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ANNOTATED

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VOL. 54

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TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 54 INCLUSIVE.

CANADIAN MANUFACTURERS ASSN. v. CANADIAN CAR SERVICE BUREAU.

(Annotated).

Board of Railway Commissioners. January 26, 1920.

1. DEMURRAGE (§ III I—475)—AVERAGE — RIGHT — FREE TIME — MAXIMUM—REASONABLE CARS—LOADING OR UNLOADING—CREDIT.

There is no basis of right, as such, to the allowance of free time provided in the Canadian Car Demurrage Rules for loading or unloading cars. The free time allowed is a maximum reasonable average.

The consignor or consignee has a right to such portion only of the free time as is actually necessary, with due diligence, to effect the loading or unloading of cars. If he loads or unloads within the free time that is a closed transaction, and there is no credit to impute to a car which takes longer than the free time.

2. REGULATIVE TRIBUNAL (§ IV B—520)—PRACTICE—JUSTIFICATION—TOLLS — TRAFFIC — CARRIAGE — C.L. — L.C.L. — TRAINLOAD—UNJUST DISCRIMINATION.

In the carriage of traffic on the North American continent, it is only justifiable to consider carload and less than carload quantities with regard to tolls.

It is not justifiable for a regulative tribunal to direct or countenance tolls predicated upon the handling of trainload quantities. The car of coal consigned to the larger dealer must be treated in the same way as the car of coal consigned to the smaller dealer.

3. DEMURRAGE (§ III I—483)—AVERAGE—UNJUST DISCRIMINATION—CAR SUPPLY—INCREASE.

The average demurrage system is unjustly discriminatory in principle and it has not been affirmatively established that it will so work out as to increase the car supply available at any given time.

[*Wallaceburg Sugar Co.* v. *Canadian Car Service Bureau* (1909), 8 Can. Ry. Cas. 332, followed; *In re Car Demurrage Rules* (1917), 24 Can. Ry. Cas. 180, at pages 195, 196, referred to.]

Statement.

APPLICATION for an order directing the extension of the Canadian Car Service Rules so as to provide for what is known as the Average Demurrage Plan, which now forms part of the National Car Demurrage Rules in force in the United States.

The application was finally disposed of on material on file with the Board.

MCLEAN, ASSISTANT CHIEF COMMISSIONER:—Application is made for average demurrage. More specifically it is set out that the demurrage on all cars held for loading or unloading shall be computed on the basis of the average time of detention to all cars released during each calendar month. The method of computation

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outlined is that a credit of one day shall be allowed for each car released within the first 24 hours of free time. A debit of one day shall be charged for each 24 hours, or fraction thereof, that a car is detained beyond the first 48 hours of free time. Not more than one day's credit is to be allowed on any one car, and in no case is more than 5 days' credit to be applied in cancellation of debits accruing on any one car, thus making a maximum of 7 days, including Sundays and holidays, that any car may be held free.

At the end of the calendar month, the total number of days credited will be deducted from the total number of days debited, and the demurrage charge per day charged on the remainder. If the credits equal or exceed the debits, no charge is to be made for the detention of the cars, and no payment is to be made to the consignor or consignee in respect of such excess of credits. Credits in excess of debits of any one month are not to be considered in computing the average detention for another month.

Those taking advantage of the average plan are to forego the advantages of the weather and of the bunching rules.

A consignor or consignee taking advantage of the average plan may be required to give sufficient security to the carrier for the payment of balances due by him at the end of each month.

The question was also gone into in connection with the amendment of the Canadian Car Demurrage Rules which was made on July 28, 1917, effective by order on August 20, 1917. In the decision in that case, reference was made to the various submissions bearing upon average demurrage, and it was stated in the judgment that the Board would endeavour to ascertain whether average demurrage had worked a real benefit in places where it had been tried, it being at the same time stated that from the best information had at the previous hearings the contrary was the case. *In re Car Demurrage Rules*, (1917), 24 Can. Ry. Cas., 180 at page 196.

Under the date of June 16, 1919, on direction, a letter was issued by the Board setting out that in view of the many changes which have taken place in railway matters since the judgment on the demurrage rules, as above referred to, had issued, the Board was prepared to arrange for a hearing, or hearings, if the parties interested desired to add to the record in the case.

The material received was concerned mostly with opinions on the principle involved, and, in general, the opinion was expressed

that the matter might stand for decision on what had been submitted. In general, it does not appear that there is such additional material evidence available in regard to the working of the system as would justify a further hearing.

The matter as presented may be subdivided into the following headings:—

(*a*) Whether when the consignor or consignee unloads within the free time allowed by the demurrage rules, he has a *right* to apply the difference between the free time allowed and the time actually taken as a credit on another car which is not loaded or unloaded within the free time. (*b*) The advantage of such proposed system of credits as an incentive to quicker loading or unloading. (*c*) The general effect on car movements.

As bearing on the question of *right*, which matter, it appears to me is fundamental, some detail references to the notes of hearing are necessary; and it may be pointed out in this connection that reference is also made to earlier applications of the Canadian Retail Coal Ass'n of London, Ont., and the Wallaceburg Sugar Co.

In the *Wallaceburg Sugar Co.'s* case, (1919), 8 Can. Ry. Cas. 332, application was made as regards a particular commodity; in the case of the Canadian Retail Coal Ass'n, the application was also as to particular commodities, coal and coke.

The application of the Wallaceburg Sugar Co. was not limited by the use of the adjective "optional." The application of the Canadian Retail Coal Ass'n was. So is the present application as developed; but it does not appear that the adjective "optional" makes any vital difference.

In the application of the Canadian Retail Coal Ass'n, Mr. Hay stated, at page 2922, vol. 124:—

> When they allow us 72 hours for unloading a car of coal they must of necessity in order to arrive at a proper business basis have figured on the detention of that car. That, I think, is a reasonable and fair proposition. Now then, when that car is placed on our siding we have 72 hours to unload it. We will probably unload the car within the first 24 hours . . . Inasmuch as we have already paid the railway company for the detention of that car for two days they have not given us any allowance for that dollar we have been fined on the other car (that is the car held over the 72-hour period), and that should stand over against the time that is to our credit.

In the same case, at page 2959, Mr. Hay said: "We were applying for a principle we think fair and that should be carried out."

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At the hearing in Ottawa, the following discussion took place as bearing on the point in question, vol. 179, pages 4576-4578:—

Commissioner McLEAN: Is it your position, Mr Walsh, that a shipper has a right to hold a car for the free time?

Mr WALSH: Absolutely not. I have not held that opinion.

Commissioner McLEAN: Then your position would be that it is the reasonable maximum time allowed for unloading?

Mr. WALSH: I have always held this position, I have advocated it in our paper and through circulars to our members, that 48 hours or 72 hours was the maximum time allowed, but it was not expected they should take that time to unload equipment. When they do that they are depriving themselves of a proper facility, and they are depriving somebody else. But we think it is a reasonable time to allow in case of emergency or of accident. I think it would be fair to say this, that the people I represent are not laying themselves out to delay cars or to take advantage of the free time; their purpose is to unload as quickly as they can and get the cars to load up again. As I say, and I want to repeat, our people realise that. Our manufacturers hold that cars are for the purpose of transporting freight from one point to another, that they are not for storage purposes, and we try to the best of our ability to unload as rapidly as possible, but we have got to have the conditions, they must be favourable.

Commissioner McLEAN: Following that, if the free time simply represents the maximum reasonable time for unloading, is it quite fair to say that because a man unloads within that time that the portion of the unused should be applied to another car? That looks at it as a matter of right. He has a right to so much time within two days. If he is able to unload a car and have, say, one-half or three-quarters of the day unused, what has that got to do with another car?

Mr. WALSH: Simply because another car cannot be got at.

Commissioner McLEAN: But if you say two days is a reasonable time for unloading does it not mean that each car should stand by itself?

Mr. WALSH: If it could be worked out theoretically perfectly.

Commissioner McLEAN: Leaving aside theory, is not that your position? I just want to understand your position.

Mr. WALSH: Possibly that is correct.

Commissioner McLEAN: I just want to see what your position leads to.

Mr. WALSH: Yes, but that is not possible.

Commissioner McLEAN: But either the two days is a right or it is not. If he does use the two days on one car, he has a right to the unused portion to apply on another car. Either it is that or it is a reasonable maximum time for unloading, and whatever he unloads within that time it stops at that. It is either one position or the other.

Mr. WALSH: Certainly, if the conditions are ideal. We had a good illustration of it yesterday in connection with the movement of cars.

Commissioner McLEAN: We have to take one horn of the dilemma. It is either a right or a reasonable maximum. If it is a reasonable maximum it applies on the one car. I may be wrong, but it seems to me that that is a fair conclusion from the discussion.

Mr. WALSH: That is all.

In supplementary summary and comment in his letter dated October 18, 1913, Mr. Walsh took, in substance, the position that the two days free time referred to had become a right by usage. The following extract from his letter is material:—

At page 4577 Commissioner McLean asked whether the two days free time allowed was a right or not. It is a right in the sense that common usage has made it so. It has been well established that a receiver of freight is entitled to notice of its arrival and to a reasonable time within which to remove it. It is the same right as he has in respect to less than carload shipments on which he is given from 72 to 96 hours, and if the freight moves through the freight sheds the carrier has to provide storage and is liable under the bill of lading conditions as carrier for that length of time.

As regards carload freight, the carrier does not have to provide such facilities. All that is required to do is to place the car for unloading. The bill of lading conditions determine the liability of the carrier and the length of free time within which the receiver has to remove the goods.

This point was seized upon by the representatives of the railways and dealt with at some length both by Mr. Beatty and Mr. Biggar at pages 4583 and following, and 4605, 4606, and 4607. Both of these gentlemen took the position that the 48 hours, as suggested, was not a right and, therefore, the public was not entitled to it. The Board is familiar with the origin of the rule and it is, therefore, unnecessary for us to enlarge further on the subject except to point out that the records of the Canadian Car Service Bureau show that the public does not as a rule take 48 hours to unload, neither has it ever been contended that cars should be held for that length of time. It is, however, our contention that we have the right in cases of necessity to that length of time. We respectfuly suggest to the Board that in dealing with this question actual conditions must be taken into consideration. Mr Biggar dealt entirely with conditions in Great Britain. These are not applicable here. The nature and volume of traffic are entirely different.

The same position is adopted in the correspondence on the Board's files, including the correspondence received in reply to the circular letter of June 16, 1919, already referred to.

The Dominion Sugar Co., in a letter dated January 17, 1916, says that in checking up all cars into their yards the average time of unloading is less than 24 hours, or less than one-half the free time; and it was submitted that the company felt that "as though it would be an injustice to ourselves to have each individual car charged for demurrage, in view of the fact that hundreds of cars are unloaded within even 12 hours time."

The Canada Crushed Stone Corp. made the following query: "If the shipper can save the railway money by the quick loading of cars, why should he not be credited to offset the loss when the railway cannot supply cars promptly?"

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The T. H. Taylor Co. stated they thought it was only fair that the shipper should be allowed something for cars which were unloaded within the free time allowed.

The Algoma Steel Corp. stated that it had been paying several thousands of dollars annually for demurrage, and it seemed to said corporation that it should be credited for cars which it returned promptly; that is, before the free time was up.

The Steel Company of Canada, pointed out that it unloaded a large portion of its cars within the free time. It took the position that it was unfair it should be penalised at a heavy rate for cars taken in excess of the free time when it had "earned money for the railways on so much of their traffic." It expressed the opinion that if the penalty was a fair one for the use of the car, the railway should be willing to grant a credit to the consignee who gives up cars to them in less than the free time.

Without multiplying citations, the position is, in substance, that the free time for loading or unloading exists as a matter of *right*, and that whatever is done by the consignor or consignee in regard to loading or unloading within the free time is in derogation from his strict rights and is something for which he should receive a credit.

The great majority of cars are, under the existing demurrage rules, loaded or unloaded within the free time, there being no incentive such as is argued for to induce extra expedition in loading or unloading, so as to obtain credits thereby. It follows that the loading or unloading within the free time is carried out not with any idea of benefiting the railway, but because the business conditions of the consignor and consignee concerned make it a good business policy to do so.

In analyzing the question of the *right* which it is contended exists, reference may be made to some decisions of the Board. In dealing with the application of the Wallaceburg Sugar Co. for average demurrage, which was heard in 1909, the Board used the following language (8 Can. Ry. Cas. at page 335):—

> The "average system" suggested, in my opinion, is not justifiable under the contractual relations which exist between the consignor or consignee (as the case may be) and the railway company. The contract of carriage is, that the railway company will carry the goods to the point where they are to be delivered to the consignee, who in turn is to unload and release the car with all reasonable despatch. For more certainty and uniformity

of practice, rules have been adopted which say in effect that "reasonable despatch" for unloading shall not, in the case under consideration, exceed 48 hours. If a man exceeds this reasonable time in unloading, he is penalised by a charge of $1 per day for the extra time he may hold the car. Such a provision is in the public interest, because it makes a consignee prompt in releasing cars consigned to him, and thus increases the supply of available cars for the shipping public. . . . . The intention is that, under the Car Service Rules, each car shall be dealt with by itself and without reference to the movements of other cars. This insures equal treatment of the smaller shipper or consignee with the larger one.

At a later date, in dealing with an application of the Canadian Car Service Bureau, the Board used the following language: "Car Service Rules constitute a code dealing with the question of average reasonable time for delivery, delays to cars, and penalties for such delays." See Annotation, *infra*, page 16.

In the matter of the complaint of the Wood Coal Co., of Brantford, Ont., file 1700.2, and the complaint of the Barber-Ellis, Limited, Brantford, Ont., file 1700.56, the question of the construction of Rule 2 of the then existing Car Service Rules was involved. Under this rule, 24 hours' additional free time was allowed for clearance of customs. This was in addition to the 48 hours free time. It was contended, in substance, that the whole period of 72 hours was available for the clearance of customs and for unloading. It was held that the clearance of customs must be effected before the car was in a position to be unloaded, and that the time allowed for clearance of customs as compared with the time allowed for unloading must, therefore, be prior; that is to say, the time allowed for clearance of customs stands first on the list, and under the rule the 48 hours for unloading runs from the termination of the time allowed for clearance of customs.

The question of *right* herein involved has been dealt with from time to time in English decisions.

The Lancashire and Yorkshire Railway Co. having proposed that on and from the first day of March, 1895, it would levy a charge of sixpence per wagon per day under the title of siding rent, upon all wagons containing coal or coke, and remaining undischarged upon sidings belonging to the railway company for a longer period than four clear days, the matter came before the Railway and Canal Traffic Commission in *Manchester and Northern Counties Federation of Coal Traders' Assn.* v. *Lancashire and Yorkshire Ry.*

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Co. (1897), 10 Ry. & Can. Tr. Cas. 127. The following references to what is set out in the decision are pertinent:—

[The carrier's obligation] is to deliver [the wagons] within a reasonable time; *per* Collins, J., at page 133.

Carrier's obligation.—All that he undertakes and all that he receives consideration for is the carrier's duty, which ends after he has delivered the goods—that is, has put the goods in a position where the trader can take delivery, given him notice of the fact, and left them there for a reasonable time, such as would enable the trader, with ordinary appliances, to get his goods out of the wagon; at pages 133, 134.

Termination of carrier's liability.—It clearly determined when a reasonable time had elapsed—a time within which, on the principles I have laid down, the trader, acting reasonably, might have taken the coals out of that wagon; and that reasonableness, I think, must be determined, not by reference to the after-use which it would have been convenient for the trader to put that wagon to after the coals had arrived, and he had the opportunity of taking delivery, but with reference to the fact that the carrier's obligation as an insurer remained up to the expiration of that reasonable time; at page 134.

The point was raised that the railway must be deemed to have conceded the right to the traders to use these wagons as shops during the four days—that is, during the four days they admit to be covered by the rate.

Collins, J., said, at pages 137-138:—

I regard them as trying to fix an extreme limit up to which they are content to bear the obligation of carriers, and to deem it as covered by the rate—and they make it an extreme limit in order to meet the exigencies of the consignees.

In *Midland Ry. Co.* v. *Black et al.* (1899), 10 Ry. & Can. Tr. Cas. 142, the question of average was dealt with by Wright, J., at pages 148-149, as follows:—

Then Mr. Chitty, on this part of the case as to the charge, raised a point which is of great importance, and, *primâ facie*, one which has a great deal in it. He said it cannot be reasonable to pay the company six pence per day beyond the 4 days in cases in which, as in the majority of cases, the bulk of the traffic is unloaded by the traders within 4 days; so that the company getting the benefit of the accommodation saved by that expedition on the part of the traders as regards something like 90 to 95% of the traffic, it cannot be fair that the company should have that advantage, and also be paid for what happens after the 4 days. But I do not think such a matter of set-off as that it is competent for us to consider. The trader has no right to the 4 days. It is not as if he waived anything by unloading within four days. The trader is bound to discharge in a reasonable time. If it is reasonable for him to discharge in 2 or 3 days and he does so, it is no more than his duty, and, as Sir Frederick Peel pointed out, after the 4 days, supposing the 4 days is the right time, the character of the company is a new and altogether different one. He is now a warehouseman; and how can the amount which he is

entitled to charge for warehousing these trucks (warehousing is hardly the right word for it but it conveys what I mean) be affected by the circumstance that he has not been put to all the expense as a carrier or as a conveyor of the traffic to which he might have been subjected?

The principle of average demurrage was before the Railway and Canal Traffic Association in *North British Ry. Co.* v. *Coltness Iron Co., Ltd., et al.; Caledonian Ry. Co.* v. *Coltness Iron Co., et al.; Glasgow and Southwestern Ry. Co.* v. *William Baird & Co., et al.* (1911), 14 Ry. & Can. Tr. Cas. 246.

The matter involved came before the Railway and Canal Traffic Commission as arbitrators appointed by the Board of Trade to determine certain differences between them and the defendant in respect of certain charges which applicants claimed to be entitled to under sec. 5 (4) of the schedule to their several Rates and Charges Order Act, 1892, on the ground that the defendants had detained wagons belonging to the applicants for an unreasonable length of time.

It was contended for the defendants that the true view was that if a railway company gets wagons released it does not matter whether they are sent out in order of arrival or otherwise. The decision in this case was given by Lord Mackenzie. It was set out that under sec. 5 (4) of the schedules of the Act of 1892, the consignor or consignee must have a reasonable time to put traffic in or to take traffic out. It was stated, at page 262, that "A full margin must be allowed to cover the reasonable maximum time to enable the consignor or consignee to give or take delivery."

In dealing with the question of average, at pages 264-265, the following language was used:—

> It is necessary to refer to an argument used by counsel for the traders in support of what has been called the average principle. This consists in crediting to the trader whatever free time is saved. If over the whole period of a week, or a month as the case may be, it is ascertained that the total free time has not been exceeded by the total number of wagons, then, according to this contention, no demurrage is due. This principle, to my mind, is founded upon a fallacy. A trader is not entitled to keep a wagon for the whole of the free time. His duty is to discharge with all reasonable despatch. If he does this, he does no more than his duty, and is not entitled to credit for the remainder of the free time. This is pointed out in the *Midland Railway* v. *Black, supra*, by Wright, J.; see also the statement by Collins, J., in *Midland Railway Company* v. *Sills* (1896), 9 Ry. & Can. Tr. Cas. at page 163. Nor do I think it admissible that the free time allowed both before and after conveyance should be added together, and if the total period is not exceeded that then no demurrage should be due.

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The obligation of the carrier under the contract of carriage covers not only transit but also a reasonable time for loading and unloading. Just as the carrier is entitled to a reasonable time in which to deliver, so the recipient of goods is entitled to a reasonable time to demand and receive delivery.

Chapman v. *Great Western Ry. Co.* (1880), 5 Q.B.D. 278, *per* Cockburn, J., at pp. 281-282:

> He [the consignee] cannot, for his own convenience, or by his own laches, prolong the heavier liability of the carrier beyond a reasonable time . . . When once the consignee is in *morâ* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident.

Under the bill of lading, sec. 6, it is provided:—

> Goods not removed by the party entitled to receive them within 48 hours (exclusive of legal holidays), or in the case of bonded goods within 72 hours (exclusive of legal holidays), after written notice has been sent or given, may be kept in car, station or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage, and to the carrier's responsibility as a warehouseman only . . .

The situation which arises in respect of liability may be referred to. If in the case of two cars, each of which has 48 hours free time, car number one is unloaded in 24 hours while car number two is unloaded in 72 hours, then under the average principle the imputation of 24 hours' credit to number two enables it to be unloaded without any demurrage penalty, but while from the standpoint of the Demurrage Rules the second car is treated as unloaded in a constructive period of 48 hours, the situation is that it has taken 72 hours actual time. Under sec. 6 of the bill of lading, the carrier would be liable as a warehouseman only after the 48-hour period.

The proposal to apply a credit to the car detained 72 hours is based on the idea that the 48 hours' free time is a necessary incident of the contract of carriage and that during this period the contract of carriage, with the carrier's liability attaching thereto, continues. But in order to make the credit system applicable the contract of carriage on the car in question must have been completed. The transfer of the credit in effect means the transfer from a commodity which has moved under a contract of carriage with the incidents attaching thereto (and after the contract of carriage has terminated to another commodity where the contract of carriage has terminated) that is to say, an attempt is made to counterbalance

the contract of carriage as a carrier with the contract as a warehouseman.

Dealing with the question as a matter of *right*, the consignor or consignee has a right to such portion of the free time as is actually necessary, with due diligence, to effect the loading or unloading. If he loads or unloads the car within the free time, that is a closed transaction and there is no credit to impute to a car which takes longer than the free time. The free time allowed is a maximum reasonable average. The Board has in various instances, when application has been made to it for extension of the free time on account of the alleged necessity of the consignor or consignee having extra time because of length of road haul or other conditions peculiarly affecting the situation of the consignor or consignee being involved, declined to add to the free time.

While it appears that there is no such basis of *right* as is contended for and while this might properly be taken as closing the matter, it seems proper to consider further the question of whether there are any such conditions in respect of betterment of handling of cars involved as would justify a departure from the principle which, in my opinion, is a well-established one; that is to say, would practical operating conditions justify the abrogation of the principle?

It is argued that the Average Demurrage method affords an incentive to a quicker handling of the cars, and that this enures to the advantage of the carrier.

From letters from Mr. Lincoln, manager of the Traffic Bureau of the Merchants' Assn. of New York City, which are filed by Mr. Walsh, said letters being dated May 28 and June 9, 1913, the following excerpts are taken:—

> The average agreement, by offering certain incentives to the receivers of freight, and particularly the large receivers, results in the more prompt release of equipment, that credits may be obtained to offset debits where demurrage accrues beyond the control of the receiver . . . As to the shipper or receiver, I am confidant that an opportunity to earn credits for the purpose of offsetting debits is a constant incentive to the shipper to unload his car within 24 hours.

The Algoma Steel Corp. contends:—

> Transportation companies benefit by this plan in that they secure the return of equipment promptly, as industries find it an incentive to load and unload and send back the cars as quickly as possible.

In the evidence of Mr. Hay, already referred to, it was set out

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at page 2930, vol. 124, that the consignee should, by extension of the credit, be given an incentive to unloading the cars; that this would help the release of cars.

In the evidence given by Mr. Dunn, of the International Harvester Co. of Canada, it was contended at page 4553, vol. 179, that it would enable a more economical utilization of labour on the part of the company. It was set out that unloading gangs working on piece work were used, and that if the unloading of cars were not limited by the date of receipt this would permit a continuous use of the unloading gangs.

This is, in effect, an argument that the average system should be used to offset the labour costs of the industry.

Similar evidence was given by Mr. Champ, of the Steel Company of Canada, at page 4537, vol. 179, to the effect that great effort was lost in locating and unloading cars in order of date.

In a submission made by the Canadian Manufacturers' Assn. subsequent to the circular letter already referred to, it was stated:—

> It is our view and that of a number of manufacturers vitally interested in the question, that the addition of the average agreement in Canada would assist materially in the prompt handling of cars.

The chairman of the Brantford Branch of the Canadian Manufacturers' Assn. stated that he considered that the theory of average demurrage was correct, as "it gives the manufacturer an opportunity of making a bonus for exceptional service to offset the penalties when delays occur."

The Peterboro Board of Trade, *per* the secretary of its transportation committee, used similar language. It said:—

> We agree with the manufacturers that this average agreement appeals to us as being a fair and reasonable way of dealing between the commercial interests and the railways, and that carriers must recognise the fact that to deliver them their rolling stock in less than the free time allowed must represent some compensation for which they should be willing to give reasonable consideration.

The same position was taken by the Canadian General Electric Co. of Peterboro, which considers that the average arrangement would bring about a more economical use of rolling stock, as it carried a compensation for releasing cars within the free time allowed.

The same position is to be found in a submission from the Canada Foundry Co. Mr. Dunn, in his evidence already referred

to, expressed the opinion that the average system would permit releasing of two cars where one was now released.

The references to the evidence above set out shew that the idea of an incentive to quicker handling of cars, as a result of the credits asked for, predicates the existence of the *right* already referred to, and the comments already made are applicable in this connection.

In addition to what has already been set out, various other advantages are claimed for the system, as follows:—

(*a*) It will remove the friction arising over the operation of the weather and bunching rules; (*b*) It is justified by United States practice and experience; (*c*) It is considered as being differentiated from what was dealt with in the *Wallaceburg Sugar* case, 8 Can. Ry. Cas. 332, in that there is proposed a limitation of credits.

The system is one which enures to the advantage of the large shipper. As bearing on this, various comments from the hearing which took place at Toronto on December 13, 1916, may be referred to. The reference is to vol. 259 of the evidence.

At page 8445, the Chief Commissioner said: "The average demurrage does help out the big shipper." A discussion took place between Mr. Green, representing the Steel Company of Canada, and the Chief Commissioner, and at page 8515 the following comment was made by the Chief Commissioner: "As far as the average question is concerned, no doubt it is a good thing for the large plant, because it enables them to keep the cars without paying demurrage," and on page 8516, the following discussion took place:—

> Mr. GREEN: The point I was trying to make out was that the railroads admitted at that time that they got just as many cars released—in other words, it was a 50-50 proposition.
>
> The CHIEF COMMISSIONER: They get no more and no less, but you wouldn't have to pay demurrage, and the small man who couldn't work an average would have to.

A further comment of the ex-Chief Commissioner "average demurrage does not help the small dealer, and he in turn objects to average demurrage . . . ," may be referred to.

In re Car Demurrage Rules, 24 Can. Ry. Cas. 180, at page 195.

It is not claimed by the shippers to be of general applicability.

In a letter submitted by the Canadian General Electric Co., Peterboro, the following language occurs: "There doubtless are

several lines of business where the adoption of such a scheme would work out to the advantage of both the public and the transportation company."

Mr. Champ, in his evidence already referred to, says that the existing arrangement is "very unfair to the large shipper."

The following extract from the evidence, vol. 274, page 4794, is pertinent in this connection:—

The CHIEF COMMISSIONER: Mr. Dunn, how many cars a month would a man have to handle before this was of the slightest practical use to him?

Mr DUNN: I cannot conceive that it is of much service to the man who has not from 10 to 20 cars a month; he may gather up 10 to 20 days under the best conditions.

The CHIEF COMMISSIONER: I only want the fact as you saw it. Your own idea is that it is not of much use to any one who does not have a business of 20 cars per month. Isn't it really a large-plant facility?

Mr. DUNN: Well, Mr. Chairman—

The CHIEF COMMISSIONER: But it is a large-plant facility, is it not?

Mr. DUNN: I think so.

What has been so earnestly urged is, in reality, a plea for the large shipper. It means, in substance, that the large shipper who, because of his control of capital is able to have superior facilities, is, through a rearrangement of the demurrage rules, to obtain therefrom a still further advantage. For example, a coal dealer who has no coal trestle may have to take the full free time allowed, and, in individual cases, may have to exceed it. The coal dealer who has a coal trestle has superior facilities for handling coal. This is something which attaches to the scope of his business and the amount of capital he is able to control; and with the equalizing of conditions in this respect it is not the function of the Board to interfere. But, if the large dealer, on account of his superior facilities, is able to unload quickly and to obtain credits therefrom, the result of the system asked for would, in all probability, be to relieve him entirely from demurrage payments, payments which the less favourably situated dealer might be subjected to; and it might be that these dealers were competitors in a common area. It would be improper for the Board to attempt to take away from the larger dealer the advantages in point of facilities which his larger volume of business justified and which his greater control of capital permits; but, in dealing with the question of demurrage rules, it would be equally improper for the Board to leave out of

consideration the effect which might be exercised through this proposed system in weighing the scales against the smaller dealer.

The suggestion that since the arrangement is optional the smaller dealer does not need to use it unless he desires does not meet the question.

The further suggestion that the matter might be equalized by extending the time so as to take care of the smaller dealer, is to ask that the Board should equalize conditions by discriminating in favour of the smaller dealer. To state such a proposition is to attract attention to the fact that such a condition would not long endure before complaints were received.

In regulative policy in regard to rates, the practice on the North American continent is that the only quantities in railway carriage which it is justifiable to consider are carload quantities and less than carload quantities, and that it is not justifiable for a regulative tribunal to direct or countenance rates predicated upon the handling of trainload quantities. The car of coal consigned to the large dealer must be treated in the same way as the car of coal consigned to the smaller dealer.

The adoption of the system might, and probably would, enable large businesses to carry on their activities without the payment of any demurrage penalties whatever. This, however, is incidental, not fundamental. The fundamental question is, would the system bring about such an expedited releasing of cars as would by adding to the number of cars free at a given moment, facilitate the handling of traffic in general, thereby enuring to the advantage of the general shipping and receiving public?

Consider the situation that may arise during a car shortage. Box cars loaded with lumber are moved into a manufacturing plant which is operating under the average system. The cars are given, let it be assumed, the expedited unloading which is claimed for the average system. The plant, at the same time, has been experiencing the car shortage on outbound movements. The result will be that the cars so unloaded can be held by the plant, through the instrumentality of its credits, as a store of empty cars to meet its needs. The result of this as affecting other industries on the average system which have lesser credits, and especially those operating without the average system, is readily apparent.

RY. BD.

CANADIAN MANUFACTURERS ASSN. v. CANADIAN CAR SERVICE BUREAU.

On careful consideration of the evidence adduced and the especial references made to practice in the United States, I am of opinion that the average system is discriminatory in principle, and that it has not been affirmatively established that it will so work out as to increase the car supply available at any given time.

THE CHIEF COMMISSIONER and COMMISSIONERS GOODEVE, BOYCE, and RUTHERFORD concurred, and especially on the principle of "Right."

Annotation.

ANNOTATION.

DEMURRAGE—AVERAGE—RECIPROCAL.

By ANGUS MACMURCHY, K.C.

By section 312 (8) of the Railway Act, 1919, the Board is specifically given power to deal with reciprocal demurrage whereby railways like shippers are penalised for delay in supplying cars or for delaying them in transit, or both. On July 28, 1917, the Board postponed consideration of reciprocal demurrage until after the war, 24 Can. Ry. Cas. at page 195. Demurrage charges, as the term is generally understood in railway practice, are included within the word "toll or rate," sec. 2 (32) and are subject to control by the Board. *Duthie* v. *G.T.R.Co.* (1905), 4 Can. Ry. Cas. 304; *Robinson* v. *C.P.R.* (1909), 19 Man. L.R. 300, 306. They are charges made to compel the prompt loading or unloading of cars in addition to the rate or toll. Originally, the word was used to express the payment for detention of a vessel beyond the normal time required for loading or unloading. Unlike freight charges, demurrage charges are in the nature of a penalty and are imposed, not for the benefit of the carrier whose property is detained from use, but in order to promote the free movement of cars in the public interest, by compelling the prompt loading or unloading and release of cars for other uses or users and to relieve the track on which the cars stand while being loaded or unloaded. *Steinhardt & Kelly* v. *Erie Railroad Co.*, 52 I.C.C. 306.

The Average Demurrage System, which forms part of the National Car Demurrage Rules in force in the United States, is not in force in Canada. *Wallaceburg Sugar Co.* v. *Canadian Car Service Bureau*, 8 Can. Ry. Cas. 332. It has now been held by the Board to be unjustly discriminatory and its adoption as part of the Canadian Car Demurrage Rules refused.

The Canadian Car Demurrage Rules (effective August 20, 1917) are printed in full in 24 Can. Ry. Cas. 180 *et seq.* They apply to all cars held by or for consignors or consignees for loading or other purposes, except private cars or cars held at railway terminals on through way-bills awaiting transshipment to vessels. By Rule No. 2 notice of arrival of car and billing shall be sent or given to the consignee in writing. When the notice has been placed in the mail, the consignee is deemed to be notified at 7 a.m. following the day of mailing, even though the notice is not received by the consignee. *Ohio Iron & Metal Co.* v. *E.J. & E. Ry. Co.*, 34 I.C.C. 75; *Eastern Lumber Co.* v. *Director General*, etc., 57 I.C.C. 272. Five days has been held to be sufficient time free from demurrage for trans-shipping grain at St. John, N.B.: *Montreal Board of Trade* v. *C.P.R. Co.* (1918), 23 Can. Ry. Cas. 10. By

Annotation.

Rule 2, the same period is allowed at Montreal and at tidewater ports for unloading lumber and hay for export. By Rule No. 5 further free time for loading or unloading may be allowed on account of weather interference (*McDiarmid et al.* v. *G.T.R. Co.* (1909), 8 Can. Ry. Cas. 337), or by Rule No. 6 where cars are "bunched," *i.e.*, delivered in excess of daily orders.

The question of whether or not weather conditions are such as to prevent the employment of men in loading cars is one of fact and is not affected by shipper's diligence or lack thereof in procuring help. *Central Pennsylvania Lumber Co.* v. *Director General*, etc., 53 I.C.C. 524.

The Interstate Commerce Commission has uniformly held that strikes preventing shippers from loading or unloading cars give no ground for relief against demurrage being charged: *Wholesale Coal Trade Ass'n.* v. *Director General B. & O. Ry. Co.*, 58 I.C.C. 53.

By Rule No. 8 no demurrage can be collected from the consignee for any delays for which Government or railway officials may be responsible. Demurrage is not collectible when delay takes place in the Customs Department, due to Government regulations. Application Canadian Seed Co. (April 28, 1920), File 1700, 220, 1. For delay in inspection of grain by Government officials see *Toronto Board of Trade* v. *Canadian Freight Ass'n.* (1917), 22 Can. Ry. Cas. 93. Demurrage cannot be collected for detention of cars due to errors of railway officials which prevent proper tender or delivery, *e.g.*, railway agent disregarding shipper's request to make out a new bill of lading and failing to make proper correction on original bill of lading: *Southern Lumber Co.* v. *Director General St. L. & S.F. Ry. Co.*, 55 I.C.C. 343; or failing properly to reconsign: *Southern Lumber & Mfg. Co.* v. *Central of Georgia Ry. Co. et al.*, 55 I.C.C. 227. The Board has, however, given relief from payment of demurrage in special cases, re Influenza epidemic, file 1700, 234, Nov. 25, 1919. Demurrage may be properly charged at the rate in force when the cars arrive at destination. *Security Traffic Bureau* v. *Canadian Freight Ass'n.* (1916), 21 Can. Ry. Cas. 57.

It is not a charge for rental of railway cars, which are transportation facilities and not for warehouse purposes. *Canadian Freight Ass'n.* v. *Winnipeg Board of Trade* (1911), 13 Can. Ry. Cas. 122.

The primary duty of a carrier is to carry, it is not the duty of a carrier, as such, to furnish storage beyond the reasonable time necessary for unloading and removal. *Cleveland & St. Louis R. Co.* v. *Dettlebach* (1916), 239 U.S. 588; *Southern R. Co.* v. *Prescott* (1916), 240 U.S. 632; *American Paper & Pulp Association* v. *B. & O. Ry. Co.* (1916), 41 I.C.C. 506 at page 512. Demurrage cannot be charged on cars held at a reconsignment point because of an embargo at the points where diversion is ordered unless the tariffs provide therefor. This is upon the general principle that demurrage is charged for detention for which the shipper is directly responsible and can abate while an embargo is placed by reason of the carriers' disability. The *Reconsignment* case (1917), 47 I.C.C. 590, 634; *Wood* v. *New York etc. Ry. Co.*, 53 I.C.C. 183; *Halfpenny* v. *Director General*, etc., 58 I.C.C. 268. Since the *Reconsignment* case carriers in the United States have embodied in their tariffs generally, notice that orders for diversion or reconsignment will not be accepted to embargo points.

When an unlawful toll is attempted to be charged and the consignee refuses to unload until such toll is adjusted, demurrage cannot be charged.

Annotation. *Canadian Handle Mfg. Co.* v. *M.C.R. Co.* (1917), 21 Can. Ry. Cas. 12. Having regard to international comity, inasmuch as contracts made in the United States for the carriage of traffic passing from one point to another in the United States through Canadian territory are under the control of the Interstate Commerce Commission, the Board has refused to make any order as to demurrage charged for delay of such traffic in Canada which would nullify a previous order of the I.C.C. on the same subject matter. *American Coal & Coke Co.* v. *M.C.R. Co.* (1915), 21 Can. Ry. Cas. 15.

A complaint alleging that demurrage collected at Key West on three carloads of hay shipped in bond from Canada, through the United States to Habana, Cuba, were unjust and unreasonable and wrongfully charged, was dismissed for want of jurisdiction. *Quintal & Lynch* v. *Florida East Coast Ry. Co.*, 57 I.C.C. 289.

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Ontario Supreme Court, Appellate Division, Mulock, C. J. Ex., Riddell, Sutherland, and Masten, JJ. June 9, 1920.

SALE (§ II C—35)—WARRANTY AS TO QUALITY—BREACH—REMEDIES OF PURCHASER—MEASURE OF DAMAGES.

Where there is a breach of an express warranty as to the quality of goods sold, the breach gives the purchaser the choice of either rejecting the goods and treating the contract as repudiated, or retaining the goods and suing for damages for delivery of the inferior article. Where the purchaser retains the goods, the measure of damages is the difference between the value with the defect warranted against, and the value which they would have had without the defect, and this must be ascertained at the place of delivery and at the time of delivery, although delay in asserting such claim is not in itself sufficient to establish an intentional abandonment of the right of action.

[*Wallis, etc.*, v. *Pratt & Haynes*, [1910] 2 K.B. 1003; *John Hallam* v. *Bainton* (1919), 48 D.L.R. 120, 45 O.L.R. 483; *Ashworth* v. *Wells* (1898), 78 L.T. 136; *Jones* v. *Just* (1868), L.R. 3 Q.B. 197, referred to.]

Statement. APPEAL by defendant from a judgment of Kelly, J., in an action for damages for breach of warranty. New trial as to damages ordered.

The judgment appealed from is as follows

KELLY, J.:—In March, 1918, the plaintiff, who carries on business at Brantford as a dealer in hay and other produce, purchased, by oral contract, from the defendant, a hay dealer at Stratford, several cars of hay. The contract-price was $16 per ton f.o.b. at the several points of shipment. The plaintiff alleges that he purchased and that the defendant warranted the hay not to be inferior to grade No. 2. The action is to recover damages in respect of 10 car-loads on the ground of inferiority in quality. The plaintiff did not see the hay at or prior to the time of the contract, which he made over the telephone from Brantford with the defendant at Stratford.

The plaintiff at the time was selling hay and shipping it for delivery at various points in the United States, principally at army camps; and the defendant knew that the hay he contracted to sell was intended for that purpose. The parties agreed that the defendant should ship the cars to Brantford, making the bills of lading payable to the bank there. This was done, and the plaintiff, on arrival of the cars at Brantford, paid the defendant's drafts, obtained possession of the hay, and then re-routed it to Albert Miller & Co., dealers in hay and other produce in Chicago, who were his agents there to make sales of hay. The defendant denies that he contracted to sell hay not inferior to grade No. 2, and says that what he did agree to sell was "good hay"—mixed hay, clover and June grass, and he denies that "grade" was mentioned in making the contract. I find that what the plaintiff contracted for was hay not inferior to grade No. 2.

From the records in evidence it appears that all of the 10 carloads (which were shipped by the defendant from various points) were shipped before the end of March for Brantford; that, without the cars being opened or inspected at Brantford, all were re-shipped from Brantford for the United States, and at least 6 of them reached Chicago by the 2nd April, and on that date were opened and inspected by Miller & Co.'s representative. The others arrived at their destination very soon afterwards.

The evidence is conclusive that the greater part of the hay was on this inspection found to be of inferior kind, and affected by dampness, mould, rot, etc., making it altogether unsuitable for the purpose for which it was intended, and very much inferior to what was contracted for, whether the contract was for grade No. 2, as the plaintiff alleges, or for "good hay," as the defendant maintains. The condition the plaintiff complains of was found chiefly in the interior of the bales, and was not perceptible on an examination of the exterior only. Miller & Co.'s system of inspection and recording was thorough and complete, and the evidence of their representative as to what he found on the arrival of the cars must be taken without qualification. The defendant, on the other hand, while not attempting to deny the accuracy of the evidence as to the condition of the hay on its arrival at

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points in the United States, maintains that, when placed in the cars at the points of shipment, it was of the quality and in the condition contracted for, and that any inferiority in quality or damage to its condition was due to causes arising after it had passed from his possession at the various shipping points. It is definitely established, too, that the cars containing the hay, on their arrival at the United States points, were in good condition—tight and dry and sealed.

The defendant's employees, in January or the early part of February, baled this hay at the premises of different farmers from whom he purchased, and, according to the evidence submitted by the defendant, it remained on these different premises under cover, in good barns, until the time of shipment in March, when it was taken to the cars and there loaded for shipment to Brantford. The defendant's witnesses say that the cars in which it was shipped were satisfactory and in good condition at the time of loading.

While there is evidence that hay which has become damp will in a short time shew evidence of damage, I find, on the evidence generally, and particularly as to its condition when inspected on its arrival at its destination, and the short interval of time between the shipping dates and that inspection, that, when loaded into the cars by the defendant, this hay was not in the condition he or his witnesses swore to. On that part of the issue there are circumstances which tend to discredit the defence as against the evidence put forward by the plaintiff: for instance, the lapse of time between baling the hay and loading it into the cars, with the consequent liability to its becoming affected by moisture; the exposure in the interval of part of it in barns under which cattle were stabled; and the further exposure during its removal from the barns to the cars. Where it conflicts with that of Morcmont, I find myself unable to accept the evidence of these witnesses, and particularly that of Sykes, who says that he saw all of the hay when he bought it from the farmers, and also when it was baled and shipped, and commits himself to the statement that it was equal to or better than grade No. 2. The unreliability of his evidence may be judged from several instances where he undertook to speak of the grade and quality of particular carlots which, on examination at the points of destination, turned

out not to correspond with his description: for instance, as to the contents of car No. 13116, which he described as the best hay baled that year—all clean, long timothy—while, on inspection on its arrival at Chicago on the 2nd April, it was shewn to be low in grade, absolutely worthless for feeding, and fit only for manure, the car itself on its arrival being sealed up and in condition to have protected the hay while in transit. Not only is this so, but other witnesses say that its condition on arrival at its destination can be accounted for only on the assumption that it was wet or damp when loaded. Robertson, a witness called by the defence, and who baled this hay, says that he cannot account for that condition except on that theory; and Campbell, a man of experience in such matters, says from its condition it must have been damp when loaded.

Then again, the history of two other car-lots shipped by the defendant to the plaintiff at Brantford is important. One of these cars was opened and examined on its arrival at Brantford, and the contents turned out to be inferior and badly damaged. The plaintiff sold it there at a loss, which the defendant made good. When it was ascertained that the other also was open to the same objection, it was retaken by the defendant. The cars which were re-routed from Brantford to United States points had all passed through before this condition of the two cars was discovered. The plaintiff says that, when he became aware of the condition of the contents of the two cars above referred to, he objected to accepting further deliveries, and the defendant told him to continue and he would make it right. The defendant says he did not promise to settle for any other car-lots found to be defective. In view of his further statement that he generally sells hay at a named price, and if it is not suitable he then makes an allowance, and having in mind that just at that time he relieved the plaintiff from loss on these two car-lots which had been proven not to be what the purchaser had a right to expect, I think the plaintiff's version of what then happened is the more likely to be correct.

The terms of payment prevented the plaintiff from getting possession of the goods until he had paid the purchase-money to the bank, and until then inspection was impossible; even inspection without opening up the hay—door-inspection, as it was called

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in the evidence—would not have revealed the condition. It cannot be successfully argued that obtaining possession on such terms was an unconditional acceptance, either of the goods or of the quality. The plaintiff did not thereby waive his right to rely upon the warranty as to quality and condition. There was nothing in the contract requiring inspection at any particular time or place. The defendant knew this, and knew also that the hay was sold or was being sold for delivery by the plaintiff in the United States and for use at the military camps there. Accepting the goods, in the circumstances, does not deprive the purchaser of his right to seek damages for inferiority of quality. The right of a purchaser to reject goods not in accordance with what has been contracted for, when delivery has been made and possession taken, must not be confused with the right to claim damages for delivery of goods of inferior quality.

The reasons for judgment of the Appellate Division in the recent case of *John Hallam Limited* v. *Bainton* (1919), 45 O.L.R. 483, 48 D.L.R. 120, contain a lengthy discussion of the duty of a purchaser to accept under various circumstances and his right to damages for breach of warranty of quality; but, though that case arose out of a sale by sample, when applied to the facts of the present case, so far as it is applicable, it materially supports the position of the plaintiff.

The only other objection offered was the delay by the plaintiff in giving notice to the defendant of the condition of the goods and making claim for damages. The plaintiff's explanation is that the delay was due to his waiting receipt from his correspondents in Chicago of full particulars of the condition and value on a resale of the contents of all the cars. There is no evidence that the defendant has been prejudiced by this delay, and I am unable to say that it was without justification.

The only item in the particulars of damage which was expressly objected to on the argument is that containing the charges for inspection.

The plaintiff's agents were compelled to sell the hay at prices much less than those then current, and which they could have obtained for hay of the grade, quality, and condition called for by the defendant's contract. This resulted in a loss to the plaintiff, exclusive of the said charges for inspection, of $1,647. I

assess the damages at that sum, with interest thereon from the date of these agents' final report to the plaintiff of their disposal of this hay, which I understand was the 18th September, 1918. If I am not correct in this date, counsel may speak to me about it.

The plaintiff is entitled to his costs.

F. H. Thompson, K.C., and *J. C. Makins*, K.C., for appellant.

W. S. Brewster, K.C., for respondent.

Masten, J.

MASTEN, J.:—This is an action by a purchaser of hay to recover damages for breach of a warranty alleged to have been given by the vendor (the defendant) respecting the quality of the hay.

Four questions arise:—

(1) Was there a warranty, and, if so, what was it?

(2) Is a breach of the warranty proved?

(3) If there was a warranty and a breach of it by the defendant, has the plaintiff lost his right of action through laches, estoppel, or waiver?

(4) The measure of damages?

The leading facts are set forth in the judgment now under review, as well as in that of my brother Riddell, and need not be here repeated. There are, however, one or two additional circumstances which ought to be borne in mind, and to which I shall refer when considering the question of damages.

It is clear that a breach of an express warranty as to quality is a breach of a condition, and, as stated by Fletcher Moulton, L.J. (whose dissenting judgment was confirmed in the House of Lords, [1911] A.C. 394), in the case of *Wallis Son & Wells* v. *Pratt & Haynes*, [1910] 2 K.B. 1003, at pp. 1014, 1015:—

"This breach gave to the purchasers the choice of the two remedies, either of rejecting the goods and treating the contract as repudiated or suing for damages for delivery of the inferior article. But the purchasers resold the goods in ignorance of the breach . . . and by the fact that they have resold the goods they have prevented themselves from exercising the higher right."

If there was in this case a breach of the defendant's warranty, the plaintiff had the right, on delivery of the hay to him, either to reject or to accept it, and claim damages for breach of the

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warranty. He did not reject, and now sues for damages for breach of warranty.

The trial Judge has found, upon conflicting oral evidence, that the defendant expressly warranted that the hay to be supplied by him under the contract in question should not be inferior to grade No. 2, and he has found a breach of such warranty. The appellant has failed to satisfy me that these findings of an experienced Judge, in a carefully considered judgment, should be disturbed. On the contrary, they seem to be supported by the evidence.

Counsel for the defence contends that, even though there was a warranty and a breach of the warranty, the action of the plaintiff in retaining the hay, reselling it as he did through his commission agents in Chicago, and making no complaint from the time of delivery of the hay in April until November following, when he first presented his claim, precludes the plaintiff from recovering.

The question is considered in two cases in our own Courts. In *Stephenson* v. *Ranney* (1852), 2 U.C.C.P. 196, Macaulay, C.J., in dealing with the question, says, at p. 212:—

"Some of the cases shew that where upon a sale by sample the vendee has had an opportunity to inspect the article delivered and has unequivocally accepted it and converted it to his own use, not only does the property pass, etc., but he is liable to be concluded by his conduct from afterwards disputing the correspondence of the goods with the sample, such as *Poulton* v. *Lattimore* (1829), 9 B. & C. 259, 109 E.R 96; *Hopkins* v. *Appleby* (1816), 1 Stark. (N.P.C.) 477. It will however be found in other cases of sale by sample, which involves an implied warranty that the bulk corresponds therewith, the vendee may accept and retain the goods, and either bring an action for the breach of such warranty or resist an action for the price, by shewing it in mitigation of damages; but in such case it seems to be expected (if not decided) he must give prompt notice of the deficiency, not upon the ground that the vendor may elect to take back the goods or rescind the bargain, or that the vendee's notice impliedly offers to return and rescind on his part, for it might be very inconvenient and even impossible for him to do so, but rather at the peril of being held concluded in evidence from setting up such a case, after unreason-

ably delaying notice and as it were evincing by his silence a tacit acquiescence in the fulfilment of the contract by the vendor."

Further on he says, p. 213:—

"The evidence raised two questions for the jury: 1st, whether the bulk did correspond with the sample; and if not, 2nd, whether the defendant had waived the objection. *Alexander* v. *Gardner* (1835), 1 Bing. (N.C.) 671, 131 E.R. 1276."

He held that there was conflicting evidence, direct and circumstantial, on both sides, and that it was for the jury to decide, and he upheld the verdict of the jury that there was no waiver.

In the recent case of *John Hallam Limited* v. *Bainton*, 45 O.L.R. 483, 48 D.L.R. 120 (now affirmed in the Supreme Court of Canada), my brother Riddell deals as follows with the same question (45 O.L.R. at p. 488, 48 D.L.R. at p. 123):—

"Accepting the goods in this way has its dangers for the purchaser, because very little will sometimes estop him from saying that such an acceptance of the goods is not an acceptance of the goods as satisfying the warranty. Any purchaser may, if he sees fit, waive any objection to the goods—*quilibet renuntiare potest juri pro se introducto*—and his conduct in taking the goods and dealing with them will be scrutinised with some care, and in some instances will result in his being considered to have waived objection to the goods: *Parker* v. *Palmer* (1821), 4 B. & Ald. 387, 106 E.R. 978. But his taking the goods into his possession and dealing with them after an opportunity to inspect, or even after a partial or casual inspection, will not necessarily be considered an acceptance of the goods as answering the contract and a waiver of the term that the goods shall correspond with the sample."

In *Poulton* v. *Lattimore*, 9 B. & C. 259, at p. 265, (109 E.R. 96) Littledale, J., says:—

"The not giving notice" (of the breach of warranty) "raises a strong presumption that the article at the time of the sale corresponded with the warranty, and calls for strict proof of the breach of warranty. But if that be clearly established, the seller will be liable in an action brought for breach of his contract, notwithstanding any length of time which may have elapsed since the sale."

From these cases it appears that the question is whether there is evidence establishing either an estoppel, a waiver, or such laches as precludes the plaintiff from recovering.

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In order to establish an estoppel, it must be shewn that the action of the plaintiff induced the defendant to do some act to his prejudice relying upon the plaintiff's course of action. Nothing of that kind is shewn nor indeed could be shewn under the circumstances here existing. When the plaintiff exercised his option of accepting the hay, notwithstanding the breach of warranty, the property in the hay passed to him and from that time on the defendant had no control over it: he was not entitled in any way to interfere with or influence the plaintiff's dealings with the hay; the hay had passed into the absolute dominion of the plaintiff. There was therefore nothing which the defendant did or could have done in regard to the hay, and therefore there was no estoppel.

With respect to the question of waiver by the plaintiff, it is plainly established by the authorities that waiver depends on intention, and there is here no circumstance other than the lapse of time indicating an intention on the part of the plaintiff to waive his rights. His cause of action for breach of warranty arose when the hay was delivered to him and accepted, notwithstanding its defects. He had, at that moment, a complete cause of action, and the mere silence of the plaintiff and a failure to assert his claim until November are insufficient, in my opinion, to establish an intentional abandonment of his right of action. Nor was the lapse of time (from April to November) before the plaintiff began to assert his rights such laches as, in my opinion, precluded the plaintiff from recovering. I should only add that, as I understand the law applicable to this case, the maxim *caveat emptor* has no application because the warranty was an express warranty.

Turning, then, to the question of damages: I think the case comes within the broad general rule as stated in the 9th edition of Mayne on Damages, p. 188: "Where the article has not been returned, the measure of damage will be the difference between its value, with the defect warranted against, and the value which it would have borne without that defect;" and this must be ascertained at the place of delivery (Brantford), at the time of delivery, when the plaintiff took possession. In support of this statement, I refer to the case of *Ashworth* v. *Wells* (1898), 78 L.T. 136.

"In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at

the time of the delivery to the buyer and the value they would have had if they had answered to the warranty" (sec. 53 (3) of the Sale of Goods Act, 1893 (Imp.), which appears to state the existing law without alteration).

The case of *Jones* v. *Just* (1868), L.R. 3 Q.B. 197, well illustrates this rule. The action was for a breach of a warranty on certain shipments of manilla hemp from Singapore to Liverpool. It was found that there was a breach of the warranty. After the hemp had arrived in Liverpool, and it was claimed that there was a breach of a warranty, and after some correspondence between the parties, the hemp was sold by auction, by the orders of the plaintiff (the vendor), as "manilla hemp with all faults," and at the auction it realised about 75 per cent. of the price which similar hemp would have fetched if undamaged. The price of hemp had risen considerably since the contract, so that the proceeds of the sale were very nearly equal to the invoice-price. The case was tried before Blackburn, J., who instructed the jury that if they found for the plaintiff the damages would be measured by the rate at which the hemp was valued when it arrived at Liverpool compared with the rate which the same hemp would have realised had it been shipped in the state in which it should have been shipped, thus giving the plaintiffs (the purchasers) the benefit of the rise in the market. The jury found in favour of the plaintiff; the defendant moved against the verdict and for a new trial; and the directions of Blackburn, J., were held to have been correct.

See also *Loder* v. *Kekule* (1857), 3 C.B. (N.S.) 128, 140 E.R. 687; *Phillpotts* v. *Evans* (1839), 5 M. & W. 475, 151 E.R. 200.

These cases appear to me to establish that here the damages are to be measured by the difference between what the hay was actually worth when it arrived in Brantford and what the same hay would have been worth at Brantford, had it been in the state in which it should have been.

When the plaintiff paid the drafts and took up the bills of lading and re-shipped the hay to his Chicago commission agents to be sold by them, his right of action was then and there crystallised and fixed. The hay was not equal to grade 2. He could have rejected it for not complying with the express warranty that it should be of that grade. He did not exercise his right of

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rejection, but took the hay, retaining his right to claim damages as for breach of warranty. The hay became his, and what subsequently happened to it in his hands cannot lessen or increase the damages payable by the defendant. For the purpose of ascertaining the damages to which the plaintiff is entitled, whether nominal or substantial, the inquiry must be directed to ascertain the difference between the value of hay of No. 2 grade at Brantford on the 3rd April, and the value of the hay actually delivered by the defendant at Brantford on that and prior days.

It is clear that the plaintiff, by accepting the hay, undertook the obligation of minimising the damages in case the hay did not fulfil the warranty. The rule that it is the duty of the purchaser in such a case to do everything that a reasonable man can do in the ordinary conduct of affairs to mitigate the damages, is very clearly established. In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss: *Dunkirk Colliery Co.* v. *Lever* (1878), 9 Ch. D. 20, *per* James, L.J., at p. 25; *Warren* v. *Stoddart* (1881), 105 U.S. 224; *Payzu Limited* v. *Saunders*, [1919] 2 K.B. 581.

As was said by Viscount Haldane, L.C., in *British Westinghouse Electric and Manufacturing Co. Limited* v. *Underground Electric Railways Co. of London Limited*, [1912] A.C. 673, at p. 689:—

"This first principle (that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed) is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

What the plaintiff ought to do in any particular case, in order to minimise the damages, is a question of fact; *per* Scrutton, L.J., in *Payzu Limited* v. *Saunders*, [1919] 2 K.B. at p. 589.

On the facts it seems to me that in the ordinary course of business a prudent business man would have inspected the hay at Brantford. Had the plaintiff done so, he would have then and

there become informed of its quality and condition. Of course he was entitled, if he chose to do so, to omit such inspection, but that omission cannot increase his legal rights or lessen his legal obligations to the defendant. To save expense and time to himself, he re-shipped without inspecting, but in so doing he assumed the consequences resulting from such omission. It is plain, from the evidence of the defendant with respect to the car which he took back, that by dealing with the hay in Brantford the loss might well have been minimised—but the plaintiff, having taken the risk of omitting to inspect, re-shipped the cars, without unloading, to his commission agents in Chicago for sale by them in the States. In so doing he failed in the duty which he owed to the defendant to minimise the loss.

Two items of loss are plain on the face of things: (1) the freight charges on the shipment of hay; (2) the further deterioration of the hay which was going on in the closed cars, and which might have been stopped by unloading and dealing with the hay at Brantford; and there may be others.

As there must, in my opinion, be a new trial as to damages, I do not further discuss what the plaintiff ought in fact to have done to minimise the damage, either by selling the defective hay at Brantford or otherwise.

But it is said, on behalf of the plaintiff, that the damages come within the second rule in *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 156 E.R. 145, viz., that this hay was bought for certain specific purposes, of which the defendant was aware, and that the damages are to be computed on the basis of the loss which the plaintiff sustained, having regard to those specific purposes. In my opinion, the circumstances here shewn are not such as to bring the case within that rule. The true position is, that the plaintiff gave to the defendant a general order or request to ship hay to him at $16 per ton, to be delivered to him at Brantford, on payment of the purchase-price, but the defendant never undertook to sell or deliver to the plaintiff any specific quantity of hay. The defendant was made aware of the fact that the plaintiff expected to export this hay to the United States, but I do not think anything beyond this is shewn by the evidence. What the plaintiff actually did was to ship the hay to Chicago, to his regular commission agents there, and these commission agents

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then sold, as opportunity offered, to various people, principally to the military camps.

The evidence of these commission agents is that, if the hay had fulfilled the warranty, it could have been sold at $26 per ton; but there were, so far as appears, no contracts in existence which the plaintiff was under obligation to fulfil.

