods, and purchase during the year a sufficient amount to warrant the continuance of the special discount given to dealers of his class.

One of the terms was, that he would not sell, or offer for sale at retail, Berliner gramophones or Victor talking machines, records or supplies at less than the licensed retail prices that were fixed by the plaintiffs. Another provision was that the plaintiffs might terminate the agreement at any time for cause or otherwise.

Under this agreement, the plaintiffs shipped their goods to Scythes as the same were ordered. During the year 1913 the plaintiffs had been advertising their goods extensively in an endeavour to create a demand for talking machines, and in their advertisements at any particular place they referred the public to the local dealer's as the place where their instruments could be obtained. Being desirous that this advertisement should enure as far as possible to the benefit of their own goods, the plaintiffs

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decided that dealers who were handling their talking machines and records should henceforth not handle those of a rival concern, and they sent to their various dealers an agreement to that effect to sign. On January 19, 1914, the plaintiffs and the defendant company, who by that time had taken over the business of W. G. F. Scythes, executed an agreement containing the following:—

In consideration of the dealer whose name is signed to the attached contract, ordering Berliner and Victor merchandise to the value of $500 at cost prices, to be forwarded in one shipment, the Berliner Gram-O-Phone Co. Ltd. agrees to allow a special discount of 5 per cent. in addition to the discount allowed to class "C" dealers, as same are, or may be in force, from time to time, instead of the regular discount of 25 per cent. commonly allowed class "D" dealers.

In addition the dealer agrees at all times to carry in stock a representative line and purchase during any one year a sufficient quantity of Berliner and Victor merchandise to warrant the continuance of the special discount, and the Berliner Gram-O-Phone Co. Ltd. shall be the sole judge as to whether or not these conditions are complied with.

The dealer further agrees to handle exclusively, as far as concerns disc talking machines and disc records, the products of the Berliner Gram-O-Phone Co. Ltd. for a period of 5 years from the date of this contract.

Since the date of the agreement the plaintiffs have supplied the defendants with such Berliner and Victor merchandise as they have ordered.

At the time the defendants signed the agreement, they had on sale at their place of business in Regina disc talking machines and disc records of a rival concern known as "Edison's." These the defendants continued to sell, and the plaintiffs have brought this action in which they ask for an injunction restraining the defendants from selling the Edison disc talking machines and Edison disc records.

Although on the argument, counsel for the defendants submitted a number of objections to the plaintiffs' claim, only two of them were seriously argued and they alone merit consideration.

The first was that there was no consideration for the execution of the agreement of January 19, by the defendant, and the other was that the agreement was in restraint of trade.

As to consideration: The rule on this point is stated in 27 Hals. p. 565.

In support of the proposition there laid down, the author cites, among others, the cases of *Gravely* v. *Barnard* (1874), L.R. 18 Eq. 518, and the judgment of Eve, J., in *Woodbridge & Sons* v. *Bellamy*, [1911] 1 Ch. 326 at p. 332.

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In the former of these cases the plaintiff, a surgeon, engaged the defendant (then not qualified) to assist him in his practice, the engagement being terminable at the will of either party. Subsequently, the defendant previous to going up to pass his final examination, executed at the plaintiff's request a bond which was conditioned to be void if the defendant should not practise within certain limits, but which contained no express agreement on the part of the defendant to continue in the defendant's employment. Three months afterwards the defendant was dismissed. Subsequently he commenced practice within the prescribed limit, and a suit was instituted to restrain him from so doing. It was urged that there was no consideration for the agreement. In giving judgment, the Master of the Rolls, at p. 522, said:—

What do the words "for the consideration aforesaid" mean? The defendant says they mean nothing, that though the instrument speaks of a consideration, none was given. I cannot adopt that view. I think it must mean that there was an agreement by the plaintiff and defendant that the connection between them was not to be terminated there and then.

In the latter case, Eve, J., held that the taking of the defendant into their employment was a sufficient consideration to support the restrictive covenant. But, in his judgment, he went further, and expressed the opinion that the consideration would have been sufficient even if the agreement for service had previously been concluded. The judgment in this case was reversed by the Court of Appeal, not, however, on the ground that there had been no consideration, but because the Court of Appeal were of opinion that no breach of the covenant had been committed.

Counsel for the defendant relied on the case of *Copeland-Chatterson Co.* v. *Hickok*, 16 Man. L.R. 610. In this case, the defendant, while in the employ of the plaintiffs at a monthly salary, signed, at their request, an agreement that he would not, within one year after the termination of his employment with the company, engage or be interested in any business or work within Canada or Great Britain in competition with the business of the company. The defendant expected to be appointed manager at Winnipeg, and had reason to believe that a refusal to sign the agreement would be followed by dismissal, but no promises were made to him prior to signing, nor was he told that he would be dismissed. It was held by the Court of Appeal that there was in this case no sufficient consideration to support the agreement.

In a later case, that of *Skeans* v. *Hampton* (1914), 31 O.L.R.

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424, where the circumstances were very similar, the Court of Appeal in Ontario, although referring to the case of *Copeland-Chatterson* v. *Hickok*, *supra*, did not follow it, but approved of the decision of Eve, J., in *Woodbridge* v. *Bellamy*, [1911] 1 Ch. 326, and held there was ample consideration to support the restrictive covenant.

The facts of the case at bar, in my opinion, bring it squarely within the decision of the Master of the Rolls in *Gravely* v. *Barnard*, L.R. 18 Eq. 518. The plaintiffs have an undoubted right to sell their disc machines and records on such terms and under such conditions as to them seemed best. That prior to the signing of the agreement of January 19, 1914, the defendants had been getting the discount which, under that agreement, would be theirs by right is immaterial. The plaintiffs had a right to say to the defendants: "You must sign the agreement for the exclusive handling of our goods, or we will terminate our dealings with you at once." They did not say that, because there was no occasion to say it; the defendants signed without any demur and the plaintiffs continued supplying them with the goods at the agreed discount. The consideration for the execution of the agreement by the defendants was, to use the language of the Master of the Rolls, "that the connection between them would not be terminated there and then," but that the plaintiffs would continue to do business with them on the terms specified. I am, therefore, of opinion that there was a sufficient consideration to support the agreement.

Then, was it in restraint of trade? On this point observations of Wills, J., in *Incandescent Gas Light Co.* v. *Cantelo*, 12 R.P.C. 262, which were approved of by the Privy Council in *National Phonograph Co.* v. *Menck* (1911), 80 L.J.P.C. 105, at 111, seem to me to shed considerable light.

See also *United Shoe Co.* v. *Brunet*, [1909] A.C. 330.

The plaintiffs having a right to restrain all trading in their goods, have a perfect right to limit it to such dealers as will deal with them on the terms they impose. When the defendants entered into the agreement, they knew it contained the exclusive clause, and they admit that they knew their subsequent sales of the Edison instruments were in violation of the terms of that clause. The restriction imposed by it is, to my mind, a very

reasonable one, and one calculated to secure to the plaintiffs the benefits resulting from the advertising done by them.

It the defendants were not willing to agree to it, they were not obliged to do so. They were under no compulsion to purchase the plaintiffs' goods. I must take it that they agreed to the exclusive clause because they were of opinion they could not purchase the plaintiffs' goods without signing it and that the purchase of the plaintiffs' goods was desirable for their business interests Having accepted the conditions imposed by the plaintiffs, which I find they had a right to impose, the defendants are bound by those conditions. It was argued that, under the agreement, the plaintiffs could prevent the defendants from dealing in any other disc talking machines for five years, while they themselves were under no obligation to furnish to the defendants a single machine. In my opinion, that is not the meaning of the agreement. Where the agreement not only stipulates that the defendants will deal exclusively in the plaintiffs' instruments but at the same time provides that the defendants must carry in stock a line of such instruments, there is an implied covenant that the plaintiffs will sell to the defendants the necessary instruments.

The plaintiffs at the trial abandoned their claim for damages, and only asked for an order restraining the defendants from continuing to sell the Edison disc talking machines and Edison disc records. To this, in my opinion, they are entitled, and there will be judgment accordingly with costs.

Judgment for plaintiffs.

CLASON v. SELENSKY.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. November 18, 1916.

Principal and surety (§ I B—11)—*Alteration of contract—Extension—Loss of vendor's lien—Evidence.*]—Appeal by plaintiff from a judgment for defendant. Reversed.