In any case, the defendant was not aware of any specific contract which the plaintiff was under, to deliver hay equal to grade 2, to any person, and, "in order that the notice may have any effect, it must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss:" *Horne* v. *Midland R.W. Co.* (1873), L.R. 8 C.P. 131, 141; *Grébert-Borgnis* v. *Nugent* (1885), 15 Q. B.D. 85.

By subtracting from the selling price in the States the cost of transportation, commission, and all other proper charges of realisation, some evidence of the value to the plaintiff at Brantford of hay of the quality contracted for would be afforded.

If the defendant had contracted to deliver a specified quantity of hay and had wholly failed to make delivery, the plaintiff's damages would have been his profit, that is, the difference between the potential selling value at Brantford and the cost, that is, $16 plus the railway freight to Brantford.

But that is not this case: the defendant did supply hay which the plaintiff accepted and sold—relying on the defendant's warranty.

In such a case a further element enters into the estimation of damages, viz., What was the value of the inferior hay which the defendant supplied and which the plaintiff accepted? It is at this point that error has, I think, intervened.

The value which the judgment in review ascribes to this inferior hay is the price which it realised at various places in the United States (principally at Chicago), after deducting therefrom the cost of transporting it to various military camps, and after rejection re-shipping it to Chicago, and the price is in some instances the price realised months after the 3rd April, when the market-price had altered.

As I have already indicated, I think the plaintiff should have established its value at Brantford at the time of its acceptance

there; and, as this was not done, I think there was a mistrial in that regard.

I should not, however, part with the case without noticing an argument put forward on behalf of the plaintiff, viz., that the rule which I think governs does not here apply, because, as alleged by the plaintiff, it was a term of the contract that the hay need not be inspected in Brantford. I do not think that, as a fact, the contract contained any such term. In the absence of any specific agreement to the contrary, the presumption of law in case of a sale of goods is that the inspection shall be at the place of delivery: *Perkins* v. *Bell*, [1893] 1 Q.B. 193 (see particularly the remarks of A. L. Smith, L.J., at p. 197).

The trial Judge has made no finding on this point, and I find nothing in the evidence to displace the legal presumption that the inspection should be at Brantford.

The strongest expression used by the plaintiff with regard to that question is to be found on p. 3 of the notes of evidence, where he says:—

"Q. And did you tell him what you were going to do with the hay? A. I told him one time that we were not inspecting the hay here and to be particular in loading not to put in a bale that would not grade No. 2."

The defendant, on the other hand, says:—

"Mrs. Merrill told me that they were going to have this hay re-baled in Brantford and more hay put in the cars on account of the railways having so may embargoes on it, or re-teamed from the Grand Trunk station to the Toronto Hamilton and Buffalo.

A careful perusal and re-perusal of all the evidence bearing on this point convinces me that whatever may have been said was said casually by the plaintiff, and that the defendant never agreed to waive inspection at Brantford.

A suggestion is made on behalf of the plaintiff that at the time when the hay contained in a horse-car was inspected by the plaintiff and defendant together, and the alleged defect settled for by the defendant, and when another car was taken back by the defendant, an undertaking was given by the defendant that all deficiencies in any other cars would be allowed for by him, and that he would make compensation for any defects. I think, upon the evidence, that no such agreement was entered

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into; but, if there was an agreement, it was entirely without consideration, for all the other cars had then been accepted by the defendant, so that there was no right of rejection, and they had at that time been sent forward by him to his agents for sale, so that any right of rejection on his part was gone.

For these reasons, I am of opinion that, while the finding of liability of the defendant ought to be maintained, the damages have been assessed on a wrong principle.

The appeal in this respect should be allowed, the assessment of damages set aside, and a new trial should be directed, limited to the question of the quantum of damages.

No costs of the former trial or of this appeal to either party. Costs of the new trial to be in the discretion of the trial Judge.

Mulock, C.J.Ex
Sutherland, J.
Riddell, J.

MULOCK, C.J. EX., and SUTHERLAND, J., agreed with MASTEN, J.

RIDDELL, J. (dissenting):—An appeal from the judgment of Mr. Justice Kelly at the trial. The facts are simple. The plaintiff, who carries on business at Brantford as a dealer in hay etc., wished to buy hay for export to the United States and sale there for the use of the American Forces. The defendant, being told by the plaintiff that the hay was to be shipped to the United States and to the American Government at the military camps, sold to the plaintiff a number of car-loads of hay for that purpose at $16 per ton, the hay guaranteed to be up to No. 2 timothy. There is a dispute as to the fact whether the plaintiff at the time informed the defendant that he was not inspecting the hay at Brantford. I believe he did; but, in my view, that is immaterial.

The parties agreed that defendant should ship the cars to Brantford, making the bills of lading payable to the bank there. This was done, and the plaintiff, on arrival of the cars at Brantford, paid the defendant's drafts, obtained possession of the hay, and then re-routed it to Albert Miller & Co., dealers in hay and other produce at Chicago, who were his agents there to make sales of hay.

One load was placed on a palace horse-car, which the Government would not allow to leave Canada; this must needs be unloaded. It was unloaded, and the hay found not up to quality. The defendant admitted this, and this car was settled for on that basis.

The other cars were sent forward as received, being rebilled.

The hay, on arriving at its destination, was found to be inferior; the plaintiff sued for damages, and Mr. Justice Kelly gave him a judgment for $1,647 and interest from the 18th September, 1918.

The defendant now appeals.

As to liability for damages, notwithstanding the earnest and able argument of the appellant's counsel, I cannot see any ground for interfering.

The representation of quality was either a condition or a warranty. Admittedly the property passed, and consequently the condition, while it may not technically have become a warranty, was reduced so that the remedy upon it was an action for damages: Halsbury's Laws of England, vol. 25, p. 151, note (*d*); *Wallis Sons & Wells* v. *Pratt & Haynes*, [1911] A.C. 394; *S.C.*, [1910] 2 K.B. 1015 (C.A.), *per* Fletcher Moulton, L.J.; *Niagara Grain and Feed Co.* v. *Reno* (1916), 32 D.L.R. 576, at pp. 577-8, 38 O.L.R. 159, at p. 162.

For all practical purposes, this agreement that the hay should not be inferior to No. 2 is to be treated as a warranty; and it is well decided that in a breach of warranty the purchaser is not necessarily to be precluded from taking possession of and dealing with the goods as his own, at the peril of being held to have accepted them as answering the contract. *Borthwick* v. *Young*, (1886), 12 A.R. (Ont.), 671, which was cited for another conclusion, depends on its own facts. There the Court held that on the facts there was no warranty, and applied the law accordingly. We are not concerned with the question whether the Court reached a right conclusion as to the facts; all we are to consider, all we are bound by, is the law as applied to the facts so found.

Where there is a warranty, whether it is by reason of the sale being by sample as in *John Hallam Limited* v. *Bainton*, 45 O.L.R. 483, 48 D.L.R. 120, or by representation of quality, as in *Catalano & Sansone* v. *Cuneo Fruit and Importing Co.* (1919), 46 O.L.R. 160, 49 D.L.R. 610, the purchaser may, even after inspection, take possession of the goods, and sell them, and thereafter claim damages under his warranty.

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Then as to quantum, it is well-established that where goods are bought "with reference to a known particular purpose, damages ought to be given for the loss incurred by the failure of that purpose:" Mayne on Damages, 7th ed., pp. 206, 207. The question may be, "What is the value which the plaintiff would have received had the defendant fully performed his contract?" *Bridge* v. *Wain* (1816), 1 Stark (N.P.C.). 504. This is but one case of what is commonly called the second rule in *Hadley* v. *Baxendale*, 9 Exch. 341, 156 E.R 145, i.e.: if there are special circumstances, and the circumstances are communicated at the time of the contract, the damages reasonably contemplated are such as would ordinarily follow from a breach of contract in these special circumstances. See *per* Lord Esher, M.R., in *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79, at p. 88.

The defendant selling to the plaintiff, knowing that the plaintiff was to sell to the American Army, the damages should be calculated upon what the plaintiff has lost by not being able to sell to the American Army; and the "amount by which the subject-matter is worth less by reason of the breach of contract," as mentioned in 46 O.L.R. at p. 164, 49 D.L.R. at p. 614, is determined by the difference between the amount which the plaintiff would have received had the contract been kept and the amount he actually received; that is, subject to the proviso that he should act in a reasonable way and not so as to increase his damages: see 46 O.L.R. at p. 165, 49 D.L.R. at pp. 614, 615.

The learned Judge has proceeded on the proper principle, and we should not interfere with his decision: *Morrow Cereal Co.* v. *Ogilvie Flour Mills Co.* (1918), 57 Can. S.C.R. 403, 44 D.L.R. 557.

I would dismiss the appeal with costs.

New trial as to damages directed.

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Canada Supreme Court, Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 3, 1920.

LANDLORD AND TENANT (§ III D—110)—DISTRESS FOR RENT—CONDITIONAL SALE OF CHATTELS—INVALID AS AGAINST CREDITORS—SEIZURE OF CHATTELS BY LANDLORD—CONVERSION.

Section 4 of the Act respecting Distress for Rent, R.S.S., 1909, ch. 51, does not impair the right of a landlord to distrain upon goods on the premises held by the tenant under a conditional sale agreement, and to seize and impound such goods for the purpose of selling the tenant's interest in them and applying the proceeds in satisfaction of the rent.

[*Theatre Amusement Co.* v. *Reid and Drackett* (1919), 46 D.L.R. 498, 12 S.L.R. 174 at 176, affirmed.]

Statement.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1919), 46 D.L.R. 498, 12 S.L.R. 174 at 176, reversing the judgment of the trial Judge (1919), 12 S.L.R. 174, and dismissing the appellant's action.

The facts of the case are fully set out in the judgments following.

H. J. Schull, for appellant; *C. E. Gregory*, K.C., for respondent.

Idington, J.

IDINGTON, J.:—The respondent Reid as landlord issued to his co-respondent a distress warrant most carefully worded so as to restrict him to the seizure only of what could be lawfully destrained for rent admittedly due and owing said landlord, and seizure was made thereunder accordingly.

Amongst other things taken thereunder were goods which the tenant had acquired from appellant under a conditional bargain and sale which was intended to secure appellant, the vendor, any unpaid balance of the price.

There had been very substantial payments made by said tenant on account of the price and thereby a very substantial interest in the goods had become vested in him before the seizure. Indeed enough to pay the rent.

The appellant claimed from said bailiff after said seizure possession of said goods and, because the goods were not delivered over to him, brings this action claiming there was a conversion thereof by virtue of the demand and refusal.

At common law he could not have a shadow of ground for making such claim. For not only were the goods of strangers liable to distress but the retention of the possession by the landlord when destrained was his only security and, so far as not modified by statute, is the law yet.

Needless to refer in detail to all the changes and modifications for none of them dispense with the necessity for continuation of

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possession by the landlord till his seizure has been prosecuted or abandoned or the goods replevied.

And under and by virtue of the statutory provision of the Legislature of Saskatchewan, where all this took place, the respective rights of the landlord and such a vendor are expressly provided for by sec. 4 of the Act respecting Distress for Rent, &c., R.S.S. 1909, ch. 51, as follows:—

> A landlord shall not distrain for rent on the goods and chattels, the property of any person except the tenant, or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply . . . to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition . . .

As I understand this section, the landlord had a perfectly legal right to seize and enforce by sale all the interest the tenant had which is thus made answerable for the rent due and would have sufficed to pay same.

Unfortunately for appellant, its lien or rights of property in the goods was not such as protected it against other creditors because not verified by the necessary affidavit in its behalf when registering it. And the sheriff for other creditors seized the goods which were afterwards duly sold thereunder, and the respondent Reid as landlord was satisfied thereout as the law provides.

The appellant conceived the idea that in law the landlord was bound to abandon the goods to it; and its assumption and claim is that if he had done so the creditors could not have succeeded.

Its duty, seeing there was enough in the tenant's interest in the goods to satisfy the rent, was to have tendered the rent and then got possession and it might have held as against the creditors for both rent and amount of lien or balance of price.

It was so ill advised, as to imagine it could get the goods, despite the above quoted statute, and perhaps defeat the landlord's claim. It has thereby lost its only chance.

The action is one only for conversion based only on said demand and refusal.

In my opinion, the judgment appealed from should stand and this appeal be dismissed with costs.

Duff, J.

DUFF, J., (dissenting):—The questions raised by this appeal are accurately stated in Mr. Gregory's factum filed on behalf of

the respondent; they are:—(a). Had the defendant Reid a right to seize Findlay's interest in the chattels for rent? (b). If he had that right, was he bound to deliver up possession to the plaintiff, assuming the plaintiff's interest was greater than, or paramount to his interest? (c). If he had the right to seize, is he liable to damages?

Before proceeding to discuss these questions it is desirable to point out that a point somewhat discussed upon the argument, namely, whether the defendant's dealings with the goods amounted to conversion is entirely disposed of by the concession made at the trial and the findings of the trial Judge and that no such point could properly be raised either in this Court or in the Court of Appeal for Saskatchewan.

Mr. Gregory, at the trial, states the issues as follows:—

I think, perhaps, my Lord, if Mr. Schull and I discuss the issue before your Lordship it will save a little time. I understand the only issue that is raised in this case is whether when we had an interest in those goods, when we went in there and seized, whether we are guilty of conversion or trespass which will entitle them to damages simply because they also had an interest in the goods; that is the whole issue of the case. It may be so or not that their interest may be paramount to ours; the full bench has decided we have an interest in these goods and having that interest, the whole question for you to decide is whether that interest—whether their interest being larger than ours, we are bound to give up at their demand our possession in the goods, and having not done so, whether we are liable for damages.

And the finding of the trial Judge is as follows: "I find from the evidence, that the defendant Drackett was in possession under defendant Reid's warrant, of the goods and chattels in question herein at the time Bourdon, plaintiff's bailiff, demanded possession thereof, and that Drackett refused to give up possession or surrender the said goods to Bourdon, and I also find from the evidence that defendant Reid approved of and confirmed the action of his bailiff and agent, Drackett."

The subsidiary question as to possession under a police warrant was raised at the trial as affecting the amount of damages. That point I will discuss when dealing with the third point.

Coming then to question A as stated above, in my judgment, the Saskatchewan Statute is clear upon that and that the respondent had undoubtedly the right to seize Findlay's interest. The point of substance in the case arises upon question B. With great respect, I am unable to agree with the view of the Courts below as

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to the construction of sec. 4 of ch. 51, R.S.S. 1909. I think the interest which may be seized and held or sold under that section is only the interest of the tenant and that the purchaser of the interest takes it subject to all its infirmities and if the interest is of such a character as to enable the owner of some paramount interest to take possession of the chattel out of his hands in given circumstances then the purchaser takes subject to that infirmity as well as others. This, it appears to me, must equally apply where the landlord, instead of selling, exercises his right to hold the goods distrained as his pledge for rent. He is of course not obliged to sell. If the landlord sees fit to hold, that which he is entitled to hold is the interest of the tenant subject, as in the case of the purchase, to all the infirmities of that interest, subject that is to say, to any paramount interest or right of possession.

It is not a very convincing suggestion that the landlord who has initiated proceedings looking towards a sale is entitled to retain possession until the sale takes place. The landlord is pledgee with a statutory right of sale. His right to retain possession of the goods can be no greater and no less after he has decided to sell than during the period, which may be an indefinite one, when he is holding the goods as pledgee merely.

This brings us to question C, the question of damages. The first point to consider is the point argued in the appellant's factum; that at the time of the demand the goods were under seizure under Police Court warrant. The evidence upon this point is extremely meagre and I think it is much open to question whether the possession of the respondent was ever interrupted. However that may be, the trial Judge finds, and the evidence amply supports his finding, that the police seizure was abandoned before Oct. 1, 1917, the day on which the appellant's action was commenced. There can be no doubt that at the time the action was commenced the respondents were holding possession under a claim of right and denying the appellant's right of possession. That is amply proved by the letter written by the respondent's solicitor on Sept. 29, and by the concession made at the trial by Mr. Gregory in the passage already quoted.

The next point, on the question of damages, arises in this way. The sheriff having taken possession of the goods on Oct. 3, under a writ of execution and the right of the execution creditor under

that writ having been held to be paramount to that of the appellant company under their unregistered lien note, the appellant now contends that this result is owing to the fact that by resisting them in the exercise of their rights the respondent prevented them getting possession of the goods and thus curing the defect in their security arising from the non-registration of the lien note.

I think this contention is well founded. In my judgment, the Act respecting Lien Notes and Conditional Sales of Goods, R.S.S. 1909, ch. 145, would not have operated to prejudice the common law right of the appellant company if the respondent had given up possession of the goods before or at the time of the issue of the appellant company's writ. The legal position then is this: The respondent, having wrongfully converted the appellant's goods is *primâ facie* responsible for the value of those goods at the time of the conversion. Moreover, the seizure by the sheriff was, in the circumstances actually existing, the direct and immediate consequence of the respondent's wrong.

Anglin, J.

ANGLIN, J.:—Under a registered agreement in writing the plaintiff held an unpaid vendor's lien on certain chattel property in a theatre occupied by one Findlay (the purchaser of the chattels) as tenant of the defendant Reid. It is *res judicata* that the plaintiff's lien was invalid as against execution creditors of Findlay because of a defect in the affidavit of *bona fides* required by sec. 2 (3) of R.S.S. 1909, ch. 145. The plaintiff alleges that if it had been able to obtain possession of the chattels by seizure prior to their being taken in execution the defect in its lien note would have been cured and its title perfected and that such possession was wrongfully withheld from it by the defendants and an execution creditor was thus enabled to seize and defeat its claim to the goods *pro tanto*. It accordingly sues for damages for conversion of its property by the defendants, the landlord and his bailiff.

Assuming, but without so deciding, that the plaintiff, under its lien note had a paramount right which, notwithstanding the exception in favour of landlords made by the proviso to sec. 4 of the Act respecting Distress for Rent and Extra-Judicial Seizure (R.S.S. 1909, ch. 51), would have entitled it to possession of the goods although held by the defendants under a lawful distress for rent due by Findlay, that the bailiff Drackett was in error in refusing to recognise such paramount right of the plaintiff, and

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that actual possession, if obtained when the plaintiff's bailiff demanded it, would have enabled it to hold the goods against creditors of Findlay who might subsequently obtain judgments (but see *Grand Trunk Pacific R. Co.* v. *Dearborn* (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315). I am nevertheless of the opinion that the plaintiff cannot succeed in its claim for damages for conversion of them by the defendants, because the evidence does not establish that at the time of the only demand for possession made on its behalf the defendants were in possession of the goods, or that a withdrawal of the landlord's claim would have enabled the plaintiff to obtain possession.

The facts on this aspect of the case are in a narrow compass. On September 24 or 25, a constable acting under a distress warrant issued out of the Police Magistrate's Court of the City of Moose-jaw distrained the chattels in question to satisfy claims for wages prosecuted in that Court. An inventory of the goods was made and signed by the distraining constable and by one Lucien Plisson, who was the caretaker of the theatre. The police, I infer from Plisson's evidence, did not think it necessary to shut down the theatre and therefore allowed Plisson to keep the keys and left him in charge, apparently without taking from him anything (except his signature to the inventory) in the nature of an attornment or formally appointing him their representative in possession. Later on the same day the landlord's bailiff came to distrain. He found Plisson in apparent possession and upon being informed by him of the earlier police seizure and being shewn the notice of seizure and inventory, he told Plisson that the priority of the police claim would be considered later. He did not ask for the keys of the theatre. He made an inventory, however, prepared a notice of distress addressed to Findlay, and took from Plisson an undertaking in writing to "look after" and "conduct" the premises "as heretofore . . . at the usual rate of pay." On September 27, Plisson locked up the theatre, held the keys for a short time and then handed them over to the police—he says "as a matter of protection." After the police had been given the keys the plaintiff's bailiff, Bourdon, on September 29, demanded them from Plisson, but of course he did not obtain them. Bourdon then saw the landlord's bailiff, Drackett, not at the theatre but at his office, informed him that he had a warrant and lien and demanded possession of

the goods in the theatre. Drackett said: "We don't recognise your claim." Bourdon made no further effort to secure possession of the goods. The police held the keys until October 2, when the solicitor for the wage-earners appears to have concluded, for reasons not stated, that the Police Court distress could not be maintained against the plaintiff's lien and he instructed the police to abandon the seizure. They thereupon notified Drackett that he could have the keys and he then got them for the first time. On the following day he handed them over to the sheriff on his demand for possession under a writ of execution obtained in the meantime by the wage-earners in a civil action. For what it may be worth Plisson deposes that "Drackett never got possession (of the theatre) as far as I can see"; and Drackett says that when Bourdon was demanding possession of the goods from him "they were under seizure by both the police and myself."

On the foregoing facts I am of the opinion that it has not been shewn that the defendants had possession of the goods when Burdon made his demand on September 29, or that they could then have given him actual possession such as the plaintiff claims would have cured the defect in its title under its lien note and that therefore, however mistaken or even wrongful may have been Drackett's refusal to recognise the plaintiff's claim, it cannot be held either that it amounted to a conversion of the goods or that it was the cause of the plaintiff's failing to obtain such possession as it now asserts would have enabled it to defeat the execution under which the sheriff obtained possession.

Solely on this ground the appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR, J.:—This is an action in damages by the appellant against the respondent for conversion. Brodeur, J.

A man named Findlay was the lessee of a theatre in Moosejaw and Reid, the respondent, was the lessor. The theatre furnishings had been purchased from the appellant by Findlay who had given the latter a lien note.

On or previous to September 24, 1917, a police constable, acting under distress warrant issued out of the Police Magistrate's Court, seized and took possession of those furnishings.

On the same day, Reid, the lessor, issued a distress warrant to his correspondent Drackett who went on the premises and appa-

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rently seized and took possession of the same chattels. A few days later, the appellant company, the holder of the lien on the goods, asked the respondent, the lessor, to deliver up possession to him of the goods. This was refused and the present action in damages for conversion was instituted.

Under ordinary circumstances, when a person detains goods so as to deprive the person entitled to the possession of them of his dominion over them, it is a conversion. *Burroughes* v. *Bayne* (1860), 5 H. & N. 296, 157 E.R. 1196. But in this case the claim is made by the respondent that as lessor he had the right to seize the interest of Findlay in those chattels. The evidence shews that the goods had been sold to Findlay for $3,450 by the appellant, that a sum of $1,650 cash had been paid and that the lien note had been given for the balance $1,800. By a judicial sale of this equitable interest of Findlay there might be realised a sum sufficient to cover the rent due, about $900.

According to the provisions of the common law a landlord could distrain for arrears of rent upon all goods found upon the premises. By statutory provisions, ch. 51, R.S.S. 1909, sec. 4, it was provided that the landlord could not distrain on goods which did not belong to the lessee, though they were found on the premises; but the statute declared that this restriction should not apply to the interest of the tenant in any goods on the premises in the possession of the tenant, under a contract for purchase or by which he may or is to become the owner thereof upon performance.

There is no doubt that under the provisions of this statute, Reid, as landlord, could seize the interest of his tenant, Findlay, in the chattels in question and have it sold. This is not a case of taking a person's goods wrongfully in execution. Under the statute he could exercise some rights in regard to those goods. If the landlord had the right to seize and sell Findlay's interest in the goods, he could take possession of them to exercise his right of distraint. How could he sell the equitable interest of Findlay without shewing the goods at the judicial sale?

Besides, in order to make a demand and refusal sufficient evidence of conversion, the party who refuses must, at the time of the demand, have it in his power to deliver up the article demanded in the condition in which the delivery is demanded. *Latter* v. *White* (1872), L.R. 5 H.L. 578.

The previous seizure which had been made by a wage-earner and in execution of a judgment of the Police Magistrate's Court, the fact that a police constable had possession of these same goods by virtue of the writ of execution of this latter Court would not have given Reid the absolute right of handing over the chattels to the appellant. Suppose Reid had handed possession as far as he was concerned, that would not have given the possession to the appellant company and prevent it from suffering the damages they claim having suffered. These wage-earners had a superior right to the one which the appellant seeks to exercise as it was decided in a former trial.

For all these reasons I am of the opinion that the appellant is not entitled to recover damages from the respondent. His appeal should be dismissed with cost.

Mignault, J.

MIGNAULT, J.:—In my opinion, this appeal fails because it has not been shewn that Drackett, Reid's bailiff, had possession of, and could have delivered to the appellant, the goods covered by the latter's lien note when the appellant demanded possession of the same. I do not think it necessary to express any opinion on the question whether, under the statute, R.S.S. 1909, ch. 51, sec. 4, the respondents could have withheld possession of the goods as against the appellant, in order to distrain and sell the interest of the tenant therein. *Appeal dismissed.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Ferguson, JJ.A. June 11, 1920.

CARRIERS (§ III C—390)—GOODS CARRIED TO DESTINATION—CAR PLACED ON SIDING—CONSIGNEE BREAKING INTO AND UNLOADING—TERMINATION OF RELATIONSHIP OF BAILOR AND BAILEE—ALLEGED SHORTAGE—LIABILITY OF CARRIER.

Where the consignee of goods, for his own convenience and without surrendering the bill of lading or paying the freight, and in the absence of the carrier and without its permission, breaks open and unloads the carrier's car, he waives his right as to time and place and manner of delivery and terminates the relationship of bailor and bailee and from the time of opening the car the carrier is relieved from responsibility either as carrier or warehouseman, and cannot be held liable for alleged shortage.

Statement.

APPEAL by plaintiff from the judgment of Masten, J., in an action to recover the value of certain goods consigned to the plaintiffs and said to have been lost in transit by the defendants, or one of them.

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The judgment appealed from is as follows:—

MASTEN, J.:—This is a claim made by the Russell Motor Car Company, consignees of certain goods, on the ground that the goods were lost in transit, and that the defendants are responsible for such loss.

The plaintiffs purchased the goods in question from the H. Mueller Manufacturing Company Limited, of Sarnia, and it is said that the consignors shipped the goods in a box-car, No. 41599, over the line of the defendants the Pere Marquette Railway Company, who received the car and at Chatham transferred it as directed to the Canadian Pacific Railway Company for transmission to Toronto. The plaintiffs further say that 19,744 forgings were shipped to them in the said car, but that only 15,867 were received, thus leaving a deficiency of 3,877, for which they seek to charge the railway company at the rate of 46 cents per forging, which is to be charged if the defendants are liable; but question does arise as to whether the defendants are responsible for the alleged loss.

The defendants contend, in the first place, that there is no adequate proof that the consignors, the Mueller company, ever loaded on the car in question 19,744 forgings. According to the evidence, the car was loaded at Sarnia on the private siding of the H. Mueller Manufacturing Company. The bill of lading was made out by the Mueller company and signed by the agent of the Pere Marquette Railway Company. It calls for: "One car brass castings of a weight of 29,023 lbs." The number of castings is not mentioned.

There was no actual count either by the Mueller company or by the railway company of the number of castings. The method of computation employed was to place in a wheelbarrow 200 castings, weigh the wheelbarrow with the castings in it, then the wheelbarrow without any castings, thus ascertaining the net weight of the 200 castings, and from this compute the weight of one casting—this being repeated three or more times gave the average for the car. After that, without repeating the operation a number of times to secure the average weight, all the subsequent wheelbarrows were weighed, but not counted, and the total weight, being in this case 29,123 lbs., was divided by 1.478 lbs., the average weight in pounds of each casting, thus giving as the total number of castings, 19,636.

Notwithstanding the able criticisms offered by Mr. MacMurchy on the method adopted, and fully appreciating their force, I am yet of opinion that I must accept as adequately proved 19,636 as the number of castings which were delivered for the plaintiffs to the railway company. After loading, the car was properly and effectively sealed, the seals being numbered A-106679 and A-106680. The seals were inspected at Chatham, where the car passed from the Pere Marquette Railway Company to the Canadian Pacific Railway Company, and the seals were there found to be intact.

The next important fact which I find is that, when the car arrived at the King street yards of the Canadian Pacific Railway Company, the seals were still intact. I do not pause here to discuss in detail the manner of sealing. It is sufficient to say that a seal is placed upon the car when loaded, that seal is numbered, and I am satisfied upon the evidence that was adduced before me that the device is such that it could not be broken and replaced. The identical seals in an unbroken condition were on the car when it arrived at the King street yards of the Canadian Pacific Railway Company. It arrived in the yards on the 25th January, 1917. The plaintiffs, the Russell Motor Car Company, after failing in their request to the Canadian Pacific Railway Company to supply checkers on the morning of Saturday the 27th July, broke the seal, in the absence of the railway company, opened the car, took possession of it, and proceeded to unload it. The unloading was not completed on the 27th, but was completed on the morning of Monday the 29th. Meantime the car stood on an unloading siding in the yards of the Canadian Pacific Railway Company, but was in the custody and control, as I find, of the Russell Motor Car Company. On Saturday night, the door of the car was locked with a padlock, and the keys were kept by employees of the Russell Motor Car Company.

The crucial point in the case appears to me to be, whether, under these circumstances, the plaintiffs have brought home the loss to the railway companies.

The car was in the exclusive custody and control of the carriers, the railway companies, for 7 nights and 6 days from the time it left Sarnia until it was taken possession of by the plaintiff company. It was then in the custody and control of the plaintiffs from

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Saturday morning until it was unloaded on Monday morning, though for their own convenience it was from time to time shifted in the yard by the Canadian Pacific Railway Company.

I find as a fact that the plaintiffs received at their warehouse no more than 15,867 forgings, as claimed by them. It is plain that, if the forgings had been counted on arrival at the King street yard, when the plaintiffs took possession on Friday morning, and that there were then in the car no more than 15,867, the railway company as insurers would have been liable for the loss, upon the facts as I have found them. Because, although it is impossible upon the evidence to say when or how the loss happened, yet the law would cast upon the carrier the liability of an insurer, and the railway company would be responsible; but, in my view, the plaintiffs have failed to satisfy the onus cast upon them of establishing how many forgings there were in the car at the time they took possession of it. The loss may have occurred in transit to the King street yards; it may have occurred by pilfering from the car during the noon hour of Saturday or between 6 and 7 o'clock in the evening; it may have occurred during Sunday. All that is certain is, that there never arrived at the Russell Motor Car Company's warehouse more than 15,867 forgings, but how many there were in the car when it arrived in the King street yards has not been proved.

I think that the liability of the defendants as carriers ceased on Saturday morning, when the plaintiffs took possession of the car, and that from that time the defendants were warehousemen and liable only if negligence on their part is established. No such negligence is established. On the contrary, all reasonable precautions were taken by the Canadian Pacific Railway Company.

The result is that the plaintiffs' action fails and must be dismissed with costs.

Shirley Denison, K.C., and *W. J. Beaton*, for appellants.

Angus McMurchy, K.C., and *J. Q. Maunsell*, for defendants, the Canadian Pacific Railway Company, respondents.

J. M. Ferguson, for defendants, the Pere Marquette Railway Company, respondents.

The judgment of the Court was delivered by

Ferguson, J.A.

FERGUSON, J.A.:—Appeal by the plaintiffs from a judgment of Masten, J., dated the 27th December, 1919, dismissing the action,

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brought to recover the value of certain brass castings alleged to have been entrusted to the defendants for carriage and delivery to the plaintiffs, and lost by the defendants.

On the 20th January, 1917, the Mueller Manufacturing Company of Sarnia there loaded Pere Marquette car No. 41597 with brass castings, each weighing in the neighbourhood of 1½ lbs. The castings were not counted as they were loaded, but were weighed and the number of the castings in the car was arrived at by dividing the weight of metal in the car by the weight of each casting as ascertained by taking the average weight of 1,000.

The railway company took no part in the loading of the car, in the preparation of the bill of lading, or in the sealing of the car. That was all done by the consignors; they prepared the bill, sealed the car, and had a local agent of the Pere Marquette sign the bill, which purported to cover a shipment to the plaintiffs at Toronto of 29,023 lbs. of brass castings.

According to the tally of weights made by the consignors at the time of loading, the weight of the metal should have been 29,123 which amount, divided by the unit of weight of each casting, indicated that there were in the car 19,636 castings, and the consignors sent to the plaintiffs an invoice for that number.

The Pere Marquette Railway Company delivered the car to the Canadian Pacific at Chatham, and it arrived at Toronto on the 26th January. The plaintiffs were anxious to receive the castings, and, having spotted the car on a delivery siding, broke open the seal and proceeded to unload. They did not surrender the bill, pay the freight, or weigh the metal unloaded; but they counted the castings, and according to their count there was a shortage of 3,769 castings, for the value of which they sued.

It is established that the unloading of the car commenced early on Saturday morning, and was completed on the following Monday morning; that, when the plaintiffs left the car at noon and again at 5 o'clock on Saturday, they closed the door and locked it with a padlock of their own, and retained possession of the key.

[The learned Justice of Appeal quoted the findings of fact of the trial Judge, as set out in his reasons for judgment, above.]

The appellants contend:—

(1) That the defendants' liability as carriers did not cease when the defendants took possession of the car for the purpose of

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unloading, but continued till the car was unloaded, or for such period of time as was necessary to afford the plaintiffs reasonable opportunity to complete the unloading.

(2) That the time taken to unload was not unreasonable.

(3) That the learned trial Judge erred in his statement of the law as to the obligation of the defendants.

(4) That, whether the defendants be treated as carriers or warehousemen, they were obliged to account for the goods entrusted to them, and having, according to the findings of the learned trial Judge, failed to account, they are liable.

Counsel for the respondents urged us to reverse the finding that 19,636 castings were delivered, and argued:—

(1) That the railway company's liability as carriers and warehousemen under the contract created by the delivery of the goods for carriage, as evidenced by the bill of lading, ceased so soon as the plaintiffs wrongfully opened the car and took possession of the contents, and, in the right of ownership, exercised dominion and control over the goods.

(2) That thereafter the goods were never replaced in the possession, dominion, or control of the company, but throughout the unloading period continued in the possession, dominion, and control of the plaintiffs, and that consequently there was no re-bailment.

I have carefully perused the evidence and exhibits and considered them along with the findings of the learned trial Judge, and am of the opinion that whatever was in the car, when the railway company received it and signed the bill of lading, was still in the car at the time the plaintiffs broke the seals and opened the car. The evidence which has led me to this conclusion leads me to doubt the correctness of the finding that 19,636 castings were delivered to the railway company, but is not sufficient to enable me to say that the finding is so much against the weight of evidence that it is clearly wrong and should be reversed. In such circumstances, it must be taken as established that 19,636 castings were delivered to the railway company at Sarnia, and that 19,636 were in the car when the plaintiffs opened it; and the liability of the defendants determined upon the hypothesis that the loss occurred after the opening of the car.

It is well-established that a carrier is bound not only to carry safely but also to deliver or to afford the consignee a reasonable opportunity to take delivery.

Counsel referred us to many American authorities as to what constituted delivery, and as to when the carrier's liability as such ceased and its liability as warehouseman began. Mr. Denison relied on the reasoning in the cases collected in Corpus Juris, vol. 10, sec. 330, p. 235, and Halsbury's Laws of England, vol. 4, p. 12, for the proposition that "the liability of the carrier as such continues until the consignee or his agent has had a reasonable time in which to remove" the goods; while Mr. MacMurchy relied on the reasoning in the cases collected in Corpus Juris, vol. 10, sec. 351, p. 248, for the proposition, "When the consignee has assumed full dominion and control over the goods, there is a complete delivery which terminates the liability of the carrier, whether as carrier or warehouseman."

Most, if not all, of the cases referred to as supporting the appellants' proposition, turned on whether or not the carrier had or had not fully performed his contract, and seem to me to be not applicable to this case; where, as I see it, the question is: "Did the plaintiffs by their own acts, evidenced by their breaking open, entering, and unloading the car, in the absence and without the permission of the carrier, terminate the contract of carriage or relieve the carrier from the obligation to make any other delivery?" The foundation of the argument of the appellants' counsel is that delivery could not be and was not made till the castings were out of the car.

Delivery implies surrender by the carriers, and acceptance, express or implied, by the consignee, of possession, dominion, and control; but I do not think it necessary for the determination of this case to decide when the surrender and acceptance would have been complete had the consignees chosen to insist on their strict rights under the contract: the plaintiffs did not choose to abide by the contract, but, waiving their own and in breach of the defendants' rights as to time, place, and manner of delivery, they, for their own convenience, without surrendering the bill, without paying the freight, in the absence of the defendants and without their permission, broke open, entered, and unloaded

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the defendants' car, and, when not actually engaged in the work of unloading, retained possession of the car and of the goods by relocking the car with their own lock.

Possession, dominion, and control seem to me to lie at the root of a carrier's liability either as carrier or as warehouseman, and their liability as such bailees would continue only during such time as these plaintiffs allowed them to exercise such dominion, possession, and control.

As I view the facts of this case, it is not open to the plaintiffs to say that they did not on Saturday morning take and exercise possession, dominion, and control of the goods during the time they were actually engaged in unloading, and there is no evidence that they re-committed the goods to the possession of the railway company for the period in which they were not actively engaged in unloading. In fact the evidence is all the other way.

For these reasons, I am of the opinion that the relationship of bailor and bailee was terminated on the opening of the car, and that from and after that time the defendants were relieved from responsibility either as carriers or warehousemen, and I would dismiss the appeal with costs.

Appeal dismissed.

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BAILEY v. THE CITY OF VICTORIA and THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

Canada Supreme Court, Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 3, 1920.

1. STATUTES (§ II A—96)—HIGHWAY—MUNICIPAL ACT, R.S.B.C. 1911, CH. 170, SEC. 53, SUB-SEC. 176—BY-LAW—PUBLICATION—SUFFICIENCY.
The publication required in the *Gazette*, by sec. 53, sub-sec. 176, of the Municipal Act, R.S.B.C. 1911, ch. 170, before a by-law . . . shall come into effect is a publication of the by-law *in extenso*.
[*City of Victoria* v. *Mackay* (1918), 41 D.L.R. 498, 56 Can. S.C.R. 524, followed.]

2. HIGHWAYS (§ I A—7)—DEDICATION—INTENTION—ACCEPTANCE.
In order to establish a public highway by dedication there must be, on the part of the owner, an actual intention to dedicate, and it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public.

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia (1918), 27 B.C.R. 305, at page 312, affirming the trial judgment (1918), 44 D.L.R. 338, 27 B.C.R. 305, in an action brought by the city respondent against the appellants to clear up

the city's title to a strip of land required for the widening of Pandora Avenue in the City of Victoria.

The facts of the case are as follows:

A by-law was passed expropriating that land, the property of one Moody. The Municipal Act, R.S.B.C. 1911, ch. 170, enacted that such a by-law should be published in the Official Gazette and in a local newspaper. Instead of publishing a copy of the by-law, the respondent published a notice containing a statement of some of its salient provisions. The respondent later on served Moody with a notice to treat, paid him the compensation claimed by him and took from him a deed of the land. The respondent applied for registration of its title, but the Registrar declined to act upon it; and the respondent made no appeal against this refusal. A year later, Moody mortgaged his land, including the strip in question in this case, to the appellant who registered in due course his mortgage in the land registry office. Subsequently to such registration, the respondent completed the registration of its title and proceeded with the actual work of the widening of Pandora Avenue, removing the fences and verandah encroaching on the strip of land and also building a sidewalk. The respondents assert rights, as against the appellant mortgagee, to the strip of land in question on three grounds: 1, by expropriation, provided the by-law has been published according to statute; 2, by grant from Moody, provided the respondent's application to the Registrar for registration of its deed was still "pending" when the appellant registered his mortgage; and 3, by dedication, provided the necessary conditions for such were satisfied.

J. A. Ritchie and *Leitch*, for appellant.

E. C. Mayers, for respondent.

Idington, J.

IDINGTON, J. (dissenting):—The respondent is a municipal corporation, created as a town by a British Columbia Statute in 1867 (which was republished in R.S.B.C. 1871), and is endowed with all the powers given thereby, so far as not modified by later legislation, and was later constituted a city.

Its council proposed, in the year 1911, or thereabout, to widen Pandora Ave., one of the streets of said city, and first by resolution and later by a by-law declared the said street should be widened according to a plan prepared by its engineer.

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That by-law was followed by another expropriating by-law which never came into effect in law by reason of the failure to follow the requirements of the relevant statute as to publication, which we held in *City of Victoria* v. *Mackay* (1918), 41 D.L.R. 498, 56 Can. S.C.R. 524, to be an imperative condition precedent to such a by-law becoming effective.

I cannot accept the suggestion submitted in argument that a mere notice, such as was published, can be held a due compliance with the statute.

The respondents' counsel proceeded to carry out the said purpose of widening said street by procuring from one Moody, the owner of the land in question, a deed dated May 23, 1912, of the strip thereof so needed for that part of the street fronting his lot, and paid him $6,200 therefor.

The deed recited as follows:—

Whereas the Corporation of the City of Victoria, under the authority of the local improvement General By-law and Amendments thereto, and of certain by-laws relating to the particular work, have expropriated land for the purpose of widening Pandora Avenue from Douglas Street to Amelia Street;

And whereas the said Party of the First Part is the owner or has some interest in the said lands hereinafter mentioned:

And whereas the said lands hereinafter mentioned are necessary for the purpose of the said widening;

and then in consideration of $6,200 (the receipt of which is acknowledged) granted the said strip now in question to the respondent.

Moody thereby covenanted to execute such further assurances as necessary, and released to said corporation all his claims on said land.

The said price was duly paid out of the proceeds of the loan obtained to carry out the work of widening and paving on said street.

Stress was laid in argument upon the later use of said strip as part of the street, and also upon steps taken and orders got validating said loan, and impliedly validating, it was urged, the whole proceeding.

In my view, the alleged implication of validating said by-law is ineffective save so far as needed to protect the debenture holders in their rights as against respondent and those ratepayers liable for the loan so got, to carry out the local improvement in question.

The fundamental question raised, upon which the claim of the respondent or either of them rests, is whether or not the said deed from Moody to the city respondent, and the payment of the consideration therefor by the said city, constitute a dedication of the said strip for the use of the public as a highway.

Dedication requires an abandonment to the public use of any property or part of the dominion over same by the owner and an acceptance thereof by the public, or someone in authority to represent it, in giving such acceptance.

I am quite unable to understand how it can be maintained that a deed of grant which expressly gives the entire property for the purpose of constituting it part of a highway and accepts voluntary compensation therefor, can be held less than a dedication, or that a duly constituted authority having power to deal with the question in paying the price can be said not to have accepted it.

The mode of giving, or the circumstances of its acceptance, and the proof of both as well as the extent of the gift, have given rise to many questions of law and fact, leading Judges and writers upon these subjects to use, according to the exigencies of each case dealt with, more or less comprehensive language, in dealing therewith, respectively.

But the broad comprehensive lines of the principles upon which dedication rests do not permit of rights created in accord therewith being frittered away by being limited to the appropriate language used by Judges in some or even many of a very large class of cases falling within said principles, when accidentally defining the rights of each party in relation to the existence of possibly a very narrow right or power resting on said principles.

It seems to me idle to argue that because the by-law was ineffective as a means of enforcing expropriation therefore all the acts done by parties to such an express grant, must be treated as void.

Clearly the sole question which need be considered herein is whether or not there has been an effective giving of the land for the specific purpose of being used as a highway, and acceptance of that given, for the purpose claimed when that donated had been paid for by the donee or grantee and thus the grant became irrevocable.

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The suggestion that a gift without any consideration is necessarily implied in the doctrine and that valuable consideration having passed renders the doctrine inoperative, is most remarkable.

Though it has been applied most frequently after long use by the public, when there did not appear to have been any consideration, that does not justify the assumption that where consideration having been paid then there is no place for the application of the doctrine.

The case for dedication is often much stronger when there has been an express or implied consideration. The case of dedication by a plan is one where certainly there is an implied consideration. There the consideration is the expectation of the benefits to be received, by virtue of sales made by the proprietor to parties expected to purchase one or more of the lots set out in the subdivision plan, which is often revocable until use by the public of receipt of the expected consideration therefor, through the sale and purchase of some lot pursuant to the plan.

Then we have the case cited to us of *Cook* v. *Harris* (1875), 61 N.Y., 448, where an express monetary consideration was given by neighbours desiring a dedication, and the owner gave a bond to the commissioners and it was held that even if the bond was invalid, yet the dedication was complete.

We have also the cases of *McLean* v. *Tp. of Howland* (1909), 14 O.W.R. 509; *Fraser* v. *Diamond* (1905), 10 O.L.R. 90; *Reaume* v. *Windsor* (1915), 7 O.W.N. 647, 8 O W.N. 505; supporting the same view as well as the dictum of high authority in the judgment in the case of *Att'y-Gen'l* v. *Biphosphated Guano Co* (1879), 11 Ch. D. 327, at pages 338-9.

There seems, I respectfully submit, a further confusion of thought in assuming that, because user is often relied upon in support of a claim of dedication, therefore until actual user there can be no dedication.

As pointed out by Buckley, J., in the case of the *Att'y-Gen'l* v. *Esher Linoleum Co.*, [1901] 2 Ch. 647 at top of page 650, user is not dedication though in most of the cases dedication is proved by user.

The moment the consideration was paid and the land was conveyed, it thenceforward was devoted to the public for use

as part of the highway and could not be used for any other purpose. Any one of the public had then and ever since the right to use it as part of the street and no one could complain of such use.

The fact that the second by-law as an instrument designed to enforce expropriation was as such invalid, did not render it illegal in the sense that a fraudulent or criminal attempt taints all it touches. It was good and stood as a mere resolution.

In view of what had preceded it, that proposition is not absolutely necessary to maintain the actual acceptance by the council of the grant and thereby complete the dedication.

The question of the capacity of the respondent city to take, without a by-law, such a deed and accept thereby the grant and make it valid, is of graver import by reason of the curious language of the Statute of Incorporation which reads, in sec. 56, as follows:—"The municipal council shall be capable of holding real estate and have the entire control of all corporate property."

The rather loose manner of expressing the power by designating the municipal council as the party to become vested, has caused me some concern; for it certainly could never have been intended by the Legislature to vest the property in the council, but rather in the corporation of which the council is only the governing body.

I hold the capacity, though so expressed, to have been intended to enable the corporation acting through its council by mere resolution to take and hold real estate. I do so the more readily because the respondents claim in their factum that the city had such capacity, and no argument to the contrary has been presented by the appellants.

It seems to be assumed by the course of the appellants' argument that the by-law being, as such, ineffective, all else done in the way of executing the purpose of the city respondent must also be held void.

But if the city had, as I hold, the capacity to buy a road allowance without resorting to a by-law for expropriation, then that was done completely established the widening of the highway so far as that part in question herein is concerned.

The appellants rely on many Ontario cases, and some Quebec cases, where such projects for making or widening highways have

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quite properly been held, under the respective law applicable, invalid for want of a by-law.

In doing so they overlook the fact that the Ontario cases were decided under a Municipal Act which expressly declared that the powers of the council shall be exercised by by-law when not otherwise authorised or provided for and that the like enactments in Quebec governed the decisions in that province, cited to us.

The British Columbia Legislature adopted an entirely different conception and without rendering the by-law an imperative necessity in all cases enacted that the municipal councils might, in a long list of cases specified, if they chose to do so, enact by-laws for any of the given cases.

It was thus left open to the municipal council of respondent (Victoria) or any other similarly empowered to hold real estate, to proceed to constitute highways by the purchase of the right of way. Everything of that sort could thus be done by mere resolutions. Of course if driven to expropriation proceeding that would involve the necessity of passing a by-law. And hence in this case if respondent city had to rely upon expropriation alone and had proceeded entirely thereunder and obtained Moody's title thereby, then it might well be held that in such a case the by-law being ineffective the whole proceeding would fail. But that not being the case and the deed having been got by virtue of a voluntary bargain, and presented for registration, the highway *pro tanto* was duly constituted. The failure of its non-registration was entirely the fault of the registrar in whose hands it was for registration when Moody gave, inadvertently I suspect, a mortgage on this whole lot including that he had duly conveyed to the city.

I fail to find anything in the provisions of the Land Registry Act, R.S.B.C. 1911, ch. 127, which can help the appellants as against either of the respondents asserting their respective rights to protect the public.

I do not think it is necessary to go through all the provisions of that Act to demonstrate that each of those relied upon is ineffective. Let us take the most drastic of all those provisions, which is contained in the amendment of the Act by sec. 8 of 3 Geo. V., ch. 36, passed March 1, 1913, which reads as follows:—

Every certificate of indefeasible title issued under this Act shall, so long as same remains in force and uncancelled, be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that the person named in such certificate is seized of an estate in fee-simple in the land therein described against the whole world subject to—

This is subject to a number of express exceptions set forth in sec. 22 of R.S.B.C. 1911, ch. 127, being the Land Registry Act.

Of these sub-sec. (*e*) specifies "any public highway or right-of-way, watercourse or right of water, or other public easement."

If I am right in my conclusion that the right of way had been effectively constituted by what had pened in way of dedication, how can this furnish any answer to the claim of the Attorney-General maintained on behalf of the Crown which had always up to this enactment been wholly excepted?

I submit this does not as against him amount to anything in support of appellants on such facts.

Sections 4, 5 and 6 of the Highway Act (now R.S.B.C. 1911, ch. 99) are relied upon by respondents and I think rightly as to secs. 4 and 5, which are as follows:—

4. All roads, other than private roads, shall be deemed common and public highways.

5. Unless otherwise provided for, the soil and freehold of every public highway shall be vested in His Majesty, his heirs and successors.

It seems clear that either the city or the Attorney-General representing the public must have a grievance and right to a remedy, and possibly both, under the peculiar circumstances of the case.

If either, then needless to pursue the inquiry.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The first point for consideration is this: Was by-law 1183 published within the meaning of sub-sec. 176 of sec. 53, ch. 170, R.S.B.C. 1911? In common usage "publication" as applied to a document means, I think, something more than the giving of public notice of the existence of the document and information as to where it may be found and inspected. "Publication" of a document or newspaper means, I think, according to common speech in the absence of a qualifying context, the publication of the document *in extenso*. I think too much importance ought not to be attached to the fact that in other provisions of the Act the direction is that the council shall publish a copy.

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In addition to the clause under consideration there are sections of the statute, see, *e.g.*, secs. 140 and 147 as amended in 2 Geo. V. 1912, ch. 25, in which the council is directed to publish the by-law. These last mentioned provisions contemplate mainly the circumstances and needs of rural municipalities and it is difficult to suppose that in these sections the Legislature is providing for publication in the limited degree which is now contended is sufficient under sub-sec. 176.

It should also be noted that sub-sec. 176 applies, of course, to rural as well as urban municipalities and that the Legislature must have had in view some practical expedient for bringing home notice of the plans of the council to persons being interested, we may, I think, not unreasonably assume that the legislative intention is best interpreted by reading the words according to their ordinary meaning.

The next question is: Can by-laws 1151 and 1183 have effect in the absence of publication? The enactments of sub-sec. 176 are explicit and they have been authoritatively interpreted by this Court in *Victoria* v. *Mackay*, 41 D.L.R. 498, 56 Can. S.C.R. 524, as imposing the requirement of publication as a condition of any by-law passed under the authority of them taking legal effect as such. It should be mentioned here that no very convincing reason was suggested why by-law 1151 is not subject to the requirement of publication. The point is not very material and it may be that by-law 1183 is complete in itself; it ought not to be supposed that the assumption that this by-law was not within the condition is approved by this judgment.

The respondent's counsel meets the difficulty by arguing that the by-laws are sustainable as enacted under the authority of another provision of the Act; the contention being that as regards by-laws passed under that authority the requirement of sub-sec. 176 in relation to publication is inoperative.

The provision invoked in support of this is sub-sec. 145 of sec. 53 and is in these words:—

(Sec. 53.)—In every municipality the council may from time to time make, alter and repeal by-laws for any of the following purposes, or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say:—

(Sub-sec. 145.)—For accepting, purchasing, or taking or entering upon, holding and using any real property in any way necessary or convenient

for corporate purposes, and so that the council may direct the taking or entering upon immediately after the passing of any such by-law, subject to the restrictions in this Act contained.

The reasons which have convinced me that this view is not the right one are these. Chapter 170 (the Municipal Act) contains a number of provisions having a variety of purposes by which powers of compulsory taking are given explicitly to the council, in some cases some specific restriction being imposed while in others a specific procedure is laid down. As an example of a specific restriction, sub-sec. 166 may be referred to—a clause dealing with the construction of sewers in which authority to expropriate is given, but the land to be taken is limited to such lands as the council may deem necessary for the purpose of "constructing the main sewer" and is not in any case to exceed "10 feet in width." In sub-sec. 176 we have a special procedure.

Whatever be the purpose served by sub-sec. 145 there appears to be no reason for failing to give effect to the words "subject to the restrictions in this Act contained" and the object of this part of the sub-section at all events appears to be plain. The words are put there no doubt in order to exclude the construction which is now put forward, the effect of which would be that by resorting to this general provision the council could in those cases which have been specially provided for, escape the inconvenience of observing the specific restriction laid down or the specific procedure prescribed.

I conclude that by-laws passed with the purpose and intended to have the effect expressed in by-laws 1151 and 1183 can only become operative in law when the procedure laid down in sub-sec. 176 is observed.

If follows that subject to the question whether the highway was or was not established by dedication, the discussion of which I postpone for the moment, the proceedings necessary to establish a street by by-law under the authority of the Municipal Act were not taken; that the proceedings necessary to authorise the expropriation of property for the purpose of opening a street were not taken; and consequently that the respondent corporation cannot maintain its action on the ground that a title to the lands in question was acquired compulsorily for highway purposes.

In these circumstances, it seems impossible to hold that the corporation can establish a title under its conveyance from Moody

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as against the registered mortgage of Bailey. When Bailey applied for the registration of his mortgage, when he received a certificate of incumbrances, when he made his advance there was not even an application pending for the registration of the title of the corporation under the conveyance from Moody. An application had been made, it is true, for registration of the title but it was supported only by the production of the by-law, and it appears to have been only an attempt to comply with the requirement of sub-sec. 176 which prescribes that after the publication of a by-law for expropriation passed under that sub-section the municipality shall apply for the registration of its title and shall file a copy of the by-law.

It is quite true that this application was made long before the registration of Bailey's mortgage but for some reason it was never entered in the list of incumbrances and noted against Moody's property. Nevertheless, whatever may have been the delinquencies of the officials of the Land Registry Office in their dealings with this application, the corporation appears to be concluded by the fact that after the registration of Bailey's mortgage its application was refused. In these circumstances sec. 104 of the Land Registry Act appears to be conclusive against the appellant.

The Registrar having declined to act upon the application and no steps having been taken under sec. 114, it is not now open to the defendant corporation to allege that the appellant Bailey's mortgage must be taken subject to a pending registration (see *National Mortgage Co.* v. *Rolston* (1917), 49 D.L.R. 567, 59 Can. S.C.R. 219; *Howard* v. *Miller*, 22 D.L.R. 75, [1915] A.C. 318, 20 B.C.R. 227 at 230). The latter case it is to be observed, was a decision relating to the effect of the registration of an agreement to purchase land and turned upon the point that on the facts disclosed the respondent was not entitled to enforce his agreement specificially as against the opposite party. No such situation arises here, Bailey's mortgage being a legal mortgage.

The substantive question for decision is that to which the Judges in British Columbia evidently devoted their attention, namely whether in the *locus* in question a public highway has been established by dedication. For this purpose two concurrent conditions must be satisfied, 1st, there must be on the part of

the owner the actual intention to dedicate (*Folkestone* v. *Brockman*, [1914] A.C. 338), and 2nd, it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public. (*Att'y-Gen'l* v. *Biphosphated Guano Co.*, 11 Ch. D. 327, at page 340). I can find nothing in the legislation of British Columbia relating to municipalities giving the municipality authority on behalf of the public to accept a dedication by the mere acceptance of a deed of grant of land for the purpose of creating a highway, and in my opinion acceptance by the public can only be evidenced by public user or by the act of some public authority done in the execution of statutory powers.

It should be observed that by sec. 22 of the Land Registry Act, R.S.B.C. 1911, ch. 127, the title of the holder of a certificate of indefeasible title is expressly made subject to any "public highway," and it follows, I think, that if the public highway had been actually created by dedication before the registration of Bailey's mortgage, there could be no doubt that the public right would prevail as against the registered interest.

In the absence of some legal obstacle arising from the character of the municipality as a statutory corporation, governed as regards its capacities and the exercise of them, by the provisions of the Municipal Act, the evidence in favour of the existence of the *animus dedicandi* on the part of both Moody and the corporation would appear to be very cogent. Moody conveyed to the municipality on the assumption, it is true, that a street had been established by the procedure laid down in the Municipal Act, but on the other hand it is a most important circumstance that he, in transferring his land to the municipality, and the officers of the corporation in accepting it, were dealing with it as land devoted to the purpose of establishing a highway, an improved street along the front of that part of the property which Moody retained; a circumstance which no doubt affected materially both Moody and the corporation officials respectively in their judgment as to the amount to be demanded and paid by the way of compensation. The intention of the council to devote the strip of land to that purpose is unequivocally declared, and had the intention been acted upon by the immediate opening of the street and that again followed by acceptance by public user,

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the only question I should have thought it necessary to consider at this point would have been whether or not the municipality could lawfully create a street by its ineffectual endeavours to follow the procedure laid down in sub-sec. 176 of sec. 53. As the municipality could not without a breach of faith continue to hold the land while applying it to a purpose other than that for which it was transferred, it is possible that the transaction (coupled with user by the public) might, in the hypothetical circumstances suggested, be regarded as a transfer to the municipality as a trustee for highway purposes and as amounting to dedication by the owner with the assent of the municipality and acceptance by the public. It may be that under the British Columbia Statutes the results would be as suggested, namely, that the title to the fee would pass to the Crown instead of to the municipality but the fact that this collateral and unexpected result would ensue would hardly be of sufficient importance to counterbalance the fact that it was the settled and unqualified determination of both parties to the transaction that the highway was to be established. Reverting now to the actual facts before us, these facts fail to establish the existence of a highway at the time Bailey made the advance and took his mortgage; and as against Bailey it seems to be clear enough that the public right can only be held to have arisen if the facts in evidence are sufficient to support the inference that he assented to the setting apart of the strip in question for the public purposes of a street.

The principle to be applied is expressed by Lord Macnaghten in *Simpson* v. *Attorney-General*, [1904] A.C. 476, at page 493, thus:—

> As regards the second, it is, I think, enough for me to say that it is clear law that a dedication must be made with intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication: *Barrodough* v. *Johnson* (1838), 8 Ad. & E. 99, 112 E.R. 773.

The facts proved do not appear to me to be sufficient to support the inference which the Judges below have drawn.

Anglin, J.

ANGLIN, J.:—The plaintiffs assert rights as against the defendant mortgagee to the strip of land in question on three distinct grounds: (1) By expropriation; (2) By grant; (3) By dedication. Under either the first or the second head the title would be vested in the plaintiff city; under the third head the right of highway

would be in the public; hence the joinder of the Attorney-General as co-plaintiff.