P. H. Gordon, for appellant; *J. A. Hanbidge*, for respondents.

NEWLANDS, J.:—The plaintiff sold three oxen to defendant Selensky on a lien note due November 1, 1913, the defendant Risling signed this note as surety, and this action was brought to enforce payment of the same. Judgment was entered by default against Selensky. The defendant Risling defended on several grounds, but was only successful on one, the trial Judge having

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found that the defendant Risling was discharged by a new agreement entered into between plaintiff and defendant Selensky, the principal debtor. The following is the finding made by the trial Judge upon this defence:—

About the month of April, 1914, the defendant Selensky approached the plaintiff seeking his consent to a re-sale by defendant Selensky of two of the purchased animals to one Neigum, the third animal being then dead, but plaintiff referred him to the manager of the Quebec Bank at Denzil, which held the lien note as security for a debt of plaintiff authorizing the said bank manager to do as he saw fit. Defendant Selensky visited the bank manager and, according to the evidence, was permitted to and did re-sell the two oxen to the said Neigum taking in his name Neigum's note payable on November 1, 1914, which he endorsed over to the bank as collateral to the oxen note then held by the bank. This new note was not a lien note as appears when carefully looked at although the witnesses in their evidence refer to it as such. Before the Neigum note became due, the plaintiff, through his bailiff, seized the two oxen in Neigum's possession and sold them at public auction for the sum of $60.50. This seizure and sale to my mind is questionable and I incline to the opinion that it was not a lawful one. It is unlikely that Neigum purchased the animals without the assurance of defendant Selensky and the bank manager, that he was getting them with a clear title, and I must therefore find that plaintiff parted with his lien on these animals when they were sold to Neigum and thus deprived himself of the security which defendant Risling, the surety, had certain rights in and which would enure to his benefit if he wished to pay the amount of the note.

This finding, that plaintiff parted with his lien on the animals, is an inference which the Judge drew from the facts proved at the trial. No evidence is given of any such agreement between the parties. Now the inference which the Judge drew is opposed to what actually happened in the case. The plaintiff did seize these animals under his lien note and sold them. As far as we know Neigum made no protest; how, therefore, can an inference be drawn that the lien was lost by agreement? I think we are bound to hold that plaintiff was only exercising his legal rights when he seized and sold, there being no evidence to the contrary. If this is the case, then plaintiff did not agree to part with his lien and defendant Risling was not deprived of rights which would have enured to his benefit if he had paid the note.

I notice from the examination for discovery of defendant Risling, put in, that in the spring of 1914 the plaintiff came to his place and got him to go into town, where they met Selensky at the bank, and it was agreed that the payment of the original note should be extended until the fall of 1914. There is nothing in the evidence to show whether this was before or after the sale to Neigum, which took place on May 12, 1914, but it is impor-

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tant to shew that all parties agreed to the postponement of the payment by the defendant until the fall of 1914, the time when plaintiff seized the oxen sold under the lien note.

The appeal should be allowed with costs.

BROWN, J.:—In addition to the matters dealt with by Newlands, J., in whose judgment I concur, counsel for the defendant Risling urged that his client was released from liability by virtue of the fact that the animals seized and sold under the lien note were not sold in accordance with the provisions of sec. 8, ch. 145, R.S.S. 1909.

That section provides that the goods or chattels shall not be sold without 5 days' notice of the intended sale being first given to the buyer or bailee or his successor in interest. According to the evidence in this case, Neigum was at the time of the sale the successor in interest of Selensky, the purchaser, and under the section referred to Neigum is the party who would be entitled to notice. No objection was taken under the pleadings that Neigum had not received such notice, the only objection being that neither of the defendants had received such notice. It is immaterial whether or not, under the circumstances of this case, the defendants or either of them received notice. If it be material that Neigum should have received such notice, the defendant not having taken the objection by his pleadings and there being, I presume in consequence, no evidence offered on the point, such objection cannot be heard now.

The appeal should therefore be allowed with costs, and judgment entered for the plaintiff for the amount of his claim and costs of trial.

MCKAY, J., concurred. *Appeal allowed.*

R. M. OF SHERWOOD v. WILSON.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. November 18, 1916.

TAXES (§ III D—137)—*Revision of assessments—Powers of Board—Finality of orders.*]—Appeal by plaintiff municipality in an action for taxes. Affirmed.

H. Thomson, for appellant; *H. E. Sampson*, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—The defence is that in the year 1915 the Local Government Board revised the assessment for that year,

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which reduced these taxes by $340.91, and defendant admits the balance claimed for which the trial Judge gave plaintiffs judgment.