There can be no doubt that the expropriation proceedings taken by the city were instituted under sub-sec. 176 of sec. 53 of the Municipal Act, R.S.B.C., 1911, ch. 170, and, since it makes special and specific provision for the acquisition of land for street widening (the purpose of acquiring the land in question) recourse, in my opinion, cannot be had to general powers for the acquisition of land conferred either by sub-sec. 145 of sec. 53, or by sec. 399 of the Municipal Act in order to escape the effect of failure to comply with an essential requirement of sub-sec. 176. *Generalia specialibus non derogant. Ex parte Stephens* (1876), 3 Ch. D. 659, at pages 660-1. The heading of Part II. of the Municipal Act, of which sec. 53 is the first section, *viz.*, "Powers required to be exercised by By-law," makes it clear that a valid by-law is essential to the exercise of powers conferred by provisions included in that part of the statute. *Hammersmith Ry. Co.* v. *Brand* (1869), L.R. 4 H.L. 171, at page 203; *Eastern Counties and London & Blackwall Ry. Cos.* v. *Marriage* (1860), 9 H.L. Cas. 32, at page 41, 11 E.R. 639; *Toronto Corp.* v. *Toronto Ry. Co.*, [1907] A.C. 315, at page 324.

I agree with the trial Judge that the by-law passed under sub-sec. 176 was ineffectual for want of publication as prescribed by that section. *Victoria* v. *Mackay*, 41 D.L.R. 198, 56 Can. S.C.R. 524. The expense and trouble involved in publishing such a by-law *in extenso* might afford a strong argument for an amendment of the statute if the Legislature should be convinced that the object of its policy would be sufficiently attained by the publication of a mere notice of the by-law, such as we have in this case, in some convenient and accessible place where a copy of it might be seen. But such an argument scarcely affords ground for a Court undertaking to dispense with the observance of such a distinct requirement as that expressed in the words "every by-law passed under the provisions of this sub-section before coming into effect shall be published."

I agree with Murphy, J. (44 D.L.R. 338, 27 B.C.R. 305), and Macdonald, C.J.A., of the Court of Appeal, with whom Eberts, J., concurred, that this implies publication in full. Sections 3 and 5 of the Municipal Act make it clear that sub-sec. 176 applies

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to the City of Victoria and that nothing in any special Act relating to it shall "impair, restrict or otherwise affect" the powers which that sub-section confers. The plaintiff municipality therefore did not acquire title by expropriation.

Neither can it assert title under its unregistered grant from the owner Moody in view of the provisions of sec. 104 of the Land Registry Act, R.S.B.C. 1911, ch. 127, that

> no instrument . . . purporting to transfer . . . land or any estate or interest therein . . . shall pass any estate or interest either at law or in equity in such land until the same shall be registered in compliance with the provisions of this Act.

The city's application for the registration of the conveyance from Moody having been ultimately rejected and no steps having been taken to set aside the registrar's decision under sec. 114, the case must be treated as if no application for registration of it had been pending when application was made to register the Bailey mortgage and it was in fact registered. *National Mortgage Co.* v. *Rolston*, 49 D.L.R. 567, 59 Can. S.C.R. 219.

The claim of highway by dedication requires more consideration. In order to bind the mortgagee, against whom no finding has been made that he took his mortgage with notice either of the city's attempted expropriation or of its negotiations with Moody and the conveyance given by him—and the evidence would not warrant such a finding—it must be established either that a highway existed when he obtained and registered his mortgage, which would in that case be subject to this public right (Land Registry Act, sub-secs. 34 and 22 (*e*)), or that the mortgagee himself dedicated his interest for highway purposes or is estopped by his conduct since becoming mortgagee from denying the existence of the highway claimed.

After fully considering the testimony of Bailey himself and all the other evidence in the record I have failed to find anything on which the existence at any time of the essential *animus dedicandi* (*Simpson* v. *Attorney-General*, [1904] A.C. 476; *Mann* v. *Brodie* (1885), 10 App. Cas. 378, at page 386; *Barraclough* v. *Johnson*, 8 Ad. & E. 99, 112 E.R. 773), could safely be attributed to him. Neither do I see in his conduct, which was purely negative or passive, enough to found an estoppel against him. There is, in my opinion, nothing whatever to shew that he was aware of circumstances which might give to his inaction the significance

that the plaintiff now attributes to it—nothing to shew that a situation arose which called for active interference by a mere mortgagee at the peril of loss or impairment of his rights.

Notwithstanding the undoubted fact that it was the purpose of Moody, the owner, to convey the land in question to the city as a vendor and because he deemed himself obliged to part with it under the expropriation proceedings which had been instituted, I incline to the view and shall assume that his deed, though wholly ineffectual to convey any estate or interest, may be taken to evidence sufficiently the existence on his part of intention to dedicate the land described in it for a public highway—that it may even be regarded as an express dedication. *Reaume* v. *Windsor*, 7 O.W.N. 647; 8 O.W.N. 505, affirmed here on the second day of May, 1916. The appropriation and setting apart of the land for a public street would seem (to adopt the phrase of counsel for the respondent) to be "the conclusive factors" in dedication rather than the voluntary or gratuitous character of the transaction on the part of the owner.

But, in order to bring a highway into existence by dedication in addition to the intention of the owner of the soil to dedicate it to the public for that purpose, however directly evidenced, an acceptance by the public is also essential: *Moore* v. *Woodstock Woollen Mills* (1899), 29 Can. S.C.R. 627; *Mackett* v. *Com'rs of Herne Bay* (1876), 35 L.T. 202; *Att'y-Gen'l* v. *Biphosphated Guano Co.*, 11 Ch. D. 327, at page 340, and the crucial question in this case in my opinion is whether there was such an acceptance as was necessary to make the land in dispute part of Pandora Avenue before the execution and registration of the defendant's mortgage. User by the public—the usual indication of acceptance by the public—is entirely absent. Nothing was done to throw the strip of land open until after Bailey had become the registered mortgagee of it. There was no expenditure of public money upon it. It remained fenced in with, and, to all appearances, part and parcel of, the Moody property.

But it is said there is abundant evidence of acceptance by the municipal corporation and that that is acceptance on behalf of the public, or its equivalent. Of the intention of the municipality to devote this land to highway purposes there can be no

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uestion and there seems to be some American authority which may be invoked in support of the position that acceptance by the municipality without statutory authorisation may be tantamount to acceptance by the public. The cases are collected and reviewed in 18 Corp. Jur., *tit.* Dedication, pars. 79, 80, 88 and 99. But I have failed to find any English authority which accepts that view.

The municipal corporation is a purely statutory body and it has and can exercise only such powers as are conferred upon it by statute. Its position in this respect is well stated by Brayton, J., delivering the judgment of the Supreme Court of Rhode Island in *Remington* v. *Millerd* (1847), 1 R.I. 93, at page 98:

> Supposing the dedication to be proved, is there in this case any evidence of an acceptance by the public, any assent on their part to the use of the land in the mode intended? The usual evidence of such acceptance, namely, an user by them, is here wanting. This way has never been used. In all the cases cited there had been a use by the public from which their assent might be inferred, and in many of them the use had been for so long a period as to warrant the presumption not only of their assent, but of the act of dedication also. It is not easy to perceive how otherwise than by user this assent is to be shewn. The term public includes the whole community, the whole mass of individuals in the State. They cannot constitute agents to assent for them. The whole doctrine of dedication is based upon the fact that the public have no agents; that there is no one with whom the owner of the land can agree or contract directly; and it is therefore said that in these cases it is not necessary that the public should be a party, and that, from the necessity of this case, they cannot be.
>
> Does the plea contain any other evidence of an acceptance on the part of the public? If so, it is the fact that the town council of East Greenwich, on August 31, 1844, declared the way to be an open highway, and ordered it to be repaired at the expense of said town. If this be evidence of such acceptance, it must be because the town council are to be deemed the general agent of the public, and for this purpose represent them, or because they are by Statute specially empowered to accept the way in the mode set forth.
>
> But are they such agent? Have they any such representative character? They are the creature of the Statute, invested with certain defined powers. They are enabled to do such acts as the Statute authorised and to do them in the mode prescribed; and if they assume to do other acts, or to do them in other modes, their doings are merely void, and cannot become the more valid from any representative character which may be imputed to them. It is difficult to see how they are the agent of the public, more than the surveyor of highways.

Here the sole authority of the municipal corporation for "establishing, opening, making . . . improving . . . widening . . . roads, streets . . . or other public thoroughfares," which is conferred by sub-sec. 176 of sec. 53 of the

Municipal Act. A by-law meeting the requirements of that section is the method prescribed for the exercise of those powers. The by-law passed by the council was inefficacious because of non-compliance with an essential requirement. (*Victoria* v. *Mackay*, 41 D.L.R. 498, 56 Can. S.C.R. 524). It follows that the only power which the city possessed to widen Pandora Avenue or to procure or apply land for that purpose has not been exercised. To permit it to establish or widen a street otherwise than by following the specific method prescribed would be in effect to supersede the statute and to concede to the municipal corporation a power which it does not possess. It follows in my opinion that there was no highway in existence when the defendant's mortgage was executed and registered.

I would, for these reasons, allow this appeal with costs here and in the Court of Appeal, and would direct the entry of judgment dismissing the action with costs.

Brodeur, J.

BRODEUR, J. (dissenting):—The respondents claim the title to a strip of land on Pandora Avenue, in Victoria, B.C.

Notice of expropriation of that piece of property had been given by the City of Victoria, and after notice to treat, the owner Moody agreed, on May 23, 1912, to sell that strip of land to the municipal corporation for a certain sum of money. The city unfortunately did not register its title; and in March, 1913, Moody gave to the appellant Bailey a mortgage affecting his property on Pandora Avenue and by the description which is made in the deed covering the strip of land sold to the corporation.

There was evidently no fraud on the part of the parties to the deed of mortgage and it is evident that they have acted in absolute good faith. In 1917 the City of Victoria having discovered its omission to register its conveyance applied to the Land Registry Office for registration but having found that the conveyance could only be registered subject to the Bailey mortgage, and Bailey having refused to sign a release, the present action has been instituted to have the Moody conveyance registered in priority to the Bailey mortgage.

The action was maintained by Murphy, J., 44 D.L.R. 338, 27 B.C.R. 305, and by the Court of Appeal, Macdonald, C.J.A., and Eberts, J.A., dissenting, 27 B.C.R., at page 312.

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The trial Judge found that the expropriation by-law was invalid because it had not been duly published but that the Moody conveyance constituted a dedication of the strip of land in question and that Bailey had acquiesced in such dedication.

The dissenting Judges in the Court of Appeal held that there was no legal evidence of dedication, that the transaction between Moody and the city was a compulsory sale, that Moody never intended to dedicate and that Bailey never acquiesced in such dedication.

The most important issue to dispose of at first is whether there is dedication.

There was at first a by-law passed by the city for the expropriation of the land in question, but the by-law was never duly published and registered. This Court in a case of *Victoria* v. *Mackay*, 41 D.L.R. 498, 56 Can. S.C.R. 524, held that the publication of a by-law is a necessary condition to its validity.

The proceedings which have subsequently taken place consist in a notice to treat to Moody in the delivery by the latter of his claim which seemed to have been accepted by the city since it issued its cheque for it and a conveyance was duly executed by him on May 23, 1912, of a strip of land in front of his property for the purpose of widening Pandora Avenue.

Would that constitute dedication of this strip of land? I would not hesitate in answering in the affirmative. No formal conveyance is required to affect a common law dedication; but where there is a deed or writing as in this case, the conclusion is still more certain. Dedication means the setting apart by the owner of land for the use of the public. In most of the cases of dedication, the title is a matter of inference as to the intention of the owner and as to the acceptance by the public. But in this case there is no doubt as to the intention of the owner Moody, since he formally signed a deed in which he declared that the land was granted for the purpose of widening a public street. There is no doubt also as to the grant being accepted by the municipal corporation representing the public.

But, besides, works have been carried out by the municipal corporation on this strip of land in order to utilise it as a public street. The fences and verandah which were encroaching on the strip of land were removed and a sidewalk was built. All this

was done when Bailey was the mortgagee of the property. Since he claims to-day that his mortgage was covering the whole lot, including the strip of land in question, he should have protested against the municipal authorities using part of his property.

He was fully aware of the situation. For months and months this widening of Pandora Avenue was discussed in the press and was the subject of public discussion in the municipal council amongst the residents of the locality. When he loaned money to Moody he made inquiries as to the value of the property; and it may be reasonably inferred that the estimation he got was as to the property less the strip of land in dispute. He saw the front of the property being altered, the fences and the verandah and the steps being removed; he saw the sidewalks being built and he did not object. He must be held as having acquiesced in the corporation respondent taking and using this strip of land. His conduct shews that he has himself dedicated it to the public. It is now too late for him to claim certain rights which the mortgagor did not intend to convey and which he himself did not intend to recover.

It is not necessary that the public should have possession of the lands dedicated for any great length of time. All that is required is the assent to the use of the property by the public and the actual enjoyment of the same by the public for a length of time sufficient to have created on the part of the public such reliance upon the enjoyment of such easements as that the denial of such rights would now interfere with the public convenience and with private rights.

The appellant claims that the City of Victoria not having registered the conveyance by Moody of the strip of land, no estate or interest has passed (sec. 104 of the Land Registry Act).

Under the provisions of the Land Registry Act, the holder of a registered mortgage, as Bailey, is only *primâ facie* entitled to the estate interest in respect of which he is registered subject to the rights of the Crown, R.S.B.C. 1911, ch. 127, sec. 34, and if a person has an indefeasible fee under sec. 22 he is seized of an estate in fee simple in the land against the whole world subject to different reservations; amongst others is the public highway.

The evidence, as I have said, shews to me that a public highway on the strip of land in dispute exists and the appellant cannot

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successfully claim that his title could prevent the public from using it.

For these reasons the appeal should be dismissed with costs.

MIGNAULT, J.:—My brothers have so fully dealt with this case that my conclusions may be briefly expressed.

The City of Victoria had decided by by-law to widen Pandora Avenue and to take by expropriation a strip from Moody's land facing on that avenue, and a notice to treat was served on Moody. This was in 1912, and Moody, whose land was being taken compulsorily, filed in April, 1912, a claim with the city for compensation, cost of removal of buildings and depreciation in rental value amounting to $6,260. The city decided to pay this amount to Moody and the latter, on May 23, 1912, executed a conveyance to the city for the sum of $6,260, of the strip of land required for the widening of the avenue. This conveyance was not registered and it is only in March 1917, that the city applied for its registration.

The expropriation by-law was not published as required by R.S.B.C. 1911, ch. 170, sec. 53, sub-sec. 176, and the notice of its adoption, which was published in the Gazette, is not, in my opinion, the publication required as a condition of the by-law coming into effect. I concur with the reasons of my brother Duff on this branch of the case and hold that this by-law did not come into effect, although Moody—and this is a feature of the case in so far as the question of dedication is concerned—must be taken to have assumed that under this by-law his land was expropriated for the purpose of the street widening and that the sole question was as to the amount of the compensation to be paid him.

The city, it is true, applied for registration of the by-law in June, 1912, and this application should have been noted as pending by the registrar, which however was not done. The application was refused in October, 1914, and the city did not appeal from the refusal.

In the meantime it was proposed to Bailey, who then resided in Victoria, to loan $15,000 on Moody's property, and after Bailey had ascertained the assessed value of the property, a mortgage was granted to him by Moody of this property on March 8, 1913. On March 10, 1913, Bailey obtained from the Registrar-

General a certificate of incumbrance shewing that there were no charges on Moody's land save Bailey's application to register his mortgage. Bailey duly advanced the $15,000 to Moody on the security of the property and his mortgage was registered on April 15, 1913.

As matters then stood, Bailey's mortgage was the only charge on Moody's property and was unaffected by Moody's unregistered conveyance to the City of Victoria. The latter, however, being unable to set up against Bailey the expropriation by-law for want of publication and Moody's conveyance for want of registration, claims that Moody dedicated the strip of land for the purposes of the highway and the Att'y-Gen'l of British Columbia, as representing the public, joined the city in demanding that this dedication be declared effective.

Dedication is of course a matter of intention, and I will assume that Moody, who had received a notice to treat and who was submitting to a by-law expropriating a strip of his land for the widening of the highway, intended to dedicate this strip as a part of the highway. But intention to dedicate, although of course essential, does not alone suffice for a complete dedication. There must be an acceptance by the public and this acceptance is complete when there has been user of the dedicated land by the public.

Now it cannot be questioned that any user of this strip of land by the public was subsequent to the registration of Bailey's mortgage, and unless Bailey acquiesced in the dedication by Moody, I would think that no dedication of the strip of land by Moody can be set up against Bailey. To my mind, under the circumstances of this case, the only question is whether or not Bailey assented to Moody's dedication.

The trial Judge, Murphy, J., was of the opinion that the dedication had been accepted by the city before the Moody mortgage, because he apparently thought that public user—and there was none before April, 1914—was not essential to a valid dedication. But assuming that this view was incorrect and that the mortgagee's assent or public user was essential to complete the dedication, the trial Judge held that Bailey had assented to the dedication. This, as the Judge clearly indicates, was merely an inference. He says (44 D.L.R., at pages 341-2):—

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Assuming that where a mortgagor is in possession of mortgaged premises, the mortgagee's assent is necessary to a dedication, and further assuming that user is essential to a valid dedication, I hold, on the facts here, the defendant must be held to have given such assent. The inference of assent by a mortgagee, cannot, I think, require more cogent proof than does the inference of dedication by the owner. If so, the evidence (excluding everything that occurred prior to April, 1914), already referred to as establishing dedication by Moody, establishes, in my opinion, assent by Bailey. In addition to this evidence, the record shews that Bailey was throughout this period resident in Victoria, that at any rate, some short time after the actual work was entered upon, he devoted particular attention to this property because of default in the payment of interest, that he has personally used the sidewalk built on the disputed land and that he made no objection until his pleadings in this action were filed.

Bailey was not called to testify before the trial Judge, but his evidence on discovery was put in at the trial, and his story is that so long as his interest was paid, and it was regularly paid for a couple of years, he did not bother about the property at all. He saw that the fence had been removed, that a sidewalk had been built along the strip, but he considered that it did not concern him at all so long as his interest was paid. There was of course a good deal of talk about the future of Pandora Avenue, for at the time there was quite a boom in real estate in Victoria, but Bailey's position seems to be this, that when he lent the money the property was assessed at a value of from $75,000 to $80,000, that he thought he had a gilt edge security, and it only was when the interest payments stopped and very high taxes were imposed on the property for the widening, that he concerned himself with the matter.

With all deference, I cannot think that from Bailey's evidence a fair inference can be drawn that Bailey assented to the dedication by Moody of a strip of his property as a part of the highway. As I have said, the assent of Bailey was merely inferred by the trial Judge from the circumstances, and in a matter of inference this Court is in as favourable a position as was the trial Judge. Thinking as I do that Bailey, by the registration of his mortgage after obtaining a certificate from the Registrar that the property was clear of charges, acquired a title which was unaffected by the expropriation scheme of the City of Victoria, I would not without the clearest evidence assume that Bailey assented to anything which would deprive him of his security as to any portion of the land covered by his mortgage. The City of Victoria acted with extreme carelessness in this matter. It paid Moody, obtained

a conveyance from him and neglected to register it. It passed an expropriation by-law and failed to publish it as required by statute. It attempted to register this by-law, and when registration was refused, it did not appeal from the refusal as it could have done. The allegation that there was dedication by Moody appears to have been an afterthought, and was only made by an amendment. I would not under these circumstances come to the assistance of the city so as to affect in any way a security obtained for a *bonâ fide* advance of money made on the faith of the public register.

In arriving at this conclusion I have given due consideration to the fact that the finding of the trial Judge that Bailey assented to the dedication was concurred in by a majority of the Judges of the Court of Appeal. But I do not think that the great weight which is generally given to concurrent findings of fact precludes me in a matter of this kind from expressing my own judgment as to the inference drawn by the Judges. In *Montgomerie & Co.* v. *Wallace-James*, [1904] A.C. 73, the House of Lords decided that there was no law or settled practice of that House to prevent it from differing even from two concurrent judgments of fact, and that the House could not decline the duty of formally expressing its own judgment. Of course, as stated by Lord Macnaghten in *Johnston* v. *O'Neill*, [1911] A.C. 552, at page 578, adopting the dictum of Lord Watson in *Owners of the "P. Caland"* v. *Glamorgan S.S. Co.*, [1893] A.C. 207, at page 216,

> a Court of last resort ought not to disturb concurrent findings of fact by the Courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous.

Here I feel convinced that the finding that Bailey assented to a dedication by Moody is erroneous, may I say so with all possible respect for the Judges who thought otherwise. Moreover, as I have said, this is a matter of inference and does not rest upon the credibility of witnesses, and the recent case of *Dominion Trust Co.* v. *New York Life Ins. Co.*, 44 D.L.R. 12, [1919] A.C. 254, is an authority for the proposition that (quoting from, [1904] A.C. 73, at page 75),

> where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an Appellate Court.

The appeal should, in my opinion, be allowed and the respondents' action dismissed with costs throughout.

Appeal allowed.

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ANKCORN v. STEWART.

Ontario Supreme Court, Appellate Division, Mulock, C. J. Ex., Riddell, Sutherland, and Masten, JJ. May 5, 1920.

WILLS (§ III G—135)—CONSTRUCTION—ABSOLUTE GIFT—REDUCIBLE BY EXECUTORS—DEATH OF LEGATEE BEFORE TIME OF DISTRIBUTION—GIFT ABSOLUTE ON DEATH.

Where there is an absolute gift by will, reducible by the executors "if, having regard to the circumstances at the time of such distribution, they should see fit to reduce the same"; and one of the legatees dies before the arrival of the period of distribution, the executors have no discretion to cut down the gift to such deceased person and the gift becomes absolute upon the death of such legatee.

Statement.

APPEAL by plaintiff in an action by the daughter and administratrix of the estate of Matilda Sanderson, deceased, against the grantee of the surviving executor of the will of Hugh Stewart, the father of Matilda Sanderson, for an accounting and payment over of the share of Hugh Stewart's estate to which Matilda Sanderson was entitled. Reversed.

The judgment appealed from is as follows

KELLY, J.:—The plaintiff claims under the will of her grandfather, Hugh Stewart.

For the better understanding of the issues involved, the following dates should be kept in mind: Hugh Stewart, the testator, made his will on the 5th April, 1890, and died on the 21st August 1893. His daughter, Matilda Sanderson, the mother of the present plaintiff, married George Sanderson on the 28th December, 1892, and died on the 14th December, 1893, when the plaintiff was less than a month old. Probate of Hugh Stewart's will was granted on the 26th January, 1894, to the executors therein named, namely, his widow, Margaret Stewart, and William Stewart, who was not related to the testator. Margaret Stewart died on the 24th April, 1896. Janet Stewart, the youngest of the testator's children who are named as beneficiaries in the will, attained the age of 21 years on the 19th October, 1896. She married in February, 1897. The conveyance which will hereinafter be referred to from William Stewart, the surviving executor of Hugh Stewart, to the defendant, was made on the 16th March, 1897. William Stewart, the surviving executor, died on the 29th September, 1917. On the 14th July, 1919, letters of administration of the estate of Matilda Sanderson were granted to the plaintiff.

Hugh Stewart's will drected that after his decease his wife should have the use and management of his estate, to be used for

her support and maintenance and for the support, maintenance, and education of four of his children, Margaret, Matilda, Janet, and Hugh, until the youngest of these four should have attained the age of 21 years, and that "upon the maturity of my youngest child who may be living at the time of my decease my will is that my estate real and personal, with the exception of my household furniture utensils and clothing, shall be sold or disposed of and realised upon to the best advantage by my executors hereinafter named who are hereby authorised and empowered to do all things needful for carrying out and giving effect to this my will and after making all lawful allowance to my beloved wife to dispose of the residue thereof as follows: To my son Hugh four-tenths of the sad residue and to each of my three daughters, Margaret, Matilda, and Janet, two-tenths each of the said residue. Provided however that the payment to my son Hugh shall depend upon his remaining at home and working the place under my direction and after my decease under the direction of his mother until the maturity of my youngest child living at the time of my decease, and in the event of his not remaining at home and working the place as before mentioned, then the said residue is to be divided equally among my four children, Margaret, Matilda, Janet, and Hugh, share and share alike. But any sum of money paid to my said son Hugh as wages up to the time of the sale of my estate as aforesaid shall not be deducted from his share. 3rd. Provided also that the payments to my said daughters Margaret, Matilda, and Janet shall depend upon their being still unmarried at the time of the distribution of the said residue of my estate namely on the majority of the youngest of them surviving me or as soon thereafter as possible and for this purpose I direct that the said estate of mine be sold within one year after my said youngest child surviving me shall have attained the age of 21 years then the share or shares of such one or more of them as shall have got married shall not be required to be paid in full by my said executors if they think that she or they are then in comfortable circumstances which I leave to the good judgment of my said executors and the said share or shares or portions of such share or shares thus saved to the estate shall be divided equally amongst the other persons herein named as legatees namely the three or less than three remaining legatees. 4th. For the word maturity hereinbefore used read majority."

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The plaintiff has set up in the pleadings and claims that no action was taken or discretion exercised by the executors by way of giving effect to the above provisions in the will so as to defeat or reduce any of the benefits provided for the beneficiaries named in the will; and also that, after the death of the testator, the defendant entered into possession of all the testator's property and obtained the conveyance above referred to from William Stewart, the surviving executor, on the 18th March, 1897; and she alleges that, in the representation by the defendant that he had purchased all the interests of the other legatees under the will, and, having refused to account to her or pay her any portion of what she alleges was her mother's share in the estate of Hugh Stewart, the testator, he has committed a breach of trust for which he is accountable.

There are several obstacles in the way of the plaintiff's success. The will itself contemplates that only those of the testator's three named daughters who were unmarried at the time named for the distribution of the residue of the estate shall benefit, and that such as should marry before that time were not to be entitled to the full benefit of the bequest to her, if the executors, in whom he had reposed a wide discretion in that regard, should deem her to be in comfortable circumstances, and in such event he made express provision that such part as should not be so paid should be divided equally amongst the others already named in the will as legatees.

Matilda Sanderson had married long before the time named for the distribution of the estate, and so her right to share became dependent upon the discretion conferred upon the executors. Though not evidenced by any written document signed by the executors, there is abundance of evidence to indicate the exercise of discretion in regard to Matilda Sanderson by the two executors, and that the manner of their dealing with the daughters was in accordance with what manifestly was the desire of the testator and in exercise of the discretion reposed in them.

The testator's plan seems to have been to make special and certain provision for the daughter or daughters who should remain unmarried up to the time fixed for the distribution, in contradistinction to the daughters who prior to that time should have married, and whom the executors should deem to be in comfortable

circumstances. Matilda Sanderson's husband, at the time of and following her marriage, was to all appearances in comfortable circumstances: he was in possession of a good farm, which belonged to his father, and which, in his evidence, he said he believed at the time he occupied it, from statements of his father to him, would become his own property. The farm was stocked and equipped for farming purposes. Other witnesses stated their belief that Matilda was then as well settled for as were her own family. She was given by the executors some household furniture and other chattels to assist her in setting up housekeeping, and every indication from the evidence is that the executors, who had treated another of the female beneficiaries in a somewhat similar manner, regarded Matilda as being thereby settled with, and that in their discretion she was not to be entitled to further benefit from the estate. She died intestate, leaving her husband and the plaintiff surviving her; and, though the husband in such circumstances would have been entitled to share in anything which she had a right to receive but had not received from her father's estate, and though he knew what were his legal rights in that regard, at no time during all the great lapse of time since his wife's death did he assert or even suggest the possibility of his being entitled to claim anything from Hugh Stewart's estate; and he took no part whatever in regard thereto until just prior to the institution of the present action, when he conveyed to the plaintiff his right and interest in the estate of her mother.

It is also evidenced that, in the course of the performance of their duties, declarations were made from time to time by the executors to the effect that, in the exercise of their discretion, they had disposed of Matilda Sanderson's interests as a beneficiary under the will, in the manner above indicated. Not only is that the case, but there is further evidence that, after the death of the executrix Margaret Stewart, the surviving executor, William Stewart, similarly treated the estate, and particularly when, prior to making the conveyance referred to, to the defendant, he got in by conveyance the interest of Janet, the last unmarried daughter of the testator, following which he transferred to the defendant the property now sought to be reached.

It is contended for the plaintiff that the discretion referred to could be exercised only by the two executors, and that the

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power to exercise it did not survive or extend to the surviving executor. There is doubt as to the correctness of that view as a general proposition, even as applied to a case arising prior to the passing of the Trustee Act, 1 Geo. V. ch. 26, sec. 26 (now R.S.O. 1914, ch. 221, sec. 27), which declares that a power or trust thereafter given to or vested in two or more trustees jointly may be exercised or performed by the survivor or survivors of them for the time being. Apart from this provision, it is largely a matter of construction. The presumption is that every power given to trustees which enables them to deal with or affect the trust property is *primâ facie* given to them *ex officio* as an incident of the office, and passes with the office to the holder or holders thereof for the time being: the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the *primâ facie* presumption. The testator's reliance on the individuals to the exclusion of the holders of the office must be expressed in clear and apt language: Halsbury's Laws of England, vol. 14, p. 304. I do not think, however, that in the present instance the question arises, for I find that the discretion had been exercised and lived up to by the two executors prior to the death of the executrix Margaret Stewart, and that any action, or any act, or expression, of the surviving executor after her death was merely in pursuance of and founded on the discretion which they together had exercised in their manner of dealing with the estate before Margaret Stewart's death.

The allegation that on the testator's death the defendant entered into possession of all of the testator's property is unfounded. Following the testator's death, the use and management of the estate were in the widow, as directed by the will, and the defendant had no control or management thereof, but simply remained with his mother working the place under her direction, as required by the testator. It is likewise untrue that he represented to the surviving executor, on or prior to the 18th March, 1897, that he had purchased all the interest of the other legatees under the will, and that he thereby induced him to execute and deliver the deed referred to.

Reliance is placed upon the form of the recital in that conveyance, namely, that he had purchased all the interests of the other legatees under the will in the lands. The conveyance was pre-

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pared by the solicitor for the surviving executor and on his instructions; the recital is amply explained by this fact, and by the defendant's reliance on statements which had already been made by the executors in the course of the performance of their duties in dealing with the estate, that his sister Janet was the only surviving heir; the theory being that the other daughters, Margaret and Matilda, had been settled with, in the manner above set forth, and that consequently Janet was the only one whose interest it was necessary to acquire in order to enable the surviving executor to convey the whole interest in the property. On that state of facts the defendant was then willing that Janet should receive out of the estate the consideration which the surviving executor agreed to give her and which she did then receive.

The defendant's dealings throughout were in good faith and without improper motive or fraud such as is suggested by the plaintiff. He was not the trustee, and did not act or assume to act as such.

On the above grounds alone, though there are others as well to support the defendant's position, I am of opinion that the action must fail and be dismissed with costs to the defendant.

(To remove any doubts that there may be in regard thereto, I have not accepted as evidence the copy of the declaration of William Stewart of the 5th January, 1901.)

J. G. Kerr, for appellant.

O. L. Lewis, K. C., and *H. D. Smith*, for defendant.

MULOCK, C.J.Ex.:—This action was brought by Tillie Ankcorn, formerly Tillie Sanderson, as administratrix of the estate of her deceased mother, Matilda Sanderson, against Hugh Stewart, for the purpose of recovering from him the share to which her mother, if living, would have been entitled in the estate of Matilda Sanderson's father, Hugh Stewart the elder, being the plaintiff's grandfather and the defendant's father. Mr. Justice Kelly, the trial Judge, dismissed the action, and from his judgment the plaintiff appeals. The following are the material facts:— MULOCK, C.J.Ex.

Hugh Stewart the elder died on the 21st August, 1893, having first made his will bearing date the 5th April, 1890, the portions thereof having to do with the matters in question being as follows:—

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"1st. That after my decease my beloved wife shall have the use and management of the estate to be used for her support and maintenance and for the support maintenance and education of our four children, namely, Margaret, Matilda, Janet, and Hugh, until the youngest of the said four children shall have attained the age of 21 years.

"2nd. Upon the maturity of my youngest child who may be living at the time of my decease my will is that my estate real and personal, with the exception of my household furniture utensils and clothing, shall be sold or disposed of and realised upon to the best advantage by my executors hereinafter named who are hereby authorised and empowered to do all things needful for carrying out and giving effect to this my will and after making all lawful allowance to my beloved wife to dispose of the residue thereof as follows: To my son Hugh four-tenths of the said residue and to each of my three daughters, Margaret, Matilda, and Janet, two-tenths each of the said residue. Provided however that the payment to my son Hugh shall depend upon his remaining at home and working the place under my direction and after my decease under the direction of his mother until the maturity of my youngest child living at the time of my decease, and in the event of his not remaining at home and working the place as before mentioned, then the said residue is to be divided equally among my four children, Margaret, Matilda, Janet, and Hugh, share and share alike. But any sum of money paid to my said son Hugh as wages up to the time of the sale of my estate as aforesaid shall not be deducted from his share.

"3rd. Provided also that the payments to my said daughters Margaret, Matilda, and Janet shall depend upon their being still unmarried at the time of the distribution of the said residue of my estate namely on the majority of the youngest of them surviving me or as soon thereafter as possible and for this purpose I direct that the said estate of mine be sold within one year after my said youngest child surviving me shall have attained the age of 21 years then the share or shares of such one or more of them as shall have got married shall not be required to be paid in full by my said executors if they think that she or they are then in comfortable circumstances which I leave to the good judgment of my said executors and the said share or shares or

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portions of such share or shares thus saved to the estate shall be divided equally amongst the other persons herein named as legatees namely the three or less than three remaining legatees."

By his will he appointed his wife Margaret Stewart and one William Stewart to be executors.

On the 28th December, 1892, Matilda, one of the testator's daughters, married one George Sanderson and died intestate on the 14th December, 1893, leaving as her next of kin her husband, the said George Sanderson, and the plaintiff, then an infant. On the 24th April, 1896, Margaret Stewart, the testator's widow, died, leaving William Stewart the sole surviving executor. On the 19th October, 1896, Janet, the testator's youngest child, attained the age of 21 years. By an indenture dated the 18th March, 1897, William Stewart, surviving executor, conveyed the testator's farm to the defendant. On the 29th December, 1917, William Stewart, surviving executor, died.

In the indenture of the 18th March, 1897, above mentioned, from William Stewart to the defendant, is a recital in the following terms:—

"Whereas the said Hugh Stewart the grantee aforesaid has purchased all the interest of the other legatees under the said will in the lands hereinafter described."

In the month of November, 1914, the plaintiff attained her majority. On the 14th July, 1919, letters of administration of the estate of Matilda Sanderson were granted to the plaintiff, and on the 24th July, 1919, she instituted this action. In it she claims that the defendant had possessed himself of the assets of the testator and was accountable to her in respect of the share of her deceased mother, Matilda; and the questions in issue are:—

Is Matilda Sanderson entitled to share in her father's estate, and, if so, is the defendant accountable to her because of his having acquired the assets from the surviving executor, William Stewart, with notice of her unsatisfied claim?

For the defence it was contended that the testator left it in the discretion of his executors or the survivor to exclude any of his daughters from sharing in the estate, and that such discretion had been exercised as against Matilda Sanderson, whereby she took nothing. It was also contended that, if she was entitled, the claim was barred by the Statute of Limitations.

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The intention of the testator, as manifested by his will, admits, I think, of no doubt, and it may be summarised as follows:—

Upon the youngest of his children, Margaret, Matilda, Janet, and Hugh, attaining the age of 21 years, his estate was to be sold, and, subject to certain deductions, the residue was to be divided between the said four children, Hugh taking four-tenths, and Matilda, Margaret, and Janet each two-tenths. Then, following these gifts to the four children, is the proviso that if, "at the time of the distribution of such residue of my estate," any of the testator's daughters should have married, the executors may reduce such daughter's share if they should be of opinion that she is "then in comfortable circumstances." In other words, to each of the said daughters there is an absolute gift of two-tenths, reducible by the executors if, having regard to the circumstances existing at the time of such distribution, they should see fit so to reduce the same. Matilda having died before the arrival of the period for distribution, it became impossible for the executors to exercise the discretion given to them by the testator, to cut down her gift.

It is settled law that where the testator makes an absolute gift to a legatee, and grafts upon such gift a trust which fails, the gift remains absolute: *Hancock* v. *Watson*, [1902] A. C. 14. Applying this principle to the gift of two-tenths to Matilda Sanderson, that gift became absolute upon her death.

The direction in the will requiring the whole estate to be sold within one year of the youngest daughter attaining her majority is peremptory and for all purposes, and therefore operated as a conversion of the realty into personalty at and from that time (*Doughty* v. *Bull* (1725), 2 P. Wms. 320, 24 E.R. 748). Thus the plaintiff's cause of action is in respect of personalty.

Matilda Sanderson was not paid the two-tenths in question or any part thereof, and the plaintiff as her administratrix now seeks to recover it from the defendant, upon the ground that, in fraud of the plaintiff, he has possessed himself of all the assets of the estate.

A person who knowingly receives and deals with trust-property in a manner inconsistent with the trust is personally liable for whatever loss accrues to the trust (*Magnus* v. *Queensland National Bank* (1888), 37 Ch. D. 466, 471). Matilda had died many

years before the defendant purchased the farm, and his mother and Stewart, the other executor, had assured him that under the powers contained in the will the executors had extinguished Matilda's claim on the estate. In good faith he accepted such assurance. Nevertheless the claim had not been extinguished. He was aware that Matilda had been given a share, and, it still subsisting, he was not entitled to accept a transfer to himself, as beneficiary, of what was apparently the whole estate, thus leaving nothing in the executor's hands wherewith to satisfy Matilda's share. This was dealing with the trust-property in a manner inconsistent with the trust, and rendered the defendant a constructive trustee liable to account for the assets thus come into his hands.

During the argument counsel for the plaintiff attached importance to the recital in the deed to the effect that the defendant had purchased all the interests of the legatees. In his evidence the defendant explained that this recital was not intended to refer to Matilda's share, which both the executors and himself supposed to have ceased to exist. The executor Stewart knew that the defendant had not in fact purchased Matilda's share, and therefore was not misled by the recital, nor was any one prejudiced by it.

The defendant pleads the Statute of Limitations. The plaintiff's is a money claim—a legacy—payable out of land, and under the Limitations Act, R.S.O. 1914, ch. 75, sec. 24, the action may be maintained "within ten years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same." As it was not until the 14th July, 1919, that the plaintiff became administratrix, the claim has not been barred.

Mr. Lewis also contended that, as against a constructive trustee, the claim was barred under the provisions of sec. 47 of the Limitations Act. Section 47 is in Part II. of the Act, and that Part does not apply to a constructive trust, but only to a trust created by an instrument or an Act of the Legislature (sec. 46). He also claimed relief under sec. 37 of the Trustee Act, being ch. 121, R.S.O. 1914. That section does not prevent *cestuis que trust* following trust-assets into the hands of a constructive trustee.

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Mulock, C.J.Ex.

Mr. Lewis also argued that, as George Sanderson, the husband of Matilda Sanderson, was entitled to a one-third interest in his wife's personal estate, and had been under no disability to maintain an action in respect thereof, so much of the plaintiff's claim as applied to Sanderson's one-third interest was barred by the Limitations Act. This is not an action by Sanderson, but by his wife's administratrix. He derives title through her. Until her appointment no one was entitled to bring an action in respect of the legacy or any part of it. The statute did not begin to run as against any of the beneficiaries of Matilda Sanderson's estate until the appointment of an administratrix.

For these reasons, I am, with respect, unable to agree with the view of the learned trial Judge, and think that this appeal should be allowed, and the judgment below set aside, and that judgment should be entered declaring that the plaintiff, as administratrix of Matilda Sanderson, is entitled to a two-tenths part of the testator's estate, and that the defendant is accountable to her in respect thereof to the extent of the value of a two-tenths part of the said estate coming to his hands.

As to costs: the defendant was guilty of no moral wrong, but was led into the unfortunate position of constructive trustee by the innocent mistake of the testator's executors that they had extinguished Matilda Sanderson's claim. Under such circumstances, he should not be ordered to pay the plaintiff's costs down to judgment, but he should pay the costs of the appeal.

Sutherland, J.
Masten, J.
Riddell, J.

SUTHERLAND and MASTEN, JJ., agreed with MULOCK, C.J.Ex.

RIDDELL, J.:—The late Hugh Stewart had a family of three sons and six daughters. Some of these had been married and received their "setting out" from the father, and, for that or some other reason, the father when, on the 5th April, 1890, he came to make his will, made provision for only four of his children, his son Hugh and his three daughters, Margaret, Matilda, and Janet. Apparently these four were at home with their parents at the time (whether Margaret was or not is not made quite clear, but the question is immaterial in any case). The will is set out with sufficient particularity in the reasons for judgment of Mr. Justice Kelly.

Margaret seems to have been the first of the three daughters to leave the paternal roof. She married and went to the United

States. Matilda left home in 1891, and, after keeping house for about a year for two brothers, she married George Sanderson in December, 1892. Her father sent her, by her brother Hugh, a "setting out," a cow, bedding, and furniture.

In August, 1893, Hugh Stewart died without in any way changing his will, and early in 1894 letters probate were granted to the widow and William Stewart.

The plaintiff, Tillie Ankcorn, is the daughter of Matilda and her husband, George Sanderson. The plaintiff was born in November, 1893, and her mother died next month, intestate.

The widow of Hugh Stewart continued on the farm until her death in April, 1896, a few months before the youngest child, Janet, came of age, October, 1896. Janet was about to be married, and Hugh was also about to be married, and it was arranged that Hugh should pay Janet $1,500 as her share of the estate. This amount was arrived at in the presence of the surviving executor, William Stewart; it was also arranged that Margaret was to receive $100, and this sum was paid before the deed now to be mentioned was made. The executor, Hugh, and Janet went to Woodstock to have a deed drawn vesting the land in Hugh. The executor told the lawyer that Hugh and Janet were the sole surviving heirs. Hugh says that the lawyer told him that the executor had told him (the lawyer) that Matilda had got her portion of her father's estate, and "I didn't try to correct the lawyer." In the result, a deed was drawn up and executed by the executor, conveying the land to Hugh, on the 18th March, 1897. This contains the recital: "And whereas the said Hugh Stewart, the grantee aforesaid, has purchased all the interests of the other legatees under the said will in the lands hereinafter described."

The plaintiff, on the death of her mother in 1893, was taken by her paternal grandfather into his home, and grew up there until the death of her paternal grandmother, when the child was about eight; then she returned to her father and lived with him for some five years, when she left to care for herself. On attaining her majority in 1914, she obtained a copy of her grandfather Stewart's will and wrote the executor William Stewart several times, but received no reply. In 1916 she consulted a firm of solicitors in Owen Sound (she had married in the meantime), and they wrote

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to James Stewart, the son of William Stewart (who had died in December, 1917.) James answered, giving the particulars as he understood them.

The plaintiff wrote the defendant, her uncle Hugh Stewart, on the 31st January, 1919, a third time, asking for her share, but without reply, and then she consulted solicitors in Chatham, took out letters of administration to her mother's estate, obtained an assignment of her father's claim, and on the 24th July, 1919, issued a writ against her uncle Hugh, which is the beginning of the present action. She sues as administratrix of her mother's estate, and claims an accounting by the defendant of all the property he received from the executors of his father's will, an order for the payment to her of one-fifth, and general relief. After a trial at Chatham, my learned brother Kelly dismissed the action, and the plaintfff now appeals.

A perusal of the will makes it at once apparent that there is an express direction to sell the estate (*exceptis excipiendis*), and an express disposition, after "all lawful allowance" to the wife, of two-tenths to each daughter named. Some doubt was attempted to be cast upon the next provision to be considered; but, reading the whole will, there can be no doubt of the meaning of the words. It is as though the testator said: "Keep the property together until the youngest child comes of age, then sell it with all convenient speed;" make "all lawful allowance" for my widow; give Hugh his four-tenths; if any of the daughters is still unmarried, give her her two-tenths; if any "have got married" "look into her circumstances and if you think that she is *then* in comfortable circumstances deduct so much of her two-tenths as your good judgment directs, and divide the amount so saved amongst Hugh, the unmarried daughters, if any, and any married who shall not be in such comfortable circumstances." It is plain that the time of exercising the discretion is fixed to be "on the majority of the youngest of them surviving or so soon thereafter as possible," and that it is not the previous condition of the daughters but their condition *then* which is to be considered. It might well be that a daughter on being married would be well and comfortable, but, by misfortune, fire, sickness, or the like, be so reduced at the time of distribution as not to be in comfortable circumstances, and *vice*

versâ. Moreover, it is equally plain that what is to be considered and the only thing that is to be considered by the executors is the existing state of the daughter, not the amount absolute or relative which she may have received from the father before his death.

Both the mother and her co-executor William Stewart seem to have considered that what Matilda received from her father on her marriage as a "setting out" evened her with those who were not mentioned in the will, and therefore she was to be excluded from all claims on the estate.

This has two vices: (1) the judgment was formed before the time had come to form it; and (2) it was based upon wrong premises.

Before the time had come for making an estimate of the circumstances of the daughters, Matilda had died. The death of a child or children before the time of distribution had been contemplated by the testator; the time for distribution was to be the "majority of the youngest (of the four) surviving," but he did not see fit to make any provision for the reduction of the share of any so dying. The provision for considering the "comfortable circumstances" is wholly inapplicable, in the present age, to the case of one who has passed away from this world, and the condition upon which alone the share of Matilda could be reduced did not exist. Consequently, by the well-established rule, the absolute provision must prevail: *Hancock* v. *Watson*, [1902] A.C. 14, especially at p. 22; *In re Currie's Settlement*, [1910] 1 Ch. 329; *In re Connell's Settlement*, [1915] 1 Ch. 867, and like cases, following the leading case of *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551, 41 E.R. 1379.

It follows that, at the majority of Janet, Matilda's personal representative, had there been such, was entitled to the two-tenths of the estate. By granting the land to Hugh, and thereby placing it in Hugh's power to convey to a *bonâ fide* purchaser without notice (as he did in 1901), the executor was guilty of a breach of trust: Hugh, knowing all the facts, participated in that breach of trust, and came into possession of the trust-property and dealt with it as his own.

Knowing all the facts, however innocent he may have been of fraudulent intent, Hugh must be considered as holding the land upon the same trusts as his grantor: Lewin on Trusts, 12th ed.,

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pp. 1073, 1100, *sqq.*; Halsbury's Laws of England, vol. 28, pp. 204 *sqq.*, para. 407.

When he sold the land in 1901, it was his duty to pay a proper share to the personal representative of the deceased Matilda, in other words, to pay to him the amount indicated in the will.

It must be considered of importance to determine what the real claim against the defendant is in order to determine the time at which, if at all, the claim would be barred.

The claim does not come under the Limitations Act, R.S.O. 1914, ch. 75, sec. 47, which excludes an action to recover the proceeds of trust-property, but rather under that part of sec. 24(1) which speaks of legacies whether charged upon land or not. There the time begins to run when there arises "a present right to receive the same . . . to some person capable of giving a discharge for or release of the same." That the money which the four children named in the will were to receive is a specific legacy appears from the leading case of *Page* v. *Leapingwell* (1812), 18 Ves. 463, 34 E.R. 392—*cf.* what is said by Chitty, J., in *In re Tunno* (1890), 45 Ch. D. 66, at p. 69. That such shares are governed by sec. 24 of the Limitations Act, R.S.O. 1914, ch. 75, corresponding in this respect to the (now repealed) statute of 1833, 3 & 4 Wm. IV. ch. 27, sec. 40 (Imp.), appears from *Prior* v. *Horniblow* (1836), 2 Y. & C. (Ex.) 200; *Adams* v. *Barry* (1845), 2 Coll. 285, 293, 63 E.R. 737; and the last-named case shews that such is the case when the estate has got into the hands of some one other than the executor. The limit of time then is ten years after the right to receive the legacy accrued to some person capable of giving a discharge. By the Devolution of Estates Act, R.S.O. 1914, ch. 119, sec. 3(1), all real and personal property of the deceased vests in the personal representative, and there is no such provision for divesting personal property as is made for divesting real property under secs. 13 *sqq.* of the statute. Accordingly, until a personal representative of Matilda comes into existence, no right of receiving the legacy or of giving a discharge exists anywhere. The statute, then, begins to run on the grant of letters of administration. The same result would follow if the Statute of James were the governing law: *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204; see pp. 214 and 215, *per* Abbott, C. J., (106 E.R. 1167): "It cannot be said, that a cause of action exists, unless there be also a person in existence capable of suing;" *cf.*

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Musurus Bey v. *Gadban*, [1894] 2 Q.B. 352 (C.A.); *Meyappa Chetty* v. *Supramanian Chetty*, [1916] 1 A. C. 603, at p. 609.

I think there is nothing in the Statute of Limitations which bars the claim.

The claim should be allowed and judgment entered for the plaintiff. If the parties can agree, as they should, the amount should be stated in the judgment; if not, there should be a reference. In any case the plaintiff should have her costs on the Supreme Court scale, of action and appeal; if a reference should be necessary, the costs of the reference should be in the discretion of the Master, and judgment should be entered for the sum so found due, with costs as the Master may direct.

I am glad that it has not been necessary to deal with this case on the ground of fraud.

Appeal allowed.

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Canada Supreme Court, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. February 3, 1920.

TAXES (§ II—97)—QUEBEC SUCCESSION DUTY ACT—SITUS OF PROPERTY—DIRECT TAXATION WITHIN THE PROVINCE—B.N.A. ACT, SEC. 92 (2). The succession duty imposed by the Quebec Succession Duty Act (4 Geo. V. 1914, ch. 10), upon "all transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death" is direct taxation within the province and *intra vires* the Quebec Legislature under sec. 92 (2) of the B.N.A. Act.

[*The King* v. *Cotton* (1912), 1 D.L.R. 398, 45 Can. S.C.R. 469; *Standard Trust Co.* v. *Treasurer of Manitoba* (1915), 23 D.L.R. 811, 51 Can. S.C.R. 428, *Woodruff* v. *Att'y-Gen'l for Ontario*, [1908] A.C. 508, applied.

Statement.

APPEAL from a judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of Lemieux, C.J., at the trial (1918), 55 Que. S.C. 301, and dismissing the appellant's action. Reversed.

Lanctot, K.C., *Geoffrion*, K.C., and *L. S. St. Laurent*, K.C., for appellant; *E. Lafleur*, K.C., and *J. P. A. Gravel*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—The questions raised in this appeal are no doubt most important ones relating, as they do, to the power of the several provinces of Canada to levy succession and legacy duties on personal or movable property locally or actually situate outside of the province but owned at the time of his death by one domiciled in the province.

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In the present case the property on which or the transmission of which it was sought to recover the duties consisted of intangible property, namely shares in companies whose head offices were outside of the Province of Quebec.

The Superior Court, acting upon and applying the well-known rule *mobilia sequuntur personam*, gave judgment for the plaintiff *ès-qualité* for the amount of the duties levied and payable under the statute.

This judgment was reversed on appeal by the Court of King's Bench in a majority judgment of that Court which held that

the powers of the Provincial Legislature are not plenary but limited to "direct taxation within the province;" (British North America Act, sec. 92, (2); and that any attempt to levy a tax on property locally situate outside the province is not taxation within the province and is beyond the competence of the Provincial Legislature; that the taxation of transmissions within the province of property locally situate outside the province is an attempt to do indirectly that which the Legislature is forbidden to do directly and is in effect taxation of property within the province; and that the property and shares in question in this case are locally situate and have a situs outside the province.

I agree with that part of this judgment which declares the powers of the Provincial Legislature not to be plenary but to be limited to "direct taxation within the province." And I further agree that the taxation of "transmissions within the province" of property locally situate outside it is an attempt to do indirectly that which the Legislature cannot do directly, but I differ from the conclusion reached by the Court that the property and shares in question in this case are locally situate and have a situs outside of the province and so beyond the jurisdiction of the Provincial Legislature in levying succession duties. The judgment now in appeal ignores the application of the rule making the domicile of the deceased owner, in questions arising out of succession and legacy duties, the test of the situs of the property and shares in question and adopts that which allots the situs to the location of the head office of the respective companies and so carries this intangible property outside of the Province of Quebec.

In an appeal case from the Province of Nova Scotia, recently decided in this Court, *Smith* v. *Provincial Treasurer of Nova Scotia* (1919), 47 D.L.R. 108, 58 Can. S.C.R. 570, this Court held that to determine the situs of personal property liable to succession duties on the death of the owner the rule to be applied is that expressed in the maxim *mobilia sequuntur personam*.

That judgment was the subject of much consideration and all the authorities bearing upon the question there in issue were carefully studied.

I may say that owing to the grave and great importance of the question I have deemed it right in this appeal again to re-read all these authorities with the result that I am more firmly convinced than ever that, in construing the powers of "direct taxation within the province" granted to Provincial Legislatures by our Constitutional Act, so far as the levying of succession and legacy duties are concerned, the true rule is that which existed alike in Great Britain as in the Province of Quebec at the time such Act was passed, namely, that the domicile of the deceased owner of the property, and not its actual location at his death, determined which Province could impose succession and legacy duties upon it. That rule is not applicable in the construction of statutes levying probate, and estate duties or other taxes, but is confined to succession and legacy duties. The whole question was thoroughly thrashed out and determined in the House of Lords, in the appeal case of *Winans* v. *Att'y-Gen'l*, [1910] A.C. 27, where the rules respecting succession and legacy duties and estate and probate duties are clearly laid down and the reasons for the application of the *mobilia* rule to the two classes of duties, succession and legacy, are given and for its non-application to estate and probate duties. I was greatly tempted to embody in these reasons of mine some extracts from the judgments of the noble lords who decided that case. They were unanimous in their reasons for the judgment they delivered in determining that so far as succession and legacy duties were concerned the domicile of the deceased owner, and not the local situation of the property, must be taken as the controlling factor. As Lord Atkinson said at page 32:—

> In each case (namely legacy or succession duty) the same principle brings constructively the property within or carries it without the reach of the taxing Statutes of this realm according as the domicile of its deceased owner is without or within the realm,

and as he says on the same page, "wide as is the language of the statute imposing them."

If that was the true rule applicable to ordinary Imperial legislation, why should it not be applied to our Constitutional Act? To my mind there is greater reason in so applying it to such a statute as ours creating a confederation of then existing and of

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future provinces in one dominion and delimiting their powers of legislation, than to ordinary statutes. The grounds upon which the rule of the domicile was first introduced are stated to be based upon convenience and international law. To my mind, such grounds afford the strongest reasons for construing our Constitutional Act in accordance with the rule of the domicile so long and universally adopted.

I venture in conclusion to reproduce a paragraph from my reasons for judgment in the case of *Smith* v. *Provincial Treasurer of Nova Scotia*, 47 D.L.R. 108 at 110, 58 Can. S.C.R. 570:—

> The broad ground on which that judgment rests is that the maxim *mobilia sequuntur personam* embodies the principle applicable to the succession of property of a domiciled decedent of any province of Canada for succession and legacy duties, as distinct from probate or estate duties; that in regard to those special succession and legacy duties the domicile of the decedent and not the physical or artificial situs of the property must prevail; that this was the law in England decided in a series of cases before the B.N.A. Act was passed and that the power of taxation within the province granted to the provinces in sub-sec. 2 of sec. 92 of that Act must be construed in accordance with the English law as it then was decided to be; that accordingly each province has the power of levying succession and legacy duties only upon the personal property passed by a domiciled decedent of the province, which either is locally situate therein physically or by virtue of the maxim *mobilia sequuntur personam* is drawn into such province by reason of the domicile; that while the Imperial Legislature itself or a colony possessing plenary powers of taxation could at any time overrule the principle embodied in the maxim (see *Harding* v. *Com'rs of Stamps for Queensland*, [1898] A.C. 769), the several provinces of Canada being limited in their powers cannot do so or by any enactment of their own enlarge or extend the powers of taxation granted to them by sec. 92 of the B.N.A. Act; that any other construction of these powers of taxation would create endless, if not insuperable difficulties and would subject the same property to possible double liability to succession duty taxation, one in the province where the domiciled decedent owned the property and the other in which it was locally situated at his death. The result of the holding, in which I concur, would be that the domicile of the decedent would be the test in Canada of the right to levy succession duties upon his personal property wherever it might be locally or physically situate that such taxation could only be levied by the province of the domicile.

For the foregoing reasons I would allow this appeal with costs and restore the judgment of the Superior Court.

Idington, J.

IDINGTON, J.:—The question raised by this appeal is whether or not 4 Geo. V. 1914 (Que.), ch. 10, is, as regards the taxation imposed thereby, *ultra vires* of the Quebec Legislature.

The first part of the section in question (sec. 1387*b*), reads as follows:—

All transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death, shall be liable to the following taxes calculated upon the value of the property so transmitted, after deducting debts and charges hereinafter mentioned.

This, contrary to the express language used, it is urged must be read as a taxation of property outside the province. I cannot so read it by any of the ordinary rules of interpretation and construction.

It is, the transmission "within the province" by force of the laws enacted by the Legislature of the province, in virtue of its exclusive jurisdiction under the B.N.A. Act, sec. 92, over (item 13), Property and Civil Rights in the Province, which clearly is dealt with, and not something else constituted by the theories of interpreters as a basis for their interpretation of this section.

The Legislature which is given thus the power to destroy, if it see fit, can surely take a toll upon that which its creative power confers.

It has not gone so far as to attempt to destroy the supposed right of successions but has, on the contrary, conferred that right by virtue of its laws and imposes as a condition of the assertion of such right the tax measured by a scale set forth.

We are so accustomed to assuming, which is not the legal fact, that the property left by a deceased person becomes as a matter of course, that of some survivor named in a will, or statute of distributions, or other law of succession, that we forget that both will and succession of another sort are but the creation of the legislative powers over property and civil rights.

The right to tax the transmission is, in the last analysis, but the right to define to whom the property of a person domiciled in a country shall pass at the death of him so domiciled.

Such an exercise of the power of taxation is as direct as anything can well be, and is certainly as direct as that imposed by the licensing of a brewer in Ontario to carry on his business, which was upheld by the Judicial Committee of the Privy Council in the case of *Brewers & Malsters' Ass'n of Ontario* v. *Att'y-Gen'l for Ontario*, [1897] A.C. 231.

It was argued therein that the licensing power was indirect and therefore *ultra vires*.

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It has never been argued since, until recently, that the taxation of the exercise of any supposed right within a province was something so impalpable; indeed such a mere "abstract concept," that such taxation was unthinkable and hence impossible.

If that is a complete answer then I submit the imposition of a licensing tax as a preliminary condition to the carrying on of a business, or use of an automobile, for example, would seem to be thus left without any basis to rest upon.

If that sort of argument must prevail and be given effect to, then, of course, there can be nothing in the basis which I have suggested above for taxing transmission.

I hope it will not be necessary in order to demonstrate the existence of the fundamental basis of such a tax to repeal all laws of succession and begin anew.

We are asked to follow what has been properly designated by Pelletier, J., in the Court of King's Bench as only an *obiter dictum* in the case of *Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176.