From this judgment plaintiffs appeal, on the ground that the Local Government Board had no jurisdiction to revise the assessment for 1915, that assessment having been completed, the tax rate struck, and the taxes for that year being due on August 20.

The application to the Local Government Board was not made until December 15, 1915, and their decision was given on the 27th of that month, revising the assessment for the year 1915.

The only question for us to decide is: Did the Local Government Board have jurisdiction to make this order?

Their powers are given by ch. 9 of the Acts of 1914, "An Act respecting Subdivisions." These powers are not dependent on any other appeal, nor upon the actions of any other body. They may, at their own option, or at the request of any party interested, proceed to revise the assessment. No time is mentioned when they may act. The Act simply says (sec. 1), when it appears desirable to the Local Government Board that an assessment should be revised they may do so.

Sec. 1 (4) provides that the Board may by order fix the values for assessment purposes for one or more years, and may name a date at which the order shall come into effect. If no date is named the order takes effect immediately. By sub-sec. (5) their decision is final and without appeal, and such orders shall be binding upon the corporation and its officers and upon all other persons.

The question whether the assessment should be reduced after the tax rate is struck is, in my opinion, a question for the Board, as the Act gives them power at any time to revise the assessment. Their order in this case came into effect immediately and it referred to the 1915 assessment. By the terms of the Act it is binding on the municipality, and there is no appeal. I cannot see that they have exceeded their jurisdiction in making the order, and, therefore, the appeal should be dismissed.

Appeal dismissed.

Re ESTATE OF SOUPLY. SASK.

Saskatchewan Supreme Court, McKay, J. November 3, 1916. S. C.

DESCENT AND DISTRIBUTION (§ I E—20)—*Rights of widow in husband's estate—Defences—Same as in action for alimony.*]—Application by a widow under the Devolution of Estates Act, R.S.S. 1909, ch. 43, as amended by ch. 13 of 1910-11.

McLean, for widow, appellant; *Goetz*, for executors; *Fisher*, for official guardian.

MCKAY, J.:—There is no doubt the applicant comes within sec. 11 (*a*), as the will of her deceased husband makes no provision for her, and had he died intestate she would be entitled to one-third of his estate under sec. 4 of the said Act.

The only objection urged against her application is sec. 11 (*i*) of the said Act, which reads:—

> Any answer or defence that would have been available to the husband of the applicant in any suit for alimony shall equally be available to his executors or administrators in any application made under the provisions of secs. 11(*a*) to 11(*k*), both inclusive, of this Act.

It is contended that this section bars the applicant from relief, as the material filed shews that the deceased and his wife cohabited and lived together during the whole of their married life, and she, therefore, could not have successfully maintained an action for alimony.

I do not agree with this contention, that the applicant is barred from relief.

In view of *Re Drewry Estate*, 30 D.L.R. 581, at 583, I hold the applicant is not barred from but is entitled to relief, and I allow her one-third of the estate of the deceased after paying the debts of deceased, and the balance of the estate will then be divided according to the terms of the will between the mother and children of the deceased. The costs of all parties in connection with this application will be paid out of the estate.

Judgment for plaintiff.

Re PROHIBITION PLEBISCITE ORDINANCE. YUKON.

Yukon Territorial Court, Macaulay, J. September 26, 1916. T. C.

INTOXICATING LIQUORS (§ I A 2—10)—*Plebiscite ordinance—Recount.*]—Application on behalf of W. A. Puckett, agent for the Whitehorse electoral district of the people's prohibition movement of Yukon Territory, for an appointment fixing a time and place

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for a recount of the ballots cast in the polling divisions of Whitehorse and Braeburn, at the plebiscite held on August 30, 1916, under the provisions of the Prohibition Plebiscite Ordinance, ch. 5 of the Ordinances of the Yukon Territory, 1916.

F. T. Congdon, K.C., for applicant; *J. P. Smith* and *C. W. C. Tabor*, for Citizens' Anti-Prohibition League.

MACAULAY, J.:—The application was made on September 21 and adjourned until September 25 to permit counsel for the citizens' anti prohibition league of the Yukon Territory to appear and shew cause why the application as asked should not be granted, and on the said 25th counsel appeared as above noted and argument was heard.