The judgment in that case proceeded upon the construction of the Act there in question, being by its terms confined to property within the province, and upon that ground alone it was held that the appeal must be allowed.

Then their Lordships proceeded to deal with another ground which, with great deference I submit, was not necessary or necessarily relevant to the decision of the case.

The fact that at least the members of the majority in this Court had each written judgments resting partly or wholly on the right and power to tax a transmission of property by force of the laws of the province, apparently received no consideration.

For my part, I had with tiresome, probably too tiresome, reiteration presented that view of the case in many ways in *The King* v. *Cotton* (1912), 1 D.L.R. 398, 45 Can. S.C.R. 469.

I, therefore, must refrain from enlarging upon it here, and refer the curious (if any, in that regard), thereto and to the case of the *Standard Trust Co.* v. *Treasurer of Manitoba* (1915), 23 D.L.R. 811, 51 Can. S.C.R. 428, wherein I presented the same views; I therein pointed out that if people could get property situated outside the province which had been that of a deceased person who had been domiciled at death in the province, without asking recognition of some provincial authority, or relying upon provincial

law, then they might escape the tax. The case of *Woodruff* v. *Att'y-Gen'l for Ontario*, [1908] A.C. 508, illustrates how it may be done by transactions *inter vivos*.

The judgment of the Judicial Committee of the Privy Council in the *Cotton* case, 15 D.L.R. 283, [1914] A.C. 176, above referred to, at page 293, contains the following paragraph.

> To determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation. Take, for instance, the case of movables such as bonds or shares in New York bequeathed to some person not domiciled in the province. There is no accepted principle in international law to the effect that nations should recognise or enforce the fiscal laws of foreign countries, and there is no doubt that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of such securities after satisfying the demands, if any, of the fiscal laws of New York relating thereto. How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from someone who was not intended himself to bear the burden but to be recouped by someone else. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

This seems to suggest the possibility of the production of the will and proof of its execution before the Court in New York entitling the legatee to get possession and ownership of the securities there.

But, with great respect, I submit that neither was there in that case, nor is there in the present case, any evidence demonstrating as a practical possibility, such a course as outlined.

I am not prepared to say that, if it were proven that there was no other property than in the foreign state and that the laws of that state were of the unusual character which would permit such a proceeding in respect of the will of a testator domiciled in Canada, or other country outside of that state, such a mode of proceeding would be impossible.

If, however, as happens almost universally, the executor, in order to enable him to get possession of the goods, which were the property of his testator (and he can only get possession thereof by means of the law of that testator's domicile at death) is thereby under the necessity of applying to some authority created by a Provincial Legislature to give the necessary recognition of the right as defined by that law; or that law giving the right is so conditionally framed as to give rise to any right only upon due compliance with the taxing terms imposed; then he is surely

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bound to submit to the terms thereby imposed, and pay such tax as required as the price of such recognition. I hold that is very direct taxation.

The scale of its distribution is but another term of the conditions which the state conferring the right or assenting to the necessary recognition of it sees fit to impose, and, like many other subsidiary things such as involved in the due and convenient means of the execution of the business in hand, has nothing to do with determining the question of the constitutional right to impose such a tax. There is nothing save the question of that right involved herein.

I may say that probably the fair construction to be put upon that above quoted is that it was not intended to assert, as matter of law, all that it seems at first blush to imply, but merely as an illustration of what is to be understood as direct taxation within the Act.

Assuming that to be all intended then, for the reasons I have already assigned, it does not fit this case or meet the argument I present which induces me to hold that the tax in question is most direct taxation, and much more clearly so than was the tax imposed in question in the case of the *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575.

I do not understand that the judgment in the latter case, or in any other, unless in the above mentioned *Cotton* case, 15 D.L.R. 283, [1914] A.C. 176, in which reference has been made to the definitions by John Stuart Mill of direct and indirect taxation, maintains them as a final determination of what must imperatively guide us in relation to any question arising from the taxing power conferred by the B.N.A. Act upon the Provincial Legislatures. To impose such a test as obligatory and conclusive in all cases would, I submit, be productive of much mischief. Indeed the judgment in the said case of *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, expressly renounces at pages 581 and 582 any such test as obligatory.

The very able group of men who framed the B.N.A. Act certainly had presented to their minds the actual case of customs dues, most frequently spoken of in those days as indirect taxation which then, apart from the others, such as revenues from wild

lands, was the chief source of revenue on which the Government of old Canada depended for carrying on.

In the scheme of government which they were concerned in framing, it was intended that all (except that or the special provisions of a temporary nature provided for in sections in ch. 8, under caption of Revenues; Debts; Assets; Taxation), derivable from customs, should go to the Dominion and be incidental to the regulation of trade and commerce, and that none of the provinces should be permitted to interfere therewith.

To render the chief indirect mode of taxation of the day an impossible source of revenue by way of taxation by any province, sec. 121 of the Act was enacted.

In contradiction to that chief revenue derived from the customs dues, universally recognised as indirect taxation, the term "direct taxation" no doubt seemed appropriate for use in the section of the B.N.A. Act in question herein, especially to designate other available taxation which, when thus confined within the province must of necessity be what in popular language would be presumed to be direct taxation.

That the framers of the Act designed, except in that sense, to impose therein upon the provinces an obligatory observance of the doctrine enunciated by any philosophic writer on economic questions, however eminent, I most respectfully deny.

To hold otherwise would be to assume, for example, that a tax upon land which on close examination is generally an indirect tax according to the definition quoted, though in the popular sense it is taken to be a most direct tax, and is imposed in some of our provinces.

Yet, according to Mill's definition (John Stuart Mill, Political Economy, ch. 3, page 367) it would, I submit, if imposed here by clear headed men, be one of an indirect character, for assuredly in this country, under the conditions existent therein, such a tax would fall within the meaning of the definition of indirect taxation which he gives as follows:—

> A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.

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Despite my high regard for the author's work I doubt if the definition, resting upon intention and desire, is a very happy one. Some of the masters imposing a land tax might deem it direct and the clear headed see its beauty in its indirect character, though not always so.

I need not elaborate, or shew how (whether expected or not) the possessor of land so taxed would inevitably succeed in reaping a return of taxes so imposed from those renting from him, or how in the case of business properties the tax would become further distributable.

Social conditions in countries where the possession of land adds so much to the importance of the possessor that he may be averse to refrain from exacting the indemnity against such a tax and hence the definition, so far as relates to direct taxation, may be applicable to some lands; but here where land is held chiefly for what there is or is supposed to be in it, as a monetary investment, the result of imposing such a tax is certainly expected, by those possessing clear heads, to become so operative as to make a tax on land felt by him who as tenant occupies it for business purposes and thus impel him to distribute the burden over those buying his merchandise or manufactured goods.

I am not to be taken as assuming that, instantly such a mode of taxation may be adopted, the then possessor of land could in every instance be able to collect reimbursement of the tax from someone else, but ultimately such would be the manifest result in almost every case.

In those cases where the terms of the lease, as not infrequently happens, provide that the tenant pay all taxes the tax in the case of business properties would be almost instantly distributable in the way I suggest.

Even in the imposition of such an indirect tax as customs dues there are many instances as in its operation in the case of him importing for his own use where it becomes as direct as any tax can be and is not invariably distributable.

Again the taxation of land by municipalities had been and still is their chief source of revenue.

Another source of their revenue, especially in Ontario, then Upper Canada, was the taxation of commodities which is classed by political economists as indirect taxation. And so it continued

for thirty-four years after the B.N.A. Act had been enacted and then was changed as to form into the business tax.

As illustrative of the mode of thought, on the subject of taxation, prevalent in old Canada, at the time when the constitution of a joint authority for the general purposes of its government, coupled with a separate Legislature for each of the Provinces of Upper and Lower Canada, was first mooted, and there arose an agitation therefor which culminated some eight years later in the wider scheme presented by the B.N.A. Act we may profitably turn to Upper Canada's Assessment Acts.

The Consolidated Assessment Act of Upper Canada, 22 Vict. 1859, ch. 55, in sec. 8, reads as follows:—

8.—All municipal, local or direct taxes or rates, shall, when no other express provision has been made in this respect, be levied equally upon the whole rateable property, real and personal, of the municipality or other locality according to the assessed value of such property, and not upon any one or more kinds of property in particular or in different proportions.

The substance thereof was taken from an Act passed 6 years earlier and the exact language used was adopted in sec. 8 of another new Assessment Act passed in the year 1866.

The phrase "local or *direct* taxes or rates" evidently had no relation to theories of writers, such as Mill, on political economy, for each of these several Acts provided for the imposition of taxes on commodities which according to such theories would be indirect taxation.

I present its use as a fair sample of the Canadian mode of thought in relation to the question of what must have been intended by the words "direct taxation within the province" as used in the item No. 2 of sec. 92 of the B.N.A. Act, now to be applied herein.

Quite true that basis of taxation to which I refer was only used for purposes of municipal revenue and not for those provincial revenues now in question. Yet its adoption when expressly designated as "direct tax" suggests how little the framers of this Act, knowing of and having regard to the possibilities of the future possible variation in such municipal assessment Acts by the Legislatures they were calling into being, had regard to mere economic theories in using the term "direct taxation within the province," for the master spirits among them had taken part in enacting these municipal assessment Acts.

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Is it conceivable that it was intended to give to the creations, prospectively in the power of Provincial Legislatures, as all municipal institutions were to be and to become liable to be in fact increased by them in importance, and taxing power, and assigned wider powers of taxation than each of such Legislatures was being assigned for its own purposes? Or, is there to be applied the still more absurd alternative, that thenceforward all taxation, which political economists of the time deemed to be indirect, were to be eliminated from municipal taxation?

I hold neither of these alternatives should be adopted as expressive of the intention of those using in the B.N.A. Act the term "direct taxation" to limit the operation of the power so conferred, to the meaning of the word "direct" within the lines laid down by any political economist.

This is not the place for an essay on the subject.

I merely desire to point out how dangerous it is to question the authority to tax land as a source of provincial revenue, and how thoroughly illusory must be the dependance, solely upon some of the best of philosophic theories in political economy, as the only or even chief means of interpreting the language used by very able and practical statesmen in framing this division of the powers of government.

And let us never forget that the home Parliament in that enactment was but trying to correctly appreciate and execute the purposes dictated by the then mode of Canadian thought, and that the expressions therein ought to be interpreted as far as possible in accord therewith.

No Canadian who lived through those strenuous times is likely ever to discard that point of view unless and until by due constitutional methods another has been substituted therefor.

I admit that whilst rejecting such guiding lines in the sense of their being obligatory and finally determinative of any such question as raised herein, they may well be casually as it were, considered as an element proper for consideration along with other possible features, in the way which has been done in some of the cases in which they have been used or incidentally referred to.

To sum up: The purpose of the provision now in question was to assign to each province the direct use "within the province"

of the taxing power, just as fully as possessed by any other autonomous state, in relation to all those subjects or subject matters assigned exclusively to the several Provincial Legislatures; saving the use of those taxing powers which were being assigned either expressly or by clear implication, exclusively to the Dominion Parliament. That Parliament had, subject thereto, for any of its purposes, specifically assigned to it any mode or system of taxation.

The Legislature of the Province of Quebec is exercising or asserting the right to exercise just such powers as other states have, so far as relevant to the particular subject matters in question, assigned to its exclusive jurisdiction.

Whether or not the power is justly asserted in some cases is not for us herein to determine or perhaps even to pass upon, for we cannot remedy the possible evil of double, or possibly double, taxation. Yet I may be permitted to suggest that an examination of the doctrine of private international law, by which the domicile of the deceased has been made the basis of so much, as grouped in the judgment of Westbury, L.C., in *Enohin* v. *Wylie* (1862), 10 H.L. Cas. 13, 11 E.R. 924, it might and possibly may for the purpose of avoiding such an undesirable result, determine the line to be observed.

Sovereign states may be doing the very same thing. If this assertion of power on their part is unjust, the remedy is to be sought by other means than a denial of jurisdiction to our provinces, which would only help to perpetuate the evil by handing over to foreign states alone the determination of a just or unjust basis for settling such questions.

I feel that I may profitably add a few words relative to *Smith* v. *Provincial Treasurer of Nova Scotia*, 47 D.L.R. 108, 58 Can. S.C.R. 570, which seems, I respectfully submit, to have led to some confusion of thought herein.

I may be permitted to point out that in some of the provincial legislation which has come before this Court in the attempts to deal with the problem of succession duties, the Legislature has failed to use such appropriate and comprehensive language as lies in the meaning of the words "transmission within the province."

Hence in trying to get at their meaning resort has to be had to the appropriate legal maxims and decisions and other statutes to see if when applied to the words used they can be held to comprehend such transmission as taxable by another name.

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In like manner, by reason of probate not being always needed in Quebec, the illustrations drawn from decisions relative to the imposition of a probate duty, may not be so apt when applied to a Quebec case as in those arising elsewhere. Yet as perhaps the earliest and most apt illustration of what might be meant by taxation within a country and made the basis of a direct tax, decisions resting upon a probate duty are serviceable. The relative amount of the tax imposed does not affect the principles upon which it rests or the right to impose it.

The mere name seems to some persons to signify everything and hence whilst recognising a probate tax as valid, they refuse to so recognise a tax resting upon same basis when called a succession or death duty tax.

As an instrument of government the B.N.A. Act requires not only attention to the genesis of the frame thereof, and the growth of the law which it recognises as existent, but also the application of a wider vision and more comprehensive and accurate grasp of what is thereby dealt with than is evident in such distinctions.

Is it necessary to call this tax on transmission a probate duty in order to render it effective? And, to make it clear that it is a direct tax, for provincial revenue purposes, is it necessary to take all that which Probate or other like Courts deal with under the direct supervision of provincial government? I think not. Let us grasp the realities even though presented in the garb of what seem to the Court below to be a mere "abstract concept" for the authority endowed with the taxing power is apt and entitled to be fertile in resources for the mode of its exercise.

I think the appeal should be allowed with costs.

Duff, J.

DUFF, J.:—This appeal raises a question which in this Court was supposed to be represented by the appeal in *Cotton's* case, 15 D.L.R. 283, [1914] A.C. 176. The discussion was, in that case, without practical effect because it was held in the Privy Council that it all proceeded upon an erroneous hypothesis respecting the scope and meaning of the statute under consideration.

The question concerns the authority of the province when professing to exercise the legislative power conferred by sec. 92, sub-sec. 2, of the B.N.A. Act, the power, that is to say, to "make laws in relation . . . direct taxation within the province in order to the raising of a revenue for provincial purposes;" and

is whether by virtue of this authority the province can exact death duties payable in respect of the transmission of personal property upon the death of a person domiciled in the province, notwithstanding the fact that such personal property has a situs outside the boundaries of the province.

In *Cotton's* case, *supra*, I gave my reasons for thinking that this question ought to be answered in the affirmative. I still think that those reasons afford adequate ground for that conclusion and I shall, of course, not repeat them now. But there are one or two points I should like to emphasise.

One of these is the fact that by a practice almost uniform in common law jurisdictions—a practice embodied in the law of Quebec by statute in 1866—the law of the situs takes (as regards movables) its rules of succession from the law of the domicile; that this practice had for a long time been in force at the time of the passing of the B.N.A. Act, and further that the existence of this practice is and has been generally held to be a sufficient ground for considering that the legislative authority of the domicile is acting within its proper sphere in levying duties upon the beneficial surplus of all movables, wherever situate, comprised in the succession.

Strictly, of course, where the situs is outside the territory of the domicile, the law of the domicile has no operation within the territory of the situs and the beneficiary who acquires an interest in, *e.g.*, a tangible chattel having such a situs acquires nothing directly through the law of the domicile; but it would not be difficult to furnish a list of authorities to shew that lawyers as well as legislators have persistently refused to treat these matters from this point of view exclusively.

Emphasis is sometimes laid upon the fact that the benefit is a benefit . . . derived from the law of the domicile; (see, *e.g.*, *Wallace* v. *Attorney-General* (1865), 1 Ch. App. 1, *per* Lord Cranworth, L.C.) In other cases *mobilia sequuntur personam* and the ascription of a national situs to the movable succession at the place of the domicile is treated as the ground of jurisdiction, as by Lord Herschell in *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493, at page 503.

And the sum of the matter is admirably stated by Holmes, J., in *Bullen* v. *Wisconsin* (1916), 240 U.S.R. 625, at page 631:—

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The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession it would be recognised that by the traditions of our law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona* of the deceased. As the States where the property is situated if governed by the common law, generally recognise the law of the domicile as determining the succession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicile.

These principles have been considered to be validly applied in the fiscal legislation of a colony. *Harding* v. *Com'rs for Queensland*, [1898] A.C. 769; *In re Tyson* (1900), 10 Queensland L.J. 34; and there can be no doubt, I take it, that prior to Confederation the old Province of Canada or the Province of N.S. could have enacted such legislation validly.

In *In re Tyson*, *supra*, Griffith, C.J., said at page 37:—

It was contended that such legislation was beyond the province of a colonial Legislature. The powers of the Legislature of this colony, at any rate, have only one fetter. That is to say, their legislation only extends within their boundaries; but as international law treats the personal property of persons who die domiciled in Queensland as being in Queensland, it is no transgression of that rule to pass an Act providing that duty shall be payable upon it. In another sense there is, of course, another fetter on the legislative powers of the colony, and that is that the colony may not make a law which is directly contrary to a law of the United Kingdom extending to Queensland. Beyond these two I do not know that there is any limit at all, and we have to enforce the laws as we find them.

When this practice is considered and the words "taxation within the province" are read in the light of it, they must, I think, be held to be comprehensive enough to authorise the enactment of such legislation.

There is a broader ground upon which it might be forcibly contended that such enactments when passed by a Canadian province can be sustained. I think the words "within the province" are capable of being read as merely declaratory of the principle that legislation of a Provincial Legislature enacted under the power conferred is operative only within the territorial limits of the province. The words "within the province" it may be observed, are not to be found in the Quebec Resolutions; and these Resolutions may properly be looked at for the purpose of construing ambiguous expressions in the B.N.A. Act; *Eastman Co.* v. *Comptroller General*, [1898] A.C. 571, at pages 573-4.

The language of the paragraph in the Quebec Resolutions upon which the second paragraph of sec. 92 is founded assuredly affords no indication that the provinces which agreed to the resolutions had any intention of restricting the existing power of direct taxation or of accepting a grant of power of direct taxation more restricted than the existing power; the reservation of the right to levy certain export duties appears to have been a concession to one of the provinces which was eventually abandoned.

Some support for this interpretation might perhaps be found in *Bonanza Creek Co.* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566. Their Lordships appear in that case to have held in effect that the office of the words "with provincial objects" in No. 11 of sec. 92 is not to delimit a class of companies (companies with provincial objects) for the incorporation of which the provinces are empowered to legislate; but that these words were inserted for the purpose of making it clear that companies incorporated in the execution of this power—while within the province they enjoy such powers and rights as they possess by virtue of provincial legislation—can acquire and enjoy powers and rights beyond the province only by force of extra-provincial recognition or grant; in other words, the phrase "for provincial objects" merely denotes that in legislating upon the subject "incorporation of companies" the province legislates for the province alone. See pages 279, 283-5.

In this view subject to the condition implied in the words "direct taxation" and subject to any exemptions established by the Act the legislative power of the province in respect of taxation would only be limited by virtue of the principle that it is a power to make laws on that subject for the province and would not be less ample than the power possessed by the provinces before the Union.

The other question requiring from me a single observation concerns the topic of "direct" and "indirect" taxation. I think Lord Moulton's reasoning does not apply to the provisions of the statute as they now stand. The notary, executor, etc., is only responsible in his representative capacity and then only to the extent of the property of the defaulting beneficiary in his hands against which judgment can be executed. He is treated as custodian and compelled to deliver up the keys.

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In *Standard Trusts Co.* v. *Treasurer of Manitoba*, 23 D.L.R. 811, 51 Can. S.C.R. 428, I stated too broadly as I now conceive it, the effect of the judgment in *Cotton's* case, 15 D.L.R. 283, [1914] A.C. 176, although the statute then discussed was within the principle of *Cotton's* case since the executor or administrator was made personally responsible in the first instance for the payment of the duty to the extent of the assets of the estate coming into his hands.

The appeal should be allowed.

Anglin, J.

ANGLIN, J.:—Amongst other assets the estate of the late John Sharples, who died domiciled in the Province of Quebec, in July, 1913, comprised shares in various companies (most of them foreign) whose head offices were not in that province, of which the aggregate value was $213,039.75. The defendant Margaret Alleyn-Sharples is the universal legatee in ownership. The plaintiff, as collector of provincial revenue, sues to recover succession duties in respect of this property.

Article 1387 (b) of the R.S.Q. 1909, as enacted by 4 Geo. V. 1914, ch. 10, reads as follows:—

> 1387 (b). All transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death, shall be liable to the following taxes calculated upon the value of the property so transmitted, after deducting debts and charges as hereinafter mentioned.

In the French text for the phrase "locally situate" we find the single word "*situés.*" The only possible question of construction arises on these words. If they do not exclude property having no physical situs, the intention to impose taxation on, or in respect of, the property in question is indisputable.

In *Cotton* v. *The King*, *supra*, the phrase "locally situate" is applied to such property (page 288). For convenience I refer to my discussion of it on the same case, 1 D.L.R. 398, at page 429, 45 Can. S.C.R. 469. In the case of tangible property it no doubt means "physically situate;" in the case of intangible property I regard it as intended to denote the attribute of locality which such property possesses according to some recognised rule of law, such as those applied in *The King* v. *Lovitt*, [1912] A.C. 212, at page 218; and in *Smith* v. *Provincial Treas'r of Nova Scotia*, 47 D.L.R. 108, 58 Can. S.C.R. 570, respectively.

Of the assets in question 14 shares of the capital stock of the Northern Crown Bank, valued at $1,190, and 1,227 shares of the capital stock of the Union Bank of Canada, valued at $169,326, would, according to the opinion of the majority of this Court in the *Smith* case, *supra* (Davies, C.J., Idington and Brodeur, JJ.; Davies, C.J., however, acceding to this view only if "the domicile of the decedent is (not) the determining factor") have their situs at the place in the Province of Quebec where the same were registered and transferable, which would render them subject to taxation under art. 1375 of the R.S.Q. 1909, as enacted by 4 Geo. V. 1914, ch. 9, unless excluded from its operation by the restrictive description "actually situate"—"réellement situé"—of art. 1376 of the R.S.Q. 1909.

The situs of the rest of the property in question, however, is admittedly foreign, unless the maxim *mobilia sequuntur personam* should be deemed to give it a situs in Quebec for purposes of succession duty taxation. Indeed the plaintiff makes no claim that any of the property in question falls within art. 1375, R.S.Q. 1909. On the contrary, it is common ground that, if taxable at all, it is under art. 1387 (*b*) R.S.Q. 1909, and as "movable property locally situate outside the province."

We are therefore once more confronted with the question whether the imposition of succession duties in respect of such property is within provincial legislative jurisdiction—is "direct taxation within the province."

In the present Quebec Statutes some features found by the Judicial Committee in the former legislation and held in the *Cotton* case, *supra*, to render it obnoxious as imposing indirect taxation have been carefully eliminated, or, to speak perhaps with greater precision, their existence has been expressly negatived. (Arts. 1387 (*g*) and 1380 R.S.Q. 1909.) For the present the views enunciated by their Lordships as to the indirectness of the taxation imposed by the former legislation must be loyally accepted; but, may I say with deference, it will not occasion surprise in this country if, whenever it may again become necessary to delimit the federal and provincial legislative jurisdiction in this field, some of them, based on what, with respect, seems to have been a misconception of the provisions of the Quebec Statutes, may be dealt with by their Lordships, somewhat in the same way as they dealt

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in *Cotton's* case, 15 D.L.R. 283, at page 292, [1914] A.C. 176, with the reasoning of Lord Collins in *Woodruff* v. *Att'y-Gen'l for Ontario*, [1908] A.C. 508. The taxation here in question is in my opinion direct. When not paid by the beneficiary intended ultimately to bear it, the tax is payable only out of property to which he is entitled in the hands of the executor, trustee or administrator. It falls within Mill's classic definition, the applicability of which to the phrase "direct taxation" in sec. 92 of the B.N.A. Act their Lordships have said "is no longer open to discussion," (at p. 292)

I adhere to the opinion that the words "within the province" in sec. 92 of the B.N.A. Act were intended to be restrictive of the right of taxation of each Provincial Legislature so as to prevent its trenching on the like exclusive right of the Legislature of any sister province or upon the domain of a foreign state, just as the word "direct" was designed to preserve intact for the Dominion Parliament the field of indirect taxation. One purpose of the restriction imposed by the words "within the province" was, in my opinion, to preclude identical taxation of the same subject in two or more provinces; and this limitation of legislative power cannot be frustrated by any attempt to change the situs of property by declaratory legislation, or to disguise the nature of the taxation really imposed by giving to it a name not properly descriptive of it, or by a disclaimer of an intention to exceed statutory powers.

Personally I remain of the opinion which prevailed in *Woodruff's* case, *supra*, that imposing the tax on the transmission of movables "situate outside the province"—"on the devolution or succession," as Finlay, A.G., there put it *arguendo*, "involves the very thing which the Legislature has forbidden to the province—taxation of property not within the province" (page 513), that the real incidence of the tax rather than the form given it must be considered in determining whether it is or is not taxation within the province and that sec. 92 (3) of the B.N.A. Act should be taken to authorise taxation "only where the real subject of the tax—whether person, business or property—is within the Province"—and I cannot add anything to the statement which I made in the *Cotton* case, 1 D.L.R. 398, 45 Can. S.C.R. 469, of the arguments that seem to me to warrant those views.

In the recent case of *Smith* v. *Provincial Treas'r of Nova Scotia*, 47 D.L.R. 108, 58 Can. S.C.R. 570, without explicitly saying so I

deferred to what I conceived to be the condemnation of them implied in the Judicial Committee's comment in *Cotton's* case, 15 D.L.R. 283, [1914] A.C. 176, on the *Woodruff* case and in the fact that the judgment of their Lordships proceeded on the ground of indirect taxation, rather than on the foreign situs of the property which was most strongly pressed by the appellants. I had perhaps failed in the *Standard Trusts Co.* v. *Treasurer of Manitoba*, 23 D.L.R. 811, 51 Can. S.C.R. 428, to give to this virtual overruling of *Woodruff's* case so far as it affected successions the full weight to which further consideration led me to think it entitled. Thus accepting what I conceived to be the opinion of the Judicial Committee that provincial legislation imposing succession duties on foreign movables of a domiciled decedent was not *ultra vires*, I endeavoured in *Smith's* case, *supra*, to state what, from my point of view, were the most plausible arguments in support of the applicability of the maxim *mobilia sequuntur personam* in justification of such legislation.

In the present case the transmission itself admittedly took place under and by virtue of Quebec law and in that sense "within the province." If the transmission may be regarded as the subject thereof, the taxation would clearly be within provincial legislative jurisdiction. There is no doubt a body of authority, much of it conveniently collected in a recent American publication cited by the appellant, Gleason & Otis on "Inheritance Taxation," in favour of that view. But, unless *Lambe* v. *Manuel*, [1903] A.C. 68, may be so considered (I think it cannot) no English authority has been cited for it.

But whether the tax now in question should be regarded as imposed on the transmission itself or on the property on the occasion of its transmission, it is unquestionably a succession duty in the strict sense of that term as understood in England. This Court has so recently held in *Smith* v. *Provincial Treas'r of Nova Scotia*, 47 D.L.R. 108, 58 Can. S.C.R. 570, that it is competent for a Provincial Legislature to impose such duties on the movables of a domiciled decedent situate outside the province that further examination of that question here seems futile—if, indeed, it is not entirely precluded. Following that decision therefore, I would allow this appeal with costs here and in the Court of King's Bench and would restore the judgment of Lemieux, C.J.

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MIGNAULT, J.:—This is an appeal by the collector of provincial revenue for the District of Quebec, in the Province of Quebec, from the judgment of the Court of King's Bench (appeal side), which reversed the judgment of the Superior Court (Lemieux, C.J.), and dismissed the action which the appellant had taken against the respondents in recovery of $14,828.46, for succession duties and interest alleged to be due on shares of the aggregate value of $213,039.75 in a large number of companies whose head offices are outside the Province of Quebec. The respondent, Mrs. Sharples, is sued as well personally as in her quality of testamentary executrix of the late John Sharples, in his lifetime of the City of Quebec, and the other respondents are sued as executors of the said John Sharples, and the prayer is that Mrs. Sharples, personally, be condemned to pay the said sum, and that the judgment be declared executory against all the respondents, in their quality of executors, on the property or moneys in their possession belonging to the beneficiaries of the succession of the late Sharples.

The Superior Court, 55 Que. S.C. 301, applying the rule *mobilia sequuntur personam* gave judgment to the plaintiff, but this judgment was reversed by the Court of King's Bench on the following grounds, the Chief Justice and Carroll, J., dissenting:—

Considering that the powers of the Provincial Legislature are not plenary but limited to "direct taxation within the province" (British North America Act, section 92, s.s. 2), and that any attempt to levy a tax on property locally situate outside the province is not "taxation within the province" and is beyond the competence of the Provincial Legislature.

Considering that the taxation of transmissions within the province of property locally situate outside the province is an attempt to do indirectly that which the Legislature is forbidden to do directly and is in effect taxation of property not within the province.

Considering that the property and shares in question in this case are locally situate and have a situs outside the province.

Considering that there is error in the judgment appealed from, to wit, the judgment of the Superior Court sitting in and for the District of Quebec herein rendered on the twenty-second day of November, 1918, maintaining the action of the respondent *es-qualité*:

The Court doth maintain the appeal, doth reverse the said judgment appealed from, and now giving the judgment which the Superior Court ought to have pronounced, doth declare the Statute 4 Geo. V., ch. 10, upon which the present action is founded, to have been and to be *ultra vires* of the Quebec Legislature and doth dismiss the action of the respondent *es-qualité* with costs in the Superior Court and costs of the appeal against the respondent *es-qualité* in favour of the appellants.

The legislation in question is contained in three statutes passed in 1914 by the Quebec Legislature, being chs. 9, 10 and 11 of 4 Geo. V.

Chapter 9 imposes succession duty on property movable and immovable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, and it defines "property" (sec. 1376) as including

all property, movable or immovable actually situate (in the French version, "réellement situé") within the province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein; the whole whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province.

Chapter 10 (sec. 1387*b*) imposes succession duty upon

All transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province (in the French version "*biens meubles situés en dehors de la province*" at the time of such death.

It also states (sec. 1387*c*) that

All debts owing to the deceased at the time of his death, or which are payable by reason of his death, and which at the time of such death were payable outside the province, are included in the movable property taxable in virtue of this section.

Chapter 11 is a declaratory statute, the object of which is to declare that these taxes are direct taxes within the meaning of sec. 92 of the B.N.A. Act. I do not think that this statute need be further considered, for if these taxes are really indirect taxes, the express declaration that they are direct would not change their nature.

Taking now the scheme of taxation adopted by the Quebec Legislature as a whole, it taxes:—

1. All property, movable and immovable, actually situate ("*tout bien mobilier ou immobilier réellement situé*") within the province, the ownership, usufruct or enjoyment whereof is transmitted owing to death, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein, the whole whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province (chapter 9); 2. All transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death, including all debts owing to the deceased at the time of his death, or which are payable by reason of his death, and which at the time of such death were payable outside the province (chapter 10).

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It is of course obvious that the rule *mobilia sequuntur personam* —which is laid down as a general rule subject to certain exceptions by art. 6 of the Quebec Civil Code—may be excluded by the use of apt and clear words in a statute for the purpose (per Lord Robson in *The King* v. *Lovitt*, [1912] A.C. 212, at page 221). I cannot help thinking that this has been done by these two statutes, the first of which taxes property, movable and immovable, *actually* situate within the province, and the second imposes the tax on the transmission within the province of movable property *locally* situate outside the province. In other words, the actual or local situation of movable property, rather than its situation by virtue of the rule *mobilia sequuntur personam*, is considered for the purpose of succession duties. This would suffice to distinguish this case from *Smith* v. *Provincial Treas'r of Nova Scotia*, 47 D.L.R. 108, 58 Can. S.C.R. 570.

The Court of King's Bench holds that the province cannot tax property situate outside the province, and that to tax the transmission within the province of property locally situate outside is an attempt to do indirectly that which the Legislature is forbidden to do directly and in effect is taxation of property not within the province.

This reasoning involves a major and a minor proposition. The major proposition, that the province cannot tax property outside the province, is in my opinion self evident. The minor proposition, that the province cannot tax the transmission within the province, by succession, of property locally situate outside, and that such taxation is equivalent to taxing the property itself, appears to me very questionable. The transmission is not something that cannot be distinguished from the property transmitted. It is a right, derived under the law of the province, to succeed to property left by a testator or an intestate, and the province which grants this right can require the payment of a tax as a condition of its grant, such tax being a tax imposed not on the property itself but on the right to succeed to it.

I may add that the taxing of the transmission, as distinguished from a tax imposed upon the property transmitted, has been the outstanding feature of all the Quebec Succession Duty Statutes since 1902, ch. 9 of the Statutes of 1914 being the first statute to tax the property transmitted, while in ch. 10 we find the familiar

form of a tax imposed upon the transmission. The Quebec Civil Code moreover distinguishes between the transmission and the property transmitted, the term succession being supplied to either (art. 596 C.C.) and there is no doubt in my mind that they are entirely distinguishable.

The only other observation I desire to make on this branch of the case is that the Quebec Statutes differ essentially from the Manitoba Succession Duty law, considered by this Court in *Standard Trust Co.* v. *Treas'r of Manitoba*, 23 D.L.R. 811, 51 Can. S.C.R. 428. This Manitoba Statute (4-5 Edw. VII, ch. 45, sec. 4) expressly renders subject to succession duty movable property locally situate outside the province when the owner was domiciled in the province at the time of his death. Had the Quebec Statute done the same, I would have had very grave doubts as to its validity.

The only other question discussed at the argument—but on this point the formal judgment of the Court of King's Bench expresses no opinion, although it is referred to in the opinions of the Judges—is whether this tax is an indirect one and therefore beyond the powers of the Legislature.

Their Lordships of the Privy Council in *Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176, so held with regard to the Quebec Succession Duty Act in force before the enactment of the Statutes of 1914, and if these statutes do not differ essentially from the former Act, the question of their validity must be answered in conformity with the judgment of the Judicial Committee. The test of an indirect tax, derived from the definition of John Stuart Mill, was also authoritatively adopted by their Lordships and is whether the tax in question "is demanded from one person in the expectation that he shall indemnify himself at the expense of another; such as the excise or customs."

After a careful examination of the Quebec Statutes enacted in 1914, my opinion is that the only person personally liable to pay the succession duty imposed upon a legacy is the person in whose favour such legacy is made. The executor when called on to pay such tax—and he can be required to pay it only when he is in possession of the property bequeathed, or, in other terms, a judgment rendered against the executor can be executed against

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such property only—is sued merely in his representative capacity, and in no case can it be truly said that the succession duty is demanded from the executor in the expectation that he shall indemnify himself at the expense of another, that is to say at the expense of the legatee. As I construe these statutes, the executor can never be required, representatively or otherwise, to pay succession duty on the transmission of property or money which has never come into his possession. The tax is personally due by the beneficiaries, not collectively but distributively, that is to say, each beneficiary is personally liable for the tax due in respect of the property bequeathed to him and for no more. It may well be, in the case of a special bequest of property locally situate outside the province, when made to a person not domiciled in Quebec, that the government may be unable to collect the tax, for the beneficiary possibly may obtain possession from the local Courts, without reference to any Quebec authority, and no judgment can be enforced against the executor except on the property bequeathed. The other beneficiaries are liable for the tax imposed on their shares only, and the executor is never held except when in possession of the property. All this shews that the present law so differs from the former statute as to render it impossible to come to the conclusion that the tax is an indirect one, and therefore I am respectfully of the opinion that the decision in *Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176, is clearly distinguishable.

With the evil of double taxation a Court of law has no powers of interference. It is a matter for the consideration of the Legislatures themselves, which may so exercise their powers of concurrent taxation as to render this country an unattractive one for foreign investors. But of course the remedy is in their own hands and not in ours.

In my opinion, for the reasons I have stated, the appeals should be allowed, the judgment of the Court of King's Bench set aside and the judgment of the Superior Court restored, with costs here and in the Court of King's Bench.

Appeal allowed.

Re HINTON AVENUE, OTTAWA.

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Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Riddell and Sutherland, JJ. and Ferguson, J.A. June 8, 1920.

HIGHWAYS (§ V A—246)—STREET SHEWN ON REGISTERED PLAN—CLOSING UP OF PART OF STREET—CONSENT OF OWNER OF LOTS BOUGHT ACCORDING TO PLAN—LOTS NOT FRONTING ON PORTION TO BE CLOSED—REGISTRY ACT, R.S.O. 1914, CH. 124, SEC. 86 (4).

The consent of an owner of lots sold to him according to a registered plan, but which do not front on the portion of a street which it is sought to close, and where the closing of such portion does not deprive him of access to adjacent public highways, is not necessary to an order closing up such portion of the street and amending the registered plan under sub-sec. 4 of sec. 86 of the Registry Act, R.S.O. 1914, ch. 124, although such owner should be indemnified for depreciation in value to his property. [See *Jones* v. *Tp. of Tuckersmith* (1917), 47 D.L.R. 684, 45 O.L.R. 67.]

Statement.

On the 11th March, 1920, an order was made by the Judge of the County Court of the County of Carleton, upon the application of the Ottawa Land Association Limited, directing that a certain registered plan should be altered and amended by stopping up Hinton avenue, in the city of Ottawa, from the north side of Spencer street to the south side of Bullman street, and directing that the part of the street mentioned should be closed up.

The order was made under the authority of sec. 86 of the Registry Act, R.S.O. 1914, ch. 124, which section is set out below.

Thomas McLaughlin, as a person affected by the proposed closing of the part of Hinton avenue mentioned, appealed from the order of the County Court Judge, upon the following grounds:—

(1) That the learned Judge had no jurisdiction to make the order, by reason of the fact that the appellant, the owner of lots abutting upon Hinton avenue, did not consent to the same being closed up, his consent being required by sub-sec. 4 of sec. 86 of the Registry Act, under which section the application was made.

(2) That Hinton avenue, having, by virtue of the Surveys Act and the Municipal Act, become a public highway over which the Municipal Corporation of the City of Ottawa had jurisdiction, could be closed only under the provisions of the Municipal Act.

T. A. Beament, for appellant.

J. P. Ebbs, for the Ottawa Land Association Limited, respondents.

Sutherland, J.

SUTHERLAND, J.:—This appeal arises out of an application made under sec. 86 of the Registry Act, R.S.O. 1914, ch. 124, which is as follows:—

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"86.—(1) A plan, although registered, shall not be binding on the person registering the same, or upon any other persons, unless a sale has been made according to such plan, and in all cases amendments or alterations thereof may be authorised or ordered to be made by a Judge of the Supreme Court or by a Judge of the County or District Court of the county or district in which the land lies, on application for the purpose and upon hearing all persons concerned, upon such terms and conditions as to costs and otherwise as may be deemed just.

"(2) Any such application may be made either by the person filing the plan or by the owner for the time being of any of the land covered thereby.

"(3) An appeal shall lie from any such order to a Divisional Court.

"(4) No part of a road, street, lane or alley upon which any lot of land sold abuts, or which connects any such lot with or affords access therefrom to the nearest public highway, shall be altered or closed up without the consent of the owner of such lot; but nothing herein shall interfere with the powers of municipal corporations with reference to highways."

Prior to the application in question, there was in existence a plan, No. 157, duly registered in the registry office for the City of Ottawa, in the County of Carleton, according to which plan sales of lots had been made. The plan has a number of streets shewn thereon, one of which is Hinton avenue, which runs north and south, and connects on the north with Scott street, running east and west (the latter street lying immediately south of the right of way of the Canadian Pacific Railway), and extending south to Wellington street, an important and travelled highway in the city.

The Ottawa Land Association still own a considerable number of the lots shewn on the plan. Some three or four years ago, Thomas McLaughlin bought from that association four of these, being numbers 1290, 1292, 1303, and 1305 on the east side of Hinton avenue, lot number 1290 being the most northerly, abutting on Scott street on the north, and lot 1305 the most southerly, abutting on Bullman street on the south.

Hinton avenue extends from Scott street southerly to a considerable distance, and in its course is met or intersected by cross-streets running east and west, the first of which, Bullman street,

begins at Hinton avenue and runs easterly; the next to the south, Spencer street, and the next Armstrong street, both of which intersect it.

The Ottawa Land Association sold the lots on each side of Hinton avenue, extending from Bullman street to Spencer street, to one Beach, who bought the same for the purpose of establishing a manufacturing plant thereon. It was desired to have the land so bought comprised in one block, and for this purpose it was necessary that Hinton street between Bullman and Spencer streets should be closed, and that street obliterated and included in the parcel. Beach began an application for that purpose; but, as at the time he had only an agreement to purchase, in the end the application was continued by the said association, in whom the title to the lots on either side of Hinton street stood.

Before dealing with the application, the Judge of the County Court of the County of Carleton, before whom it came, directed that notice thereof should be served upon the owners and occupants of the lots between Spencer and Wellington streets.

The only owners interested who, in addition to McLaughlin himself, gave evidence, put their objection on the sole ground that the construction of the proposed factory would "stop their view of the river."

Some owners notified at first appeared to object to the closing of the part of the street in question, but subsequently withdrew from that position. The Corporation of the City of Ottawa, it appears, is not only not objecting, but is apparently willing that that part of the street should be closed without any remuneration being given to it for the land.

McLaughlin opposed the application on the ground that the result would be a reduction in the value of his lots. The evidence as to possible depreciation thereof was of a very meagre kind, and given by himself alone. He was asked:—

"Q. If this application were granted, no material damage would be done you? A. I would apply right off to the city to reduce my taxes because they would do me injury if they closed that street. . . .

"Q. Your object is to prevent the closing of the street because it will depreciate the value of your property and not give you the outlets that you want? A. That is the whole thing; yes, sir.

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"Q. And in not far distant time that avenue will be a prominent highway or travelled way by the public there? A. That is how I saw it when I bought the lots.

. . . . . .

"Q. If there was depreciation in your property, do you think it would go down as low as 50 per cent.? A. I would have to take some time to consider that.

"Q. It might be depreciated under 50 per cent.? A. I paid $1,900 for the lots, and I would not have bought them without the street there."

The County Court Judge came to the conclusion that the part of the street allowance proposed to be closed never was a road within the meaning of sub-sec. 4 of sec. 86 of the Registry Act. It, however, appears as a street on the plan in question, and the said association are making this application on the assumption that there is a road appearing on that plan, which they wish to have "stopped" or "closed" in part by altering and amending the plan in that way. I cannot agree with the view of the County Court Judge that there is no road within the meaning of this section nor that such a contention can be put forward by the present applicants. I am, however, of opinion that the said Judge had jurisdiction to hear and determine the application.

It was contended, however, on the part of the land-owner, that no part of the street can be closed without his consent, and that the word "abuts," appearing in sub-sec. 4 of sec. 86, should be so construed as to mean that, even though his lots did not, in the strict sense of the word, abut or touch the part of the street proposed to be closed, or a part of the street which connected his lots with or afforded access therefrom to the nearest public highway, it could not be altered or closed without his consent.

It is obvious in the present case that Hinton avenue, on which his lots abut in front, is not being closed, and that by that street he has access to Scott street on the north and Bullman street on the south—adjacent public highways. While the street immediately in front of him, or a part the closing of which would prevent his having a way out, cannot be closed without his consent, any other part of the street may be; but in such case the question whether he should or should not be compensated for the closing of such portion of the street may arise. If, upon the evidence offered,

his property is depreciated in value, that is a question to be determined by the Judge hearing the application, "upon such terms and conditions as to costs and otherwise as may be deemed just," under sub-sec. 1.

On such evidence as to depreciation as was offered, the County Court Judge came to the following conclusion:—

"I cannot convince myself upon the evidence that in granting the application there is any injury done to any of the parties interested appearing before me to object, or to any one else. In allowing the amendment of the plan as applied for, I do not consider that Mr. McLaughlin is in any way injured, inconvenienced, or his premises at all depreciated."

I am unable to agree with that finding of fact. While the evidence offered by McLaughlin as to depreciation was, as I have already stated, of a meagre and somewhat inadequate character, there was some evidence of depreciation. It would appear almost obvious that there must be some depreciation in the value of his lots in consequence of the closing of the part of the street in question. There was no evidence at all to the contrary. In these circumstances, I think we are justified in coming to the conclusion that the County Court Judge should have fixed some sum deemed by him to be just and adequate for such depreciation.

It is difficult, upon such slight evidence, to arrive in any very satisfactory way at an amount, but I would be disposed to think that if we allowed $400 it would be ample. I would therefore be of the opinion that, with that variation, the order should be affirmed. The land-owner—the appellant—should have the costs of the appeal.

Mulock, C.J.Ex. Ferguson, J.A.

MULOCK, C.J. EX., and FERGUSON, J.A., agreed with SUTHERLAND, J.

Riddell, J.

RIDDELL, J. (dissenting):—This is an appeal from an order of the Judge of the County Court of the County of Carleton closing part of a street in Ottawa, under the provisions of the Registry Act, R.S.O. 1914, ch. 124, sec. 86.

The appellant bought three lots on a street laid down in a plan registered in the proper registry office. This street led to a leading thoroughfare—Wellington street, one of the main arteries of the city—and the existence of the street was a main incentive

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for the appellant to make his purchase. The owners of the land still unsold of the subdivision shewn on the plan are desirous of closing part of the street between the appellant's lots and Wellington street, so that they may make an advantageous sale to a manufacturing company. Accordingly they made an application under sec. 86 (1), and the County Court Judge has made an order closing this part of the street.

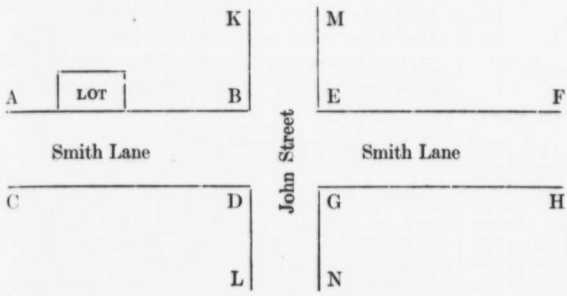
Mr. Beament advances two contentions, which will be dealt with separately:—

(1) It is contended that sec. 86 (4) prevents such an order being made without the consent of the appellant; this argument is based upon a construction of sec. 86 (4) which makes the antecedent of the relative "which" in the first and second lines, not the word "part," but the words "road, street, lane or alley;" the result being that, whenever any lot is sold on any part of a street, however long, no part of the street can be closed without the consent of the owner of that solitary lot.

There is no doubt of the general truth of the maxim, *Ad proximum antecedens fiat relatio, nisi impediatur sententia;* it is a rule both of grammar and of law that relative words must ordinarily be referred to the last antecedent, the last antecedent being the last word which can be made an antecedent so as to give a meaning. "But, although this general proposition is true in strict grammatical construction, yet there are numerous examples in the best writers to shew that the context often requires a deviation from the rule, and that the relative may refer to nouns which go before the last antecedent:" Broom's Legal Maxims, 8th ed., p. 528. So, in interpreting any written instrument—contract, deed, will, statute—the whole instrument being examined, it often happens that not the last possible antecedent but a preceding word is taken as the word to which a relative is referred. See the cases in Broom, *loc. cit.*

In my opinion, the statute intends to exclude from the compulsory powers of closing of the County Court Judge only two parts of any street: (1) a part upon which a sold lot lies; and (2) a part which connects a sold lot with the nearest public highway. Any other construction, as it seems to me, would carry the protection much beyond the necessity of the case, which is the protection of

the lot-owner. For example, suppose a subdivision had streets laid out thus:—



A.F.H.C. being a lane or street with two blind ends, A.C. and F.H., and the lane crossing a street which is in communication with the general highway system, could an owner of a lot near A. prevent the closing up of the lane near F.H.?

The street in question is said to be three-quarters of a mile long. Could an owner of a lot at one end prevent the closing of the other end in which he has no special interest? In my opinion, it is the possession of a special interest which the statute has in view, and that it is to the possessor of such a special interest that the veto is given.

(2) It is argued that the power given to the Judge is discretionary, and that it should be exercised with judicial discretion —these propositions are not disputed—and, further, that the discretion in this case was not exercised judicially.

Leaving aside the claim of ultimate benefit to the city or some part of it by the employment of men in a factory proposed to be erected, it is plain that the present proceeding is an attempt on the part of the vendors of a lot to deprive the purchaser of part of what they sold him, an expropriation by a private corporation of the appellant's property for private use. This is a violation of all sound morality and political economy—and, if permitted, it is stealing under colour of law. Unless under extraordinary circumstances, which do not appear here, the Court should not give sanction to such an act of dishonesty. No doubt, for public purposes, for the advantage of the public, the right has been given

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to expropriate for a quasi-private purpose, e.g., water-powers. Here, however, there is no public purpose to be achieved.

If the city corporation should consider the proposed scheme a good one, one such as would advantage the city, there is a simple method whereby this end can be attained without the vendors of the lot being allowed to retract the gift of the land laid out for the street.

I would allow the appeal, with costs throughout.

Order below affirmed with a variation.

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BITHELL v. BUTLER.

Quebec Court of Review, Archibald, Acting Chief Justice, Bruneau and Loranger, JJ. February 21, 1920.

1. PRIZE FIGHTING (§ I—2)—WHAT CONSTITUTES—PRIZE OR AWARD.
If an encounter takes place between two men who engage in a "fight," it is a prize fight, although there is no prize offered nor payment made to the contestants if they meet by appointment and the affair is not a sudden quarrel. A "fight" is an encounter in which one party intends to hurt the other.
[*Rex* v. *Wildfong & Lang* (1911), 17 Can. Cr. Cas. 251; *Rex* v. *Fitzgerald* (1912), 19 Can. Cr. Cas. 145; *Rex* v. *Pelkey* (1913), 12 D.L.R. 780, 21 Can. Cr. Cas. 387, 6 Alta. L.R. 103, followed.]

2. BILLS AND NOTES (§ VI C—167A)—COMPANY FORMED TO ORGANISE PRIZE-FIGHTS—PROMISSORY NOTE GIVEN BY MEMBER—ILLEGAL CONSIDERATION—VALIDITY.
A promissory note given by a member of a company formed to organise prize-fights, to another member of the company, to cover the expenses of such enterprises is void as given for an illegal consideration.

Statement.

APPEAL by plaintiff from a judgment of Lafontaine, J., dismissing an action on a promissory note as given for an illegal consideration. Affirmed.

The judgment appealed from is as follows:—

The plaintiff claims from the defendant the sum of $245.22 in payment of expenses made by the plaintiff for an organisation called the "Montreal Sporting Club" of which the defendant was a member, this sum having been covered by a promissory note for $1,500 signed by the president and four directors of said club.

The defendant denies every one of the plaintiff's allegations, and alleges specially that he has never been a party to the alleged enterprise, agreement and transaction alleged by the plaintiff, that he was not and never has been a member of the so-called club, and that the monies he had advanced were paid for the

purpose of having boxing matches, sparring exhibitions, for which prize fighters were engaged, which were illegal and contrary to law as against public morals.

The Superior Court dismissed the action as follows:—

Considering that the parol evidence given by the plaintiff of the promise or agreement which is the basis of his action, by which he pretends the defendant is bound to indemnify him, is illegal, and that the plaintiff has made no evidence of such an agreement or promise;

Considering that said agreement by the defendant, if it ever had existed, would have been made by the defendant without considerations received from the plaintiff or from any one;

Considering that the enterprise carried on by the plaintiff with four or five other persons under the assumed name of company, and for which the plaintiff's expenses were incurred, were prize fights, and that such an enterprise is illegal and contrary to law and to public morals;

Considering the plaintiff has not proved the essential allegations of his declaration and that the defendant has proved the allegations of his defence;

Doth maintain the defence and dismiss the plaintiff's action with costs.

Foster, Mann, Place, Mackinnon, Hackett and *Mulvena*, for plaintiff.

Elliott, David and *Mailhiot*, for defendant.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—I might remark that although the procès-verbal of the prothonotary indicates that a number of witnesses were examined on the part of the plaintiff, no depositions are found in the record, except the deposition of the defendant himself taken on discovery.

Several minutes of meetings of the Sporting Club are produced, but they were neither signed by a secretary nor a president. There is nowhere any subscription of stock on the part of the defendant, nor is there any written proof of the allotment of shares to the defendant.

It seems to me, however, that even if the organization of the Sporting Club was defective, that there is no doubt from the evidence of the defendant himself that he was one of the number of people who were organising what he calls prize fights, and expected to share in these profits, if there should be any, of these proceedings. I would have been disposed to condemn the defendant, if his plea had been only that he was not a member of the organisation. But in my opinion, the other plea is much more serious.

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It is manifest that what this club or association was doing was to bring men known as boxers or prize fighters to fight with each other, and it was hoping to make profit by getting the best known men to fight, and charging an entrance fee for the public to see them fight.

The plaintiff contends that the proceedings were merely an exhibition of scientific boxing and he points out, which was the truth, that each of the men engaged to fight were paid so much for coming and fighting. The one who won did not obtain anything more than what he had contracted for, and the one who lost got what he contracted for. But there was one who won and one who lost. The termination of the so-called exhibition was manifestly to be the inability or unwillingness of one of the contestants to continue to fight.

Must there then necessarily be a prize for the winner to constitute a prize fight? Section 2, sub-section 31 of the Criminal Code defines "prize fight" as follows:—

> Prize fight means an encounter or fight with fists or hands between two persons who have met for such purpose by previous arrangement made by or for them.

It is seen that this definition does not include the element of a prize.

Turning to sec. 104, we find the following:—

> Every one is guilty of an offence and liable, on summary conviction to a penalty not exceeding $1,000 and not less than $100 or to imprisonment for a term not exceeding 6 months, with or without hard labour, or to both, who sends or publishes or causes to be sent or published or otherwise made known any challenge to fight a prize fight or accepts any such challenge, etc.

And 105 makes the principals of a prize fight guilty of an offence.

Section 106 makes persons attending a prize fight guilty.

In *Rex* v. *Wildfong & Lang* (1911), 17 Can. Cr. Cas. 251, and also in *Rex* v. *Fitzgerald* (1912), 19 Can. Cr. Cas. 145, it was held that a boxing exhibition of ten rounds with six-ounce boxing gloves, in which there is no prize or award to be contested for, but for which one of the boxers was to receive a fixed sum and the other a fixed sum of the percentage of the gate receipts, is not necessarily a prize fight.

In the case of *Rex* v. *Pelkey* (1913), 12 D.L.R. 780, 21 Can. Cr. Cas. 387, 6 Alta. L.R. 103, Harvey, C.J., in the Alberta

Supreme Court went very thoroughly into the whole question of what constitutes a prize fight, and cited numerous authorities, both in England and in this country.

Among other things the Judge said that he agreed with a number of cases previously reported that the presence or absence of a prize is of no significance whatever.

In *Reg.* v. *Orton* (1878), 14 Cox C.C. 226, a Court of Justice held that on the facts of that case the charge to the jury was correct in which the Judge said that if it were a mere exhibition, it was lawful, but if the parties met intending to fight until one gave in from exhaustion or injury received, it was a breach of the law and a prize fight whether the combatants fought in gloves or not.

Stephens, J., in his work on Criminal Law, says the injuries given and received in prize fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize fights are disorderly exhibitions and mischievous on many obvious grounds.

From all the authorities—and they are fairly numerous—I have come to the conclusion that while a mere exhibition of skill in boxing is not a prize fight, yet if an encounter takes place between two men who engage in a "fight," it is a prize fight whether there be no prize at all or whether there be no payment at all, provided that they meet by appointment, and the affair is not a sudden quarrel. A "fight" is an encounter in which one party intends to hurt the other.

I have no hesitation in saying that I think the whole of the facts disclose that the fights which had been arranged by this Sporting Club were of that character and were not boxing exhibitions. I believe, therefore, that the plaintiff had no right of action against the defendant, and that judgment was right in rejecting the plaintiff's action on that ground. But as both parties were equally guilty, the judgment ought not to have granted any costs to the defendant and would not, I suppose, have granted less, because had it not been for the fact that the defendant's case was also sustained on the ground that the plaintiff had not proved liability. I think the plaintiff sufficiently did prove liability, and I would reject the action solely on the ground that the consideration was unlawful.

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BITHELL v. BUTLER.

Archibald, A.C.J.

Since writing the above notes the depositions of Jones, Schnieder, Bithell and Rooney have been put before me and have been examined more especially with regard to the question as to what was the nature of the alleged boxing exhibitions which had been given by the sporting club in question. [Here the Judge makes a perusal of the depositions of the above witnesses.]

That is the whole of the evidence on the subject. It is seen that it does not describe anything of what transpired at these boxing exhibitions. It appears, however, that they were for the purpose of making money for those persons who were carrying them on, and that they got men from outside to come and box or fight, paying as high as $600 to one man for one night. There is no question at all as to whether they used gloves or not. It was open to the plaintiff to prove that they were boxing exhibitions, because there was proof already in the record by the examination on discovery that they were prize fights. Surely the omission by the plaintiff to prove anything which would shew that the character of the proceedings did not correspond with the definition of a prize fight ought to be taken as a very considerable presumption that the proof, if made, would not be favourable to the plaintiff. The object is admitted to be, not to encourage athletics, but to make money and it would be an extraordinary circumstance if a club who had in view the encouragement of athletics would conduct its business by means of engaging men to come at the rate of $600 per night to give exhibitions.

I am convinced that the work of the club was purely and simply an effort to make money out of the more or less brutal sport of men pounding each other with their fists until one or the other of them was unable to continue the fight. In any event it is, I think, absolutely proved that the work which this so-called sporting club was doing was prize fighting within the meaning of the definition given in the statute.

Appeal dismissed.

Re McCONKEY ARBITRATION.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Ferguson, JJ.A. April 26, 1920.

LANDLORD AND TENANT (§ III A—46)—LEASE—CLAUSE FOR PAYMENT OF VALUE OF "BUILDINGS AND IMPROVEMENTS"—INTERPRETATION—FIXTURES INCLUDED.

A lease of land for 21 years contained a clause that the lessor would at the expiration of the lease pay to the lessee the value of "such buildings and improvements as may then be erected and standing on the said hereby demised premises."

Held that the words "buildings and improvements" were wide enough to include articles in good faith, brought upon the demised premises for the purpose of the tenant's business, and so affixed to it as to form part of the building, irrespective of whether or not the same were landlord's fixtures, tenant's fixtures, or trade fixtures, but not to include purely chattel property.

[*Stack* v. *T. Eaton Co.* (1902), 4 O.L.R. 335; *West* v. *Blakeway* (1841), 2 Man. & G. 729, 133 E.R. 940, and *In re Bedson's Trusts* (1885), 28 Ch. D. 523, applied.]

Statement.

APPEAL by the Toronto General Trusts Corporation from an order of Sutherland, J., refusing to set aside an award, or remit it to the arbitrators for reconsideration. Affirmed.