The Plebiscite Ordinance contains no provision for a recount unless provision is made therefor by sec. 19 of said Ordinance which reads as follows:—

"19. The said vote or plebiscite shall, subject to the provisions of this ordinance, be conducted in the same manner as is provided by ch. 28 of the Consolidated Ordinances, 1914, respecting elections, and the provisions of said ch. 28, as to dealing with and the secret marking of ballots, corrupt practices, and penalties, and proceedings after the close of the poll, and in all other respects, shall, subject to the provisions hereof, *mutatis mutandis*, apply and extend to the taking of and completing the said plebiscite or vote."

It was contended by counsel for the applicant that under the provisions of the above section all the provisions of ch. 28 of the Consol dated Ordinances, 1914, for a recount, could be read into this ordinance, and consequently the applicant was entitled to the appointment applied for.

Sec. 4 of the said Plebiscite Ordinance provides for the naming of a returning officer for each of the several electoral districts established and provided in and by ch. 23 of the C.O. respecting the council of the Yukon Territory.

Secs. 5, 7, 8, 9, 10, 11, 12, 17 and 18 provide for the actions to be taken and duties to be performed by the returning officer previous to polling day. All these provisions are inconsistent with sec. 25 of the Election Act, ch. 28 of the C.O., 1914 which provides as follows:—

"If at the close of the hour for receiving nominations more candidates than the number required to be elected remain in

nomination, *the returning officer shall announce the day upon which a poll will be held, and the day, hour and place at which the ballots will be counted, which must not be more than fourteen days after the polling.*"

There is no such provision made in the said Plebiscite Ordinance for a recount by the returning officer as is provided by said sec. 25 of said ch. 28, and apparently no intention that such a procedure should be followed.

Sec. 30 of the said Plebiscite Ordinance provides for the procedure to be followed after the close of the poll.

Sec. 31 provides for the procedure to be then followed by the returning officer.

The above section does not provide for the summing up of the votes cast in the several polling divisions, *but for the summing up of the result of the returns of all the deputy returning officers,* clearly and in unmistakable language pointing out that it is not the votes cast that the returning officer is to sum up, *but the result of the returns of all the deputy returning officers, and make a return to the commissioner of the result of the plebiscite.*

This must have been intended by the legislators as the final act to be performed by the returning officer, as it is capable of no other interpretation.

Then sec. 32 provides that—"The territorial secretary shall, *immediately after receiving the returns of the vote polled,* publish a statement of the result of the vote in one issue of the Official Gazette."

Then follows in sec. 33 the action to be taken by the Commissioner of the Territory in case the majority of the votes polled are in favour of prohibition.

The provisions of said ch. 28 of the C.O. of 1914 could only apply subject to the provisions of the Plebiscite Ordinance, and where inconsistent therewith could not apply.

In applying the principles of law to the construction of statutes, Maxwell, 5th ed. at p. 72 says:—

"It is . . . a fundamental principle, standing, as it were, at the threshold of the whole subject of interpretation, that the plain intention of the legislature as expressed by the language employed is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its

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wisdom or justice. If the language admits of no doubt, or secondary meaning, it is simply to be obeyed."

In the case before me the legislators have pointed out by secs. 30, 31 and 32 what is to be done after the close of the poll, and, by sec. 33, what further step should be taken in case a majority of votes polled were in favour of prohibition.

It was undoubtedly intended that there should not be a recount by the returning officer, because sec. 31 clearly points out *what he shall do*, and sec. 32 provides what shall be done by the territorial secretary immediately thereafter, and which must be taken to be final.

Neither could it have been intended that there should be a recount by a Judge, because sec. 32 read in conjunction with the other sections named precludes me from arriving at such a conclusion. The language employed in the framing of these secs. 30, 31 and 32, in my opinion, admits of no doubt or secondary meaning, and it is simply to be obeyed.

I am reluctantly, then, of the opinion that it was not the intention of the legislators that there should be a recount either by the various returning officers or by a Judge of the territorial Court as provided by said ch. 28 of said C.O. of 1914, and I regret that I am forced to this conclusion, as I think the voters generally of this territory who expressed their opinions on the questions provided for in the plebiscite would have been better satisfied had there been an opportunity afforded for a final recount as applied for.

For the reasons above stated I am unable to grant the application, and it is therefore accordingly dismissed.

Application dismissed.

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