The order appealed from is as follows

SUTHERLAND, J.:—This is a motion on behalf of the Toronto General Trusts Corporation for an order that the award made herein on the 13th day of October, 1919, be set aside or remitted back to the arbitrators for reconsideration, on the following among other grounds, namely:—

(1) That an error in law appears on the face of the award in that the arbitrators have allowed the tenant the value of the items or articles set out in para. 7 of the award.

(2) The items or articles referred to in para. 7 of the said award are not part of the buildings and improvements for which the landlord is obliged to pay under the terms of the lease between J. H. Richardson as lessor and William R. Wilson as lessee, dated the 1st November, 1896, referred to in the said award.

(3) The answer given by Mr. Justice Middleton in his judgment of the 20th March, 1918, to the third question in the special case submitted by the arbitrators, was wrong in law, and constituted a misdirection to the arbitrators.

The arbitration is for the purpose of fixing the value of certain buildings on lands demised under a lease bearing date the 1st day of November, 1896. The arbitrators, having taken upon themselves the burden of the arbitration, were met with difficulties arising out of the construction of the lease and the basis on which

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they were to proceed to determine the value of the buildings. Thereupon a case was stated for the opinion of the Court, and the clauses of the lease with reference to which the doubts arose were construed by Middleton, J., in a judgment delivered on the 20th March: *Re McConkey Arbitration*, 1918, 43 D.L.R. 732, 42 O.L.R. 380. The arbitration thereafter proceeded and the said award was made.

Upon the motion before me it appeared from the outset plain to me that the main contention on the part of the applicants was one based on the view that the construction placed by Middleton, J., on the clauses of the lease in question was an erroneous one, and that, the arbitrators having proceeded upon the basis that it should determine their course of procedure, the award was also erroneous, and should therefore be set aside or remitted back. Having pointed out that, if this were so, the application to me was in effect an appeal from one Judge to another, I was referred to *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, [1912] A.C. 673, in which it was held that "although the opinion of the High Court upon a special case stated by an arbitrator under the Arbitration Act, 1889, with regard to a question of law arising in the course of the reference, cannot be the subject of an appeal, yet if that opinion is erroneous an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award."

I am unable to see that that case is an authority which would make it appropriate for me to hear and determine this application, though it may be quite appropriate that it should be heard and disposed of by a higher tribunal: see p. 686.

I must therefore refuse to entertain the application, and must dismiss it with costs.

E. G. Long, for appellants.

M. H. Ludwig, K.C., for respondent.

The judgment of the Court was read by

Ferguson, J.A.

FERGUSON, J.A.:—Appeal by the lessors from a judgment of Sutherland, J., dated the 31st December, 1919, refusing to set aside an award dated the 13th October, 1919. In making the award, the arbitrators followed an opinion of Middleton, J. (42

O.L.R. 380, 43 D.L.R. 732), given on a case stated by the arbitrators under sec. 29 of the Arbitration Act, R.S.O. 1914, ch. 65.

The appellants do not complain that the arbitrators failed properly to interpret or follow the opinion of Mr. Justice Middleton, but took and maintain the position that his opinion is wrong; that his pronouncement had merely the force and effect of an opinion given to the arbitrators to enable them to make their award, and was not a judgment binding upon the parties; and, in that the award embodies and follows an erroneous opinion, error appears on the face of the award, and the award can and should be set aside.

Therefore the application to Mr. Justice Sutherland was in effect an appeal from Middleton, J. In such circumstances, Mr. Justice Sutherland contented himself with making a formal order dismissing the application, thereby enabling the appellants to submit the opinion and question to an appellate tribunal.

Section 29 of the Arbitration Act is in the same words as sec. 19 of the English Arbitration Act, 1889. The English cases establish that an appeal lies from an award following an opinion expressed under sec. 19. See *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, [1912] 3 K.B. 128, affirmed, [1912] A.C. 673; also cases collected in White Stringer & King's Annual Practice, 1920, vol. 2, p. 2220.

Counsel for the respondent did not contend that the opinion of Middleton, J., was binding upon the parties, or that the practice established in England should not be followed.

The appeal is confined to the value of certain articles which the arbitrators directed the landlord to pay for as "buildings and improvements" under the terms of a covenant in the lease. The articles in question are enumerated and valued in para. 7 of the award, as follows:—

Dumb waiter	$ 72.30
Refrigeration plant	4,114.50
Refrigerator	331.73
1 Brantford portable oven with boiler on top —No. 95	810.10
2 milk receptacles enclosed in 4′4″ x 2′1″ marble	162.58

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Kitchen:	
3 sinks, metal, with covering	$152.82
Marble counter, hoods, etc. (Amount to be according to the terms of the said agreement of the 21st June, 1919)	
Marble shelves, columns	
Kitchen (second floor):	
1 iron hood across room, outlet to fan	75.87
Marble counter, hood, etc. (Amount to be according to the terms of said agreement of 21st June, 1919)	
Third Floor:	
1 sink 4′6″ x 2′6″	43.35
1 sink 2′3″ x 3′10″	31.60
1 sink-top and covering. (Amount to be according to the terms of said agreement of 21st June, 1919)	

These items and amounts are dealt with by the arbitrators thus:—

"The arbitrators have met with differences and difficulties as to the exact meaning of the opinion of the Honourable Mr. Justice Middleton, and the application of the same to the 'items and articles' just enumerated.

"In the opinion of the Honourable Mr. Justice Middleton on the special case, he says, in reference to the words 'buildings and improvements:'—

"'I do not think this would cover purely chattel property, but that due weight must be given to the other words used, "erected and standing on the . . . demised premises;" and all that in any fair sense falls within this description, without entering into any technical discussion as to landlord's fixtures, tenant's fixtures, or trade fixtures, if in good faith brought upon the demised premises and forming an integral part thereof, must be paid for by the landlord.'

"And in the order issued thereon, the 4th paragraph reads as follows:—

"'And this Court doth further declare, in answer to the 3rd question submitted in such case, that "buildings and improvements" include fixtures in good faith brought upon the demised

premises for the purpose of the tenant's business and forming an integral part thereof, irrespective of whether or not the same may be landlord's fixtures, tenant's fixtures, or trade fixtures, but do not include purely chattel property.'

"Counsel for the tenant and mortgagees contended that the learned Judge meant 'integral' to the business and not 'integral' to the building.

"We find that these 'items or articles' are not an integral part of the building—that is, essential to its completeness as a building—but are integral to the business of the tenant in keeping a restaurant.

"We are anxious to avoid even the appearance of departing from any construction that might be placed upon the opinion of the Honourable Mr. Justice Middleton.

"The third arbitrator, being guided and influenced by the judgment of Mr. Justice Middleton, is of the view that 'items or articles' above set out in that paragraph were such as were intended by the opinion of the Honourable Mr. Justice Middleton to be allowed under the word 'buildings and improvements.' The arbitrator for the landlord defers to that view, and joins in the award, that the whole case may be before the Court, where, if the arbitrators have fallen into error, the same may be corrected."

Mr. Justice Middleton informs me that the arbitrators have, in their award, correctly interpreted his opinion, in that he meant fixtures integral to the building and not fixtures integral to the business; also that he did not, by use of the word "integral," intend to advise that such articles were to be essential to the completeness of the building, but merely that they were so affixed as to form part of the building.

The covenant in question reads:—

"That at the expiration of the said term of twenty-one years hereby granted . . . he, the said lessor, his heirs, executors, administrators, or assigns, shall and will either pay or cause to be paid to the said lessee, his executors, administrators, or assigns, . . . the just and proper value at that time (namely, at the expiration of the said term) of such buildings and improvements as may then be erected and standing on the said hereby demised premises, the said value to be fixed by arbitration as hereinafter provided."

It is in the said lease further provided:—

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"That if and whenever any question, dispute, difference, or controversy shall arise between the parties hereto, or their respective heirs, executors, administrators, or assigns, touching the value of any buildings, fixtures, or things now or hereafter to be erected or being on the demised premises . . . or touching any moneys to be paid by either party under any covenant or provision in these presents contained . . . then and in every such case the matter in difference shall be referred to three arbitrators. . . . Provided always that in determining the amount of the worth or value of any buildings, erections, or improvements standing and being upon the said demised premises at the end of any term of twenty-one years, the said arbitrators are to judge of such buildings, erections, and improvements abstractedly and without reference to site or renewal value, but are only to consider the cost of erection and deducting for age, decay, wear and tear, and damages sustained."

While it is recited that the lease is made in pursuance of the Act respecting Short Forms of Leases, the document does not contain any covenant or proviso permitting the tenant to remove his fixtures; yet counsel for the lessors contends that, because the covenants and provisoes requiring the lessors to pay for buildings and improvements put upon his premises by his tenant, are contained in a lease, it could not have been intended that the landlord, under a covenant requiring him to pay for buildings and improvements, should be required to take and pay for articles fixed to the building which can be properly described as tenant's fixtures. Counsel for the respondent contends that the articles are part of the building, and, as such, improvements; that the articles in dispute are not tenant's fixtures; but, even if they are tenant's fixtures, there is nothing in the lease permitting, let alone requiring, the tenant to sever his fixtures and convert them again into chattels.

All of the articles in dispute are attached to the building, and are such as would, on a sale of the land, pass to a purchaser. See *Stack* v. *T. Eaton Co.* (1902), 4 O.L.R. 335, 338, where Meredith, C.J., delivering the judgment of a Divisional Court, after reviewing the authorities, lays down the following among other propositions:—

"(1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.

"(2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels."

"(5) That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant."

On the authority of *West* v. *Blakeway* (1841), 2 Man. & G. 729, 133 E.R. 940, Middleton, J., in his opinion to the arbitrators, pointed out that "'improvements' is a word of large significance; and, when it is used in a lease, it is intended to have a wider and less technical operation than the word 'fixtures.'"

In *In re Bedson's Trusts* (1885), 28 Ch. D. 523, at p. 525, Brett, M.R., says:—

"One general rule as to the construction of any instrument is that one should give words their ordinary meaning in the English language, and should neither add to nor take away anything from such words unless one is obliged to do so, and another rule is, that unless obliged, one should not construe an instrument in such a way that one part would contradict the other part."

Applying these rules, it seems to me that the words "buildings and improvements" are wide enough to include tenant's fixtures, and that such a meaning is not inconsistent with or repugnant to the other provisions of the lease wherein the word "fixtures" instead of "improvements" is used. The word "fixtures" is clearly wide enough to include tenant's as well as landlord's fixtures, and I see nothing in the context, or in the circumstances under which the words were used, or in the object for which they were used, that would lead me to think that the parties intended to modify the ordinary meaning and effect of either of the words "improvements" or "fixtures."

The lease was a renewal of a prior long term lease. Such buildings as were on the property had been built by the tenant

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pursuant to the covenant to build and to maintain upon the premises buildings of a certain value, and the object of the parties was to provide for payment to the tenant of the value of these or such other buildings and improvements as might be "erected" and "standing" at the expiration of the term.

As pointed out in *Stack* v. *T. Eaton Co.*, tenant's fixtures are part of the building, and it is only when the tenant has exercised his right or privilege of severing, that these fixtures regain their state of chattels. There is no proviso in the document requiring the tenant to exercise his right or privilege, if any, to sever from the freehold what would be his fixtures. Therefore, even if the tenant had the right under this lease to remove his fixtures, which I doubt, it was a privilege which, it seems to me, he could waive. He has not exercised that right, but has, on the contrary, elected to allow these articles to remain as part of the building.

For these reasons, I am of the opinion that, on a fair construction of the document, the words "buildings and improvements" include articles in good faith brought upon the demised premises for the purpose of the tenant's business, and so affixed to it as to form part of the building, irrespective of whether or not the same may be landlord's fixtures, tenant's fixtures, or trade fixtures, but do not include purely chattel property.

This, I think, was the meaning and effect given by the arbitrators to the opinion of Middleton, J., and I think they rightly held that the articles in dispute should be taken and paid for by the landlords.

I would dismiss the appeal with costs.

Appeal dismissed.

MAN.

C. A.

DAVIES v. DANDY.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. April 6, 1920.

FRAUDULENT CONVEYANCES (§ II—8)—MORTGAGE—SECURITY SUFFICIENT AT TIME OF GIVING—VALIDITY—STATUTE OF 13 ELIZ., CH. 5.

A mortgage debt where the mortgagee has a specific portion of property set aside, and so far as his interest is concerned freed from liability to the general debts and to which he can resort for the satisfaction of his claim is not a debt within the meaning of the Statute 13 Eliz., ch. 5 (R.S.M. 1913, ch. 74), unless the mortgage security at the time of the loan is of less value than the amount loaned.

[*Crombie* v. *Young* (1894), 26 O.R. 194, followed.]

APPEAL by plaintiff from the trial judgment in an action by a judgment creditor to set aside a voluntary conveyance made by the defendant to his wife. Affirmed.

A. E. Hoskin, K.C., and *T. L. Hartley*, for appellant.

H. E. Henderson, K.C., for respondent.

PERDUE, C.J.M.:—The plaintiff erected the apartment block in question in the year 1909, at a cost of some $21,000, all of which money he borrowed by mortgages on the property. He states that the land was worth about $6,500 and that the total value of the block and the land was about $28,000. In October, 1911, he sold the property to one Livingstone, the selling price being nominally $50,000. The transaction was effected by Livingstone conveying to him a quantity of farm land and giving a mortgage on the block for $11,200, which mortgage was made to Davies' wife. In September, 1913, Livingstone sold the block to the defendant Robert M. Dandy and one Poyner for $63,000. The land is under the Real Property Act, R.S.M. 1913, ch. 171, and the transfer to the purchasers was made subject to four mortgages upon which the aggregate amount due was about $31,000. Dandy paid his share of the purchase money to Livingstone by conveying to the latter a section of land, 640 acres, and paying $1,200 in cash.

On February 27, 1914, Dandy conveyed to his wife his home farm of 480 acres near Pierson, Manitoba, pursuant, as they both say, to a promise to do so made by him several years previously. The deed was registered in June, 1914.

At the time Dandy made the conveyance to his wife he had, in addition to his interest in the block, personal property valued at $10,500. He appears to have had no other debts, except a mortgage on the farm.

During the year 1914 the rentals of the block amounted to $5,495.90, but Dandy believed at the time he purchased that the rentals were $6,300. In the following year the rentals fell to $4,474.16 and remained about the same until 1919 when they increased to $5,160. The net value of the rentals for 1914 was $3,235.09 and in the years 1915-1918 about $2,189.00. At present it would appear that the block just about pays the various charges against it, including interest on the mortgages.

Under sec. 97 of the Real Property Act, R.S.M. 1913, ch. 171, there is an implied covenant in every instrument transferring an

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estate or interest in land subject to a mortgage, that the transferee shall pay the interest on the mortgage and shall indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument, and from and against all liability in respect of any of the covenants contained therein or implied under the Act. The plaintiff obtained from the executors of Livingstone an assignment of the debt due on the mortgage from Livingstone to the plaintiff, for which, as the document recites, Dandy and Poyner became liable under the implied covenant, "and also the several covenants of Robert M. Dandy and S. J. Poyner for the due payment of said moneys for the purpose of enabling said assignee to recover payment of said mortgage." A suit was brought by the plaintiff against Dandy and Poyner on the debt and covenants so assigned. No statement of defence was delivered and judgment by default was entered on December 31, 1918, for $9,784.55 and costs against both defendants. The plaintiff's position as a creditor entitled to impeach the conveyance from Dandy to his wife is founded upon this judgment. An exemplification of the judgment was put in at the trial. The plaintiff, in attempting to shew that the debt or cause of action on which the judgment was recovered existed at the time of the conveyance from Dandy to Mrs. Dandy, went behind the judgment and put in the mortgage from Livingstone to Mrs. Davies and what purports to be an unregistered transfer of same from her to the plaintiff, dated August 29, 1913. The plaintiff also put in Exhibit 9 which is a search letter from the Land Titles Office shewing the existing encumbrances on the land on which the block stands. This search letter shews that on October 23, 1912, Mrs. Davies transferred the whole of the mortgage made by Livingstone to her to the Northern Canadian Mortgage Co., who continued to be the owners of the mortgage at the time of the trial of this suit.

The transfer from Mrs. Davies to the plaintiff is in the form prescribed by the Real Property Act which does not require the names of mortgagor or mortgagee to be given but does require the mortgage to be identified by its registered number. The transfer given by Mrs. Davies to the plaintiff does not contain the name of the mortgagor and gives the registered number of the mortgage transferred as 327919. The registered number of the mortgage from Livingstone to her is 227919. The transfer, there-

fore, is not sufficient and could not be registered under sec. 109 of the Act. As the transfer does not refer to any existing mortgage on the land it does not confer upon the plaintiff even a right to the registration of it under sec. 98. The mortgage is under seal and the transfer is an unsealed instrument which has no validity apart from the statute. An actual consideration from the plaintiff to Mrs. Davies was not proved. There was not shewn, therefore, even an equitable assignment of the mortgage or of an interest in it to the plaintiff such as would enable him to recover upon it.

By sec. 97 of the Real Property Act there was an implied covenant to Livingstone by Dandy and Poyner that they would pay the interest on the mortgage as it fell due, and that they would indemnify him against the principal sum. An assignment of this covenant to the owner of the mortgage would enable the owner to sue Dandy and Poyner for the principal and interest and compel them as the debtors to make payment to him: *Irving* v. *Boyd* (1868), 15 Gr. 157; *British Canadian Loan Co.* v. *Tear* (1893), 23 O.R. 664.

But in the action brought by the plaintiff against Dandy and Poyner we find a person who is not the owner of the mortgage or entitled to sue upon it recovering judgment for the whole mortgage moneys and interest by virtue of an assignment from Livingstone, the mortgagor, of the statutory covenant of indemnity against the mortgage. Meanwhile the mortgage itself is outstanding in the Northern Canadian Mortgage Co., who are the legal holders of it and entitled to sue upon it. No doubt the judgment is binding against Dandy until it is opened up. It clearly appears that, apart from this default judgment obtained on a spurious cause of action, Davies is not and never was a creditor of Dandy. Dandy's creditors whose claims were in existence when he made the conveyance to his wife have taken no steps to attack it. So far as we have knowledge of them, they have either been paid or they are secured by mortgages on the apartment block in question. At the time the conveyance was made the apartment block was worth $40,000 according to the evidence of Hamilton, an expert valuator. The encumbrances were then about $31,000. The net revenue was sufficient during 1914 to pay interest on all the mortgages at the rate of 8% per annum. At the present time the revenue from

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the block is about the same as it was in 1914. Hamilton estimates its present valuation to be $40,000.

I think the trial Judge was justified in finding that Dandy had at the time he made the conveyance to his wife sufficient property to satisfy the obligations for which he was then liable. The circumstances in this case are very like those in *Crombie* v. *Young* (1894), 26 O.R. 194. There the defendant shortly after making a mortgage made a voluntary settlement of other property on his wife. The value of the mortgaged property was at the time greatly in excess of the amount of the loan and was deemed by the parties to be ample security. No intention to defraud was shewn, but owing to a stagnation in real estate when the mortgage matured the property could not be sold for the amount due upon it. It was held by the Divisional Court that a mortgage debt was not within the Statute 13 Eliz., ch. 5, unless it is shewn that the mortgage security at the time of the loan was of less value than the amount loaned. The mortgage upon which the plaintiff in the present case bases his claim to be a creditor of Dandy was given by Livingstone to Mrs. Davies to secure a balance of purchase money of the block in question, the purchase price being $50,000, and there being only $25,000 of mortgages having priority over it. The Davies are hardly in a position to say that the security was not at the time worth the amount of the mortgage.

The appeal should be dismissed with costs.

Cameron, J.A.

CAMERON, J.A.:—In this case Curran, J., dismissed the action at the trial, making findings of fact which, in my opinion, are amply supported by the evidence. I am convinced there was no intention on the part of the defendants to defeat or delay creditors within the Statute of Elizabeth.

15 Hals. page 83, par. 172 says:

> The question of intent to delay, hinder, or defraud creditors is always one of fact, which the Court has to decide on the merits of each particular case after taking all the circumstances surrounding the making of the alienation into account.

Even if it had been shewn that the necessary effect of the conveyance in question was to defeat and delay the husband's creditors (and in my opinion that was not established) that circumstance would not be conclusive of the intent to defraud. 15 Hals. page 85. In *Ex parte Mercer* (1886), 17 Q.B.D. 290 at 299, Lord

Esher, referring to "the assumption that, if the natural or necessary effect of what the settlor did was to defeat or delay his creditors, the Court must find that he actually had that intent," says: "That proposition or doctrine I entirely abjure."

All the circumstances referred to in the argument as constituting badges of fraud are readily susceptible of explanation. Neither the war nor its consequences were in contemplation at the time of the transaction. The husband had every confidence in the value of his purchase of the Gwalia Block as he shewed by his large investment of land and money in it.

I further think the objection that the plaintiff is not a creditor within the Statute 13 Eliz., ch. 5, is well taken.

> Mortgagees, who have a specific portion of property set aside and so far as their interest is concerned, freed from liability to the general debts, and to which they can primarily at least, resort for the satisfaction of their claims, are not to be regarded as "creditors," or, at least, a mortgage debt is not, properly speaking, a debt for the purposes of the statute. But if the property mortgaged is not sufficient to satisfy the debt, the mortgagee, of course, will be a creditor for the balance. (May on Fraudulent and Voluntary Conveyances, 3rd ed., page 104.)

See also *Crombie* v. *Young*, 26 O.R. 194; *Sun Life Ass. Co.* v. *Elliott* (1900), 31 Can. S.C.R. 91 (referred to in note in May, *Ib.*). The determination of this is a question of fact and the trial Judge has made a finding which is supported by the evidence. In fact, the only competent evidence on which stress can be laid regarding the value of the Gwalia Block is that of Hamilton, who testified that there was ample security in the property for all the encumbrances against it.

The plaintiff's claim is on a judgment and arose out of a mortgage given by one W. G. Livingstone to his (the plaintiff's wife) on the Gwalia Block for $11,200, dated October 7, 1911, payable $2,000 on September 1, 1912, 1913, and the balance September 1, 1915, with interest at 6%. This mortgage the plaintiff's wife assigned to the Northern Canadian Mortgage Co. as security for a loan of $2,000. In August, 1913, Livingstone sold and transferred to James Dandy and one Poyner the said block. August 29, 1913, the plaintiff's wife assigned to him the said mortgage subject to the amount due to the Northern Canadian Mortgage Co. Livingstone died April 2, 1917, and his will was duly proved in October, 1917, by his executors, who, June 5, 1918, transferred and assigned

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the debt due the Livingstone estate by Dandy and Poyner to the plaintiff.

There was, therefore, no privity of contract at any time between the plaintiff's wife or the plaintiff and Dandy or Poyner, the purchasers from Livingstone. The liability of Dandy and Poyner arose solely by operation of sec. 97 of the Real Property Act under which there is implied a covenant by the transferee to the transferor to indemnify and keep harmless the transferor against the principal sum or other moneys secured by any mortgage to which the land is subject. It was only on the assignment by Livingstone's executors to the plaintiff in June, 1918, that the plaintiff acquired a right of action against Dandy. These circumstances tend to give added stress in this case to the general rule that a mortgage debt is not, properly speaking, a debt for the purposes of the statute. For in applying the rule it appears that while the plaintiff is a mortgagee of the premises it is not the defendant Dandy that is his mortgagor. Dandy became liable to Livingstone by virtue only of the statutory covenant implied in the transfer from Livingstone to him and to the plaintiff by virtue solely of the assignment nearly 5 years later by the executors of Livingstone to the plaintiff of the "debt" on that implied statutory covenant.

I would dismiss the appeal.

Haggart, J.A.
Davies, J.A.

HAGGART and FULLERTON, JJ.A., agreed in the result.

Dennistoun, J.A.

DENNISTOUN, J.A.:—This is an action by a judgment creditor to set aside a voluntary conveyance made by the defendant Dandy to his wife the co-defendant.

The trial Judge has found that the plaintiff is not a creditor within the meaning of 13 Eliz., ch. 5, and that at the time the voluntary conveyance was made to his wife the defendant Dandy had ample property with which to satisfy the obligations for which he was liable. He therefore dismissed the plaintiff's action. I am of opinion that he was right in so doing.

At the time the voluntary conveyance was made on February 27, 1914, Dandy owned chattel property which he valued at $10,500, and which he sold in 1917 for over $8,000. He also owned an interest in an apartment block in Winnipeg which he had purchased in 1913 in partnership with one Poyner for $63,000, subject to mortgages amounting to $31,883.93. In settlement of that purchase he had paid in lands and cash the sum of $20,080.

The rentals of this block amounted to some $5,500 per annum gross and to about $3,200 net. He had at that time no debts except those assumed by implied covenant in respect to the mortgages on the block.

The apartment block purchased by the defendant and the farm lands given by him in exchange were no doubt valued at a high price at the time the deal was completed, but in any event the value of the block was to a very considerable amount in excess of the encumbrances against it.

The trial Judge was clearly right in finding that Dandy was not in insolvent circumstances, or unable to pay his debts in full, or on the eve of insolvency when he conveyed his homestead farm to his wife in 1914, pursuant to a promise which he had made to her in 1909 and had repeated more than once. It follows that the voluntary conveyance cannot be successfully attacked under the Assignments Act, R.S.M. 1913, ch. 12, sec. 38.

It then remains to be considered whether it can be declared fraudulent under 13 Eliz., ch. 5.

That statute provides in effect, that all conveyances and dispositions of property real or personal, made with the intention of delaying, hindering, or defrauding creditors, shall be null and void as against them, their heirs and assigns.

In considering whether a voluntary conveyance is void under the statute the *intent or purpose* of the donor only in making the gift is to be regarded. The cases in which such conveyances are void as against creditors whose claims exist at the time of the conveyance may be divided into (1) those in which the fraudulent intent, though not apparent as a fact in evidence in the case, is established as a presumption of law; and (2) those in which such intent appears as a fact in evidence.

As to the first class of cases it may be stated generally that any voluntary transfer of property by a person "indebted" according to Lord Hardwicke's meaning in *Townshend* v. *Windham* (1750), 2 Ves. Sen. 1, at page 10, 28 E.R. 1, is void as against his existing creditors.

The mere fact of a man thus indebted giving away part of his estate is by presumption and construction of law a fraudulent act.

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The principle on which the Statute of 13 Eliz., ch. 5, proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made. (*Freeman* v. *Pope* (1870), 5 Ch. App. 538, at page 540.)

But there is a qualification of this doctrine which must be here considered. The Statute of 13 Eliz., ch. 5, is clearly intended to prevent persons from conveying away the whole or any part of their property in derogation of the rights of those who as *general* creditors have a claim on the *general* assets of their debtor. Mortgagees, therefore, who have a specific portion of property set aside and so far as their interest is concerned freed from liability to the general debts, and to which they can primarily at least resort for the satisfaction of their claims are not to be regarded as "creditors"; or at least a mortgage debt is not properly speaking a debt for the purposes of the statute; for a fully secured debt is generally excluded from an estimate of liabilities.

At the time the debt which formed the cause of action now merged in the judgment sued on was incurred, it was secured by mortgage on the apartment building referred to. True it was a fourth mortgage for $7,200 with some $24,000 in priority to it, but the property upon which it was charged had been sold for $63,000 in 1913 and was valued by a competent valuator at $40,000 at the time of the trial. There is no evidence that any attempt has been made to realise upon the security of the land and I am unable to say upon the evidence that such security is insufficient to satisfy the plaintiff's judgment without calling upon the defendant under the implied covenant for indemnity to his immediate transferor which has been assigned to the plaintiff. That being so, it is impossible to hold that a fraudulent intent to delay or defeat the claims of this plaintiff has been established as a presumption of law, for although the debt is one which has been in existence since a time prior to the voluntary conveyance, the plaintiff has never been a creditor looking to the general assets of the defendant within the meaning of 13 Eliz., ch. 5, *Freeman* v. *Pope*, 5 Ch. App. 538; *Sun Life* v. *Elliott*, 31 Can. S.C.R. 91; *Ex parte Mercer*, 17 Q.B.D. 290; May on Fraudulent Conveyances, 104; *Crombie* v. *Young*, 26 O.R. 194.

I do not consider it necessary to discuss the evidence as to intent which may by inference be drawn from the conduct of the

parties as was skilfully done by Mr. Hoskin in his able argument. Had this debt been unsecured, and the plaintiff's right to sue free from doubt, I would have approached this ground of appeal with a strong inclination in the appellant's favour.

Although this action is brought upon a judgment obtained on December 31, 1918, the plaintiff did not rely upon his judgment alone, but opened up the whole of the transactions back as far as the year 1913. He no doubt felt compelled to do this in order to shew the continuity of the debt back to and antecedent to the voluntary conveyance.

Having taken this course, the whole question of his right to recover that judgment appears to be at large. An examination of his documents of title shews that he had no right to obtain the judgment which the defendant allowed to go by default, owing to his absence in California, and his ill-health. The title to the mortgage sued on is not in the plaintiff, but appears to be in the Northern Canadian Mortgage Co., which was not a party to the action, and upon this ground alone the plaintiff should not recover.

There remains yet another which was but lightly touched upon during the argument, and that is with regard to the exemption of a homestead from proceedings of this kind. The lands conveyed by the defendant to his wife consisted of his homestead and other land.

If *Fredericks* v. *North West Thresher Co.* (1910), 3 S.L.R. 280; (1911), 44 Can. S.C.R. 318, and *Hart* v. *Rye* (1914), 16 D.L.R. 1, apply, he had a right to alienate his homestead as he saw fit without regard to the claims of creditors. On the other hand, if *Roberts* v. *Hartley* (1902), 14 Man. L.R. 284, be still the law of Manitoba, he had not. The decision will depend upon the construction to be placed upon the statutes which govern in each province when read by the light of the decision in the Supreme Court of Canada.

Upon the whole case so many difficulties beset the plaintiff that I am of opinion the findings of the trial Judge should not be disturbed, and I would dismiss the appeal with costs.

Appeal dismissed.

B. C.

C. A.

Re GILLESPIE AND MUNICIPALITY OF SOUTH VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 15, 1920.

MANDAMUS (§ IE—43)—TO COMPEL INSPECTION OF MUNICIPALITY'S BOOKS—RATEPAYER—RIGHT TO.

Under the Corporation of the District of South Vancouver Administration Act, 8 Geo. V. 1918, B.C., ch. 82, a ratepayer has no statutory right to demand from the Commissioner the production of his books and documents when the ratepayer has no direct interest therein.

Statement. APPEAL by plaintiff from the order of Macdonald, J., allowing a writ of mandamus against the City of Vancouver. Reversed.

F. A. McDiarmid and *G. S. Wismer*, for appellant.

A. H. MacNeill, K.C., for respondent.

Macdonald, C.J.A. MACDONALD, C.J.A.:—The appeal should be allowed and the order for a writ of mandamus set aside.

No doubt the Court has power to direct the issue of such a writ against an officer of the character of the Commissioner here. *Rex* v. *Southwold Corp'n; Ex parte Wrightson* (1907), 97 L.T. 431, 71 J.P. 351.

The Corporation of the District of South Vancouver is the creature of the Statute 8 Geo. V. 1918 (B.C.), ch. 82, its powers and duties and those of its officers are those given or imposed by statute or which may reasonably be inferred therefrom. *Tenby Corporation* v. *Mason*, [1908] 1 Ch. 457, 24 T.L.R. 254. In the present case the Commissioner's powers and duties are defined by ch. 82 of 8 Geo. V. 1918. Even if it were granted that the Commissioner's duties are co-extensive with those of the corporation, I have asked counsel for the respondent in vain, for reference to any statute giving his clients the right they demand. The sections in the Municipal Act, 4 Geo. V. 1914 (B.C.), ch. 52, touching upon the corporation's duty in respect of the production of its books and documents are inferentially not in favour of respondent's demand but against it. (See sec. 379 *et seq.*, and sec. 475.)

When the said ch. 82 (8 Geo. V. 1918), is appealed to, and this in my opinion is the governing Act to be applied in this case, it will be found that express provision is by sec. 10 made for inspection and audit of the Commissioner's books and accounts, and by sec. 9,

> The Commissioner shall make a report to the Minister of Finance concerning all matters connected with his administration whenever required by the Lieutenant-Governor in Council to do so.

The Legislature, while safeguarding the interests of ratepayers and municipalities by providing for a duly authorised inspection,

audits and even compulsory audits and by public enquiries into the conduct of municipal business, and in the case of its Commissioner, by ample control of the Lieutenant-Governor in Council over him, defined his duties in the matter of production for inspection of his books, documents and contracts, and neither directly nor by implication has the duty been imposed upon him to open his books and exhibit his papers or documents to any ratepayer who may desire to gratify his curiosity. The question to be decided in this appeal is not one of common law. It is the statutory right, if any, of a ratepayer to demand from the Commissioner the production of his books and documents when the ratepayer has no direct interest therein.

Macdonald, C.J.A.

It was argued that the by-law at least ought to have been produced. It appears these were duly filed in the office of the County Court as required by law, and were open to inspection by the respondents. Mandamus is an extraordinary remedy and ought not to be applied unless there is real necessity therefor. Moreover, I do not decide, it being unnecessary to do so, that the Commissioner is bound in the matter of production by the provisions of the Municipal Act.

MARTIN, J.A., dissented.

Martin, J.A.

GALLIHER, J.A.:—I agree in the reasons for judgment of MACDONALD, C.J.A.

Galliher, J.A.

MCPHILLIPS, J.A., would allow the appeal.

McPhillips, J.A

Appeal allowed.

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Supreme Court of Canada, Davies, C. J., Idington, Anglin, Brodeur and Mignault, JJ. April 6, 1920.

WILL (§ I A—36)—CAPACITY OF TESTATOR—INSTRUCTIONS TO SOLICITOR—WILL DRAWN IN ACCORDANCE WITH INSTRUCTIONS—EXECUTION AT LATER DATE—EVIDENCE.

A will may be established when the testator at the time of dictating the will has sufficient discretion for that purpose, and at the time of executing the same remembers that instructions were given and accepts the document to be signed as containing such instructions.

[*Parker* v. *Felgate* (1883), 8 P.D. 171; *Perera* v. *Perera*, [1901] A.C. 354; *Kaulbach* v. *Archbold* (1901), 31 Can. S.C.R. 387, approved and followed; *Faulkner* v. *Faulkner* (1919), 49 D.L.R. 504, 46 O.L.R. 69, affirmed.]

APPEAL from the Ontario Supreme Court, Appellate Division, (1919), 49 D.L.R. 504, 46 O.L.R. 69, affirming the validity of a will. Affirmed.

Statement.

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Davies, C.J.

H. H. Dewart, K.C., and *N. S. Macdonnell*, for respondent.

DAVIES, C.J.:—At the close of the argument in this case, which was quite elaborate and dealt with every phase of the evidence bearing upon the capacity of the testator to make the will in question alike when the instructions were given for its making on the Tuesday, and again on the Friday when it was executed, I was of the opinion that the appellant had utterly failed to establish the testator's incapacity.

In deference, however, to the opinion of the trial Judge (Middleton, J.), (1919), 44 O.L.R. 634, to the contrary effect, I have read and carefully considered all of the evidence called to our attention, with the result that I am more strongly confirmed in my opinion.

The Appellate Division (1919), 49 D.L.R. 504, 46 O.L.R. 69, which set aside the judgment of the trial Judge and affirmed the validity of the will, speaks of Mr. Anderson, the solicitor who took his instructions from the testator and drew the will, as a "careful and competent solicitor" (49 D.L.R. at 509). He, it appears to me, took great pains to make sure that the testator fully understood the disposition he was making of his property, reading each paragraph over slowly and carefully to him and satisfying himself that the testator clearly understood them. Then we have the evidence of Dr. Forrest, who attended the deceased while he was in hospital and speaks of his mental and physical condition when the instructions for the making of the will were given and when it was read over to the testator, clause by clause, and executed by him.

I agree fully with the judgment of the Appellate Division, 49 D.L.R. 504, 46 O.L.R. 69, delivered by Maclaren, J.A., allowing the appeal from the judgment of the trial Judge and affirming the validity of the will.

The decision of the Privy Council in the case of *Perera* v. *Perera*, [1901] A.C. 354, is relied upon in the judgment appealed from and is, I think, peculiarly applicable to the case before us. The head-note to that case reads that

> Where a testator is of sound mind when he gives instructions for a will, but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, held, that he must be deemed to be of sound mind when it is executed.

Lord Macnaghten in delivering the judgment of the Judicial Committee is reported at p. 361-362, as follows:—

The learned counsel for the appellant did not contend that the witnesses in support of the will were acting in conspiracy or saying what they knew to be false. He said that the will may have been, and probably was, read over to the testator, but that there was nothing to shew that he followed the reading of the will or understood its meaning. He adopted the argument of Laurie, J., to the effect that it was not enough to prove that a testator was of sound mind when he gave instructions for his will, and that the instrument drawn in pursuance of those instructions was signed by him as his will, if it is not shewn that he was capable of understanding its provisions at the time of signature. That, however, is not the law. In *Parker* v. *Felgate* (1883), 8 P.D. 171, Sir James Hannen lays down the law thus, at page 173: "If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: 'I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.'"

Their Lordships think that the ruling of Sir James Hannen is good law and good sense. They could not, therefore, hold the will invalid even if they were persuaded that Perera was unable to follow all the provisions of his will when it was read over to him by Gooneratue's clerk. But they desire to add that they see no reason to doubt or qualify the testimony of the witnesses who agreed in saying that the testator was of sound mind when the will was executed.

I would dismiss the appeal with costs.

IDINGTON, J.—The evidence of the solicitor who drew the will in question is, to my mind, conclusive that the testator was, at the time of giving instructions therefor, possessed of testamentary capacity and sufficiently so to give said instructions and to understand the will drawn in accord therewith as read to him, when he assented thereto.

Idington, J.

The solicitor, although he had become acquainted with him in the course of serving him professionally, knew nothing of his family relations, save and except what he got from himself on that occasion.

The will which resulted from the instructions so given by the testator, is what, under all the circumstances in question, including the destruction of a previous will, one might not unreasonably expect.

It seems to fit the testator's peculiar circumstances and purposes in a way that would have been impossible had he been in

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the sort of comatose state some would seem to be inclined to lead us to believe.

The refusal to make his mark on Tuesday, when too feeble to write, shews the man and the mind, in a way to indicate he knew what he was about—and declined to go down as a mere marksman, though too feeble to be quite sure of holding his pen to the end of writing out his signature.

The repeated categorical assent (given on the following Friday when the will was executed) to each clause therein indicates that degree of intelligence and understanding on the part of the testator which has been upheld in many cases as sufficient for the mere execution of a will prepared according to instructions given when testamentary capacity had existed as I find herein.

I therefore think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—Without discrediting and in large part rejecting the testimony of Mr. Anderson, the solicitor who prepared the impeached will, it is in my opinion not possible to set it aside. That I am certainly not prepared to do.

The testamentary capacity of the testator on the Tuesday, when instructions for the will were given and it was drafted, is in my opinion well established by the evidence considered as a whole. Although Dr. Forrest undoubtedly left himself open to some criticism as a witness, I cannot regard his testimony as entirely undeserving of credit.

While the condition of the testator on the Friday, when the will was executed, is perhaps more questionable, the weight of the evidence, in my opinion, is, that he then had the degree of capacity required under such authorities as *Parker* v. *Felgate*, 8 P.D. 171, at 174; *Perera* v. *Perera*, [1901] A.C. 354, at 361; and *Kaulbach* v. *Archbold*, 31 Can. S.C.R. 387, at 391.

I would dismiss the appeal with costs.

Brodeur J.

BRODEUR, J.—I concur with my brother Mignault.

Mignault, J.

MIGNAULT, J.—After carefully reading the evidence in this case I am satisfied that the testator, Hugh Faulkner, had sufficient testamentary capacity on the afternoon of Tuesday, January 29, 1918, after his admission to the hospital, to give instructions for his will. Outside of his brother, the respondent, several independent witnesses saw him on that Tuesday, and state that he was perfectly rational, although severely ill, and with assistance

he walked down the stairs and steps of his lodging house, and went to the hospital in a taxi. Shortly afterwards, Mr. Anderson, the solicitor who prepared the will, arrived at the hospital and received the testator's instructions, and unless Mr. Anderson's testimony is rejected as unreliable, the testator fully understood the nature of the disposition which he was making of his property. The will was written out by Mr. Anderson then and there and read over to the testator, but when the time came to sign it, Hugh Faulkner was in a sleepy or drowsy condition, and after a couple of attempts, Mr. Anderson and the nurse thought that they had better wait and have him sign another time. Had he then signed the will, I do not think that on the evidence it could be successfully contended that he did not have sufficient testamentary capacity.

Mr. Anderson was called early on Friday, he says, by the superintendent of the hospital, Miss Walkdem, to have the will signed, and it was then that the testator, his hand being aided by Mr. Anderson, for the disease had blinded him, put his mark to the will before three witnesses, including Dr. Forrest, his medical attendant, for whose arrival Mr. Anderson had very prudently waited before proceeding with the execution of the will. The question then was: Could the testator think thus far? See *per* Sir James Hannen in *Parker* v. *Felgate*, 8 P.D. 171, at 173, approved by the Judicial Committee of the Privy Council in *Perera* v. *Perera*, [1901] A.C. 354, at 361:—

> I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.

In fact, this test is more than satisfied because Mr. Anderson states:—

"I said to him 'Mr. Faulkner, do you know who is speaking, Anderson is speaking.' He said: 'Yes, oh yes.' 'Are you willing to have your will signed this morning?' He said 'Yes.' Then I said 'You remember the other day you did not sign your will, you would not make your mark?' He said 'Yes.' I said 'Are you willing to make your mark this morning, I am afraid you cannot see.' He said 'Yes.' 'Well,' I said, 'The will is the same will that I drew the other day, only we will have to change the date of it to this morning.'" I think I changed the date right there. Then I read it over to him. I read it clause by clause, and after

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each clause—(Q. Just a moment. In reading it over to him, what was your judgment as to whether he heard and understood what you were reading? A. He certainly heard and understood, to my mind, what was said").

Mr. Anderson adds that he went back to the clause concerning the appellant, to whom $1 only was bequeathed, and asked the testator if he wished to change this legacy, and he answered "No."

As I have said, it would be necessary to reject Mr. Anderson's testimony to decide that the will was not properly executed by a competent testator.

I have considered, of course, the nurses' evidence that Hugh Faulkner, while at the hospital, was unconscious all the time, apparently because they could not get him to speak to them. The expert medical testimony is not sufficiently strong to my mind, characterised as it really is by many qualifications, to discredit the direct evidence of testamentary capacity. The testator, it is clear, was not delirious at any time, he was generally in a state of stupor, from which, however, he could be and evidently was roused, sufficiently, without doubt, to give his instructions for his will on the Tuesday and on the Friday sufficiently to know that he was executing the will prepared according to these instructions.

The Appellate Division, 49 D.L.R. 504, 46 O.L.R. 69, under these circumstances reversed the judgment of the trial Judge, 44 O.L.R. 634, and after reading the evidence, I would not feel justified in disturbing its judgment.

The appeal should be dismissed with costs.

Appeal dismissed.

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C. A.

McCAULEY v. HUBER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 12, 1920.

AGISTERS (§ I—1)—AGREEMENT TO ALLOW COLTS TO RUN AT LARGE WITH HORSES—COLTS STRAYING—LOSS—LIABILITY—NEGLIGENCE—PROOF.

Under the terms of an agreement the defendant was to allow plaintiff's two colts to run at large with defendants' horses during the winter and to give them the same treatment as his own horses. In the spring the defendant's horses were taken in, but the colts were left running at large, and strayed, and were lost.

Held, per HAULTAIN, C.J.S., and NEWLANDS, J.A., that the horses having been lost while in the possession of the defendant, the onus was on the defendant to prove that it was through no negligence of his that they strayed away and were lost, and that he had not discharged that onus.

Held, per LAMONT and ELWOOD, JJ.A., that it being a term of the agreement that the colts were to run at large with defendant's horses, relieved the defendant from liability for their straying away while at large, unless he left them at large for an unreasonable time without seeking to find their whereabouts.

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APPEAL by defendant from the trial judgment in an action to recover the value of two stallion colts which strayed off and were lost while in the possession of the defendant under an agreement by which they were to be allowed to run at large with his horses. Affirmed, the Court being equally divided.

Statement.

W. G. Ross, for appellant; *E. F. Collins*, for respondent.

HAULTAIN, C.J.S., concurred with Newlands, J.A.

Haultain, C.J.S.

NEWLANDS, J.A.:—In this case I am of the opinion that the evidence sustains the trial Judge's finding, and I would therefore dismiss the appeal with costs.

Newlands, J.A.

In *Phipps* v. *New Claridge's Hotel Co.* (1905), 22 T.L.R. 49, Bray, J., said at page 50:

> That he was of opinion that when it was once proved that this dog was placed in the defendants' custody as an ordinary bailment, it was their duty to shew some circumstances which negatived the idea of negligence on their part. No such evidence had been placed before him. The story which their witnesses told was one he could not accept, and he must therefore hold that they had not proved that reasonable care was taken, and must come to the conclusion that there was negligence on their part.

This case was followed in Ontario in *Pratt* v. *Waddington* (1911), 23 O.L.R. 178; and in British Columbia in *Pye* v. *McClure* (1915), 22 D.L.R. 543, 21 B.C.R. 114.

The horses having been lost while in the possession of the defendant, has he shewn that such loss was through no negligence of his? By his evidence it is quite clear that he took no care of them. He did not feed them when he fed his own horses, nor did he allow them to go into his shed, but turned them away when they came home with his horses.

It is said they were not lost from these causes, but strayed away in April, after there was no necessity for stabling or feeding them. That, however, does not absolve the defendant from liability. He must still prove that it was through no negligence of his that they strayed away and were lost. His son, who was his principal witness, says that colts not castrated (these colts were entire horses) always stray away in the spring. The last time the defendant saw them was about April 20. The following week plaintiff went for them, but could not get them, and he and

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defendant's son hunted for them for a short time but could not find them. There is evidence on the part of the plaintiff that when his horses were running at large, as these were, that he never let them go more than a week without hunting them up. It is contended that as defendant went without plaintiff to look for these horses the following week after last seeing them, they were therefore lost through no negligence on his part. I cannot agree with this contention. To search for horses after they are lost is no evidence that they were not lost through the negligence of the defendant, and as the burden is upon him to shew that he was not negligent, he must shew that he exercised due care before, and not after, the horses were lost; especially as he knew that the time had arrived when these horses would stray away if not looked after.

Lamont, J.A.

LAMONT, J.A.:—In November, 1918, the plaintiff purchased two stallion colts from the defendant. He did not take them away, but obtained permission to let them run with the defendant's horses. Later he made an agreement with the defendant, as the trial Judge has found, whereby "the defendant should take care of the colts until May 1, 1919, for the sum of $25, and that the colts should receive the same treatment as the defendant's own horses." The plaintiff admits that his colts were not to be kept in during the winter by the defendant, but that they were to run at large with the defendant's horses. The defendant was sick through the winter and his son took care of the horses. The District Court Judge has found that the son did not give the plaintiff's colts the same treatment as to his own horses. The horses were allowed to run at large, but when the herd returned to the son's place he would put his own and his father's horses in the shed and feed them some straw, while he excluded the plaintiff's colts from the shed. The horses were around the son's place on April 20, 1919, at which time, or a few days before, the work horses were all taken in, leaving the plaintiff's two colts and two younger colts belonging to the defendant's son running at large. The plaintiff's two colts strayed away and have not been heard of since. The plaintiff admits that during the week following April 20, he knew his colts had strayed away, and he and the defendant's son went to look for them, but were unable to find them. The reason given by the defendant's son for their straying

away was, that they were stallion colts and that stallion colts always stray away in the spring. The trial Judge held that as the defendant's son had been guilty of negligence in not giving the plaintiff's colts the same treatment as he gave the other horses, the plaintiff was entitled to recover the value of the colts. From that judgment this appeal is brought.

A contract of agistment is in the nature of a contract of bailment for the benefit of both bailor and bailee. The contract implies, in the absence of special agreement, that the agister will use due care and diligence in keeping the animals taken in by him in return for the compensation to be paid by their owner. The agister is not an insurer, but he is liable for injury caused to the animals through his negligence or neglect to take reasonable or proper care of them. 1 Hals., page 386, pars. 841-4.

Where the animals are lost while in the custody of the agister, although there has been some conflict of judicial opinion, the weight of authority in my opinion supports the rule that the onus is upon the agister to establish that he took proper care of the animals, unless he received them under a special contract which limited his common law liability.

In *Phipps* v. *New Claridge's Hotel Co.*, 22 T.L.R. 49, it was held that where goods are given into the sole custody of a person and accepted by him as bailee, and they were lost while in his custody, the onus lies upon him to shew circumstances negativing negligence on his part.

In 1 Hals., page 545, par. 1109, the rule is laid down in the following language:

> When a chattel intrusted to a custodian is lost, injured, or destroyed the onus of proof is on the custodian to shew that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in shewing this, he is not bound to shew how or when the loss or damage occurred.

In *Ouderkirk* v. *Central National Bank of Troy* (1890), 119 N.Y. 263, the rule is succinctly stated as follows (see headnote):

> To justify a refusal to return the property, on the ground of a loss thereof, the burden is upon the bailee of shewing the exercise by him of due care according to the nature of the bailment.

See also: *Pratt* v. *Waddington*, 23 O.L.R. 178; *Pearce* v. *Sheppard* (1893), 24 O.R. 167; *Pye* v. *McClure*, 22 D.L.R. 543, 21 B.C.R. 114; *Gould* v. *Blanchard* (1897), 29 N.S.R. 361.

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Apart, therefore, from any special contract, the onus is on the agister in case of loss to shew circumstances negativing negligence on his part. The common law liability of an agister may, however, be enlarged or diminished by the terms of a special agreement entered into between the parties.

In *Harris* v. *Gt. Western Ry. Co.* (1876), 1 Q.B.D. 516, Lord Blackburn, J., at page 530, says:

> But if the bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed.

It was a term of the contract in the present case, that the colts were to be allowed to run at large with the defendant's horses. Running at large means:

> Without being under control of the owner, either by being in direct and continuous charge of a herder or by confinement within any building or other enclosure or fence, whether the same be lawful or not. The Entire Animals Act, R.S.S. 1909, ch. 120, sec. 2, sub-sec. 6. (See amendment 6 Geo. V. 1915, ch. 32.)

The evidence shews that it was customary in the district in which the plaintiff and defendant lived for farmers to permit their animals to run at large, but if they did not return home within a reasonable time, the owner would go and look for them. The plaintiff was asked as to the length of time he would leave his horses at large, without knowing where they were, and he replied that he never let them go more than a week. He further stated that three months would be an unreasonable length of time.

In my opinion the agreement on part of the plaintiff that the colts were to run at large with the defendant's horses, relieves the defendant from liability for their straying away while at large, provided he did not leave them at large an unreasonable length of time without seeking to find where they were. That is the only negligence on part of the defendant which, under the circumstances of this case, could, in my opinion, have contributed to their loss. The failure of the defendant to let the colts into the shed through the winter, while a breach of the defendant's agreement, cannot, in my opinion, be said to have contributed to their straying away. If it were necessary to conjecture as to why they strayed away, either the reason given by the defendant's son, or the probability that they found greener pastures

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elsewhere, would seem to me to be more likely than that they strayed away as a result of the defendant's failure to admit them into the shed and award them their allowance of straw. Since the defendant established that they strayed away while running at large in accordance with the terms of the agreement, the onus was upon the plaintiff to shew negligence on the part of the defendant contributing to their loss. Not only was such negligence not shewn, but the evidence discloses that, within a reasonable time after they strayed, both the defendant's son and the plaintiff were looking for them.

In view of the agreement that the colts should be allowed to run at large, I am of opinion that the defendant is not liable for their straying away while so at large. The appeal should, therefore, be allowed with costs, and the judgment below set aside, and judgment entered for the defendant with costs.

ELWOOD, J.A., concurred with Lamont, J.A. Elwood, J.A.

Appeal dismissed, the Court being equally divided.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A., and Orde, J. June 11, 1920.

CRIMINAL LAW (§ I A—3)—PRETENDING TO BE ABLE TO DISCOVER STOLEN GOODS, SEC. 443 CR. CODE—OCCULT OR CRAFTY SCIENCE—HONEST BELIEF IN POWERS.

There is no law to prevent a person from communing with departed spirits, but it is an offence under sec. 443 of the Criminal Code to profess with their aid to be able to discover lost or stolen goods although there is an honest belief in the power to do so.

[Review of authorities, *Rex* v. *Marcott* (1901), 2 O.L.R. 105; *Rex* v. *Monsell* (1916), 28 D.L.R. 275, 26 Can. Cr. Cas. 1, 35 O.L.R. 336, referred to.]

THE following statement of the facts is taken from the judgment of ORDE, J.:— Statement.

The accused, Margaret Pollock, was convicted by the Judge of the County Court of the County of Huron, upon a charge preferred against her under sec. 443 of the Criminal Code, that she "did unlawfully pretend from her skill and knowledge in an occult and crafty science to discover where and in what manner certain goods and chattels to wit certain grain and oats supposed to have been stolen from one John Leonhardt could be found." The learned County Court Judge has reserved for the opinion of this Court the following questions:—

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"(1) Was there sufficient in the evidence as a matter of law to justify the conviction, in the absence of any evidence on the part of the Crown shewing that the statements made or information given by the accused was false?

"(2) The accused being possessed, as I have found, of an honest though deluded belief in her alleged power of communication with spirits, was I right as a matter of law in convicting her of the offence charged?"

There was also a third question reserved at the request of counsel for the Crown, but this was abandoned on the hearing of the appeal.

Charles Garrow, for defendant.

Edward Bayly, K.C., for the Crown.

The judgment of the Court was read by

Orde, J.

ORDE, J.:—Counsel for the accused contended that, in order to constitute an offence under that part of sec. 443 of the Criminal Code upon which the conviction is based, there must be upon the part of the accused an intent to deceive, and that, if she honestly believed, as the learned trial Judge has found, that she really possessed the power that she professed to exercise, she could not be found guilty.

This section of the Code deals with three classes of offences, all somewhat related, but nevertheless treated as distinct by the wording of the section, which is as follows:—

"443. Every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found."

It is under the last of the three classes of offences that the present charge falls. I have been unable to find any decided case either under this part of the section of the Code or under the corresponding part of sec. 4 of the Witchcraft Act of 1736, 9 Geo. II. ch. 5, from which our legislation is taken. There are some English and Canadian cases upon the subject of fortune-telling, but the English cases with one exception deal with charges of fortune-telling under sec. 4 of the Vagrancy Act of 1824, 5 Geo. IV.

ch. 83, which makes an intent "to deceive and impose on any of His Majesty's subjects" an ingredient of the offence.

The history of sec. 443 of the Criminal Code, so far as Canada is concerned, is very simple. Prior to 1892, when the criminal laws of Canada were codified, there was no Canadian legislation on the subject, but it was held in *Regina* v. *Milford* (1890), 20 O.R. 306, that the Witchcraft Act, 9 Geo. II. ch. 5, was imported nto Canada by the Act of Upper Canada 40 Geo. III. ch. 1, and that a charge of undertaking to tell fortunes could be laid in Canada under the English Act. Whether it was in consequence of this decision or not, the Criminal Code of 1892, by sec. 396, re-enacted *verbatim* the effective portions of sec. 4 of the English Act. Section 396 is now sec. 443 of the present Code. No attempt is made in the Code to define any of the unusual terms used in the section, and we are driven to an examination of the Witchcraft Act of 1736 for their meaning.

In the present case the accused did profess, by certain means or from certain powers which she claimed to possess, to discover where and in what manner certain goods supposed to have been stolen might be found. Was her profession of a power enabling her so to discover the stolen goods a "pretending," and did the means which she claimed to use or the power which she claimed to possess constitute an alleged "skill or knowledge in an occult or crafty science?"

The evidence upon which the conviction is based is, shortly, that Leonhardt, having lost certain oats which he believed to have been stolen, went to the accused for the express purpose of endeavouring, by resorting to her alleged powers, to discover the whereabouts of the grain; that she took from him one of his mitts, which she held in her hand; and that she then proceeded, sometimes with eyes closed, and sometimes with them open, to describe to Leonhardt the manner in which the oats had been taken from his barn, the appearance of the men who took them, and of the horse and vehicle in which they were taken away, the direction in which they went, and the distance and appearance of the barn to which the oats were taken. For this Leonhardt paid her 50 cents, which he paid not because she asked for it as payment, but because she said upon his asking her that people generally gave her 50 cents. The accused gave evidence on her own behalf in which she

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stated that from early childhood she had possessed the faculty of seeing the spirits of persons who had died, some of whom she recognised as people she had known, and of receiving communications from them. She says she had always regarded this faculty as a perfectly natural one, and when young had thought all persons possessed it. She does not consider that she has any powers of her own, but that the intelligence, as she puts it, comes to her quite naturally, that there is nothing about it which is occult or superhuman, and that there is no kind of deceit or sorcery or witchcraft about it. She professes to believe in Christianity, and claims that there is nothing inconsistent with such belief in what she does. She also says that she sees spirits "clairvoyantly" or by "what is called second sight." She says her views harmonise with those of persons like Sir Oliver Lodge, Sir Arthur Conan Doyle, the late W. T. Stead, and others. She admits that she uses an article worn or carried by the person consulting her to assist her, and says that as she takes the article she comes "in touch with your magnetism." In support of her evidence, as tending to establish an honest belief in her own powers, evidence was given by a lady who, with no faith in her powers, had consulted her as to a lost ring, and who had found it as a result of a communication imparted by her deceased mother to the accused.

In interpreting what is "an occult or crafty science" we must, in my opinion, try to find out in what sense these words were used in 1736 by the Act of Geo. II. Our legislation is only a re-enactment of the law as it has been in force in England before, and in Canada since, 1792. The Act of Geo. II. repealed all the Acts dealing with witchcraft from the time of Henry VIII. onwards, and declared that thereafter no proceedings for witchcraft, etc., should be commenced or carried on in any Court in Great Britain, but nevertheless, "for the more effectual preventing and punishing any pretences to such arts or powers as are before-mentioned, whereby ignorant persons are frequently deluded and defrauded," proceeded to create the three classes of offences which were re-enacted in what is now sec. 443 of the Criminal Code. It is clear that many of the terms used in sec. 4 are taken from the Act, which were repealed. For example, in 3 Coke's Institutes, ch. 6s p. 43, "felony by conjuration, witchcraft, sorcery, or enchantment" is discussed. The words "crafty science" are used in some of the

early statutes. So that in seeking for the real meaning of these words as used in the Code we must not confine ourselves to their present-day meaning, but must look for the meaning intended to be used by the legislation from Henry VIII. onwards. For the history of the English laws and legislation on the subject of witchcraft, reference may be had to Blackstone's Commentaries, vol. 4, p. 60, and Stephen's History of the Criminal Laws of England, vol. 2, p. 430.

The term "science," in its modern use, is generally "restricted to those branches of study that relate to the phenomena of the material universe and their laws," but in its wider sense it includes "the state or fact of knowing," "knowledge (more or less extensive) as a personal attribute," "knowledge acquired by study," "acquaintance with or mastery of any department of learning," "a particular branch of knowledge or study." It was in the wider sense that the word was used by English authors from the earliest times until the more restricted meaning became general during the 19th century. In this wider sense it was sometimes given a particular meaning, now obsolete, such as "a craft, trade, or occupation requiring trained skill." For example, in the Act 22 Hen. VIII. ch. 13 the term is applied to the trades or crafts of "baking, brewing, surgery, and writing." During the period when the Witchcraft Act of 1736 was passed, the word was often used in its wider meaning. See Murray's Dictionary, *sub verb.* "Science."

"Occult," in its wide sense, means "hidden," but this use is now rare or obsolete. It is also defined by Murray's Dictionary as "of the nature of or pertaining to those ancient and mediæval reputed sciences (or their modern representatives) held to involve the knowledge or use of agencies of a secret and mysterious nature (as magic, alchemy, astrology, theosophy, and the like)," and it is undoubtedly this sense in which it was used in the Act of 1736 and the earlier Acts.

The word "crafty" would be puzzling if we tried to apply the meaning now generally given to it, viz., "cunning, artful, wily," but in earlier times it meant "skilful, dexterous, clever, ingenious," and the phrase "crafty science" is used by Chaucer with some such meaning as "skilful knowledge." While the word "craft,"

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in its earliest significance, was applied to both intellectual and manual skill or knowledge, it was also used specifically to mean "occult act or magic (Murray, *sub verb.* "craft" and "crafty"); and the context in the Act of 1736 would indicate that the word is used there substantially as a synonym for "occult."

Did the accused in the present case profess to exercise any skill or knowledge in "an occult or crafty science?" I am of the opinion that she did. The word "science," as used in sec. 443 of the Code, must be given the wide meaning in which, in my judgment, it was used in the Act of 1736, namely, "knowledge" or "a particular kind of knowledge." The power to communicate with or to receive communications from, or to see, departed spirits, has always been classed as "occult." The well-known Canadian ecclesiastic, the Very Rev. Dean Harris, styles a recent work, which is devoted almost wholly to the question of intercourse with the spirits of the departed, "Essays in Occultism, Spiritism, and Demonology," and in one of the prefatory notes says, "Among the occult sciences I include the cult of spiritism."

The profession of a power or faculty to communicate with or to receive communication from the dead is, therefore, in my judgment, the profession of a skill or knowledge in an occult science within the meaning of the Code.

It is urged on behalf of the accused that to warrant a conviction there must be on the part of the accused an intent to deceive the person consulting her, and that if the statements made or the information given by her were not proved to be false, or if the accused honestly believed in her alleged power of communication with spirits, she could not be convicted.

In *Rex* v. *Marcott*, (1901), 2 O.L.R. 105, it was held by the Court of Appeal that deception is an essential element of the offence of "undertaking to tell fortunes" under this section, and that to render a person liable to conviction there must be evidence upon which it may be reasonably found that the person charged was, in so undertaking, asserting or representing, with the intention that such assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others. But I think it is clear from a careful perusal of the judgments of Armour, C.J.O., and Osler, J.A., that the deception is that which is necessarily inherent

in claiming the power to tell fortunes, and is not to be regarded subjectively as regards the person asserting the power. The deception is that which results objectively from the assertion of the claim, and it is immaterial whether the person claiming to exercise the power honestly believes that she possesses the power, or is a mere charlatan or cheat, if the assertion of the claim is made with the intention that the person to whom it is made shall believe in the existence of the power. The deception in such a case distinguishes what is done from the undertaking to tell fortunes as a joke, or a drawing-room amusement, in which there is no intention to deceive. The statement in the head-note to *Rex* v. *Marcott* that "deception is an essential element of the offence" is in reality ambiguous. It is not intended to mean that the Court held that an intent to deceive must be proved independently of the proof of the undertaking to tell fortunes, but that, in the words of Chief Justice Armour (p. 110), "the words 'undertakes to tell fortunes' . . . import that deception is practised by doing so." The judgment of Osler, J.A., is to the same effect. In that case the Court of Appeal affirmed the conviction on the ground that it was not necessary for the Crown to prove that any actual fraud or false pretence had been practised.

I find nothing in *Rex* v. *Monsell*, (1916), 28 D.L.R. 275, 26 Can. Cr. Cas. 1, 35 O.L.R. 336, at variance with my understanding of the decision in *Rex* v. *Marcott*. It was held there that there must be an intent, on the part of the person who is telling the fortune, to delude and defraud; but this, as I understand it, is not to be limited to cases where the accused is a cheat with no belief in his powers, but extends to every case where the accused intends that the person whose fortune is told shall believe that the fortune-teller is really possessed of the power; the intent to deceive or delude or defraud depending neither upon the honesty or dishonesty of the fortune-teller on the one hand, nor upon the fact that the other person is or is not deceived or deluded or defrauded on the other, but upon the existence of an intent on the part of the fortune-teller that the other person shall believe that the fortune-teller possesses the power.

The only English decision under the Witchcraft Act is *Rex* v. *Stephenson*, (1904), 68 J.P. 524, where the charge was that of undertaking to tell fortunes. It does not assist us here. The

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other cases which were cited on the argument, namely, *Monck* v. *Hilton*, (1877), 2 Ex. D. 268, *Penny* v. *Hanson*, (1887), 18 Q.B.D. 478, *Regina* v. *Entwistle*, [1899] 1 Q.B. 846, and *Davis* v. *Curry*, [1918] 1 K.B. 109, were all under sec. 4 of the Vagrancy Act of 1824. The first three of these cases, in so far as they are applicable to a charge under the Witchcraft Act of 1736, are referred to and relied on by our Court of Appeal in the *Marcott* case. Although sec. 4 of the Vagrancy Act contains the words "to deceive and impose upon any of His Majesty's subjects," the decision in *Regina* v. *Entwistle* would seem to make it clear that, while the jury or the magistrate must be satisfied that there was an intent to deceive, that intent was included in the words "pretending or professing." Channell, J., says (p. 851): "I think those words mean representing with the intention that the representation should be believed." In the recent case of *Davis* v. *Curry*, [1918] 1 K.B. 109, the effect of the language of Darling and Channell, JJ., in the *Entwistle* case seems to be qualified by the judgment of Sankey, J., and of Darling, J., himself. The latter says at p. 116: "I cannot satisfy myself that a man can exhibit an intention to deceive by stating a thing in which he genuinely believes;" and at p. 117: "All that the Court intended to decide in *Regina* v. *Entwistle* was that, there being evidence of an intent to deceive, it was not necessary that the information should contain the words 'with intent to deceive,' as such an intent is implied in the words 'pretending and professing.' When the case comes before him again the magistrate may consider that the defendant cannot have believed in what she was professing to believe. Be that as it may, he was wrong in treating an intention to deceive as if it were immaterial, and in holding that, whether the defendant believed she had power to foretell events, or whether she knew she had no such power but intended to deceive, an offence was in either case committed. If certain things are done with an intent to deceive then an offence is committed, but if they are done with an honest belief in the possession of power to do them, and with no intention of deceiving any one, then the magistrate ought to acquit."

With all due respect to Mr. Justice Darling, I find it difficult to reconcile the decisions in *Regina* v. *Entwistle* and *Davis* v. *Curry*, except by limiting the latter case to a decision that the magistrate

should have heard the evidence as to her belief in her powers tendered by the accused. It is to be noted that Darling, J., says that if the things "are done with an honest belief in the possession of power to do them, *and with no intention of deceiving any one*, then the magistrate ought to acquit." It may be that, even with a finding that the accused had an honest belief in her powers, if she had asserted them with the intention that others should believe in her possession of them, Darling, J., might hold that there was an intention to deceive which would warrant a conviction under sec. 4 of the Vagrancy Act. But, if that were so, it is hard to understand why he should have referred the case back to the magistrate to hear the evidence as to the belief of the accused.

If the decision in *Davis* v. *Curry* is to be deemed at variance with those of our Court of Appeal in *Rex* v. *Marcott* and *Rex* v. *Monsell*, then we ought to follow the latter, which, while applying the reasoning of the earlier English cases, are really decisions upon a different Act. I do not think that in applying the principles of the *Marcott* and *Monsell* cases to the present case, any real distinction is to be drawn between the word "undertakes," in the one class of cases under sec. 443 of the Code, and "pretends," in the other class. The word "pretends" is not limited here to the making of a false profession in the sense that the person making the profession does so knowing that it is false. Like some of the other words in the section already mentioned, the meaning of the word "pretend" has in the course of time been greatly narrowed. In earlier times it meant, among other things, "to profess to have, to make profession of" some quality or skill. The element of intentional falsity now involved in the word is of modern growth. See Murray's Dictionary—*sub verb.* "pretend." It was, in my opinion, used in the Witchcraft Act of 1736, and therefore in the Criminal Code of 1892, in the sense of "professing" or "claiming" or "undertaking," the element of deceit being involved in the assertion of skill or knowledge in an occult or crafty science. It is to be observed that the Vagrancy Act of 1824 uses the words "pretending or professing," and it is probable that the two words are intended as alternative expressions for the same thing. In the *Entwistle* case the two words are used together as if the meaning were the same.

In endeavouring to interpret what the Legislature meant by the term "pretends," it is hardly proper, in my judgment, to tear

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the word from its context, and, after giving it some meaning, to fit it into place again. What we ought to do is to determine what the British Parliament in 1736 and our Canadian Parliament in 1892 really meant by the clause "pretends from his skill or knowledge in any occult or crafty science, to discover," etc. In my judgment what was intended was this, that Parliament, believing (whether rightly or wrongly is not material) that lost or stolen goods could not in fact be discovered by any alleged skill or knowledge in any occult or crafty science, intended to make it unlawful for any person, whether he really possessed any such skill or knowledge (assuming it to be possible to possess it), or honestly believed he possessed it (whether possible to possess it or not), or dishonestly professed to possess it, to claim to be able to discover where any lost or stolen goods might be found

As was pointed out by Mr. Justice Osler in the *Marcott* case, sec. 443 is grouped with other sections of the Code under the title "Fraud." Fraud is a necessary ingredient of any of the offences mentioned in the section. To constitute fraud, there must always be some person to be defrauded or deceived. In the case of any offence under this section, it is obvious that there must be some other person to whom the "pretending" or the "undertaking" is made. It must be kept clearly in mind that the offence aimed at by this portion of the section is not that of possessing or claiming to possess skill or knowledge in any occult science. It was suggested on the argument that, if the accused is to be convicted notwithstanding her honest belief in her power to receive communications from the dead, then prominent and honest investigators like Sir Arthur Conan Doyle and Sir Oliver Lodge might possibly be made criminally responsible in respect of some of their claims. But the gist of the offence is not the assertion of the power, but the claim by means of it "to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found." So far as this class of offence is concerned, Parliament has enacted that no such powers (either really possessed or honestly believed to be possessed) shall be used for any such purpose. There is no law to prevent the accused from communing with departed spirits, but the Criminal Code says that she shall not profess with their aid to be able to discover lost or stolen property.

For these reasons, I am of the opinion that the learned County Court Judge rightly found the accused guilty of the offence charged, and that both questions 1 and 2 of the case reserved should be answered in the affirmative and the appeal dismissed.

In view of the novelty of the offence and the evident good faith of the accused, the suggestion of the learned County Court Judge that sentence might be suspended, upon the accused entering into the usual recognizances, might well be carried out.

Conviction affirmed.

CITY OF MONTREAL v. MORGAN.*

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 4, 1920.

1. MUNICIPAL CORPORATIONS (§ II C—60)—CITY OF MONTREAL—BY-LAW RESERVING STREETS FOR RESIDENTIAL PURPOSES—VALIDITY—CHARTER OF INCORPORATION—JURISDICTION OF SUPREME COURT TO HEAR APPEAL.

By-law No. 570 passed by the City of Montreal which enacts that, "the following streets are reserved exclusively for residential purposes," and that "every person offending against the above provision shall be liable to a fine . . . and in default of immediate payment . . . to imprisonment" is valid and effectual as a regulation passed under sub-sec. 44a of sec. 300 of the "Charter of the City of Montreal" which empowers the Municipal Corporation "to regulate the kind of buildings that may be erected upon certain streets . . ." to prohibit the erection of a public garage on the streets named.

2. COURTS (§ III A—195)—SUPREME COURT OF CANADA—JURISDICTION TO HEAR APPEAL—MUNICIPAL CORPORATION—DEMOLITION OF BUILDING ERECTED IN CONTRAVENTION OF BY-LAW.

The Supreme Court of Canada has jurisdiction to hear an appeal where a Municipal Corporation seeks the demolition of a building erected in contravention of a by-law, the matter in controversy relating to the title to lands, to wit, the respondents right to build on his property.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1919), 29 Que. K.B. 124, reversing the judgment of the Superior Court (1918), 54 Que. S.C. 481, and dismissing the appellant's, plaintiff's, action. Reversed.

Charles Laurendeau, K.C., and *Paul Lacoste*, K.C., for appellant.

T. P. Butler, K.C., and *Geo. H. Montgomery*, K.C., for respondent.

Idington, J.

IDINGTON, J. (dissenting):—In this case the appellant by its declaration seeks to have a building valued at $50,000 or over,

*Petition for special leave to appeal to the Privy Council refused.

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demolished because someone had in mind the intention to use it when erected as a public garage which it is claimed would be an offence against a by-law of appellant.

No other relief is sought by the conclusion of the declaration.

Counsel for appellant is unable to cite any statutory authority for such a drastic method of enforcing obedience to the requirements of a by-law.

The by-law itself contains none but the ordinary money penalty for the breach thereof and imprisonment as an alternative and in case of persistent breaches imprisonment. An argument is attempted to be founded upon arts. 1065 and 1066 of the Civil Code and other articles relevant to obligations.

I am of the opinion that there is nothing in any one or all of the articles referred to which can be made relevant to what is involved herein, and hence for that sole reason that there is no statutory authority for such a drastic remedy for infringing an alleged by-law, this appeal should be dismissed.

The case has been argued in all its aspects at great length and hence in deference thereto I should perhaps express my opinion as to some of the leading contentions set up.

The by-law in question it is alleged is founded upon the powers given the appellant by the general comprehensive sections of its charter to enact by-laws for its good government, and of which sec. 299 gives the specific powers to be exercised by the way of by-law. None of the grounds set forth cover that question.

Then sec. 300 is relied upon but none of the specific provisions therein seem to touch upon what is involved herein unless it fall within paragraph 44a (as amended by 1 Geo. V. 1911 (2nd sess.), ch. 60, sec. 10) of sec. 300 of the Charter, 62 Vict. 1899, ch. 58, or par. 55 (1899, ch. 58), which read as follows:—

44a. *To regulate the kind of buildings that may be erected on certain streets, parts or sections of streets or on any land fronting on any public place or park*, to determine at what distance from the line of the streets, public places or parks the houses shall be built, provided that such distance shall not be fixed at more than twenty-five feet from the said line, or *to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery-stables, butcher's stalls or other shops or similar places of business in the said streets, parts or sections of certain streets or on any land fronting on any public place or park*, saving the indemnity, if any, payable to the proprietors, tenants or occupants of the buildings now built or being built or who having building permits, which indemnity shall be determined by three arbitrators; one to be appointed by the city, one by the proprietor,

tenant or occupant interested and the third by the two former, and, in default of agreement, by a Judge of the Superior Court.

55. *To prohibit offensive or unwholesome businesses* or establishments within the city or within one mile of the limits thereof; to prohibit *the erection or occupation of any offensive buildings in any place or site where they will damage the neighbouring property, and determine the localities where certain manufactories or occupations* may be carried on.

The by-law 570 relied upon herein to found the claim for demolition, is as follows, as set forth in the appellant's factum:—

Besides the Penal Clause, By-law No. 570 contains only the following clause:—

"The following streets are reserved exclusively for residential purposes:—Durocher, Hutchison, Mance, St. Famille and St. Urbain Streets, between Sherbrooke Street and Pine Avenue."

I can find nothing in this to prohibit such an erection as in question. And I find no reason founded thereon for the demolition of a building which, admittedly, as to part of it fronting on Mance Street, might be converted into and used as an apartment house.

And as to the major part of it, fronting on another than any of those streets named, by no stretch of imagination can those parts be defined as within the area defined in the by-law.

It is to be observed that this action is not to prohibit the use of the said building or any part of it as a public garage, but solely because it may be adaptable therefor, or any other like purpose, that the desire to demolish it is sought to be gratified.

The attempt founded upon such powers as given to remove factories or workshops from residential districts or prohibit their operation therein must, if ever, be dealt with in a much more specific manner than is done by this by-law.

I need not follow the curious question of a license having been given expressly to build a public garage and work done on faith thereof, and a lease therefor made of the premises a month before the appellant's authorities changed their minds and attempted to object thereto, and prevent the building being completed.

I see no ground upon which such an action can be founded and enforced resting upon no other right than said by-law; and that itself founded only on such legislative provisions as presented above.

I incline to the opinion that the appeal taken by appellant is not within our jurisdiction but the case having been, subject thereto, fully argued out, I need not form a definite opinion

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thereon which might be found more difficult to dispose of than the want of legal merits in the appeal itself.

This appeal should be dismissed with costs.

DUFF, J. (dissenting):—This appeal should be dismissed with costs.

ANGLIN, J.:—The facts of this case are fully stated in the judgments rendered in the Superior Court (1918), 54 Que. S.C. 481, and in the Court of King's Bench (1919), 29 Que. K.B. 124, and in the opinion to be delivered by my brother Mignault, which I have had the advantage of reading.

I concur in the disposition made by my brother of the motion to quash this appeal.

Much was made in argument of alleged permits to construct the public garage in question granted to the respondent by civic officials. I agree with Carroll, J., 29 Que. K.B., at 136, when he says:—

> Aucune autorité ne pouvait lui conférer le droit de construire en violation des prescriptions de la loi, et aucune autorité municipale ne pouvait acquiescer à pareille illégalité. Les actes des officers municipaux ne sont valides que s'ils sont conformes à la loi.

See *Yabbicom* v. *The King*, [1899] 1 Q.B., 444, 448.

It may be said that if the respondent is obliged to demolish his building or sustain loss in converting it into a structure to be made use of for some less profitable purpose he will have a legal right to recover damages from the municipal corporation owing to the conduct of its officials and representatives. On that point I express no opinion. But any equitable considerations which he can invoke arising out of what occurred in regard to the granting of the building permits, approval of plans, etc., are more than offset by his acquiescence in the demand of the city that he should change the character of the building in Jeanne Mance St. so as to make it conform to by-law No. 570, his taking out of a permit to complete it as an apartment house and his undertaking that, if not fined in the Recorder's Court (where a prosecution was instituted and carried to conviction) for a breach of by-law No. 570, he would complete the building in accordance with the permit so obtained. I am quite unable to assent to the view of Martin, J., 29 Que. K.B. 124, at 140, that the equities of this case are all against the appellant. If not equally balanced, they seem to me rather to preponderate in its favour.

But the question we have to decide cannot be disposed of on equitable grounds. We have to determine whether by-law No. 570 of the City of Montreal is valid and effective to prevent the erection and maintenance of a public garage on Jeanne Mance St., just above Sherbrooke St. I respectfully adopt the following passage from the judgment of Lamothe, C.J., 29 Que. K.B., at 140.

Je désire écarter immédiatement du débat la considération du montant des dommages que l'appelant pourra souffrir par cette démolition, ainsi que le montant des dommages que les propriétaires voisins pourraient souffrir par suite du maintien du garage—si ce n'est pour souligner l'importance de la cause. Ce point de vue fait appel à des sentiments auxquels les juges doivent fermer leur coeur. La cour est en face d'une question de loi—et non d'une question d'équité. Si le règlement civique No. 570 a force de loi, si ce règlement a été violé, il nous faut le dire sans regarder aux consequences.

I also agree with that Judge that the objections founded on Jeanne Mance St. being called "Mance Street" in the by-law, and on the fact that the frontings of lot 43, of which lot 43-1 (on which the building in question is erected) is a subdivision, is on Sherbrooke, lack substance. There is no room for any doubt that Jeanne Mance St. is the street intended to be designated in the by-law and the respondent's garage as constructed in fact fronts on that street.

The only questions of real importance to be determined are: (a) whether by-law No. 570 is authorised by the charter, 62 Vict. 1899 (Que.), ch. 58, of the City of Montreal; (b) whether that by-law is sufficiently clear, precise and definite; and (c) to what consequences a breach of it will subject the respondent.

Paragraph 44 of art. 300 of the City Charter, 62 Vict. 1899, ch. 58, set out in the judgment of my brother Mignault, empowers the municipal corporation to regulate the height, construction and materials of all buildings and their architecture, dimensions, symmetry, etc. Par. 44 (a)—an amendment of 1 Geo. V. 1911 (2nd Sess.), ch. 60—confers power to pass by-laws. (See judgment of Idington, J., *ante* p. 166.)

In view of the specific provisions of the charter, I incline to think that any general power to pass by-laws for the good government, etc., of the city conferred by arts. 299, 300, and 300 (c), cannot be invoked to sustain by-law No. 570, although the article last cited—an amendment of 3 Geo. V. 1912, ch. 54—may, as my

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brother Mignault suggests, furnish a strong argument against giving a restrictive effect to any of the provisions of the specific clauses—*inter alia*, of par. 44 (a) of art. 300, as amended in 1911 (2nd Sess.).

No other authority than *City of Toronto* v. *Virgo*, [1896] A.C. 88, at page 93, need be cited for the general proposition that power to regulate does not imply power to prohibit. Thus, under the first clause of art. 44 (a) the city could not entirely prohibit the erection of any buildings whatsoever on any named street nor could it entirely prohibit the erection within the city limits of any particular kind of building, in the sense in which that phrase is used in par. 44 (a). But every power to regulate necessarily implies power to restrain the doing of that which is contrary to the regulation authorised, and in that sense and to that extent involves the power to prohibit. As Rousset says in his work "Science Nouvelle Des Lois," vol. 1, at page 224:

> Restreindre le champ de la *liberté naturelle*, lui interdire *certains actes déterminés*, c'est en cela et en cela seulement que consiste le pouvoir régulateur de l'autorité législative sur l'exercice des droits individuels des citoyens.—A ce point de vue la loi ne peut être qu'une *prohibition d'action*. La formule de sa rédaction sera donc nécessairement *prohibitive*.—C'est ce qu'il s'agissait de constater.

Compare *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, at page 99. The word "exclusively" in by-law 570, expresses the prohibition of the erection of buildings not suitable for a residential street. Effective regulation of the kind of buildings that may be erected on certain streets necessarily involves the right to authorise the erection of buildings of some descriptions and to prohibit the erection of those of other descriptions on such streets.

The Legislature in passing art. 44 (a) certainly did not intend senselessly to repeat the enactment of par. 44. It had in that paragraph dealt exhaustively with such matters as materials, height, dimensions, architecture, symmetry and stability. By the phrase "kind of buildings" in art. 44 (a) must therefore be meant something quite different. As the context shews it is with the destination of the building—the use for which it is designed—that that paragraph deals—the kind of building, *i.e.*, industrial, commercial, residential, educational, religious. Of that I cannot conceive any reasonable doubt.

The first clause of par. 44 (a) in my opinion, taken by itself, is quite broad enough to empower the municipal corporation to prescribe that in certain streets no buildings other than residences (*i.e.*, private dwelling houses) shall be built, or to enact that from certain streets commercial and industrial buildings shall be excluded. Does anything in the rest of the paragraph require that the *ex facie* generality of the power so conferred should be restricted? The clause immediately following, which deals with the distance of houses from street lines, certainly does not. But it is said that the next succeeding clause

> or to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery-stables, butcher's stalls or other shops or similar places of business in the said streets, parts or sections of certain streets or on any land fronting on any public place or park—

clearly indicates that any power of prohibition involved in the right to regulate conferred by the first clause of the ordinance must be restricted to the particular classes of buildings enumerated in such later clause—factories, workshops, etc.—or, if not, that the presence of this express provision for prohibition precludes the implication of any power to prohibit being involved in the right of regulation first conferred, because if such a power to prohibit exists under the first clause, the later clause, "or to prohibit, etc.," is unnecessary and useless. This argument of course assumes that the subject matter of the two clauses is the same.

On an analysis of the paragraph the force of these contentions disappears. In the first place the separation of the clause "to regulate, etc.," from the clause "to prohibit, etc.," by the intervening clause dealing with the distances of houses from street lines, in itself goes far to negative the idea that the latter could have been intended as a particularisation of the subjects to which any prohibitive power conferred by the former should be restricted. But the two clauses really deal with different subject matters. The earlier clause has to do only with the erection of buildings; the latter with the construction, maintenance, and operation of a number of things, some of which (*e.g.*, billiard-rooms and butcher stalls) may occupy a comparatively small part of a building. Original erection of buildings is dealt with by the first clause. Reconstruction and occupation of existing buildings come under the second.

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In regard to new buildings the Legislature has seen fit to confer an unlimited power of regulation. The municipal corporation is given complete discretion as to the kind of new buildings which it will allow to be erected on streets designated by it. But in the case of existing buildings only certain uses of them may be prohibited; and here the power is properly extended to prohibition of occupation and maintenance as well as construction.

The use of the word "construction" in the later clause at first presented some difficulty; but it is properly used in connection with such things as butcher stalls and pigeon-hole rooms in the fitting up of which work of construction is necessary; and in other cases it may well be taken to mean reconstruction or alteration. I find nothing in the subsequent clauses of par. 44 (a) which can properly be invoked to restrict the generality of the power conferred by its opening clause.

The concluding provision for indemnity in par. 44 (a) obviously refers to cases in which the operation of the by-law would interfere with the use made of structures already built, or to be made of structures in course of erection, or for which permits had issued at the date of its passing. There is nothing to shew that any such cases exist in regard to the streets named in the by-law. Moreover, the statute itself preserves or confers the right to indemnity in such cases and an express provision for it in the by-law would scarcely seem to be required.

Section 1 of by-law No. 570 reads as follows:—

Section 1.—The following streets are reserved exclusively for residential purposes:—Durocher, Hutchison, Mance, St. Famille and St. Urbain Streets, between Sherbrooke and Pine Avenue.

It seems to have been practically common ground in the Courts below as it was at bar in this Court, that the erection of any building other than a dwelling house fronting on any of the streets named in the by-law would contravene it. I am far from being satisfied, however, that this construction of the words "for residential purposes" is not too narrow. I rather incline to the view that "residential" is used in contradistinction to "business and industrial" and that such buildings as churches and schools would not necessarily be excluded—that buildings not of a business or industrial character, such as are ordinarily found in exclusively residential districts, are not prohibited. *Wright* v. *Berry* (1903), 19 T.L.R. 259.

Nor does this imply such vagueness or indefiniteness in the by-law as would render it invalid.

I fully recognise the force of the general rules that the language of by-laws should be explicit and free from ambiguity, and that by-laws in restraint of rights of property as well as penal by-laws should be strictly construed. But the very statement of the latter rule implies that a by-law is not necessarily invalid because its terms call for construction—as does also another well recognised rule, *viz.*, that a by-law of a public representative body clothed with ample authority should be "benevolently" interpreted and supported if possible. *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, at 99. It may be a counsel of perfection that in drafting by-laws the use of words susceptible of more than one interpretation should be avoided; but it is too much to exact of municipal councils that such a degree of certainty should always be attained. It would be going quite too far to say that merely because a term used in a by-law may be susceptible of more than one interpretation the by-law is necessarily bad for uncertainty.

As Lord Alverstone said in *Leyton Urban Council* v. *Chew*, [1907] 2 K.B. 283, at page 288: "I quite agree that a man ought to know what he is required to do, but the answer is that the by-law gives him sufficient information." Exception had been there taken to the presence in a construction by-law of the words "or otherwise in a suitable manner and with suitable materials." See too *Dunning* v. *Maher* (1912), 106 L.T. 846.

During the course of the argument I directed attention to sub-sec. 10 of sec. 406 of the Ontario Municipal Act, R.S.O. 1914, ch. 192, which empowers councils of cities and towns to pass by-laws "for declaring any highway or part of a highway to be a residential street," and I put to counsel the question: "Could a by-law passed by the council of an Ontario town in these terms—'B Street is hereby declared to be a residential street'—be successfully attacked as too vague and indefinite to be enforced?" In the application of such a by-law it would of course be necessary to determine just what class of buildings should be permitted in a residential street. But I cannot think that the by-law should therefore be held invalid. That business and industrial establishments are excluded by by-law No. 570 there would seem to be no room for reasonable doubt. Nor can

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there by any question that a public garage is a business establishment, if indeed it is not industrial as well.

I am, for these reasons, of the opinion that by-law No. 570 is valid and effectual, as a regulation passed under the first clause of par. 44 (a) of art. 300 of the charter of the City of Montreal, to prohibit the erection on the part of Jeanne Mance St. here in question of a public garage.

To what consequences has the defendant's contravention of by-law No. 570 subjected him? He argues that he is merely liable to the penalty which the by-law provides and that the plaintiffs have no other means of enforcing it. But a person prepared to do so cannot thus purchase the right to disobey the law. The public interest forbids that the enforcement of the penalty should be the sole remedy for the breach of such a by-law and requires that the regulation itself should be made effective. The general rule of construction that where a law creates a new obligation and enforces its performance in a specific manner, is that performance cannot be enforced in any other manner. *Doedem. Murray* v. *Bridges* (1831), 1 B. & Ad. 847, at 849, 109 E.R. 1001, is of course well established. But that rule is more uniformly applicable to statutes creating private rights than to those imposing public obligations. *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, at 448. Moreover, whether the general rule is to prevail or an exception to it should be admitted must depend on the scope and language of the Act which creates the obligation. *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A.C. 387, at pages 397-8, *per* Lord Macnaghten. The provisions and object of the Act must be looked at. *Vallance* v. *Falle* (1884), 13 Q.B.D. 109, at 110; *Brain* v. *Thomas* (1881), 50 L.J. (Q.B.) 662, at page 663. Here the object and scope of by-law No. 570 make it clear, in my opinion, that the recovery of the penalties prescribed was not meant to be the sole remedy available for its enforcement. A breach of the obligation which it imposes falls within the purview of art. 1066 C.C., as my brother Mignault points out.

I entirely agree, however, that the demolition of a costly building should be ordered only as a last resort, and if the owner persists in defying the law, and I concur in the allowance of a further period of 6 months to permit of compliance by the defendand with the by-law.

The appeal should be allowed with costs here and in the Court of King's Bench and the judgment of the Superior Court should be restored subject to the modification that if within 6 months the defendant converts the building on lot 43-1 into something permissible under by-law No. 570, the order for its demolition shall not be enforced.

Anglin, J.

BRODEUR, J.:—I am of the opinion that the motion to quash the appeal should be dismissed. The appeal should be allowed with costs here and in the Court of Appeal, 29 Que. K.B. 124, and the judgment of the Superior Court, 54 Que. S.C. 481, should be restored. I concur with my brother Mignault.

Brodeur J.

MIGNAULT, J.:—At the hearing the respondent moved to quash this appeal for want of jurisdiction. In my opinion this motion cannot be granted for the simple reason that the matter in controversy affects the future rights of the respondent as to the use and enjoyment of his property. Mr. Montgomery urged that the interest of the appellant alone was to be considered, but here the appellant seeks to have the respondent's building demolished and therefore the matter in controversy relates to a title to lands, to wit, the right of the respondent to build on his property, as he has done, and the right of the appellant to demand the demolition of the building so erected. If the appellant is right, the respondent's title and right of use of his land is materially restricted. The motion should be dismissed with costs.

Mignault, J.

On the merits, the main question is whether the appellant had the right to pass by-law No. 570, and, if this right exists, whether the by-law prohibits the erection of a public garage on Mance St., so that the appellant would be justified in asking for the demolition of the public garage erected by the respondent.

By-law No. 570, passed in 1915, enacts as follows:

Section 1.—The following streets are reserved exclusively for residential purposes: Durocher, Hutchison, Mance, St. Famille and St. Urbain Streets, between Sherbrooke and Pine Avenue.

Section 2.—Every person offending against the above provision shall be liable to a fine, with or without costs, and in default of immediate payment of said fine, with or without costs, as the case may be, to an imprisonment, the amount of said fine and term of imprisonment to be fixed by the Recorder's Court of the City of Montreal, at its discretion, but such fine shall not exceed forty dollars, and the imprisonment shall not be for a longer period than two calendar months, the said imprisonment, however, to cease at any time before

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the expiration of the term fixed by the said Recorder's Court upon payment of the said fine, or fine and costs, as the case may be, and if the infringement of this by-law continues, the offender shall be liable to the fine and penalty provided by this by-law for each day during which the infringement is continued.

The first question is whether this by-law was authorised by the appellant's charter, 62 Vict. 1899, ch. 58, and amendments.

The appellant cites several of the provisions of this charter to which I will briefly refer.

Section 299 of the charter gives the city council the right to pass by-laws for the peace, order, good government and general welfare of the city, and for all matters and things whatsoever that concern and affect the city as a city and body politic and corporate, provided always that such by-laws be not repugnant to the laws of the Province of Quebec or of Canada. And the section adds "for greater certainty, but not so as to restrict the scope of the foregoing provision, or of any power otherwise conferred by this charter," a list of eighteen subjects, none of which cover the matter now under consideration.

Sub-sec. 44 of sec. 300 of the charter, 62 Vict. 1899, ch. 58, gives the city council the power

to regulate the height, construction and materials of all buildings . . . to regulate the architecture, dimensions and symmetry of buildings in certain streets . . . to prohibit the construction of buildings and structures not conforming to such regulations, and to direct the suspension, at any time of the erection of any such building as does not conform to such regulations, and to cause the demolition of any building not conforming to such regulations if necessary.

Sub-sec. 44a of the same section, as amended, gives the council the power "to regulate, etc." (See judgment of Idington, J., *ante* p. 166.)

Sub-sec. 55 of sec. 300 also enacts that the council shall have the power "to prohibit." (See judgment of Idington, J., *ante* p. 167.)

Sec. 300c. added by 3 Geo. V. 1912, ch. 54, sec. 9, provides as follows:—

300c. In order to give full effect to arts. 299 and 300 and to extend and complete the same, so as to secure full autonomy for the city and to avoid any interpretation of such articles and their paragraphs which might be considered as a restriction of its powers, the city is authorised to adopt, repeal or amend and carry out all necessary by-laws concerning the proper administration of its affairs, peace, order and safety as well as all matters which may concern or affect public interest and the welfare of the citizens; provided always that such by-laws be not inconsistent with the laws of Canada or of this province, nor contrary to any special provision of this charter.

I think the statutory provisions which I have cited—and they are the only ones on which the appellant relies—must be read together. Sec. 300 gives to the city specific powers enumerated in considerably more than a hundred sub-sections. Paragraph one of sec. 299 and sec. 300c are of the same class of enactments, and, standing by themselves, would probably not allow the city to prevent the construction by the respondent of a building for commercial purposes on his own property. *City of Toronto* v. *Virgo*, [1896] A.C. 88, at pages 93, 94, although sec. 300c shews that it was not intended that secs. 299 and 300 should be restrictively construed. Of course the general powers given to the city are not to be repugnant to or inconsistent with the laws of Canada or of the province, and therefore the respondent may, not unreasonably, contend that his right to make full use of his title of ownership under arts. 406 and 407 of the Civil Code ought not to be regarded as taken away or restricted by these more general enactments. But while this is no doubt true, the question still remains whether the respondent's right to make any use he desires of his property is not restricted—and the Legislature could undoubtedly restrict it—by the specific enactments of sec. 300 of the charter. I will therefore endeavour to answer this question by considering sub-secs. 44, 44a and 55 of sec. 300.

Sub-sec. 44 speaks about regulating the height, construction and materials of all buildings as well as the architecture, dimensions and symmetry of buildings in certain streets, and the city is authorised to prohibit the construction of buildings not conforming to such regulations and to cause their demolition if necessary. In my opinion this sub-section does not help the appellant.

Sub-sec. 55 concerns the prohibition of "offensive or unwholesome" businesses, establishments or buildings which the city is empowered to prohibit "within the city or within one mile of the limits thereof." It surely cannot be contended that this sub-section would apply to a commercial building or a public garage on a street like Mance St., for if it does the appellant could prevent the erection of public garages or commercial buildings anywhere within the city or within a further radius of one mile. And as to the power to determine the localities where certain manufactories or occupations may be carried on, it seems sufficient

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to say that by-law No. 570 does not profess to do anything of the kind. The appellant in his factum cites by-law No. 551, which prohibits the erection on either side of Sherbrooke St. between St. Denis and City Councillors Sts., of any public garage, but the by-law here under consideration goes much further and purports to reserve a part of Mance and other streets for residential purposes exclusively.

There remains only sub-sec. 44*a* (as amended, 1911 (2nd Sess.), ch. 60, sec. 10), which allows the city to regulate the "kind of buildings" (in the French text "le genre des constructions") that may be erected on certain streets, parts or sections of streets or on any land fronting on a public place or park. It was suggested that by "kind of buildings" is meant the regulation of the mode of construction, architecture, materials, dimensions, height, etc. But that matter is already dealt with in sub-sec. 44, which exhausts the subject in so far as the mode of construction, materials, and the architectural properties of buildings are concerned, so the "kind of buildings" referred to in sub-sec. 44*a*, which was added to the charter by a subsequent amendment, must be the kind, either residential, commercial or industrial, of buildings which may be erected in certain locations. The description of these localities as being certain streets or parts or sections of streets or land fronting on any public place or park would indicate that it was intended to preserve to certain locations a more select or refined character, which, it is urged, is eminently desirable in a large modern city. The evidence shews that Mance St., above Sherbrooke St., was an exclusively residential street before the construction of the respondent's garage, and that after the opening of this garage, the neighbours were awakened at all hours of the night by the tooting of motor cars for admission to the garage, which of course was a decided nuisance to the immediate vicinity. The evidence is also that there is a repair shop in connection with this garage, and this would well come within the description of a "workshop" which is among the buildings or establishments which sub-sec. 44*a* permits the city to prohibit in certain streets, parts or sections of streets or land fronting on any public place or park.

I have not lost sight of the possible suggestion that the words "the kind of buildings" should be restricted to the kind enumerated

below, to wit, factories, workshops, etc. It may also be said that the word "construction" in connection with the enumeration would be useless if the regulation of the "kind of buildings" that may be erected applies to all buildings that could be constructed in the localities indicated. I think however that the two clauses are severable and bear on different subjects. In the first the question is of the kind of new buildings that may be erected, in the second of the fitting up of existing buildings for the enumerated purposes, and in the latter case I understand the word "construction" in the sense of "alteration" or "fitting up" for a certain purpose. There obviously can be no "construction" of billiard-rooms, pigeon-hole rooms or butcher stalls, in the same sense as the "construction" of a new building. I consequently think that the introductory clause of sub-sec. 44*a* is not cut down by the enumeration, from which moreover it is separated by an independent provision.

I would therefore conclude that under sub-sec. 44*a* the appellant could prevent the construction of any buildings other than residential ones on the part of Mance St. mentioned in the by-law, and this would exclude the public garage which the respondent claims to have the right to build there.

We now have to consider the terms of by-law 570.

The vital enactment of this by-law is contained in the words:—

> The following streets are reserved exclusively for residential purposes: Durocher, Hutchison, Mance, St. Famille and St. Urbain streets, between Sherbrooke Street and Pine Avenue.

It is contended that this enactment is too vague to have any meaning. I cannot agree with this contention. The reservation of these streets exclusively for residential purposes means that no buildings other than what can properly be considered as residential ones may be erected on them. It is said that this would exclude buildings such as churches or schools. It is unnecessary to express any opinion on this point, for it is obvious that the respondent's public garage is not a residential building. And I may add, merely as an apt illustration, that the Municipal Act of Ontario, R.S.O. 1914, ch. 192, sec. 406, sub-sec. 10, empowers cities and towns to pass by-laws for declaring any highway or part of a highway "to be a residential street," and this language

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would certainly prevent the erection, on a street declared residential, of a public garage such as that of the respondent.

I am therefore of opinion that by-law 570 is sufficiently supported by sub-sec. 44*a* and that it suffices to render the respondent's public garage an unlawful one.

It is said that the by-law provides a penalty and that this penalty only, and not the demolition of the building, can be claimed. There are no doubt cases where this argument has successfully been made, but I do not think that here the imposition of a penalty deprives the appellant of any other remedy to prevent the erection of a building in violation of the by-law; on the contrary, art. 1066 of the Civil Code clearly allows the demand for the demolition or undoing of anything done in breach of an obligation. The facts here are that as soon as it was discovered that the respondent intended to build a public garage fronting on Mance St., the appellant notified him to desist and he then promised to convert his building into an apartment house, and actually asked for, and obtained, a building permit for this purpose, and wrote to the appellant that he had not proceeded with the work on the Mance St. end of the building except in accordance with the new plans and permit. The respondent subsequently decided to complete the building as a public garage, but he did so at his own risk, and his pretext that his tenant refused to consent to its being converted into an apartment house, is certainly no excuse for the violation of the by-law.

It is said that the appellant authorised by the building permits which it gave to the respondent the construction of a public garage on Mance St. The building permits do not bear this construction, for they are limited to the construction of a public garage on lot 67, which is not on Mance St., and do not allow the construction of a public garage fronting on Mance St. and situate on the rear part (looking from Sherbrooke St.) of lot 43-1 which abuts both on Sherbrooke and Mance Streets.

Objection is also made to the name of "Mance Street" in the by-law, the real name being "Jeanne Mance Street." But there is no doubt as to the identity of the street meant to be dealt with, and the objection cannot be entertained.

I think therefore that the appellant is entitled to succeed, but I would allow the respondent 6 months to change the desti-

nation of his building so as to conform with the by-law, and on his failure to do so I would grant the prayer of the appellant for the demolition.

The appeal should be allowed with costs here and in Courts below. *Appeal allowed.*

PELOQUIN v. LATRAVERSE.

Quebec Superior Court, Bruneau, J. November 6, 1919.

CONSPIRACY (§ III A—10)—AGREEMENT TO SELL SERVICES AND GOODS ONLY AT EXORBITANT PRICE—SEC. 498 CRIM. CODE.

An agreement between all the electrical contractors in a locality that they will sell their goods and the services of their employees only at an exorbitant price, is a conspiracy in restraint of trade within the meaning of sec. 498 of the Criminal Code.

Statement.

ACTION to recover the price of goods sold and the cost of installation or on a *quantum meruit*. Judgment for defendant.

The plaintiff demands a judgment for $325.82, the price and value of merchandise, commercial goods and work done and delivered for the benefit of the defendant at Sorel. It concerned the installation of an electrical lighting system in the house of the defendant; no price having been agreed upon, the value claimed is based on the *quantum meruit*.

The defendant alleges that all the prices put on the account, both for the manual labor and for the materials, are over-rated and unjust. He caused an estimate to be made by experts, who fixed the value of $185, which sum he offered to the plaintiff and now consigns to the Court.

J. B. Brousseau, K.C., for appellant; *A. Allard*, for defendant.

The Superior Court upheld the defence by the following judgment:—

Bruneau, J.

BRUNEAU, J.:—The prices demanded by the plaintiff are, according to the evidence, the current prices at Sorel. But we must add that these prices are those set by a convention of the only three electrical contractors of Sorel, at which they agreed to charge the same rates or prices as those asked by the plaintiff, and which, according to them, are exacted by the same trades companies at Montreal.

Dunan, witness for the plaintiff, says that if the electrical installation is not accepted by the "Canadian Fire Underwriters'

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Association" he will take it out and put it in again at his own expense.

The work of the plaintiff has not been done in accordance with the regulations of the "Canadian Fire Underwriters' Association." In fact, Alexandre Pruneau, electrical inspector in the employ of this association, points out the numerous defects in the installation at the defendant's home, defects which are a source of danger for fire and even for one's life, and he declares that the association would not give the certificate required by the insurance companies, for such an installation. The plaintiff, it is true, was opposed to such a test, but his objection has no foundation, since he himself declared in his testimony that the defendant's aim was only to have this certificate for a safe installation.

The defendant tried to prove—through two witnesses, both electricians—that the profits demanded by the plaintiff were excessive, that the total value was only $185, including the profits which they settled at 25 to 33 per cent.

Article 498 of the Crim. Code, R.S.C. 1906, ch. 146, decrees:—

"Every one is guilty of an indictable offence and liable to penalty not exceeding $4,000, and not less than $200, or to two years' imprisonment or, if a corporation, is liable to a penalty not exceeding $10,000, and not less than $1,000, who conspires, combines, agrees or arranges with any other person, etc., (*c*) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or, (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees."

Considering that this last provision does not apply to the plaintiff since it has not been proved that he belongs to such an association in Sorel; that the understanding between the plaintiff and the only two other electrical contractors of that locality bears, on the contrary, all the marks of a coalition tending to sell only at a certain price the labour of their workmen and the merchandise which they furnish; that such an understanding constitutes a

regular monopoly, an action by which one or several people—through means that thwart all competition—raise the price on certain things to enrich themselves at the expense of the public, *Hately* v. *Elliott* (1905), 9 O.L.R. 185; *Weidman* v. *Shragge* (1912), 2 D.L.R. 734, 20 Can. Cr. Cas. 117, 46 Can. S.C.R. 1; *The King* v. *Clarke* (1907), 14 Can. Cr. Cas. 46; that if tradesmen are allowed to organise themselves for the protection of their common interests, it is only on the condition that public interest should not be made to suffer unjustly through unreasonable profits: *The King* v. *Gage* (1907), 13 Can. Cr. Cas. 415; that an understanding, such as the one between the plaintiff and the other electrical contractors of Sorel, is contrary to the freedom of commerce, to work and industry, tending to raise their prices above the level which free competition would have determined, (Cass. 11 fev. [1878] s. 1878. 1. 198); that a convention, existing between all individuals practising the same kind of trade in a locality, to make their sales only on a determined rate of profit, is void and unlawful, and contrary to public order; that the nullification embraces not only future deeds, but also deeds already accomplished in execution of the convention under discussion, (Douai, mai 13, [1851] s. 1851, 2, 733); that such coalitions have, at all times, been condemned and still are by the Legislatures of all nations, with severe penalties; that all Legislatures—our own included—sprang and still draw their principle from Roman law: *Santa Clara etc. Co.* v. *Hayes* (1888), 76 Calif. 387; *Atcheson* v. *Mallon* (1870), 43 N.Y. 147; *Hooker* v. *Vanderwater* (1847), 4 Den. (N.Y.) 349, 47 Am. Dec. 528; *De Witt Wire-Cloth Co.* v. *New Jersey Wire-Cloth Co.* (1891), 14 N.Y. Supp. 277; 5 Bacon Abr. 606 (tit. Monopoly); Hawkins, Pleas of the Crown, vol. 1, ch. 29, p. 624, sec. 8; *Lombards* case, Lib. Assis. (Year Book, part 5), page 276, Pl. 38. (par. 38); Anonymous (1699), 12 Mod. 248, 88 E.R. 1297. "It is fit", said Lord Holt, "that all confederacies, by those of trade to raise their rates, should be suppressed", 27 Cyc., p. 890 *et seq.* (see p. 891, note 16) French Penal Code, art. 491; that the understanding between the plaintiff and his colleagues, the electrical contractors of Sorel, appears to us to be the offence stated and punished by art. 496 of the Crim. Code, *supra;* that the Court cannot be bound by an understanding of this nature to determine the *quantum meruit* of the value of the work and merchandise delivered and sold by the plaintiff to the

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defendant; that the plaintiffs, Dunan and Paul Hus, would, in fact, be both witnesses and judges in their own case, concerning the value of their workmen's labor and the price of their merchandise; that the plaintiff vainly attests that the prices fixed by the electrical contractors of Sorel have been, up to the present, accepted and paid by the public of that locality; that, not only is the plaintiff without right to enforce his claims by calling upon a convention which is itself contrary to public order, but also that no proof is at hand to shew that the public paid the excessive and arbitrary prices, demanded by the plaintiff in full knowledge of the understanding whose victim it was; that even though it is proven, in a general way, that all things necessary to life have increased in price within the last few years, it is, nevertheless, not an established fact that the profits demanded and exacted by the plaintiff are in the same proportion where the value of manual labour and electrical merchandise is concerned.

Considering that, to justify his high demands, the plaintiff further pleads, but without success, that in the case of electricians, the work is handled by experts in their art and craft; that this principle is not restrictive, but applies, on the contrary, to workmen of every denomination, and the public has a right to expect expert workmanship in every art and craft; that it is a fixed principle in the doctrine of decrees, that workmen are always, and justly, held responsible for the bad advice they may give, and for all work which they perform or make others perform in opposition to the rules of their art and craft; that, under the circumstances, the plaintiff should have been perfectly satisfied with the offer of $200 from the defendant, taking into account the numerous defects in the work, which will necessitate considerable added expenses to the defendant to obtain—although the exact sum has not been determined by the evidence—the certificate of the "Canadian Fire Underwriters' Association," and such—from his own acknowledgment—was the defendant's object; that the plaintiff further alleges that the electrical contractors are obliged to charge higher prices because their trade forces them to keep certain kinds of wares so long in stock, as though the same case does not apply to all commerce; moreover, that the evidence justifies the defendant's offer; that in deducting the profits of 100%—although they are even higher—from the total of $209.52 which the plaintiff demands

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from the defendant for materials, the amount left is $104.76; that in making the same deduction on the thirteen and a half days' salary of the workman Villandre, there remains the sum of $47.25, which the plaintiff paid him; that the two aforesaid sums of $104.76 and $47.25 form a total of $152.01 representing the real disbursement of the plaintiff in the fulfilling of his contract both for his workman's salary and the price of his merchandise; that by adding to said sum of $152.01, 30% for profits, which this Court regards as just and reasonable, making $45.60, the plaintiff thus has the right to claim from the defendant the sum of $127.61; that the rate of 30% accorded to the plaintiff by this Court, as a profit on his enterprise, represents a yearly salary of $6,000—all workmen's salaries and merchandise paid;

For these reasons the Court accepts the defendants aforesaid offers and consignment, declares them to be regular, legal, good and sufficient, maintains the defence and dismisses the plaintiff's action with costs. *Judgment accordingly.*

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, and Brodeur, JJ., May 4, 1920.

ADMIRALTY (§ II—8)—ARREST OF VESSEL FOR DEBT—NECESSARY REPAIRS BY SHIPWRIGHT WHILE UNDER ARREST—RIGHTS OF PARTIES.

The right of a party who seizes a vessel for debt is on the value of the vessel as at the date of the seizure and not on the value subsequently enhanced by the necessary work of a shipwright, done to the vessel while under arrest.

The shipwright has a possessory lien for necessary and beneficial repairs to the ship while such ship was under arrest although the sanction of the Court was not obtained before making the repairs.

[*Halifax Shipyards, etc.* v. *The Ship "Westerian"* (1919), 50 D.L.R. 543, affirmed.]

Statement.

APPEAL from the Exchequer Court of Canada (1919), 50 D.L.R. 543, 19 Can. Ex. 259. Affirmed.

A. Geoffrion, K.C., and *J. B. Kenny*, K.C., for appellant.

C. J. Burchell, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—I concur with my brother Anglin.

Idington, J.

IDINGTON, J.:—The ship "Westerian" was sold under proceedings taken by appellants for the purpose of enforcing claims which for the most part would have constituted liens upon her, but, by virtue of the circumstances, which had transpired, ceased to

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have that quality, unless and until in an analogous sense there arose a respective precedence in favour of each appellant, by virtue of the said respective appellants' proceedings over those having failed to take the like steps to enforce their respective claims.

At the time when the first seizure of the "Westerian" for the purpose of enforcing one of those claims, took place, the intervening respondent was engaged in making repairs upon her under a contract with the owners which it had entered into for doing so, according to some specifications named and others to be delivered as the work progressed.

At the time of the said seizure, said work to the value of $15,000 had been executed, for which it is admitted the intervening respondent had a lien prior to these other claims.

The said respondent seems to have paid no attention to the seizure made, but continued its work under said contract without making any application to the Court for protection in doing so, or permission thus to deal with property in the custody of the law, until another $15,000 worth of work, if to be estimated on basis of said contract, had been done.

The ship was sold for about $80,000, about 4 months after the seizure, and about 2 months after all the said work had been completed, and that fund is now in Court.

It does not seem to have occurred to respondent until after the work had been nearly all completed to move herein. Then, upon doing so, an order was made by the District Registrar giving it liberty to appear and intervene in said action.

There should, I submit, have been something more decisive done by respondent than appears, before the sale of the ship, so that all concerned should have understood how they respectively were situated in relation to such a claim.

On the other hand, I cannot help thinking that appellants, at the date of the application for said order allowing intervention, which took place about 2 weeks before the work was finished, must have had their attention thereby called to the fact that respondent must have assumed it would have a lien.

Nothing appears, in the case presented us, helping us fully to understand many things bearing upon that very peculiar situation which was being developed.

I cannot help having a strong suspicion that the appellants stood by, knowing that the respondent was finishing its job, and hoping that it would be well done, or at all events acted with some knowledge thereof, in such a way as to debar them from taking advantage, as they seek to do by this appeal, of the curious legal situation which has developed.

Counsel for appellant on my suggesting during the argument something like unto such possibilities, very properly pointed out that his client's places of business were in Montreal, and this work was being done in Halifax, and there was no evidence of any of them having agents in Halifax, and that therefore, we must assume, upon such facts, they were ignorant of what was being done, and hence we could not deal with such a situation, or hold them bound by any estoppel, equitable or otherwise, from claiming as they do now.

The solicitor for appellants, however, carried on business in Halifax. Should he not be held as such agent for all the purposes in question of each appellant?

I refer to all this because, after an examination of all the authorities cited by Cassels, J. (1919), 50 D.L.R. 543, at 547 *et seq.*, 19 Can. Ex. 259, and others referred to in argument, and occurring to me since, I remain, as the argument left me, under the impression that without more evidence than he had, or we have, to go upon, the terms of the order made are too wide.

To settle the law upon such a basis would enable parties situated as respondent was at the time of the seizure, to act as the respondent has acted herein, and to obtain as of right what the order now gives herein.

It may well be that no injustice may be likely to arise under this order now in question, but we have not such facts before us as to enable me to say so.

On the other hand, if my surmise is possible of demonstration, I think an opportunity should be given respondent to do so in the reference which has been directed below and must be had in any event.

And in the event of respondent succeeding in establishing actual knowledge of the later work being done, or facts which would establish ground for the fair inference that they were put upon inquiry, and should have made further inquiry, and be

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bound by the highly probable results thereof, I should then be prepared to hold that the better way of applying the equitable doctrine invoked, would be to let the respondent rank in common with appellants upon the fund now in question.

I see no ground for supposing that any of the parties concerned acted fraudulently or from any improper motive but incline to think each and all of them acted in entire ignorance of the law because they never considered the curious possibilities.

But that having so developed each feels justified in putting forth such arguments as, in law, may or may not, uphold their respective contentions.

To maintain in its present form the order appealed from would give priority to respondent in a way which might work out grave injustice to some of those concerned, and also hold out a premium to those hereafter tempted to offend against the law in like manner as respondent has done by proceeding improvidently without the leave of the Court.

Whilst it is very desirable that appellants should not be permitted to profit at the expense of the respondent, yet there may, for aught we can learn from the record before us, have been created situations by reason of the course of the several proceedings taken which might render it impossible to push respondent's claim very far.

For example, we find the ship sold for $80,000, apparently about enough to cover all the claims and costs, except this item now in question.

Assuming that the respondent's neglect to get leave of the Court led all others innocently to believe that in fact the claims would be all covered by such a bid, and thus those others were induced thereby to refrain from protecting their interests by way of further bidding, would respondent be entitled in equity to encroach upon the fund further than in respect to items such as the removal of the coal and the like which saved the loss of the ship by the fire started in it?

I have been throughout under the impression that these assumptions are probably not maintainable and of little consequence. Yet I think it right to thus illustrate how much we are groping in the dark for want of a more detailed and accurate history of all that has transpired; which can bear upon the equitable rights of the respective parties concerned.

The solicitor for the appellants, as already observed, carried on business in Halifax and probably acted throughout in all these proceedings which began with the issue of the first writ on January 17, 1919.

Hence I imagine it improbable that the lastly mentioned of the alternatives to be considered will present any serious difficulties. Yet a very little information in way of dates might have saved the trouble of suggesting its possibilities.

The inquiry as to the respondent's claim began April, 1919—exact date not given—and as to what was done from March 8, 1919, to that date, or a reasonable time before sale on May 10, 1919, from which it might be inferred appellants had a reasonable opportunity to consider the possibilities of this claim and govern themselves accordingly in relation to the sale, we are left only to guess at the facts.

Passing these several suggestions, and again, for want of evidence, assuming nothing in any of them and considering the order made to rest upon the rather bare equity that inadvertently the respondent had so acted as to add to the proceeds realised, how far should the Court below have gone?

I agree with Cassels, J., of the Exchequer Court, 50 D.L.R. 543, 19 Can. Ex. 259, that the value of the vessel when sold, if she had been in the same condition in which she was at the date of the seizure, is all appellants are entitled to out of the fund. How to determine that is no easy task.

Yet I think a reference to find such salable value, on May 10, 1919, on the assumption of the vessel being in the same plight and condition as when seized on January 17, should produce the result sought for.

Regard being had to the actual facts bearing upon selling value on the date of the sale, is no doubt what should be proceeded upon. And the deduction of any additional salable value, realised by virtue of the labour and expense of the respondent after the first seizure, should produce the same result.

Is that what the reference by the order now in question to determine "the value of the work and labour done and materials supplied on and after January 17, 1919, as may be reasonable and beneficial upon and to the defendant ship" is at all likely to produce? I am afraid not. Looked at from the point of view

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of the owners, no doubt all that was done would be reasonable and beneficial to the defendant ship. But, it is urged, and I think possibly with a great deal of reason, that what was done did not add to the realisable selling value so much as implied in the direction given.

It is what actually was added, by virtue of said labour and expense, to the price realised; in other words, forms that part of the fund now in question, which respondent is entitled to.

In conclusion, any words should be adopted in the formal judgment which will embrace and adequately define and direct, firstly, a reference to determine whether or not the appellants having the conduct of the sale knew, or should have known, within a reasonable time preceding same, the fact that respondent had proceeded with the work now in question after the seizure, in good faith believing itself entitled to share, in respect of payment therefor, in the proceeds of the sale.

And if that is answered affirmatively there is no need for further inquiry. In that event the respondent should share *pro rata* with appellants in the distribution of the fund in question, and the costs of respondent throughout should be added to the amount proven to have been expended by it in labour and material after the seizure.

Then, secondly, default that finding and the finding of anything such as suggested above that would render it inequitable to do so, the salable value of the ship, without such work and labour since seizure, as above indicated, should be determined by the referee, and the claims of the appellants upon the fund should be restricted thereto.

In such event the respondent should be paid its claims, for said work in question, out of the balance of the fund in Court after deducting the salable value so found.

The costs of the appeal in such latter event should be reserved to be disposed of by the local Judge.

Duff, J.

DUFF, J., would dismiss the appeal.

Anglin, J.

ANGLIN, J.:—The question for determination in this appeal is the right of the respondent intervenor, a shipwright, who, under a contract for repairs then in course of execution, had possession of the defendant ship at the time of her arrest at the suit of the plaintiffs, to claim priority in the distribution of the proceeds of the sale of the vessel under an order of the Court in respect of some

$15,000 expended in completing such repairs after the arrest, without the sanction of the Court but in good faith. The circumstances out of which this question arises are sufficiently set forth in the judgment of Cassels, J., of the Exchequer Court, 50 D.L.R. 543, 19 Can. Ex. 259.

The trial Judge, Drysdale, J., allowed the intervenor's claim for priority in respect of expenditure incurred before the arrest—properly no doubt, recognising and protecting its common law possessory lien therefor; *Williams* v. *Allsup* (1861), 10 C.B. (N.S.) 417, 142 E.R. 514; 26 Hals., pars. 984 and 987; and in respect of that part of the judgment there has been no appeal. He wholly disallowed the claim for expenditure after the arrest because incurred without the sanction of the Court.

On appeal from the latter part of this judgment, Cassels, J., of the Exchequer Court, allowed the intervenor's claim so far as its expenditure may be found to "be reasonable and beneficial upon and to the defendant ship" (50 D.L.R. at 549, 19 Can. Ex. 259), by the District Registrar assisted by merchants, to whom a reference was directed, and granted priority therefor over the claim of the plaintiffs. From this judgment the plaintiffs now appeal.

The claim of the plaintiff, the Montreal Dry Docks & Ship Repairing Co., is for the cost of earlier repairs in respect of which it had relinquished any possessory lien. Its co-plaintiffs have claims for necessaries supplied to the ship during the course of such earlier repairs and before she came into possession of the intervenor. The rights of all the plaintiffs *in rem* arise, therefore, only upon, and date from, the arrest of the ship at their suit.

No doubt the intervenor would have been better advised to have sought the sanction of the Court before proceeding with further repairs after the arrest of the ship, which, however, was left in its actual possession until the repairs had been completed. That sanction not having been obtained, however, the question arises what are the respective rights of the plaintiffs and the intervenor in regard to the cost of such subsequent repairs.

Consideration of the numerous authorities cited and some others—none of them directly in point—has satisfied me that the basic principle on which this issue should be determined was

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correctly stated by Cassels, J., when he said, 50 D.L.R. 543 at 549, (19 Can. Ex. 259):—

These authorities indicate that the right of the plaintiff who seized the vessel is on the value of the vessel as at the date of the seizure [when they first acquired a right *in rem*] and not the value subsequently enhanced by the necessary work of the shipwright.

That principle is found in the decision of Sir Robert Phillimore in *The "St. Olaf"* (1869), L.R. 2 A. & E. 360 at 361, in the following passage quoted by Cassels, J. (50 D.L.R. at 548):

The right of the plaintiff who proceeds against the *St. Olaf* was to have the value of the vessel at the time she was brought into Court, as far as the proceedings *in rem* are concerned. His right was to have this *res* made responsible for the damage inflicted upon his ship, so far as the value of it extended, and the repair of the vessel subsequent to the damage for the purpose of preventing a deterioration of the property could not in any way increase his right or the obligation of the other party. It left them, as I conceive, *in statu quo* in that respect.

As put by Dr. Lushington in *The "Aline"* (1839), 1 Wm. Rob. 111, at page 120:—

With respect to any subsequent accretion in the value of the vessel arising from repairs done after the period when the damage was occasioned [in the case at bar after the arrest out of which the plaintiffs' statutory lien arises] his claim to participate in the benefit of such increase of value must depend upon the consideration how that increase arises, and to whom it in equity belongs.

As put by Lord Esher in *The "Cella"* (1888), 13 P.D. 82, at page 87:—

Whatever may be the judgment of the Court it must take effect from the time of the writ . . . But if the money be in Court or the Court has possession of the *res*, it can give effect to its judgment as if it had been delivered the moment after it took possession of the *res*. It is contrary to the principle of these cases and to justice that the rights of the parties should depend not upon any act of theirs but upon the amount of business which the Court has to do. Therefore the judgment in regard to a thing, or to money which is in the hands of the Court, must be taken to have been delivered the moment the thing or the money came into the possession of the Court.

Under the doctrine thus stated the plaintiffs would not have the benefit of any repairs subsequent to the arrest.

It may be that as in *The "Aline,"* 1 Wm. Rob. 111, at page 120, against the owner who repairs his vessel at his own expense, the claim of the successful suitor would extend to the full amount of his loss against the ship and the subsequent repairs.

Yet a stranger making such repairs on the faith of a possessory lien, which he erroneously conceived he would have, although not entitled to an equitable lien (*The "Aneroid"* (1877), 2 P.D. 189

at 191), may be in a better position to receive equitable consideration to which the owner cannot lay claim. On the one hand the shipwright cannot be allowed to improve the plaintiffs out of whatever interest they acquired in the *res* by the arrest. Their right was to have it taken and sold for their benefit as it then stood and that right may not be prejudiced, as it well might be if full effect were given to the contention of Mr. Burchell that because the respondent had a contractual right, as against the owner, to retain the vessel and to complete the repairs to her, which it had undertaken to make, the plaintiffs' security acquired by the arrest is subject to that right and the respondent is therefore entitled to priority over the plaintiffs for the full amount of its expenditure regardless of whether the selling value of the vessel was or was not thereby increased. While such a claim might be maintained if the assent of the plaintiffs to the completion of the repairs had been expressly given or might fairly be implied, (*Jowitt & Sons* v. *Union Cold Storage Co.*, [1913] 3 K.B. 1, at 10), the evidence here scarcely warrants such an inference. The respondent, in effect, asserts that its possessory lien extends to the post-arrest repairs because the marshall did not deprive it of actual possession. But, as stated by Townsend, J., in *The "Acacia;" Hamilton* v. *Harland* (1880), 4 Asp. M.L.C. 254 at 256, 42 L.T. 264.

> The property proceeded against, which, when arrested, is deemed to be in the custody of the marshall, although it may really remain in the hands of the party claiming the lien

with whom he found it. The intervenor's possessory lien ceased with the arrest, but his interest then accrued will be protected by the Court which deprived him of his legal possession. (*The "Tergeste,"* [1903] P. 26, at pp. 32-34.) As to it the plaintiffs acquired their security on the *res cum onere*. For any subsequent expenditure, however, not sanctioned by the Court, the intervenor's claim must rest on equitable considerations, such as prevailed in the two receivership cases cited by Cassels, J., 50 D.L.R. 541, 19 Can. Ex. 259. On the other hand, on what principle can the plaintiffs claim the benefit of whatever additional salable value was given to the vessel by the subsequent expenditure made by the intervenor? Equity would seem to require that, having acted in good faith, it should have the advantage of whatever increase

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of the salable value of the *res* is brought about, so long as no prejudice is done to any statutory right acquired by the plaintiffs through the arrest. (*The "Aline"*, 1 Wm. Rob. 111, at page 121). As put in the factum of the respondent, "Much is to be said in favour of a principle which does justice to one party without doing injustice to the other."

While the Exchequer Court does not possess the full equitable jurisdiction now vested in the Probate Divorce and Admiralty Division by the Judicature Acts (*Bow, McLachlan* v. *The "Camosun,"* [1909] A.C. 597), in the decision of cases properly within the jurisdiction of the former Court of Admiralty, with which the Exchequer Court is vested, "equitable considerations ought to have their weight." (*The "Saracen;" Bernard v. Hyne* (1847), 6 Moo. P.C.C. 56 at 74, 13 E.R. 604, 2 Wm. Rob. 451.) As put by Dr. Lushington in *The "Don Francisco"* (1862), 1 Lush. 468, at 472, 31 L. J. Adm. 205, "The Court of Admiralty may, in deciding a case, be influenced by equitable consideration."

From the very first it was held that the jurisdiction which the plaintiffs had invoked, originally conferred in 3-4 Vict. 1840, ch. 65, should be exercised "in equity and upon equitable principles." *The "Alexander Larsen"* (1841), 1 Wm. Rob. 288, at pages 290, 295. It is certainly within the jurisdiction of the Exchequer Court to determine the extent to which the *res* formerly in its possession and the fund now in Court representing it became a security to the plaintiffs by the arrest—how far it is subject to the so-called statutory lien in their favour; and it is also within its jurisdiction to determine in respect of what amount the intervenor has a possessory lien and the priority of these two liens *inter se*. By sec. 4 of the Admiralty Court Act, 24-25 Vict. 1861, ch. 10, the Admiralty Court was given express jurisdiction over claims for building, equipping or repairing any ship. In determining the question as to the extent of the plaintiffs' rights the Court may properly so deal with the *res* under its control that an injustice shall not be done to a person who by the expenditure of money in good faith has improved the subject matter of the common security and increased its salable value.

A careful study of the authorities has not only failed to disclose anything directly opposed to the disposition of the question before us which I have indicated seems to me to be proper, but has led

me to the conclusion that that disposition accords with their spirit, although nothing directly in point can be found.

I would therefore dismiss this appeal with costs and affirm the judgment of Cassels, J., of the Exchequer Court, 50 D.L.R. 543, 19 Can. Ex. 259, as I conceive, he intended it should have been framed. In order that his idea may be more clearly embodied and more precisely expressed, the formal judgment of the Court, as issued, should be modified by striking out of the third paragraph the words

as may be reasonable and beneficial upon and to the defendant ship

and substituting therefor

so far as the selling value of the defendant ship was thereby increased.

Anglin, J.

BRODEUR, J. (dissenting):—The question in this case is whether the respondents should have priority for the repairs made to the ship "Westerian" after she was arrested by the appellants.

Brodeur J.

The Local Judge in Admiralty, Drysdale, J., decided that no such priority could be claimed, but his judgment was reversed by the Exchequer Court, 50 D.L.R. 543, 19 Can. Ex. 259. The appellants admit that the respondents should rank *pari passu* with them.

The claims made by the two parties arise out of repairs which were made for the purpose of converting the ship from an inland water vessel into a sea-going ship.

At one time the appellants could have claimed a possessory lien for the repairs they did on the ship but for reasons which are not disclosed in the record they abandoned their possession and lost their lien.

The vessel was then delivered by her owner to the respondents to have the remodelling completed. When these repairs were going on, the vessel, on January 17, was arrested.

In spite of this arrest the respondents went on to complete the repairs without obtaining from the Court any authorisation to that effect. There is no objection on the part of the appellants that the respondents should have priority for the repairs made before the seizure, but the contest is as to the rank of the claims for the repairs made after the arrest.

From the time the arrest took place the ship was in charge of the Court and if some repair work had to be done to her, it became

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necessary for those interested to apply to the Court to obtain necessary authorisation to do these works. The respondents should not have assumed a power which was entirely in the discretion of the Court. It would not be easy for us to determine whether such authorisation would have been given or not.

As far as equity is concerned, both parties are in the same position. The respondents will have the benefit, when the sale takes place, of the $50,000 worth of repairs made by the appellants to the vessel and, on the other hand, the appellants will have the benefit of the $25,000 worth of repairs made by the respondents.

The rule that they should all rank *pari passu* appears to me as being the most equitable one.

The appeal should be maintained with costs of this Court and of the Court below and the judgment of the trial Judge should be restored with a proviso that the claims of the parties should rank *pari passu*. *Appeal dismissed.*

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CUNLIFFE v. PLANTA.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. September 15, 1920.

PRINCIPAL AND AGENT (§ II A—5)—REPRESENTATION TO SOLICITOR—PARTY PROPER AUTHORISED AGENT—SOLICITOR ACTING ON REPRESENTATION—REPUDIATION BY PRINCIPAL.

One who represents himself to a solicitor as being the properly authorised agent of certain parties on behalf of whom he retains the services of the solicitor, makes himself liable for the solicitor's costs as upon a warranty of authority if the agent has in fact no such authority.

Statement.

APPEAL by plaintiff from the judgment of Barker, Co. J. Reversed.

E. C. Mayers, for appellant; *Joseph Martin*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal.

It is not disputed that respondent represented himself to the plaintiff as being the agent of the Patricia Hotel owners; that is to say, the agent of the landlords. Nowhere does it appear that he put any qualification upon the extent of his agency. At page 19 of his evidence he says:—"I rang up Mr. Cunliffe, I explained to him that I was agent for the owners of the Patricia Hotel premises, and that I had received information that the furniture was being removed from the building. I told him there was a large amount owing for rent and asked him what could be done."

And again, at page 22, respondent said, in speaking of a conversation he had with one of his principals:—"I explained to Slater that the goods had been removed from the premises and I had instructed the solicitor to take proceedings to protect their (the landlords') interests."

The respondent's own view of his authority is made clear from a perusal of the evidence. He thought he had the right to instruct the solicitor to take such proceedings as would adequately protect the interests of his principals, the landlords, who were absentees.

It is suggested that the solicitor should have questioned the respondent as to the extent or limitations of his authority, and that not having done so, he was guilty of some breach of duty as a solicitor. I cannot take that view. He was not retained to advise the respondent as to the extent of his authority but to carry out the respondent's instructions on the assumption that the respondent was what he represented himself to be.

Now the proceedings taken by the solicitor were quite proper on the instructions given, that the tenant had fraudulently removed his goods to avoid distress. In fact, the propriety of the proceedings up to the time of the interpleader is not, as I understand it, in dispute, but it was contended by respondent's counsel that when a claim was made to the goods by the chattel mortgagee and when the solicitor was faced with an interpleader issue, he should have advised his client to go no further; but the respondent is again met with the consequences of his own declaration and instructions, because when the solicitor discussed this phase of the matter with him, the appellant in his evidence says, and this is not contradicted:—"Mr. Planta told me that he did not think the chattel mortgage was genuine." As a result of this the claim of the chattel mortgagee was resisted and it is the costs of these proceedings which the solicitor has been ordered to pay because the landlords have repudiated the authority of the respondent to instruct the taking of any such proceedings.

Now, while the landlords were held not to be bound, the respondent, in my opinion, made himself liable as upon a warranty of authority. In my opinion, the only want of care shewn by the appellant in connection with his retainer was in not protecting his own interests as against the landlords'. The respondent

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certainly cannot complain if the solicitor took him at his own estimate of himself and accepted his assumption of authority as genuine.

GALLIHER, J.A., (dissenting):—While it would be within the scope of Planta's authority to distrain on the goods upon the premises for the protection of his landlords' rights and even to follow them, under the statute, when clandestinely removed, it certainly would not be within the scope of his authority to authorise the proceedings taken in this case. It then becomes a question as to whether he expressly or impliedly warranted to the plaintiff that he had such authority.

There is no question that he did not expressly do so, nor can I hold upon the evidence that he did so impliedly.

When it was ascertained that there was a chattel mortgage upon the goods it must have then been apparent, if the chattel mortgage was *bonâ fide* and valid, that the seizure would have to be abandoned. This fact the plaintiff chose to contest and he did so without obtaining direct instructions from the landlords and upon instructions from the agent, the defendant herein, which were not ordinarily within the scope of the agent's authority and which the plaintiff should have known. The plaintiff should have inquired directly of Planta if he had such authority and had Planta so asserted the case would be in a very different position.

I regret that I cannot see my way to assist the plaintiff, as I believe he acted in good faith throughout, but I am afraid his own failure to put himself in a position of safety is responsible for the situation in which he finds himself.

McPhillips, J.A.

MCPHILLIPS, J.A., would allow the appeal.

Appeal allowed.

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HARRIS v. WINNIPEG ELECTRIC R. Co.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Brodeur and Mignault, JJ. March 8, 1920.

COURTS (§ II A—150)—JURISDICTION OF COURT TO SET ASIDE—UNREASONABLE VERDICT.

The Manitoba Court of Appeal has power to set aside a verdict of a jury and dismiss an action if, in its opinion, the verdict is one which reasonable men could not under the evidence fairly give, although there was evidence which may have justified the trial Judge in sending the case to the jury.

APPEAL by plaintiff from the judgment of the Manitoba Court of Appeal (1918), 29 Man. L.R. 306, setting aside a verdict and dismissing an action for damages for injuries received while alighting from defendant's street car. Affirmed.

Lafleur, K.C., for appellant; *J. A. Ritchie*, K.C., for respondent.

DAVIES, C.J.:—I think this appeal must be dismissed. The action was one to recover damages arising from the plaintiff having fallen while alighting from one of the company's cars, and the negligence charged against the company as having caused the accident was the condition of the exit vestibule of the car. The plaintiff, in the particulars of the negligence complained of, delivered in the action, stated such negligence to consist:

(d) In permitting snow and ice to collect and remain upon the steps and passage way of the exit of the said car. (e) In permitting the exit to become and to be in a slippery condition, without taking reasonable means to counteract such slippery condition. (f) In permitting an icy coating on steps of such exit. (g) In not taking means to counteract the effect of the formation or collection of snow and ice within the said exit.

In her evidence at the trial, the plaintiff endeavoured to support these charges of negligence, but the least that can be said of her evidence is that it is most unsatisfactory and somewhat contradictory, while a number of the witnesses, some of them officials in defendants' employ, and others quite independent, disprove altogether the statement that the exit vestibule was in the condition charged.

The jury rendered a general verdict in favour of the plaintiff upon which the trial Judge directed judgment to be entered for her for the damages found.

The Appeal Court of Manitoba unanimously set aside this judgment (1918), 29 Man. L.R. 306, on the grounds that there was no such evidence to sustain the alleged negligence, either as charged in the particulars or as afterwards modified at the trial, as reasonable men could fairly find a verdict for the plaintiff upon. As I understand their judgment, the Court held that, in view of the conflicting and unsatisfactory evidence of the plaintiff herself, flatly contradicted as it was, in so far as the condition of the exit was concerned, by numerous witnesses, passengers quite disinterested as well as the officials of the company in the car, it was impossible to uphold a verdict of negligence on the company's part.

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Davies, C.J.

I fully agree with the reasons stated by Perdue, C.J.M., and the other Judges in the Court of Appeal setting aside the verdict as one which reasonable men could not under the evidence fairly find and dismissing the action.

I cannot see that there could be possibly any use in granting a new trial. All the evidence which could have been produced on either side appears to have been heard, and the Court reached, in my opinion, the right conclusion that on this evidence the plaintiff failed to make out any case of negligence against the company on which she could recover.

Since the argument a question has been raised, not touched upon in the factums or in the argument at bar, as to the power of the Court of Appeal to set aside the verdict and dismiss an action such as this where there is any evidence whatever to support the verdict. I have read, and concur in, the reasons stated by my brother Mignault for holding that the Court of Appeal had the power to give the judgment it did, dismissing the action.

I would dismiss this appeal with costs.

Idington, J.

IDINGTON, J. (dissenting):—The appellant was a passenger on respondent's street railway and brought this action for damages, suffered by her, in course of making her exit from the car when it had stopped at a usual stopping place.

She alleges in her statement of claim that "when approaching the exit of said street car, owing to the negligence of the defendant, she was precipitated violently down the steps of the exit of said car and upon the street platform, thereby sustaining severe, painful and permanent injuries."

In same statement of claim she sets forth particulars of said negligence in seven separate paragraphs of which the first is as follows:—

(a) The failure of the defendant to maintain its said street car, more particularly the exit therefrom, in a safe condition.

Paragraphs (b) and (c) complain of want of warning of unsafe condition; and the next two paragraphs are as follows:—

(d) In permitting snow and ice to collect and remain upon the steps and passageway of the exit from the said conveyance. (e) In permitting the exit to become and to be in a slippery condition without taking reasonable means to counteract such slippery condition.

The other paragraphs consist in first a repetition in milder form as to icy condition, and next in not taking means to counteract the effect of said condition.

The exit consisted firstly of a step down from the floor of the car to a platform three feet ten inches in width, as stated by counsel herein, and apparently same length to the bar which separated the entrance passageway from that of the platform I have attempted to describe.

She says that before stepping down from the floor of the car to this exit platform, she had hold of a post at her right and faced obliquely, as I understand her, the exit door of the car.

Immediately she stepped on this platform her foot slipped, she fell and was shot down through the doorway and in course of her fall caught hold, with her left hand, of a railing bar to her left.

The story is somewhat confusing by reason of many suggestions made by others, as well as some given by herself to others who appear as witnesses.

The high heel sort of boot she wore from which that heel on the left boot was knocked off, in the fall, and all incident thereto, were made to occupy a large part of the consideration given the case.

Connected therewith we have much confusion of fact and more of speculation tending to further confusion.

I am not going to try, when to my mind so many have failed, to make a clear demonstration that would remove all this confusion of fact and thought. There is her sworn testimony that she slipped and fell because of the slippery nature of the platform upon which she stepped down. There is the undoubted fact of her fall and there does not seem to be any adequate cause for her falling unless the slippery nature of the platform she swears to.

It is a common occurrence for people making a misstep when going down, even only a single step of 6 inches high such as she had to take from the floor of the car, to that floor of the vestibule which I have referred to as a platform. The cause can only be known to the party suffering such an accident, and too frequently by reason of an absent-minded condition, it is not accurately known even to him, or her, so suffering.

In this case we have only one cause assigned and that is the slippery nature of the place into which she stepped. True she speaks of ice and snow and slush and wet, almost all of which may be exaggeration. I cannot, however, see how as a matter of

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law it had became the duty of the trial Judge to withdraw such a case from the jury. And that is what the Court of Appeal must have concluded was his duty for it has dismissed the action, 29 Man. L.R. 306, alleging he should have done so.

If the evidence of, and on behalf of, the plaintiff happens to be so utterly and inherently incredible that the jury could not reasonably find a verdict thereon, a trial Judge might enter a nonsuit, but so long as there is evidence entitling plaintiff, if the evidence on his, or her, behalf alone, to a verdict, it must be submitted to the jury no matter how strong the evidence adduced on defendant's behalf may be.

If the issues joined happened to be so developed that the onus rested upon the defendant, then his right would be the same.

When it comes to a case of conflicting evidence the jury is alone the tribunal to decide under the direction of the trial Judge.

If the weight of evidence is against the party on whom the onus rests under the issue, there is no remedy but a new trial; unless where power may by statute (or rule having the force thereof) have been given the Appellate Court, or the parties have agreed, or the party concerned in establishing the onus resting upon him, may have submitted to such reservation as a means of ending the litigation.

Such, I conceive, was the condition of the common law relative to the trial by jury, and if a verdict seemed to be against the weight of evidence, the only means open to an Appellate Court was to grant a new trial.

It was neither competent for the trial Judge nor for an Appellate Court to review the case as a whole and determine the rights of the parties as has been done by the Court below herein.

In some jurisdictions as, for example, in Ontario, by virtue of rules made under the Judicature Act, Rule 615 confers such power. But in the opinion judgments delivered herein in the Court below, no such like rule or statute is referred to as it existed before any similar change, and in *Hiddle* v. *National Ins. Co.*, [1896] A.C. 372, plaintiff was nonsuited at the close of his case. No conflict of evidence existed and the change in law did not need to be exercised.

Of course there are decisions under the law relative to the rights and duties of a trial Judge when he had only to consider

the facts adduced in evidence and decide whether or not there had been evidence presented by him on whom the onus rested, under the issues presented, to entitle him to have the case submitted to the jury. It never was conceivable under the then state of the law that an Appellate Court could review the whole case and decide upon the relative weight of evidence.

Much less could a trial Judge then or now assume such jurisdiction.

All he could do then and, so far as I can see, can now do, is to determine whether or not a case made by him on whom the onus rested was such as entitled him to have the case submitted to the jury and, if further evidence in reply thereto contradictory or conflicting therewith, was to submit it all to the jury to decide.

The Court below seems to assume herein that it was the duty of the trial Judge at the close of the case to pass upon the whole case and then decide whether upon the respective weight of evidence allowed on either side there was a case to present to the jury.

Such, with respect, I do not conceive to be the law. Of course, if the evidence adduced by the appellant was, as Fullerton, J.A., at the close of his judgment holds, it was an impossible state of fact, it would be the trial Judge's duty to nonsuit.

I do not agree with that view.

If her evidence standing alone was possible of belief it was the trial Judge's duty to have submitted the case to the jury with a clear direction as to the law to be observed.

In doing so it is usual for the trial Judge to review the evidence and point out the conflict, if any, in order to help the jury to reach a correct verdict on the facts.

In this case I am of opinion that the trial Judge erred in telling the jury, as he did, as follows:—

> Now, with that view of negligence in your mind, what about this sand? A jury is in that fortunate position of not being bound by the rules of evidence, of not being bound down so exactly by what occurs in the Court room as is a Judge if trying a case without a jury. You have, as a jury, a perfect right to consider the balance of probabilities. And, in the consideration of the balance of probabilities, you are entitled to use your common sense upon what you know is ordinarily and commonly done under similar circumstances.

I know of no reason why such a distinction can be made between the duties of a Judge trying a case and a jury.

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Idington, J.

It may well be that a jury may possess more common sense and knowledge of the world and what passes therein as matter of common knowledge than a Judge, or that a Judge might be endowed with more of such sense or knowledge than a jury.

The direction thus given was very apt to be taken as a license to deal with facts presented to them in a way that a Judge should not.

And, though somewhat modified at a later stage when its effect may have become operative in a way that was beyond recall I am afraid, in a case of this kind, it was so likely to mislead that a new trial should have been granted if nothing more were involved for an Appellate Court to pass upon.

There is another feature of the charge which inclines me to that view in this that the grave conflict of evidence between the plaintiff and others, relative to the exact condition of the floor of the vestibule, was not as pointedly remarked upon in the charge as it might have been.

There is no hard and fast line of duty relative to a trial Judge's duty in marshalling the facts presented on either side. It is for that reason and that they were not fully so marshalled as they might have been that the remark to which I have taken exception becomes the more important and leads me to the conviction that a new trial should have been granted by the Court below, unless for the reason I am about to assign the Court of Appeal might do what the trial Judge could not in law do or attempt to do as seems to be the holding of the Court below.

At common law, I repeat, the only remedy for a verdict against the weight of evidence was a new trial. See Chitty's Archbold's Practice, 12th ed., at page 1522.

That state of the law of England existed at the time of its introduction into Manitoba as a province.

A few years later the law was changed by a rule giving to the Court of Appeal, whilst withholding from a Divisional Court, the power to interfere in such a way as to discard the verdict entirely.

The question thus presented to us is whether or not there is any such power existent in the Court of Appeal for Manitoba as is thus found in the Court of Appeal in England.

Perdue, C.J.M., of the Court below concludes his opinion judgment as follows, 29 Man. L.R. at page 319:—

I think that the case should have been withdrawn from the jury at the close of the evidence and a dismissal of the action directed. Defendants' counsel moved for a non-suit at the close of the plaintiff's case but did not renew the motion at the close of the whole case. On the present application this Court may grant the relief to which the defendants are entitled.

He cites and seems to rely on 7 different decisions in England, all decided before the law had been so changed as to allow the Court of Appeal there conditionally to review the case by a consideration of the evidence as a whole and enter judgment accordingly.

Having examined each of the cases so cited and relied upon, I find, except in *Dublin etc. R. Co.* v. *Slattery* (1878), 3 App. Cas. 1155, I am about to refer to, they all fall within the rule laid down by Willes J., in *Ryder* v. *Wombwell* (1868), L.R. 4 Ex. 32 (one of those so cited), as follows, at page 38:—

> There is in every case . . . a preliminary question which is one of law, *viz.*, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the Judge ought to withdraw from the jury and direct a nonsuit if the onus is on the plaintiff or direct a verdict for the plaintiff if the onus is on the defendant.

There was in each no conflict of evidence on the admitted facts or the case as made out by the party on whom the onus lay.

In the case of *Dublin, Wicklow and Wexford Rly.* v. *Slattery*, 3 App. Cas. 1155, there was a conflict of evidence as to the warning by ringing of bell or whistle by the appellant's engine, but on the facts admitted by respondent who was plaintiff, it was strictly urged by counsel for appellant that he was, independently of the issue so raised, not entitled to recover. This view was maintained by a number of eminent Judges but did not prevail.

No one seems to have thought of trying to interfere with the finding of the jury on the issue of conflicting evidence.

And all those so dissenting conceded in clearest terms that if there had been any conflict of facts which were applicable to the relevant law, as they understood it, the jury must deal with them and decide such issue.

Here there was a clear case made by plaintiff, now the appellant, and even if the trial Judge had conceived it was outweighed by the evidence adduced by respondent, he had no right to dismiss the action as held by the Chief Justice below.

Indeed, with great respect, I am unable to see how, with these authorities before him, he could assert such authority as existent in any trial Judge when there was such a conflict of evidence.

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Idington, J.

The language he quotes from these several cases refers not to the evidence in a case as a whole, but to that supporting the party on whom the onus of proof lay.

Such, however, being the ruling of the Court below I have sought for a possible explanation in the law as laid down in these cases being changed in the direction it has been in England and Ontario, for example, as hereinbefore referred to, but I cannot find it so changed in Manitoba, according to existent law to be applied and acted on by the Court of Appeal below.

Even in England when the change was first made the power was not given the trial Judge but was only given the Court of Appeal. It was withheld even from the Divisional Court.

I find a similar power was given the King's Bench of Manitoba by Rule 614, which was evidently taken from the English rule and appears as part of the King's Bench Act, of the R.S.M. 1902, ch. 40.

That rule is amended in the later rules by dropping out the words "or for a new trial" which I suspect had become inappropriate for changed powers and constitution of the Courts.

Then let us turn to the Court of Appeal Act, R.S.M. 1913, ch. 43, and we find, in sec. 9 thereof, the following:—

> 9. Upon appeal from, or motion against, the order, decision, verdict or decree of a trial Judge, or on the rehearing of any cause, application or matter, it shall not be obligatory on the Court to grant a new trial, or to adopt the view of the evidence taken by the trial Judge, but the Court shall act upon its own view of what the evidence in its judgment proves, and the Court may draw inferences of fact and pronounce the verdict, decision or order which, in its judgment, the Judge who tried the case ought to have pronounced.

Inasmuch as there never was any law which I can find empowering the trial Judge to substitute himself for the jury when there was a clear conflict of evidence as herein existed at the trial on the actual issue to be tried, I cannot see how this section can help, in such cases as this, the Court below.

Its jurisdiction in this regard seems expressly limited to what the Judge, who tried the case, ought to have pronounced.

There is a comprehensive transfer of power in sec. 6 of the Act which, assuming the rule I have quoted above in force at the date therein named, under and by virtue of which it might be fairly arguable if we had not sec. 9, above quoted, following it and limiting its meaning, that the power assigned by the old rule to the King's Bench Act was transferred.

I cannot so read the two sections together and must take the later one as my guide.

I conclude, therefore, for the foregoing reasons that the Court below has no other power than under sec. 9 and that does not give it the power to set aside a verdict and enter judgment according to its own view of the facts.

Idington, J.

Hence I think the appeal should be allowed with costs of the appeal and a new trial be granted, costs to abide the event.

Duff, J.

DUFF, J.:—The conclusion of the Court below is, in my opinion, right and the appeal should be dismissed with costs.

Brodeur J.

BRODEUR, J.:—This is a street railway accident. The plaintiff, a young lady, in leaving the car slipped and fell down the steps. She claims in her evidence that the exit vestibule had been rendered slippery by snow, ice and slush. She is not, however, very positive as to the condition of the floor. At first she spoke of snow and ice and then of slush. Later on her counsel introduced a new element of negligence by stating that the floor was damp. The evidence on the other side was to the effect that the floor was in excellent condition, was not slippery and that the accident was likely caused by the heel of her shoe catching on the edge of the steps, since the heel was found on the first step.

This evidence was given by 4 witnesses and cannot be impeached since some of them were absolutely disinterested.

The trial Judge in charging the jury commented on this evidence and stated that they were not bound by the ordinary rules of evidence and that it was a matter in regard to which they could consider the balance of probabilities. Though requested by the respondent to submit to the jury specific questions as to the particular negligence, the trial Judge refused, and a general verdict of negligence was given. This verdict was set aside by the unanimous judgment of the Court of Appeal, 29 Man. L.R. 306.

There is no reasonable evidence to my mind to support the verdict of the jury. That given by the plaintiff is conflicting and taken by itself is not at all convincing. But her version as to the slippery condition of the vestibule is contradicted in a satisfactory way by the witnesses for the defence, and it seems to me that the accident was not due to any negligence on the part of the company. The removal of the heel from her shoe was the real cause of the accident. She slipped as a result of that and fell down the steps.

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Mignault, J.

The verdict of the jury was against the weight of evidence and is such that it could not reasonably be found. *Hallett* v. *Bank of Montreal* (1918), 43 D.L.R. 115, 46 N.B.R. 62.

The judgment which dismissed the plaintiff's action and which set aside the verdict should be confirmed with costs.

MIGNAULT, J.:—The appellant obtained a verdict for $1,000 for damages which she alleged she had suffered by reason of falling when she was leaving a car of the respondent company on October 24, 1917. The trial Judge, Metcalfe, J., gave her judgment for this amount, but his judgment was unanimously reversed by the Court of Appeal of Manitoba, 29 Man. L.R. 306, and the plaintiff's action was dismissed. From the latter judgment the appellant appeals to this Court.

The verdict was a general one, the trial Judge having declined to put questions to the jury. But the only ground on which the jury could possibly find negligence against the respondent company, was on the question whether the vestibule of the electric car, where the appellant says she slipped, was in a slippery and dangerous condition at the time of the accident. There was a great preponderance of evidence that the platform or vestibule was perfectly dry. The appellant, however, swears first that it was covered with ice and snow, then she says there was not ice but snow and slush, afterwards wet snow and slush, covering the platform or vestibule an inch thick, looking as if it had not been cleaned off for a long time. The trial Judge was evidently unfavourably impressed by the appellant's testimony, contradicted as it was by all the other witnesses who saw the vestibule. He told the jury that there was certainly not the ice that she said at first was there, because she said afterwards it was not ice. And he added:—

> Now if there was not this slushy condition then Mrs. Harris has not a proper recollection of the condition; and it may be that she has no better recollection of what she did when she came out of the vestibule door; and as a juryman it would seem to me that she walked out in the ordinary way and started to go down these steps, and I would not pay much attention to the theory of the plaintiff or to the theory of the defendant with regard to that because it is only theory and you are entitled to think for yourselves.

Before that the trial Judge said to the jury:—

> A jury is in that fortunate position of not being bound by the rules of evidence, of not being bound down so exactly by what occurs in the Court room as is a Judge if trying a case without a jury. You have, as a jury, a

perfect right to consider the balance of probabilities. And, in the consideration of the balance of probabilities, you are entitled to use your common sense upon what you know is ordinarily and commonly done under similar circumstances.

This seems to have given the impression to the jury that they could depart from the evidence in giving a verdict, and after considering their verdict for some time, they returned to Court and asked if they could depart from the evidence in arriving at a decision. The trial Judge then told them that no juryman could depart from the evidence that has been given which he believes to be evidence, and that the jury cannot go against any evidence which they believe.

There was a possible cause of the accident which was suggested by the defence. The appellant was wearing boots with high heels. The heel on the left foot came off. The appellant said that her foot struck the landing platform on the street, and the force of the blow wrenched the heel off. In her examination on discovery she had said that she saw the heel flying through the air, but could not remember this at the trial. The heel was found on the upper of the two steps leading from the platform of the vestibule of the car. The defence suggested that she had been tripped up by her heel catching and coming off. The jury, however, evidently believed that this was not the cause of the accident, but that the vestibule of the car was in a dangerously slippery condition.

The question now is whether, viewing the whole of the evidence, the jury could reasonably find that the vestibule of the car was in a dangerously slippery condition. The trial Judge put to them the question fairly. He said:—

In order to find a verdict against this company you have to find that the passage was slippery; and you have to find further that it was so slippery as to be dangerous. By that I mean that it was not reasonable to leave it in that slippery condition, having regard to the passengers who would get on and off. Well if you do that and find that it was unreasonably slippery and if you find that because of that slipperyness the accident was caused, then you have no further difficulty; there will be a verdict for the plaintiff. But if you cannot go that far, if you don't know how it was caused, and if you cannot find some specific negligence which satisfies your conscience, then you prostitute your oath if you find a verdict for the plaintiff.

Applying this test to the verdict, I am of opinion that the verdict was not one which the jury viewing the whole evidence could reasonably find. The appellant's testimony as to the condition of the vestibule of the car, contradicted as it was by

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every other witness who saw the vestibule, could not be reasonably believed by the jury. Either she had not, as put by the trial Judge, a proper recollection of the condition of the vestibule, or having rashly first said that there was ice and snow, her subsequent variance of this statement shews that she is not to be credited against the positive statement of all the other witnesses who say the vestibule was dry. And much as I feel reluctant to interfere with jury verdicts, I cannot say that this verdict was one which the jury could reasonably find in view of all the evidence adduced at the trial.

An important question arose during consideration of this case (not one raised or discussed by the appellant) whether the Court of Appeal of Manitoba had the power to render judgment dismissing the action *non obstante veredicto*. The appellant's counsel, it is true, argued that the case was not one where this power should be exercised, but, as I understood him, did not deny the existence of such a power if properly exercised.

Perdue, C.J.M., in his reasons for judgment, said, [see judgment of Idington, J., *ante* p. 205.]

With respect, I do not think that a nonsuit could have been granted at the close of the plaintiff's case. It was the evidence of the defendant company which so thoroughly discredited the plaintiff's story that the jury could not reasonably find in her favour. Under these circumstances the trial Judge could not, at the close of the plaintiff's case or at the close of the whole trial, direct a dismissal.

The question however remains whether the Court of Appeal could dismiss the plaintiff's action.

Section 6 of the Court of Appeal Act, R.S.M. 1913, ch. 43, is as follows:—

> 6. The Court of Appeal shall be vested with and shall exercise all the rights, powers and duties which immediately prior to July 23, 1906, were held, exercised and enjoyed, under and by virtue of the King's Bench Act, or any other statute of this province or of the Dominion of Canada, by the Court of King's Bench sitting in banc and as a Court of Appeal from the judgment, decision, order or decree of a single Judge, or verdict of a jury, or of a Surrogate Court Judge or of a County Court Judge, or verdict of a County Court jury.

On July 23, 1906, Rule 614 of the Court of King's Bench, as enacted by the Revised Statutes of Manitoba, 1902, ch. 40, was as follows:—

614. Upon a motion for judgment or for a new trial the Court may, if satisfied that it has before it all the material necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly; or may, if it is of opinion that it has not sufficient material before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts or inquiries to be taken, as it may think fit.

In R.S.M. 1913, ch. 46, sec. 638, the words "or for a new trial" in sec. 614 were struck out, and were the new King's Bench Rule No. 638, the one referred to in the Court of Appeal Act, sec. 6, the striking out of these words might give rise to considerable difficulty on account of the collocation of Rule 638 with other rules concerning the trial Court. But Rule 614, in force on July 23, 1906, being made applicable to the Court of Appeal, in my opinion authorised the latter to do what it has done in this case.

I may add that Rule 614 was taken verbatim from Ontario Rule No. 615 of 1897, and it had never been doubted that under the latter rule the Ontario Divisional Court could on an appeal dismiss a plaintiff's action notwithstanding the jury's verdict.

See also, under the similar English rule, *Millar* v. *Toulmin* (1886), 17 Q.B.D. 603, and *Allcock* v. *Hall*, [1891] 1 Q.B. 444.

I do not think under these circumstances that the Court of Appeal erred in disregarding the verdict and dismissing the appellant's action.

I would, therefore, dismiss this appeal with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ. June 9, 1920.

COMPANIES (§ V F—237)—SUBSCRIBER FOR STOCK—CONTRACT—TERMS—NOT SUBSCRIBER SUBJECT TO CALL—LIABILITY—TRANSFER OF SHARES BY DIRECTORS.

A party who becomes a subscriber for stock in a company upon the terms of a contract by which he agrees to pay for his stock 20 per cent. upon the signing of the subscription and 10 per cent. in each succeeding month, does not become a subscriber for stock subject to call, but becomes a subscriber under the terms of the contract. There is nothing to prevent the directors of the company from assenting to a transfer of the shares, no call having been made, and sec. 66 of the Dominion Companies Act, R.S.C. 1906, ch. 79, having no application. The shares not being surrendered but transferred, and any continuing liability on the part of the original subscriber is as a debtor and not as a contributory.

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APPEAL by the liquidator of a company from an order of Middleton, J., reversing an order of the Master placing certain subscribers on the list of contributories. Affirmed.

The judgment appealed from is as follows:—

MIDDLETON, J.:—The Port Arthur Waggon Company Limited was incorporated under the Dominion Act on the 11th January, 1910. On the 25th January, 1913, it was declared to be insolvent and ordered to be wound up.

At the time of the organisation of the company, it was contemplated that an agreement should be made between it and the Tudhope-Anderson Company, carrying on business at Winnipeg, under which that company should manufacture waggons for this concern under an agreement. On the strength of this contemplated arrangement, Tudhope, who was largely interested in the Tudhope-Anderson Company, subscribed for stock. Before this company commenced operations, negotiations were entered into with the Speight Waggon Company of Markham, a business rival of the Tudhope-Anderson Company, and it was deemed that it would be more advantageous for the company to come to terms with the Speight company than to carry out the contemplated arrangement with the Tudhope-Anderson Company. It was recognised that, if this should be done, as a matter of fairness Mr. Tudhope should be relieved from his subscription for stock, and accordingly he was allowed to transfer his stock to Mr. W. J. Lindsay, one of the promoters of the company, and an agreement was executed cancelling a contract that he had signed between the company and the Tudhope-Anderson Company. All this took place in 1910, while the company was as yet in an entirely embryonic condition. After the agreement with the Speight company had been executed, the company went actively into business, incurred large liabilities, and in a short time became insolvent. During all the time which elapsed from Mr. Tudhope's retirement until the liquidation, it was assumed that his retirement had been effectual, and he was not regarded or treated in any way as a shareholder of the company. In the course of liquidation, the circumstances surrounding his retirement were investigated, and in the result he has been placed on the list of contributories.

When Mr. Tudhope retired, it was thought that the people who had offered to subscribe for the stock might have been induced

to subscribe by the fact of Mr. Tudhope's connection with the company, and it was thought right to send them a circular advising them of the change of policy, and giving all those who desired to retire from the company an opportunity to transfer their stock-holdings. Shelden, who had gone into the company on the strength of Mr. Tudhope's connection with it, availed himself of this option, and transferred his stock, and thereafter assumed that he had no further connection with the company.

In all this every one acted with perfect honesty. There were no creditors, or at any rate no creditors claiming any substantial amount, and all that was done was done in good faith in recognition of the fact that it would be unreasonable to expect Mr. Tudhope to implement his subscription when the company desired as a matter of business policy to withdraw from the agreement made with the company with which he was identified.

Turning now to the documents which the Master thinks fixed liability on these gentlemen, first to be considered is the application of Mr. Tudhope for stock. It is worded as follows:—

To the Directors. I hereby apply and subscribe for 100 shares of the seven per cent. preferred stock of the above company, at the par value of $100 per share, and agree to accept same, or any lesser amount that may be allotted to me, and agree to pay for the same as follows:—20% on signing hereof and 10% each succeeding month until fully paid.

Enclosed please find $ being first payment on my subscription.

I hereby authorise the secretary of the company to register me on the books of the company as holder of said shares.

Dated this day of A.D. 1910.

Signature, James B. Tudhope. Occupation———

Address, Orillia.

On the 22nd March, 1910, probably the date on which the subscription was signed, this stock was alloted to Mr. Tudhope. It is not denied that notice of allotment was duly given and that he became a shareholder of the company. He was elected a director, and became president of the company, and attended its meetings from time to time. No part of the price of his stock was paid.

At the meeting of the directors on the 5th August, 1910, the negotiations for the substitution of an agreement with the Speight company for the agreement with the Tudhope-Anderson Company had so far advanced that a resolution was passed accepting the offer of the Speight company "to sell to the Port Arthur Waggon

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Company Limited its stock in trade, contracts, goodwill, patents, and its whole undertaking and assets, for seven hundred and fifty shares of the preferred stock and twenty-five thousand dollars in cash," plus the stock in hand at cost price.

Immediately after this resolution is a resolution dealing with Mr. Tudhope as follows:—

Mr. James B. Tudhope informed the directors, through the secretary, Mr. Fox, that he was retiring from the company with all his interest on the following conditions: (1) To be relieved of his liability on the stock subscribed of 100 shares, and his application returned. (2) That all shareholders having subscribed for stock up to date of the acceptance of this offer to have the opportunity to cancel their subscriptions, and to be relieved from all liability thereunder. (3) To be relieved from all liability incurred either by the company or by the directors at the present time. A circular to this effect will be sent out to all the shareholders. Resolved, on the motion of Mr. Starr seconded by Mr. Cameron, that this board of directors accept Mr. Tudhope's proposition, and the executive officers be authorised to carry out the same.

When these minutes came to be read at the next meeting, they were amended by adding to the above, "That the contract between the Port Arthur Waggon Company Limited and the Tudhope-Anderson Company Limited be completed by the first named company as already agreed upon." This contract, it is admitted, was a contract releasing the former agreement by which the Tudhope-Anderson Company undertook to manufacture for the Port Arthur company certain waggons.

Pursuant to these instructions, the rescinding agreement was executed, and Mr. Tudhope transferred his stock to Mr. Lindsay. This transfer was as follows:—

Toronto, August 26th, 1910. I hereby transfer to W. J. Lindsay all my rights under this subscription. James B. Tudhope. Witness, Jas. H. Spence.

Under which is written:—

I hereby accept the above transfer. W. J. Lindsay. Witness, Jas. H. Spence.

As appears by the minutes, on the 26th August Mr. Tudhope tendered his resignation as director, which was accepted, and a resolution was passed "that the transfer of Mr. J. B. Tudhope's subscription be approved and sanctioned."

At the same meeting, entered immediately above the resolution quoted, is the following:—

Proposed by J. H. Spence, seconded by T. H. Speight, that a call be made upon the directors for payment of twenty-five per cent. of the amount of their subscriptions, being ten per cent. on application and fifteen per cent. on allotment.

The appropriate entries transferring the stock were made in the books of the company, and the agreement with the Speight company was completed. It does not appear to me to be profitable to follow the dealings of the company further. It is enough that insolvency resulted.

The Master has held that Tudhope is liable because payments were in arrear under the terms of his subscription, and, therefore, the stock could not be validly or effectually transferred. He also regards the arrangements come to as in effect a surrender of the shares and not as a transfer. He also suggests that the transaction between Tudhope and the company cannot be regarded as a "compromise," and for this reason he is not relieved from his liability.

In addition to contesting liability, Mr. Tudhope attacks the validity of the entire proceedings under which it is sought to make him liable, upon the ground that the liquidation has come to an end.

After the winding-up had proceeded to some extent, on the 11th July, 1913, an agreement was made between the liquidator of the company and one John M. Wiley. This agreement recited the liquidation proceedings, and that Wiley had formed a syndicate for the reorganisation of the business of the company, and obtained subscriptions to such syndicate, and caused to be incorporated a new company, and on behalf of this company had offered to purchase from the liquidator "the whole assets" of the company for the consideration mentioned; that this had been recommended to the Court by the liquidator, with the sanction of the creditors and shareholders of the company, and that at a meeting called for the purpose of considering it, the proposed scheme of reorganisation had been accepted; it was, therefore, agreed that the purchaser should take over all the assets of the company, indemnify the liquidator with respect to any liability he might be under, and deliver to the liquidator notes of the new company for the amounts of the claims of the creditors, payable in 6, 12 and 18 months, the liquidator to do such things "as may be necessary for the more effectually vesting in or realising for the new company the benefits of the transfer hereinbefore mentioned, and in particular the liquidator shall, at the expense of the new company, and at its request, and subject to its control, (a) take all such proceedings

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against persons liable to contribute to the assets of the vendor as the new company may require, including the making of calls upon any of the unpaid shares of the vendor."

Following this, Wiley transferred the agreement to the Port Arthur Waggons and Implements Limited, the new company, and on the 14th July, 1913, an agreement was made between the company in liquidation and the new company by which were transferred to it all its assets, *inter alia* "(g), the full benefit of all subscriptions to the capital stock of the vendor, and of all amounts unpaid thereon, whether already called or hereafter to be called," all this being approved by the Master in Ordinary.

It is stated that the new company has in its turn gone into liquidation, and that these proceedings are now being carried on in the name of the liquidator of the original company for the benefit of the liquidator of the new company. The contention is that upon the sale of the assets the liquidation, as a liquidation, came to an end, and that the purchaser of the assets must enforce any claims that he may have by action, and he cannot continue the liquidation.

Dealing first with the situation of Mr. Tudhope, I think the allotment of the stock and the notice of allotment amount to an acceptance of the offer contained in the subscription. A contract was thus formed. Under it Tudhope did not become a subscriber for stock subject to call, but he became a subscriber for stock upon the terms of the contract, that is to say, that he agreed to pay for his stock 20 per cent. upon the signing of the subscription, and 10 per cent. in each succeeding month. In my view, these payments became due by virtue of the contract, and they are not, in the true sense of the term, "calls" within the meaning of the Act.

I have not considered whether it is competent for a company to enter into such a special agreement with individual shareholders. Much may be said indicating that this mode of subscription for stock is entirely foreign to the underlying principle of the Companies Act. That Act seems to contemplate a subscription for stock subject to call so that all stockholders shall be upon a parity.

But, assuming that such an agreement is competent, the questions then are: first, whether this liability in respect of this

stock brings the case within the prohibition of the statute against the transfer of stock upon which a call is in arrear; and, secondly, if so, what is the effect of a transfer in violation of the terms of the statute?

By the Dominion Companies Act, R.S.C. 1906, ch. 79, sec. 65, it is provided: "No transfer of shares whereof the whole amount has not been paid in shall be made without the consent of the directors." By sec. 66 it is provided: "No shares shall be transferable until all previous calls thereon are fully paid in."

Reliance is placed by the liquidator upon the decision by the late Chancellor Sir John Boyd in *Re Peterborough Cold Storage Co.* (1907), 14 O.L.R. 475. That was a case in which the stock had been allotted upon subscription, 25 per cent. being payable upon subscription and 25 per cent. on allotment. The directors who had not paid what was due, knowing the company to be insolvent, contrived, as they thought, to free themselves from liability. They procured five persons of no substance to whom they transferred all their stock, except one share each, and upon the company going into liquidation they relied upon this as freeing them from liability. The real gist of the holding is that the whole contrivance was a fraud and an abuse by the directors of the power given to them to assent to a transfer, for it had been exercised not in the interests of the company but in the interests of the directors as individuals, and for the purpose of defeating the rights of the creditors and of the shareholders.

I do not understand that, in the view of the Chancellor, the case was brought within the provisions of the Ontario statute. He says (pp. 476, 477): "The transaction is within the mischief guarded against by sec. 30 of the Act, R.S.O. 1897, ch. 191. That enacts that 'no share shall be transferable until all previous calls thereupon be fully paid.' Technically there was no call made, but there was 25 per cent. exacted from the subsequent subscribers for shares by the directorate, and they excused themselves from making a like contribution to the funds of the company." I think the real reasoning of the Chancellor is this: The policy of the Act is clearly indicated by sec. 30, and this makes it plain that it was the duty of the directors to see that no assent should be given by them to the transfer of stock upon which any payment was due, and it was on the violation of this duty that the liability, in truth, rested.

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A call is defined in Halsbury (Laws of England, vol. 5, para. 268) as being the claim for "any amount which has not been paid or satisfied on a share, made by the company or its governing body from its members prior to winding up, or by its liquidator when it is in course of winding up."

The Dominion Companies Act, sec. 58 *et seq.*, deals with calls, and it is clear from the provisions of the statute that what is contemplated is a call made by a resolution of the directors, for sec. 58 provides that it is the duty of the directors to make a call of not less than 10 per cent. upon the allotted shares within a year from incorporation, and that the residue shall be called in and made payable when ordered by the letters patent or by the by-laws of the company. Section 59 provides that "a call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed."

In *Croskey* v. *Bank of Wales* (1863), 4 Giff. 314, 66 E.R. 726, it was held that "a payment required to be made by the subscribers upon allotment is not a call;" Vice-Chancellor Stuart saying (pp. 330, 331): "This is a question of construction as to what a call is, and here it is as plain as language can shew that by the memorandum of association, which is the contract between the parties, and the prospectus, there is a difference made between a payment on deposit, a payment on allotment, and a call. . . . A call is a thing which cannot be made until shares have been allotted."

Chief Baron Kelly in *Hubbersty* v. *Manchester Sheffield and Lincolnshire R.W. Co.* (1867), 8 B. & S. 420, L.R. 2 Q.B. 471, speaking of instalments payable in respect of subscriptions for preference shares, during the course of the argument, asks (p. 421): "Are the three instalments by which the preference shares were to be paid up a 'call'?" And in the course of the judgment he says: "Speaking for myself, I doubt whether the payment on those shares can properly be termed a call."

In *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56, the matter is put very plainly by Lindley, M.R. (p. 61): "Further, if more shares than those taken by the subscribers of the memorandum" (i.e., the original incorporators) "are issued by the directors, there is nothing to prevent them from offering those shares on such terms as regards payment to the company on application and

allotment as the directors may think expedient. Payments so required to be made are not calls, because the payments are to be made by persons who are not yet members; but, when made, those payments must be treated, unless otherwise agreed, as payments on account of the nominal capital of the company, and as reducing *pro tanto* the liability of those who pay. Such persons have nothing to complain of if they pay according to their bargain, and the subscribers of the memorandum pay according to theirs."

For these reasons, I conclude that the liability of Mr. Tudhope upon his subscription was not a liability for "call," and that the stock held by him was not subject to call.

Dealing next with the resolution passed on the 26th August purporting to make a call, if my opinion is correct it could have no operation on Tudhope's stock; but, in the second place, I do not think it a valid call at all, for it purports to be a call upon the stock held by the directors. The very essence of a call is that it should bear equally upon all stock allotted. I doubt if the resolution was intended to be more than a request to the directors of the company to pay up on stock for which they had already subscribed and in respect of which they were in arrear, having regard to the terms of subscription; and furthermore it appears to me plain that it could not have been intended to be a call within the technical meaning of the statute so as to prevent the transfer of Tudhope's stock, for it was contemporaneous with the resolution permitting the transfer.

The statute must be considered as it stands, and there was nothing to prevent the directors assenting to the transfer of the stock, for there was no "call" in arrear.

When the company accepted Tudhope's subscription, he became liable upon the contract to take the stock and to pay for it in accordance with the terms of his subscription. His liability was one that would not run with the stock so as to free him from liability upon the transfer, but there was nothing to prevent a novation by dealings between the company and the transferee.

Here the evidence is clear that there was a novation. The company accepted Lindsay as transferee of the stock, and Lindsay accepted Tudhope's position as the holder of the stock. The novation was complete, and the stock continued to exist; it was not surrendered nor destroyed, but transferred.

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But, even if there were not such dealings as would, in law, amount to a novation, Tudhope's liability was not, in my view, a liability that could be enforced as a call, but by an action upon his promise to pay. The situation is precisely as if he had given to the company a series of promissory notes at the time he became a stockholder.

The true situation is that indicated in *In re Hoylake R.W. Co., Ex p. Littledale* (1874), 9 Ch. App. 257, an authority of value here as shewing that a transfer of shares, even if calls are due, is not void and invalid so that the shareholder is left liable as a contributory. He ceases upon the record of the transfer to be liable to be made a contributory, but remains merely a debtor to the company for the amount of the call then due. By parity of reasoning, it appears to me that here Mr. Tudhope, if liable at all, would be liable as a debtor, and not as a contributory. Littledale, who owed calls at the time of the transfer of his stock, it is there said (p. 260), was "not liable in law or in equity to pay or contribute to any debt of the company. He was merely in the position of a person who might owe money to the company. He could not be made a contributory for that purpose, or for the purpose of adjusting the rights of the contributories among themselves. We cannot make any debtor to a company liable as a contributory, because the money coming from him might be used for the purpose of settling the debts of the company or adjusting the liabilities between the shareholders. He was, to all intents and purposes, in exactly the same position as if his shares had been forfeited; that is, he would be a debtor for the call due at the time, if anything was due." This is a weighty decision by Sir W. M. James, L.J., and Sir G. Mellish, L.J., and so far as I can find it has never been questioned.

In the Supreme Court of Canada, in the case of *Smith* v. *Gow-Ganda Mines Limited* (1911), 44 Can. S.C.R. 621, there is a statement of Mr. Justice Duff's which is in conflict with the decision that I have just referred to. This statement was made without any reference to that case, and I do not think it is more than a dictum—no doubt, of very great weight. The real point of the decision in *Smith's* case was that there was not at the time the stock had been issued to the plaintiff any stock that could be issued to him. Speaking of the stock on which the calls were in

arrear, Duff, J. (pp. 625, 626), says: "The statute declares the shares themselves in such circumstances to be non-transferable; so long as any such calls remain unpaid they are *extra commercium*." The Ontario Statute, which there governed differs somewhat from the Dominion Act. I think that the English authority is binding upon me.

Being of opinion that Tudhope is not liable as a contributory, for the reasons given, I refrain from considering fully the other questions argued. I am quite clear that there was nothing here in the nature of a compromise. That is not the true ground upon which the bargain with Mr. Tudhope could be rested. It was in form, and in substance, a transfer of his stock, and I do not think that it was intended as a surrender by him of his stock. No doubt it was contemplated that Lindsay, the promoter, would sell this stock to those who were expected to come in on the strength of the new bargain made with the Speight company, and the stock was in that way to be paid for by those to whom Lindsay would transfer it; but, even if, as suggested by the liquidator, it was the intention that the stock should be surrendered, I am far from convinced that an agreement to surrender might not be made by a Dominion company, bearing in mind the recent decisions upon the question of *ultra vires*.

For the same reason, I refrain from considering at length the effect of the transactions between the liquidator and the new company. As at present advised, I am of opinion that the liquidator might sell any claim that he might have as liquidator, and the *chose in action* would become vested in the purchaser, but I do not think he could sell the right to use the winding-up machinery of the Act. When he has sold the assets of the company, it is his duty to divide the proceeds, and the liquidation ends. If the assets had been reduced to the form of a judgment, an execution might, no doubt, issue on the judgment, which would be assigned to the purchaser; but, if the claim is simply a *chose in action*, then the purchaser would resort to the ordinary machinery of the Court for its enforcement.

The machinery provided by the Winding-up Act is for the liquidation of the company, and as soon as the company is liquidated the right to place it in operation ends.

What I have said applies with equal force to the case of Shelden.

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For these reasons, I think the appeals should be allowed, and that the liquidator should pay the costs throughout. I trust that he has been prudent enough to make arrangements for his indemnity.

The appeal was heard by Mulock, C.J.Ex., and Clute, Riddell, and Sutherland, J.J.

SUTHERLAND, J.:—This is an appeal from the judgment of Middleton, J., dated the 18th March, 1919, reversing a judgment of the Master in Ordinary, dated the 13th October, 1916, placing the appellant upon the list of contributories in the course of winding-up proceedings. The facts are so very fully set out in the judgment appealed from that it seems useless to attempt to add thereto.

The Master was of opinion that the transfer of his shares in the company by Tudhope to one Lindsay, in August, 1910, was one which could not then be validly made, because Tudhope was then in arrears under the terms of his subscription for the stock, and that the alleged compromise by which Tudhope was permitted to assign and transfer the shares to Lindsay was one to which the directors had no power to consent, not being a compromise of a "*bonâ fide* dispute as to the original liability or liability as holder." I agree with Middleton, J., that there was no call in any proper sense of the term made, and that sec. 66 of the Dominion Companies Act, R.S.C. 1906, ch. 79, has no application here. There was, I think, nothing to prevent the directors, in the circumstances, from assenting, as they purported to do, to the transfer of the stock.

Middleton, J., came to the conclusion that what was done by the company, Tudhope, and Lindsay, was to arrange and carry out a novation, the two former agreeing with each other and with the latter that he should take Tudhope's place with respect to the stock, which in consequence was not surrendered, but transferred, Lindsay taking Tudhope's place with respect thereto, and all liability thereon. I agree with this view also. I am further of the opinion that, if there was any continuing liability on the part of Tudhope at all, it could not be as a contributory, as the Master has found, but must rest on the ground of liability as a debtor, if at all, the debt being enforceable by action only: *In re Hoylake R.W. Co., Ex p. Littledale* (1874), 9 Ch. App. 257.

I would affirm the judgment of Middleton, J., for the reasons stated by him.

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If it were necessary, however, to do so, I think I would go farther than he did and hold that there was in fact a matter of difference between Tudhope and the company resulting from the latter's dealings with the Speight company, and its agreement with that company. This agreement would plainly greatly prejudice the agreement which the company had theretofore made with the Tudhope-Anderson Company, the prospective benefit from which for his company was the ground on which Tudhope had subscribed for the stock in question. This stock was in a sense, if not in reality, that of the Tudhope-Anderson Company.

I am not prepared to say he could not have, at the time, set this up in answer to a demand of the company for payment of the stock, and, as it was argued, "litigate it." The directors may have been quite justified in believing, which it must be assumed they did, that it was in the interest of the company to enter into the agreement with the Speight company. They may have been, and indeed I think must have been, impressed by the fact that the result would be prejudicial to the Tudhope-Anderson Company with respect to their agreement, and that this would be and was a proper cause of complaint, which might lead to litigation. In so far as Tudhope and his stock were concerned, it would be unfair—indeed fraudulent—to hold him to his contract to keep shares which he had been induced to buy by reason of the expected benefits to a company in which he was interested, when those benefits were minimised or destroyed by the entering into a new agreement with another company.

I am of opinion that the directors could and in reality did enter into a compromise of this claim for relief and restoration made by Tudhope. I would dismiss the appeal with costs.

The appeal as to another original stockholder named Shelden, for similar reasons, will also fail.

Mulock, C.J.Ex.
Clute, J.
Riddell, J.

MULOCK, C.J. Ex., and CLUTE, J., agreed with SUTHERLAND, J.

RIDDELL, J.:—An appeal by the liquidator against the judgment of Mr. Justice Middleton, so far as it relieves Tudhope.

The facts, as I understand them from the evidence—which has not been very carefully adduced—are as follows: Tudhope became a shareholder in the company rather to advance the interests of his own company than to make an investment in the

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Port Arthur company. Before anything like a call was made, the scheme of business of the company was changed; and it was no longer a useful proposition for him, as he thought. The arrangement that the new company would sell to the Tudhope-Anderson Company was likely to be complicated by an arrangement to sell to a competitor. Tudhope was dissatisfied, and the rest of the directors were probably more than glad to get rid of him—it is common knowledge that it is better for any company to get rid of a dissatisfied director. Accordingly, the former arrangement to sell to Tudhope's company was got rid of, and Tudhope was relieved of his shares, which were assigned to a nominee of the company.

It is pleasing to know that no imputation is made against the perfect good faith of all parties to the transaction—the sole question is whether the law permits such a transaction to stand.

In the first place, I think that in this Court we cannot give effect to the objection to the status of the liquidator to take these proceedings—the same objections were made in *Re Port Arthur Waggon Co., Smyth's Case*, (1918), 45 D.L.R. 207, 57 Can. S.C.R. 388, on the same facts, and were held to be of no avail. I do not reconsider the law—my opinion in *Smyth's Case** was that there had been no valid sale of the assets of the company—that view seems to have recommended itself to Davies and Idington, JJ., and Falconbridge, C.J., in the Supreme Court. I understand Mr. Justice Idington to disapprove only of my amiable credulity (a failing which, I hope, if it exists, at least leans to virtue's side) in accepting Smyth's story at its face value. The learned Chief Justice of the Common Pleas held in this Court that, whether there was a sale or not, the liquidator had a *locus standi*—and that view was also accepted by the majority of the Supreme Court of Canada. *Quâcunque viâ*, the liquidator is *rectus in curiâ*. And against the present contention of the respondent, we must, I think, take the facts as they appear in the books of the company.

Tudhope, being president, resigned his position on the 19th August, but continued as director; on the 29th August, Tudhope

*In *Re Port Arthur Waggon Co. Limited, Smyth's Case*, the Second Divisional Court of the Appellate Division, composed of MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ., gave judgment on the 30th March, 1917. There was an equal division of opinion. The reasons of the learned Judges are not reported: see 12 O.W.N. 59. The appeal to the Supreme Court of Canada was from the order of the divided Court.

being present and acting as a director, it was "proposed by J. H. Spence, seconded by T. H. Speight, that a call be made upon the directors for payment of 25% of amount of their subscriptions, being 10% on application and 15% on allotment. Carried." And then Tudhope tendered his resignation, which was accepted; and it was "proposed by Mr. Spence, seconded by Mr. Speight, that the transfer of Mr. Tudhope's subscription to Mr. W. J. Lindsay be approved and sanctioned. Carried."

It is, in my view, impossible to look upon the "proposition" that a call be made as an actual call as regards Tudhope. *Primâ facie* a payment to be made on allotment is not a call: *Croskey* v. *Bank of Wales* (1863), 4 Giff. 314, 66 E.R. 726; *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56—nor are instalments payable in respect of subscriptions: *Hubbersty* v. *Manchester Sheffield and Lincolnshire R.W. Co.* (1867), L.R. 2 Q.B. 471. Our statute, the Companies Act, R.S.C. 1906, ch. 79, sec. 66, being the same as 8 Vict. ch. 16 sec. 16, (Imp.), the call is made when there is a "resolution formally come to, by those who have the power to determine, that those who are bound to contribute, i.e., the shareholders, shall pay a certain instalment:" *per* Patteson, J., giving the judgment of the Court in *Regina* v. *Londonderry and Coleraine R. Co.* (1849), 13 Q.B. 998, at p. 1005, 116 E.R. 1544—and "a call is made, within the meaning of this section, when the resolution above described has been come to:" *ib. Cf. Shaw* v. *Rowley* (1847), 16 M. & W. 810, 153 E.R. 1419.

But the resolution could only mean that the directors should pay the amount named, i.e., those who were continuing to be directors—it had no reference to Tudhope, who was not liable to pay a call at all, and who, moreover, was about to cease to be a director. I cannot think that Tudhope was in contemplation at all in this resolution.

As regards the case of *Re Peterborough Cold Storage Co.* (1907), 14 O.L.R. 475, I think Mr. Justice Middleton's view of that case is correct—so far as it is at variance with what is here said, it must be considered overruled.

I therefore do not consider the section already referred to as a bar to Tudhope disposing of his shares in any way.

But I cannot read the transaction as being anything else than a surrender of the shares—and, as it is tersely and accurately put,

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"A surrender of shares presents . . . this logical dilemma: If it is not intended to re-issue the shares, there is a reduction of capital; and if it is intended to re-issue them, the transaction involves a trafficking by the company in its own shares:" Palmer's Company Precedents, 11th ed., p. 750.

Assuming that the transaction is wholly *ultra vires*, the objection remains that Tudhope does not and cannot owe on any call, but his liability is a debt only, and therefore he cannot be placed on the list of contributories.

This is the sole question before us upon this appeal, and for the last reason only I would dismiss the appeal with costs.

Appeal dismissed.

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C. A.

LUMSDEN v. PACIFIC STEAMSHIP Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 15, 1920.

CARRIERS (§ II O—365)—PASSENGER BY A PARTICULAR VESSEL—BAGGAGE SENT TO WHARF BY ANOTHER LINE—NO INDICATION AS TO WHAT VESSEL IT WAS TO GO ON—DISCRETION OF STEAMSHIP COMPANY AS TO SHIPPING ON FIRST VESSEL LEAVING.

A traveller who, having purchased passage on a particular ship, forwards her baggage to the place of embarkation by a railway company which has no connection with the steamship company on whose ship she is to sail, without specifying that it is to be taken on the particular ship leaves it open to the steamship company to forward it by any of their vessels by which it would reach its destination in due course, even if it has to be carried for a portion of the way by another line, and by doing so the steamship company does not lose the benefit of the stipulations limiting its liability under the contract.

Statement.

APPEAL by defendant from the judgment of Ruggles, Co.J., in an action for damages for loss of baggage. Reversed.

Douglas Armour, K.C., for appellant; *R. M. Macdonald*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The appeal must be allowed.

To entitle the plaintiff to succeed, it was, I think, incumbent upon her to prove that the Southern Pacific Railway Company was the agent of the defendants, which proof is entirely lacking. The defendants had no knowledge that she intended to sail on the "President" and in view of this there was, I think, no obligation on their part to forward the trunk to Victoria on that ship. In the proper sense of the term there was no deviation, no breach of contract or want of ordinary care on the defendants' part. What the plaintiff did was what many travellers would, no doubt, have done, but the fault was not the fault of the defendants.

MARTIN, J.A., would allow the appeal.

GALLIHER, J.A.:—Mr. Macdonald argues that by reason of deviation the defendants have lost the benefit of the stipulations limiting their liability under their contract and cited a number of cases bearing on that point. In most of the cases the deviation is from the usual or regular course of the voyage of a ship on which the goods have been placed for transport from one port to another.

There can also be deviation where the goods are carried upon a ship different from that contemplated as expressed by Fry, L.J., in *Balian & Sons* v. *Joly, Victoria & Co., Ltd.* (1890), 6 T.L.R. 345. It is upon this latter ground that Mr. Macdonald relies. The facts are shortly these:

The plaintiff having been to California, where she remained some months, desiring to return to Victoria, B.C., purchased at Los Angeles from the defendants a ticket from San Francisco to Victoria by the steamship "President," one of the defendants' vessels. The plaintiff travelled by rail from Los Angeles to Santa Barbara, about 100 miles from San Francisco, having with her the trunk containing the goods claimed for in this action, and after arriving in Santa Barbara, where she stayed a few days, she purchased a ticket from the Southern Pacific Railway from Santa Barbara to San Francisco, where she would take the steamer for Victoria. At Santa Barbara she procured the agent of the railway company to check her trunk to Victoria, B.C., upon the railway ticket she had just purchased and the steamship ticket from San Francisco. There was nothing on the check to indicate which particular steamer the trunk should go by.

The trunk arrived at San Francisco 2 days before the "President" sailed and upon the day the "Admiral Dewey," another of the defendants' vessels, was sailing for Seattle and was placed upon the "Admiral Dewey" and on arrival at Seattle was handed over to the Canadian Pacific line for carriage to Victoria. Whilst in the possession of the latter company, the trunk with its contents was lost.

Now while the check on the trunk did not designate the particular vessel on which it was to go, I think it must be taken to have been known to the servants of the steamship company that the "Admiral Dewey" did not call at the port of Victoria; in fact, it is admitted in the answer to the interrogatories delivered by the

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plaintiff that the "Admiral Dewey" went direct from San Francisco to Seattle without calling at any intermediate port.

In sending it by the "Admiral Dewey" the defendants knew it would have to be handed over to another transportation company to be forwarded to its destination.

In purchasing her ticket by steamship "President" it would certainly be in contemplation of the plaintiff that her baggage would accompany her on that ship and not on some other ship and in the natural and usual course, unless for unavoidable reason (which is not shewn) or to put in the language of sec. 17, sub-sec. (d) of the Tariff Regulations, as proved, the company would have in contemplation the sending of the trunk by the "President." This sub-section reads as follows:—

> Every effort will be made to forward baggage on same steamship with the passenger, but such forwarding is not guaranteed and the right is reserved to forward baggage on a preceding or following steamship to that on which the passenger travels.

Had the plaintiff taken her trunk to the company's wharf at San Francisco to be checked to Victoria and presented her ticket for passage on the "President," and the company had sent it by the "Admiral Dewey" without making any effort to send it by the "President," there would be such deviation as would in my opinion entitle her to recover. Can what transpired here be put upon as high a plane?

The trunk was not checked in San Francisco but in Santa Barbara and by the Southern Pacific Railway Co., which it is not shewn had any connection with the steamship company or were in any way their agents. When the trunk arrived at the wharf in San Francisco, 2 days before the "President" was to sail there was nothing to indicate that it should be retained and forwarded on the "President" except that it was checked to Victoria where the "President" called. Is this one fact sufficient to impose upon the defendants the obligation of sending the trunk by the "President" or some preceding or following ship, calling at Victoria? I am afraid I am unable to conclude that it is. The plaintiff by her own act in having her trunk forwarded by the railway company in Santa Barbara, without specifying any particular ship has, I think, left it open to the defendants to forward it by any of their vessels by which it would reach its destination

in due course, even if it had to be carried for a portion of the way by another line.

The appeal should be allowed and the judgment reduced to the amount paid into Court.

McPHILLIPS, J.A., would allow the appeal.

Appeal allowed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Brodeur, and Mignault, JJ. May 4, 1920.

MORTGAGES (§ II B—40)—CONDITIONAL SALE AGREEMENT—MORTGAGE DEBENTURE—REGISTRATION—PRIORITY—BILLS OF SALE ORDINANCE, C.O.N.W.T. 1915, CH. 43—ORDINANCE RESPECTING HIRE RECEIPTS AND CONDITIONAL SALES OF GOODS, C.O.N.W.T., 1915, CH. 44, ALTA. (1916), CH. 3, SEC. 8.

A publishing company purchased from the defendant appellant in 1913 certain machinery under a conditional sale agreement, only a small portion of the purchase price being paid at the time of purchase. In 1915 the same company received an advance from the plaintiffs giving as security what was termed a "first mortgage debenture," which specifically charged the assets of the company with payment of the amount but was never registered, the defendant failed to comply with the provision of the 1916 amendment of the Conditional Sale Ordinance which required a renewal statement to be registered every two years. The Court held that by the failure to register the renewal statement the priority over the debenture mortgage was lost.

[*Foster* v. *International Typesetting Machine Co.* (1919), 47 D.L.R. 329, affirmed.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1919), 47 D.L.R. 329, 14 Alta. L.R. 542, at 543, affirming the judgment of Ives, J., at the trial (1919), 14 Alta. L.R. 542, and maintaining the respondent's, plaintiff's, action. Affirmed.

R. B. Bennett, K.C., for appellant; *H. P. O. Savary*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—The issue in this appeal was an interpleader one to determine the priority of the parties' rights to certain property of the Press Publishing Co., under the respective securities of the litigants.

I am of the opinion that the decision of the trial Judge (Ives, J., (1919), 14 Alta. L.R. 542), was correct, namely, that the failure of the defendant appellant to renew the registration of its lien agreement on October 3, 1917, when the previous registration

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expired, had the effect of losing the priority of the defendant's lien agreement over the plaintiff's debenture.

This judgment was unanimously concurred in by the Appellate Division (1919), 47 D.L.R. 329, 14 Alta. L.R. 542, at 543.

The appeal, therefore, should be dismissed with costs.

IDINGTON, J.:—If, as I submit we must, we strictly observe the terms of the interpleader issue herein and read it in light of the facts leading up to its framing and apply the relevant law, the question raised by this appeal is in a very narrow compass.

The appellant, under a conditional sale agreement, agreed to sell for $2,150 in 1913 to the Press Publishing Co. some printing machines and delivered same to the latter.

The said Press Publishing Co. in 1915 gave to the respondents as security for an advance of $6,763.47, a first mortgage debenture, the validity of which as such is not impeached.

The Press Publishing Co. became insolvent and its property was seized by the sheriff under executions of other creditors than parties hereto and the landlord had later placed in his hands a warrant to distrain for rent. Thereupon an order was made for its winding up.

In the course of proceedings thereunder it was decided by the creditors and others concerned, and affirmed by an order of the Master at Calgary, to transfer to the respondents as holders of said debentures, all the assets, undertaking and business of said company, free from all liabilities of the company subject only to such liens or charges as might exist therein for taxes or under chattel mortgages or lien notes or agreements or claims for rent entitled to priority over the said debenture but reserving to the said Edward H. McArthur and the said James C. Foster, Jr., all rights which they might have, notwithstanding this order, to resist or contest any claim of mortgage or lien upon the said assets, be and the same is hereby approved.

The Order of the Master proceeded further thus:—

And it is hereby ordered that the liquidator be and it is hereby authorised and empowered to carry out and complete such settlement and to sell and transfer unto the said Edward H. McArthur and James C. Foster, Jr., all of the assets, undertaking and business of the said company, subject to such mortgages and liens as may appear to be a charge thereon in priority to the charge created by the debenture held by them, and that the acceptance of such transfer shall not prejudice or affect any rights which the said Edward H. McArthur and the said James C. Foster, Jr., have, or, but for the making of this order and the transfer hereunder, might have had to resist or contest any such mortgage, lien, charge or encumbrance, and they shall take and hold said

assets, undertaking and business subject only to such mortgages, liens, charges and encumbrances as are or were prior to the making of this order, entitled to priority over the charge created by their said debenture, but reserving unto the Intertype Corporation only the right to contest the validity of the debenture held by the said Edward H. McArthur and James C. Foster, Jr., and to take such action or proceedings at its own expense and for its own benefit only as it may see fit, to set aside the same for the purpose only of recovering the amount owing by the company to the said Intertype Corporation.

F. CLARRY, M.C.

The issue arising out of the foregoing is as follows:—

Whereas the above named James C. Foster, Jr., and Edward H. McArthur affirm, and the above named International Typesetting Machine Co. and J. V. Drumheller deny, that certain goods and chattels formerly in the possession of The Press Publishing Co., seized by the sheriff of the Judicial District of Calgary under warrant of distress from W. R. Hull, are the property of the plaintiffs, or that the plaintiffs have the right to possession thereof, as against the defendants, or either of them; and it has been ordered by order of the Master dated the 14th day of January, A.D. 1919, that the said question shall be tried by a Judge without a jury at Calgary at a date to be fixed by the clerk of the Court.

The appellant by its solicitors then gave a written admission of facts for the purpose of this "action," admitting respondents' advance; that it was made on the express condition that a debenture would be issued to respondents to secure its repayment and further in detail all the legal requirements to constitute, in my opinion, the validity of the debenture, and admit non-payment of the money, and that respondents are the holders of the debenture and had made demand for payment, and that yet it remains unpaid.

There was no reservation of any kind in the appellant's favour in the admission.

The appellant was not at the time of its making the agreement of sale with the Press Publishing Co. in law bound to renew its registration of such lien agreement as it had, but long before the seizure by the sheriff the law was changed by an amendment of 6 Geo. V. 1916, ch. 3, sec. 8, which provided that unless registration is renewed:

Any such agreement, proviso or condition as is mentioned in section 1 of this Act, shall cease to have effect and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser.

The appellant after complying with this made default in complying with the law by failing to renew on Oct. 3, 1918.

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As a result thereof I am of the opinion that its title and right of possession passed to and became vested in the Press Publishing Co., which was the purchaser.

The moment that occurred, the respondent's claim as against the Press Company became *ipso facto* operative upon that which had so passed and remained so throughout.

Whether other creditors might, in turn, have sought successfully to have impeached that result, by reason of any failure on the part of the respondents to register, in any of the ways which the Companies Ordinance, C.O.N.W.T., 1915, ch. 61, or the Bills of Sale Ordinance, C.O.N.W.T., 1915, ch. 43, require, is not open on this issue. It might conceivably be open to argument on behalf of such creditors in a proper case. That does not concern us, for all such matters are precluded by the proceedings I have so fully recited leading up to the order transferring the property then in liquidation to the respondents.

And the form of the issue founded thereon, together with the all-comprehensive admission of appellant, leaves no room for other creditors or even the appellant itself to start a new issue.

As this way of looking at the case seems to me quite impregnable, I need not pursue the matter further.

I may, however, say that if I could find any flaw in the process of reasoning I adopt, and had to consider the matter from the point of view taken by the Court below, I could not see my way to reverse, though I do see in that way of looking at the case a rather wider field for argument not touched upon before us, which, resting upon the peculiar provision in the Bills of Sale Ordinance contemplating evidently a renewal of debenture mortgages, and again the registration of them being provided in another place.

I confess I have not followed up these respective provisions to see whether [they are] in force or not and concurrently so.

But if they are, I may be permitted to say, the sooner the confusion they may create is removed by legislation the better.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J. (dissenting):—The debenture of April 5, 1915, charges the "fixed assets" of the company and the charge upon these assets is declared to be a "specific charge." As regards the "fixed assets," therefore, I have no hesitation in holding that the debenture is a mortgage within the Bills of Sale Ordinance,

C.O. 1915, ch. 43, and, not having been registered, it is, under the authority of *G.T.P.R. Co.* v. *Dearborn* (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315, void as against creditors.

By the order of December 27, 1918, the right was reserved to the appellant company alone to contest the validity of the debenture as against the appellant company and the issue direct to be tried as in the following terms: (See judgment of Idington, J., *ante* p. 231).

The right of the appellant company to contest the validity of the debenture as against the respondents is not open to dispute and the claim of the respondents as affirmants in the issue must, therefore, fail.

BRODEUR, J.:—I am of opinion that this appeal should be dismissed. I concur with my brother Idington. Brodeur J.

MIGNAULT, J. (dissenting):—The appellant, in October, 1913, had sold to the Press Publishing Co. a machine described as "one model A Intertype," for $2,150, the price being payable by instalments, and the title to the property remaining in the appellant until full payment of the purchase price, which, however, was never fully paid. The agreement was registered as required by the Ordinance respecting Hire Receipts and Conditional Sales of Goods, C.O.N.W.T. 1915, ch. 44. In 1916, 6 Geo. V. ch. 3, sec. 8, an amendment was adopted requiring the filing of an annual renewal statement, and the appellant failed to file this renewal statement as it should have done on October 3, 1918, the effect of this failure being, in the words of the statute, that the agreement "shall cease to have effect, and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser or bailee." Mignault, J.

On that date, however, October 3, 1918, the appellant's solicitors sent a distress warrant to the sheriff with instructions to seize the machine, and on the following day the sheriff answered that the goods were under seizure under a landlord's warrant, so that it would not be necessary to seize under the appellant's warrant, but that he (the sheriff) had placed the warrant on file and would protect the legal amount of the appellant's claim in the event of sale.

While the appellant's title to the machine in question was fully protected by registration, the respondents obtained from

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the Press Publishing Co., a first mortgage debenture for an advance of $6,763.47, carrying interest at 7% and dated April 5, 1915. This debenture contained the following clause:—

3. The company hereby charges with such payments its undertaking and all its property whatsoever and wheresoever, both present and future, and such charge under this debenture as regards the company's fixed assets and good-will is to be a specific charge, and as regards the company's other assets is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge on its property ranking in priority to or *pari passu* with this debenture.

4. The company may at any time, without notice, pay off this debenture.

5. The principal moneys hereby secured shall immediately become payable if an order is made or an effective resolution is passed for the winding up of the company.

The respondent's debenture was never registered in the Registration Office under the Bills of Sale Ordinance, nor was it registered with the registrar of joint stock companies.

By the Bills of Sale Ordinance, ch. 43 of the C.O.N.W.T., sec. 6:

Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, shall within 30 days from the execution thereof be registered . . .

and sec. 11 provides that a mortgage not registered

shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration.

In *G.T.P.R. Co.* v. *Dearborn*, 47 D.L.R. 27, 58 Can. S.C.R. 315, this Court held that the word "creditors" as used in sec. 17 of this ordinance—and the opinions of the Judges shew that the meaning of this word in secs. 11 and 17 was considered for purposes of construction—means all creditors of the mortgagor, and not merely execution creditors. It would therefore appear that even if the appellant is not an execution creditor, its status as a contract creditor of the Press Publishing Co. would entitle it to treat the mortgage debenture of the respondents, if subject to registration, as being absolutely null and void.

The respondents, however, contend that their debenture was not subject to registration. The trial Judge, whose judgment was affirmed by the Appellate Division of Alberta, 47 D.L.R. 329, 14 Alta. L.R. 542, at 543, accepted this contention. He said:—

Clearly the security is not a mortgage but a charge and does not come within the provisions of the Bills of Sale Ordinance according to the cases, *Johnston* v. *Wade* (1908), 17 O.L.R. 372, and the cases there cited.

I cannot, with respect, agree with this construction of the debenture or of the ordinance. The debenture expressly states that it is to be a specific charge as regards the company's fixed assets and good-will. If such a charge is not of the nature of a mortgage, I cannot see how it could affect the company's fixed assets, and if it is a mortgage, it is null and void for want of registration as regards the company's creditors, and the appellant is undoubtedly a creditor of the company.

In *Johnston* v. *Wade*, 17 O.L.R. 372, the bond contained the following conditions:—"The company hereby charges with such payments its undertaking and all its property real and personal, rights, powers and assets of every kind and description, present and future, including its uncalled capital." In the present case, as I have said, the bond expressly provides that the charge under the debenture "as regards the company's fixed assets and good-will is to be a specific charge, and as regards the company's other assets it is to be a floating security."

This sufficiently distinguishes this case from *Johnston* v. *Wade*, 17 O.L.R. 372, and also from several English decisions relied on by the respondents, where the effect of a floating charge was considered, for here, as to the fixed assets of the company, the debenture was made a specific and not a floating charge.

On this view of the case it does not appear necessary to consider whether the appellant has or has not a lien on the machine it sold to the Press Publishing Co. It is, however, contended that by the amendment of 6 Geo. V. 1916 ch. 3, sec. 8, it is provided that if the required renewal statement is not filed, the conditional sale agreement "shall cease to have effect, and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser or bailee."

I would think that this enactment would not render the agreement void *inter partes* (see also *Re Richard Bros. Estate; Stuart Mfg. Co.* v. *Whitaker* (1917), 11 Alta. L.R. 495), but it appears sufficient, as regards any mortgage created by the respondent's debenture, to say that the appellant was and is a creditor of the Press Publishing Co.

I have hitherto discussed the questions submitted as they were presented by the counsel of both parties, each of whom denied the validity of the lien or charge claimed by the other.

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Mignault, J.

I may also add that both Courts below dealt with the matter as involving a question of priority between two rival claimants.

The question arose under an order of the Master in Chambers, of January 14, 1919, subsequent to the liquidation proceedings taken against the Press Publishing Co. This order authorised a settlement of the claim of the respondents by transferring to them all the assets of the company free and clear of all debts and liabilities of the company, but subject to such mortgages, liens, charges and encumbrances as are or were, prior to the making of the order, entitled to priority over the charge created by the respondent's debenture, reserving unto the appellant only the right to contest the validity of the debenture, and to take proceedings to set aside the same for the purpose only of recovering the amount owing by the company to the appellant.

Then an interpleader order was made on February 22, 1919, stating as follows the question to be decided: (See judgment of Idington, J., *ante* p. 231).

On the question thus submitted, I am of opinion, for the reasons above stated, that this question should be answered in the negative. I do not, however, wish to be understood as passing in any way on the rights of any creditor who had seized the machine in question, if any such rights can now be asserted.

The appeal should therefore be allowed with costs throughout.

Appeal dismissed.

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GRAY v. PETERBOROUGH RADIAL R. Co.

Ontario Supreme Court, Orde, J., May 28, 1920.

AUTOMOBILES (§ III C—310)—MOTOR TRUCK DRIVEN BY EMPLOYEE ON HIS OWN BUSINESS—NEGLIGENCE—ACCIDENT—LIABILITY OF OWNER OF TRUCK.

The owner of a motor car is liable under the Motor Vehicles Act, R.S.O. 1914, ch. 20 (as amended by 7 Geo. V. ch. 49, sec. 14, and 8 Geo. V. ch. 37, sec. 8, for injuries caused by the negligence of the driver of a motor car to a person invited to ride in the car although the driver is not acting in the course of his employment, if the person accepting the invitation is unaware that the driver is not employed on his employer's business and is in no sense a party to the use of the vehicle on business which is not that of the owner.

[*Duffield* v. *Peers* (1916), 32 D.L.R. 339, 37 O.L.R. 652; *Parlov* v. *Lozina and Raolovich* (1920), 47 O.L.R. 376, distinguished.]

Statement.

ACTION by Claude Gray, an infant, by Joseph Gray, his father and next friend, and by Joseph Gray as co-plaintiff, against

the Peterborough Radial Railway Company, the Hydro-Electric Power Commission of Peterborough, and the Bonner-Worth Company Limited, to recover damages for personal injuries sustained by the plaintiff Claude Gray and consequent expenses and loss incurred by the plaintiff Joseph Gray, by reason of the negligence of the defendants, or one of them, as the plaintiffs alleged.

G. N. Gordon, for plaintiffs.

Joseph Wearing, for defendants the Peterborough Radial Railway Co. and the Hydro-Electric Power Commission of Peterborough.

R. S. Robertson, for defendants the Bonner-Worth Company.

Orde, J.

ORDE, J.:—This is an action for damages for injuries caused to the infant plaintiff, Claude Gray, as a result of a collision between a street-car belonging to the Peterborough Radial Railway Company and a motor-truck belonging to the Bonner-Worth Company. The Hydro-Electric Commission were joined as defendants by reason of their ownership or control of the railway company. It is possible that either the railway company or the Hydro-Electric Commission was an unnecessary party, but no objection was made on this score, and they were represented by the same counsel.

By their verdict the jury found the driver of the street-car and the driver of the motor-truck guilty of negligence causing the accident, and assessed the damages at $600 for the infant plaintiff, Claude Gray, and $100 for his father, Joseph Gray.

At the request of the defendants, I also submitted to the jury the question whether, if they found both drivers guilty of negligence, either could, by the exercise of reasonable care, have avoided the accident, and if so which. The plaintiffs were not interested in the answer to this question, but counsel for the defendants thought that in some way the answer might shift the whole liability to one or the other of them. The jury answered that with reasonable care either might have avoided the accident.

At the conclusion of the plaintiffs' evidence, the defendants the Bonner-Worth Company moved for a nonsuit, on the ground that the evidence disclosed that the driver of the motor-truck was not at the time of the accident engaged upon his employers'

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business, and that the provisions of sec. 19 * of the Motor Vehicles Act, R.S.O. 1914, ch. 207, in its present amended form, did not apply, under the facts and circumstances of the present case. The motion was argued at the conclusion of the trial, and I reserved judgment.

The Bonner-Worth Company were manufacturers of woollens and textile goods in Peterborough, and owned and operated in connection with their business a motor-truck. During the spring of 1919 they were erecting certain buildings at their factory, and had been in the habit of selling the loose or waste wood to their employees, and had allowed one Angus Murray, the driver of their truck, and a duly licensed chauffeur, to use the truck after business hours for the purpose of taking the wood away. Murray appears to have been doing this as a mere matter of friendship for his fellow-workmen, and was not under any orders or directions from his employers in regard to it. The motor-truck was in effect lent to him for the purpose. It was the practice for the man who wanted his wood drawn to ask if he or Murray might have the truck for the purpose, but there seems to be some doubt as to whether any express permission was obtained on the day in question. Permission had been obtained by John James (whose wood was being moved) on an earlier occasion, and it seems to have been assumed that that permission was sufficient. At all events it is safe to assume that Murray was operating the truck with the consent of the owners; but, being in the employ of the owners, it is immaterial, if sec. 19 of the Motor Vehicles Act is applicable, whether he took the truck with or without their consent.

About 6 p.m. on the 3rd June, 1919, Murray, having already delivered one load of wood at James's house, was about to return to the factory for another load. The plaintiff Claude Gray was playing near Murray's home, and, at the request of one of Murray's sons, Murray gave Gray permission to ride upon the

*Section 19, with the amendments made in 1917, by 7 Geo. V. ch. 49, sec. 14, and in 1918, by 8 Geo. V. ch. 37, sec. 8, reads: "The owner of a motor-vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor-vehicle was in the possession of some person other than the owner without his consent, express or implied, not being a person in the employ of the owner, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation."

truck back to the factory. At the factory the truck was loaded with wood; Murray, the driver, took the seat with a boy beside him; one of Murray's sons got upon the running-board on one side and Claude Gray upon the running-board on the other side. There was also another person sitting on the wood, and James, after closing the gate, got in beside the driver. It is not necessary for the purposes of my judgment to go into the details of the accident. In attempting to cross the street railway track upon McDonnell street, at a point about 300 feet beyond the Bonner-Worth gateway, the motor-truck was struck by a street-car operated by the Peterborough Radial Railway Company, Claude Gray was thrown to the ground, sustaining a compound fracture of his left thigh, and, according to the medical testimony, a permanent shortening of the left leg. There was ample evidence to justify the verdict of the jury that both drivers were guilty of negligence causing the accident, and there can be no doubt as to the liability of the railway company.

The question whether or not the Bonner-Worth Company would be liable at common law was not very seriously argued. Counsel for the plaintiffs did contend that, if the Bonner-Worth Company were not liable under the Motor Vehicles Act, they were liable at common law on the theory that, by allowing their employee Murray to use the motor-truck for the purpose of carrying wood for his fellow-employees, they added to the scope of Murray's employment and so rendered themselves liable for his negligence. No authority was cited for this proposition. The law as to the liability of a master for the negligence of his servant while doing something he is permitted, but not employed, to do, is not clearly settled. It is stated in Clerk and Lindsell on Torts, 6th ed., after discussing certain cases as to the scope of the servant's authority, at p. 90:—

"Whether a master is to be held responsible for the negligence of the servant in the course of doing something which the servant is not employed to do, but is merely permitted to do, for his own pleasure or convenience, has never been much considered; but it is apprehended that the act to which the negligence is directly incidental, must, on the principle of the above cases, and by analogy to the rule as to wilful torts, be done on behalf of the master, and that it is not enough that it should have been merely permitted."

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To render the master liable it is necessary to shew that the servant in doing the act which occasioned the injury was acting in the course of his employment. If at the time he was engaged, not on his master's business, but on his own, the relation of master and servant does not exist. And it is immaterial that the servant is using his master's property with his master's permission: Halsbury's Laws of England, vol. 20, para. 603; *Cormack* v. *Digby* (1876), 9 I.R.C.L. 557. In the present case Murray, although using his master's truck, of which, while engaged upon his master's business, he was the driver, was using it for a purpose of his own or of his fellow-employee James. He was not in any way engaged upon his master's business. While it is possible that, as bailee of the truck, his authority might be such as to render his employers liable for some tortious act done in their interest, I am of the opinion that no such liability could attach at common law for an act of negligence in no way connected with his employers' interest but arising solely from the private business in which he was then engaged. The recent case of *Duffield* v. *Peers* (1916), 37 O.L.R. 652, 32 D.L.R. 339, in which the master was held liable, bears some points of resemblance to this case but is distinguishable from it on the grounds already mentioned.

The Bonner-Worth Company not being liable, therefore, at common law, are they liable under the provisions of sec. 19 of the Motor Vehicles Act? Mr. Robertson contended that the whole purview of the Act is so to regulate and govern the use of motor-vehicles upon highways as to safeguard other persons travelling upon the highways, and that the Act was not intended to, and does not when properly interpreted, give to persons occupying a motor-vehicle, whose driver infringes the Act, rights against the owner which they would not otherwise have possessed. And it was suggested during the argument that if, instead of Claude Gray, it had been Murray's son who had been injured, there might be the anomalous case of an infant suing his father's employer for damages sustained through the father's negligence with the father acting as the infant's next friend. But this illustration suggests a plausible difficulty rather than a real one, because there is no law which exempts a father from liability to his own son for damages for negligence, and if the negligence occurred while in the performance of his employer's business the

employer would be liable to the son; and, while the father in most cases is the natural and proper next friend for an infant plaintiff, any other person may act in that capacity, and especially when the father's interests are adverse. The principle upon which the problem presented by Mr. Robertson's contention is to be solved is not to be found in any such illustration as that arising from an injury to a member of the negligent employee's family. It must be sought, if it is to be found at all, in the fact that the occupants of the vehicle are disentitled to the benefit of the Act, either by reason of their being volunteers or because they are in their relationship to others in some way identified with the vehicle itself or its driver.

Mr. Robertson relies on the principle that the breach of a statute does not necessarily give a right to a civil action, and that to enable the plaintiff to invoke the statute either some private right of the plaintiff must have been interfered with by the breach of the statute or the plaintiff must have suffered some special damage as the result of the interference with some public right, and he refers to *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; *Woods* v. *Winskill*, [1913] 2 Ch. 303; *Buxton* v. *North Eastern R. W. Co.* (1868), L.R. 3 Q. B. 549; *Gorris* v. *Scott* (1874), L. R. 9 Exch. 125; and *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109; [1903] 2 Ch. 556.

So far as the Motor Vehicles Act is concerned, there has been no case in Ontario that I am aware of where the injured occupant of the vehicle has recovered against the owner, where the latter was not the driver, except the recent case of *Parlov* v. *Lozina and Raolovich* (1920), 47 O.L.R. 376, where Middleton, J., held that both co-owners of a motor-car were liable in damages to a voluntary passenger in the car for the negligence of one of the owners while driving the car. It appears to have been admitted that the provisions of the Motor Vehicles Act left no way of escape for the absent owner, but my brother Middleton tells me that this point was not argued but was taken for granted, and that he does not regard his judgment as in any way a binding decision upon the point which is before me now.

I have gone very carefully into the arguments advanced by Mr. Robertson, and have come to the conclusion that they cannot be sustained. Whether or not the Legislature really intended to give rights of action which could not otherwise have existed, to

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the occupants of a motor-vehicle whose driver is negligent, may be open to doubt. We must gather the intention of the Legislature from the words of the Act. I have always thought that sec. 19, whether in its original or in its amended form, may have been intended merely to make the owner of the vehicle liable for those penalties which the Act imposed for the violation of its provisions, and that there was no intention to extend the owner's liability in a civil action for negligence beyond his liability at common law, merely because, by sec. 11 (2), negligent driving upon a highway is made an offence against the Act. But this question is no longer *res integra*. The decisions of the Ontario Courts in *Mattei* v. *Gillies* (1908), 16 O.L.R. 558, *Smith* v. *Brenner* (1908), 12 O.W.R. 1197, *Verral* v. *Dominion Automobile Co.* (1911), 24 O.L.R. 551, and *Bernstein* v. *Lynch* (1913), 28 O.L.R. 435, 13 D.L.R. 134, have made it clear that sec. 19 renders the owner liable in damages under certain circumstances where he would not be liable at common law.

But it is urged that the Act is designed to protect those who are using the highway either on foot or otherwise against the improper or negligent operation of motor-vehicles, and not to protect those who are occupants of the motor-vehicle itself. There is much to be said in favour of such a view. It seems a hardship to subject the owner to liability for injuries to his servant's guests due to his servant's negligence. But the hardship is no greater than when some pedestrian is injured. To hold that the owner is liable to the occupant of the car merely enlarges the field of liability, but does not necessarily invoke the application of any different principle. The hardship, if any, has been created by the Legislature. If it were to be held that the owner is to escape from liability to voluntary occupants of the car when his employee is negligent, then it is difficult to see where the line is to be drawn, because the principle upon which the exemption from liability is urged is not concerned with the voluntary character of the occupancy, but with the distinction between occupants of the car and those using the highway outside of the car. And in that case a passenger for hire in a taxicab which the driver was using for his own gain without the consent of the owner, his employer, would not be entitled to recover against the owner for the reckless or negligent driving of the employee. I can see no reason for holding that the Act is not intended to protect persons in the position

of such a passenger as fully as others using the highway. There are many sections of the Act which in their wide scope must be intended to protect passengers as well as others against breaches of its provisions, such as secs. 6, 11, 13, 14, and 15.

Throughout the argument, stress was laid upon the distinction between those using the highway and those occupying the guilty car. But, for example, is the owner of a shop, whose window is smashed by a motor-car running amuck with a drunken driver, not entitled to the benefits of the Act against the owner? It does not necessarily follow from this construction of the Act that every occupant of a motor-vehicle would have a right of action against the owner because of the driver's negligence. It is hard to believe that any such right could arise when the occupant of the vehicle was a guilty party with the servant in the improper use of the car, or was aware when invited to occupy the car that the driver was not engaged upon his master's business.

In the present case Claude Gray was not aware, so far as any evidence went to shew, that Murray was not engaged upon his employers' business. Without in any way endeavouring to determine just where the line is to be drawn between those cases where liability is fastened upon the employer and where it is not, I am of the opinion that the provisions of sec. 19, in view of the wide judicial interpretation already given to them by the decisions I have mentioned, are not to be limited to cases of injuries to persons using the highway other than occupants of the motor-vehicle itself, but extend to cases like the present, where the occupant of the car is in no sense a party to the use of the vehicle upon business which is not that of the owner and is not aware of the fact that the car is being so used. In such cases the driver is to be regarded, in the words of the late Chancellor in *Mattei* v. *Gillies*, 16 O.L.R. 558, 563, as "the *alter ego* of the proprietor," and the owner is liable for his negligence.

For these reasons, I am of the opinion that the Bonner-Worth Company, as well as the other defendants, are liable to the plaintiffs, and I accordingly give judgment for the plaintiffs against all the defendants for the damages assessed by the jury, namely, in favour of the infant plaintiff Claude Gray for $600, to be paid into Court to abide further order, and in favour of the plaintiff Joseph Gray for $100, together with their costs of the action.

Judgment accordingly.

B. C.

C. A.

WESTMINSTER TRUST Co. v. BRYMNER.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 15, 1920.

CONTRACTS (§ I E—71)—GUARANTEE FOR DEBT FOR WHICH ANOTHER IS PRIMARILY LIABLE.

A contract which shews plainly that there was a guarantee for the payment of a debt for which another is primarily liable and not an original promise to keep indemnified against the liability, independently of whether someone else makes default or not, is a contract of guarantee and not of indemnity and if time is given to the principal debtor without the assent of the sureties, the sureties are absolved from all liability.

Statement. APPEAL by plaintiff from the judgment of Gregory, J., in an action on a guarantee contract. Affirmed.

W. J. Taylor, K.C., for appellant; *E. C. Mayers*, for respondent Brymner; *R. S. Lennie*, for respondent Rand.

Macdonald, C.J.A. MACDONALD, C.J.A.:—I would dismiss the appeal for the reasons given by the trial Judge.

Martin, J.A. MARTIN, J.A., would dismiss the appeal.

Galliher, J. GALLIHER, J.A.:—There is one short neat point only for consideration in this case, viz.; is the instrument sued on a guarantee for the payment of the debt of another?

If it is, then I think it has been established that the plaintiffs have without the knowledge of the defendants given extension of time to the principal debtor and the defendants are released. As to whether it is a guarantee or not, I think Mr. Mayers has submitted the true test and which is the test I deduce from the authorities cited on both sides.

First, is there a primary debtor? Dice is the primary debtor.

Second, is there an entire divesting of all interest of the person sought to be charged?

Rand for a certain sum assigned and transferred all his interest under his agreement to Dice to the plaintiffs, and as the trial Judge puts it, is in no way liable to make the payments for which Dice remains primarily liable except under the bond sued on. His interest in the subject matter disappears under the assignment except in so far as he may have obligated himself in the bond, and this answers the third proposition that there is an absence of liability of the person sought to be charged other than that arising out of the bond. I think all these elements are present here.

The trial Judge has gone very fully into the matter and I do not propose to do more than state my agreement in the conclusions he has arrived at.

I would dismiss the appeal.

McPHILLIPS, J.A.:—This appeal raises a point which after all is of small compass, a pure question of law, whether the contract is one of indemnity or guarantee?

We have had most excellent and elaborate arguments addressed to us, and in the very able argument of Mr. Taylor, counsel for the appellant, he frankly concedes that if the contract be one of guarantee simply, then the appeal must fail.

The case presents at first sight difficulties and complications, but these are dissolved when the whole transaction is viewed in its true perspective. Before the execution of the instrument under seal upon which the respondents are sought to be made liable to the appellant (called "Vendors Bond to secure performance of an Agreement of Sale" and styled on the back thereof, "Guarantee") all the interest in the land as described in the agreement of sale had been transferred to and was in the appellant, and Dice was the debtor of the appellant; then it was that the situation was created of the respondents becoming sureties as I view it, for the payment of the debt of Dice, *i.e.*, it was in its nature a guarantee. To make this clear it is only necessary to make some excerpts from the bond. The obligors (the respondents),

> are held and firmly bound unto the Westminster Trust Limited (the appellant) in the penal sum of $22,400 . . . We the obligors agree that in the case the payments under said agreement are not fully and properly met on the dates they become due that we will from date of said default pay the obligee interest on said arrears at the rate of 10% per annum.
>
> We the said obligors further agree that we will pay all payments due under above agreement of sale *in case William C. Dice is in default* and bind ourselves equally with William C. Dice as per terms and covenants entered into under said agreement for said payments . . .

It is apparent here that Dice is the principal debtor and it is clear that it is not a case of indemnity. *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K.B. 778, is a case very much in point and supports the judgment of the trial Judge and is referred to in his judgment. There the Court of Appeal for England had to determine on the facts of that case whether the contract was one of guarantee or indemnity, *i.e.*, whether the contract was or was not under sec. 4 of the Statute of Frauds, 29 Car. II. ch. 3. In that case Vaughan Williams, L.J., gave very careful consideration to the cases which are, in the main, the authorities relied upon by the appellant in the present case, the Lord Justice in particular quoted, at page 785, some of the language of Lord Davey as used

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by that Lord Justice in *Guild* v. *Conrad*, [1894] 2 Q.B. 885, at page 896, which appears to me to be exceedingly apposite to the present case:—

> In my opinion there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not

Here it is Dice, the purchaser under the agreement of sale, who is the principal debtor and liable to the appellant; it is only in case of default of payment on his part that any liability can arise upon the part of the respondents. Then the admitted fact is that time was given to the principal debtor without the assent of the sureties (the respondents), and if it be a guarantee, it follows of course that the respondents are absolved from all liability. I would apply the language of Vaughan Williams, L.J., in the *Harburg* case, [1902] 1 K.B. 778 at 786, to the present case, reading "Dice" in place of the words "the syndicate:"—

> In my judgment, the circumstances of the present case shew plainly that there was a guarantee of the payment of a debt for which the *syndicate* was primarily liable, and not an original promise by the defendant to keep the plaintiffs indemnified. In my judgment a contract of indemnity does not come within sec. 4, but I think there is nothing to justify us in holding that in the present case the contract is a contract of indemnity . . . it is a contract of guarantee—"a promise to answer for the debt of another."

Mr. Taylor relied greatly upon the reasons for judgment of Stirling, L.J., in the *Harburg* case, as supporting his position, but, with deference, I am not able to agree that support can be found for the case of the appellant in the reasons of the Lord Justice.

It has to be admitted that the question is one of great nicety, and as Stirling, L.J., at page 789, said:—"undoubtedly the decisions run fine in these cases." Further on in his judgment, at page 790, he said:—

> From the judgment of Bowen, L.J., in *Sutton* v. *Grey*, [1894] 1 Q.B. 285, it is clear that he regarded *Couturier* v. *Hastie* (1852), 8 Exch 40, 155 E.R. 1250 (reversed on another point (1853), 9 Exch. 102, 156 E.R. 43 (1856), 5 H.L. Cas. 673, 10 E.R. 1065), as going to the very verge of the law.

The ratio of all that Stirling, L.J., says, as affecting the present case and the application of the law, is that there must be some "interest" to take the case out of the category of guarantee and suretyship and place it in the category of indemnity. At page 791, he said:—

As it seems to me, in the judgment of Cockburn, C.J., in *Fitzgerald* v. *Dressler* (1859), 7 C.B. (N.S.) 374, 141 E.R. 861, and in the judgment of Lord Esher, M.R., "interest" means some species of interest which the law recognises.

I cannot say that the respondents in the present case have any "interest," such as "the law recognises"—in truth and in fact all the "interest" has passed to the appellant. There exists only the bare suretyship or guarantee to the appellant. The appellant is still possessed of the lands described in the agreement of sale and it is only when Dice completes his payments that he can call for a conveyance thereof. There is no resultant or other interest outstanding and in the respondents. See also *Darys* v. *Buswell*, [1913] 2 K.B. 47; *Duncan Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1; *General Finance Corp.* v. *Le Jeune* (1917), 11 S.L.R. 38, and (1918), 39 D.L.R. 33, 11 S.L.R. 38 at 40. It is also a matter to bear in mind as the evidence shews that the parties to the transaction always treated the obligation as one of guarantee, and the instrument will be so construed. In *Adolph Lumber Co.* v. *Meadow Creek L. Co.* (1919), 45 D.L.R. 579, 58 Can. S.C.R. 306, Davies, C.J., said, at page 580:—

> In these circumstances we have the right and the duty, as by their subsequent conduct, the parties have themselves put a construction upon the contract, to adopt and apply that as the proper construction.

It may be said that the whole case as presented by the appellant resolves itself into the contention that the situation is not one of suretyship, but one of indemnity; in effect one of independent contract whereby the respondents undertook and bound themselves to pay the debt of Dice, quite apart from the responsibility of Dice as principal debtor, and that in any case the dealings with Dice, the changes in the incidents of liability and extensions of time were all matters of benefit and not of prejudice to the respondents.

I am satisfied that the present case is not one of indemnity but one of suretyship, and that upon the facts the respondents stand discharged from all liability to the appellant, that the dealings, alterations of contract and extensions of time were matters of benefit, not of prejudice, and cannot be listened to. (*Polak* v. *Everett* (1876), 1 Q.B.D. 669; *Holme* v. *Brunskill* (1877), 3 Q.B.D. 495.)

I therefore am of the opinion that the judgment of the trial Judge should be affirmed and the appeal dismissed.

Appeal dismissed.

ONT.

S. C.

MUSHOL v. BENJAMIN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. April 26, 1920.

EVIDENCE (§ XII A—920)—UNDERLYING CONNECTION BETWEEN SEVERAL ITEMS—CORROBORATION AS TO SOME—COURT SATISFIED AS TO TRUTH—CORROBORATION AS TO ALL.

While it is true that where there are in issue a number of properties, transactions or other items so distinct, separate and independent that they might form distinct, separate and independent causes of action on the one side or the other, corroborative evidence directed specifically to each is *primâ facie* essential to meet the requirements of the provision of the Evidence Act, R.S.O. 1914, ch. 76, yet where an underlying connection between several items is testified to by the interested party, and his evidence is corroborated with respect to some of these items so as to satisfy the mind of the Court not only of the truthfulness and correctness of his testimony with regard to the latter items, but of his general credibility, his evidence is thereby corroborated as to the residue of the items.

[*Voyer* v. *Lepage* (1914), 19 D.L.R. 52, 8 Alta. L.R. 139, followed.]

Statement.

APPEAL by the plaintiff from a judgment of a County Court Judge whereby, on taking an account between the parties, he found a balance in favour of the defendant of less than $2.

THE following statement of the facts is taken from the judgment of FERGUSON, J.A.:—

The plaintiff is the administrator of the estate of Elias Benjamin deceased; the defendant is a brother of the deceased. The action was commenced by a specially endorsed writ, with a claim reading as follows:—

"The plaintiff's claim is against the defendant for moneys loaned and advances made by Elias Benjamin, deceased, to the defendant, which have never been repaid.

"The following are the particulars:—

"To moneys advanced on the 29th day of April, 1913. . $146.70

"To moneys advanced on the 3rd day of July, 1913. . . 391.20

"To moneys advanced on the 29th day of May, 1917. . 300.00

$837.90

"The plaintiff expressly abandons the excess over $800."

The defendant, in his affidavit of merits, raised a set-off and counterclaim, reading as follows:—

"That I have a good defence to this action upon the merits, and I also have a counterclaim against the estate of the deceased for $520, which I hereby file against the said estate. My said counterclaim is made up as follows:—

"On or about the 18th April, 1913, I left Canada to return to Persia, my native land, and did not return to Fort William until the 28th January, 1918, my return being delayed by reason of the war, and by reason of the fact that I had to serve in the war in Persia and Russia.

"When I left Fort William, as aforesaid, I had a number of collections and matters of business to be attended to during my absence, and I entrusted my deceased brother with the said business. He collected, while I was away, the following items:—

"$600, which he obtained for me, and which he deposited to his own credit in Ray Street & Co.'s bank in Fort William—and afterwards withdrew.

"$750, the proceeds of the sale of a lot on Gore street in Fort William, sold to Norman Owens.

"$100, paid to the deceased by George Moshul.

"$100, paid to the deceased by George Jacob.

"$ 30, paid to the deceased by Saul George.

"Total, $1,580.

"I received while in the old country, from my brother, the following amounts:—

"About April, 1914	$500
"About January, 1914	400
"About March, 1916, brought to Persia from Fort William by one Solomon for me	60
"About the same time, brought to Persia for me by Saul George	100
"Total	$1,060

"Balance owing to me by the estate of deceased, $520.

"I never borrowed any money from the deceased or from his estate."

The learned Judge did not limit his inquiry to the items sued for or to those referred to in the defendant's affidavit. He took an account between the parties, and found as follows —

"I hold that on the 29th day of April, 1913, the defendant advanced to the said Elias Benjamin $276.11 and authorised him to collect the $750 and interest due under the agreement for sale between the said George Benjamin and Norman T. Owens, and which amount the said Elias Benjamin collected for the defendant.

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"Jons Mushol owed the defendant $100, and paid the said amount to the said Elias Benjamin. Sargis Yunan was indebted to George Benjamin in the sum of $150, and paid the said amount to Elias Benjamin for the defendant. The said Elias Benjamin received at least $1,276.11 from the defendant, besides interest. He remitted to the defendant a total of $1,275.

"It is not clear that George Jacob paid $100 to Elias Benjamin or not. Elias Benjamin probably paid an instalment of $107 due on a lot purchased by the defendant. The letter enclosing the last $300 to the defendant indicates that the said Elias Benjamin does not expect the defendant to repay him any portion of the amount therein enclosed. The plaintiff's claim is allowed for $1,275, and the defendant's counterclaim or set-off for $1,276.11, leaving a balance due to the defendant of $1.11.

"There will be judgment for the defendant against the plaintiff for $1.11 and costs to be taxed."

W. A. Dowler, K.C., for appellant.

W. Lawr, for respondent.

The judgment of the Court was delivered by

Ferguson, J.A.

FERGUSON, J.A.:—The appellant accepted the findings in reference to the item of $750.

On the argument we disposed of the other two items of $100 and $150 allowed to the defendant, being of the opinion that the defendant's testimony on these items had been sufficiently corroborated, as required by sec. 12 of the Evidence Act, R.S.O. 1914, ch. 76, but reserved for further consideration the question of the sufficiency of the corroborative evidence in reference to the item of $276.11.

The learned trial Judge believed the defendant's story that, when he left Canada, in April, 1913, he had transferred his balance in Ray Street & Co.'s bank to his brother Elias, and appointed him his agent to collect certain moneys that were owing to him, but he did not find that the amount of the bank-account was $600, as the defendant first asserted; the learned Judge found that it was only the $276.11 which he has allowed.

Examined for discovery, the defendant, through an interpreter, deposed:—

"Q. How much money did he have in his name in Ray Street & Co.'s bank at the time he left? A. In George's name?

"Q. Yes. A. $600. He says it might be over $600 but he don't remember.

"Q. How much money did he have to pay his fare and to take with him to the old country? A. About $250.

"Q. How much did his fare cost him? A. $74 from Fort William to Berlin, Germany, through New York.

"Q. How much money did he take besides the $74? A. He had $250 altogether for his trip—$74 paid for his ticket to Berlin. The rest he had in his pocket for the trip from Berlin to Persia.

"Q. Has he got his Ray Street & Co. bank-book? A. The old book he had in his name he left in the bank. The new book he left with his brother.

"Q. Has he got any statement from Ray Street & Co. abotu the money he left there? A. He says they could find out in Ray Street & Co.'s book—he has nothing with him."

Cross-examined at the trial, he deposed:—

"The day before I left for Persia, I transferred the account in the bank to my brother, amounting to near $600. I lost my book. It was not less than $600. I took out some money for my trip. I don't know how much. I took some money besides my ticket-money. I did not take any money in express orders. I got it at Ray Street & Co.'s. It was cash. The money transferred to Elias Benjamin belonged to me. I took $250, including the ticket for $72. I left the old bank-book with Ray Street & Co."

At the trial Mr. Thomson, an employee of Ray Street & Co., was called as a witness, and produced two bank-books, a deposit-slip, and some other vouchers. The bank-book of the defendant shews an account opened in June, 1912, and continued down to the 29th April, 1913, with a then credit balance of $495.31 drawn out on that day in the following sums: $72.50; $146.70; and $276.11.

The vouchers produced are three cheques dated the 29th April, 1913, drawn by the defendant, payable as follows:—

"Ocean ticket or bearer..... $ 72.50
"Draft or bearer..... 146.70
"Cash or bearer..... 276.11."

The bank-book of the deceased Elias Benjamin shews a bank-account opened on the 29th April, 1913, with a deposit of $270, and an account continued down to August, 1914. The deposit-slip produced reads:—

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"Ray Street & Co., Fort William, Ont.,
"Credit K. Benjamin,
"Deposited by.....,
$276.11
6.11
$270.00."

It is to be noted that the first item in the plaintiff's claim was for $146.70, said to have been advanced by the deceased to the defendant on the 29th April, 1913, and evidenced by a receipt reading:—

"Fort William, Can., Apl. 29, 1913.
"Ray Street & Co. No. 1799.
"Bankers, Insurance, and Real Estate.

"Received from K. Benjamin, the sum of one hundred & forty six.....70/100 dollars, for draft payable to Geo. Benjamin, Urmia, Persia.

"No. 180214 drawn on American Express Co., London, Engld., for thirty pound.

"Ray Street & Co.,
"$146.70. "Per J. F. Thomson."

Clearly the item claimed for is the same sum as was drawn from the defendant's bank-account on the cheque marked "draft or bearer", dated the 29th April, 1913. To me the receipt indicates that the deceased went to Ray Street & Co. to purchase the draft for his brother, but that he made the purchase with his brother's money.

Counsel for the appellant contends that the evidence does not sufficiently corroborate the defendant's testimony so as to support his claim on this item of $276.11. He submits that it is more consistent or at least as consistent with the view that the defendant owed the money to the deceased as it is with the view that the defendant turned the money over to the deceased for safekeeping, to be remitted to him as and when required, and he relies upon a statement of Lindley, L.J., quoted with approval in the judgment in *Thompson* v. *Coulter*, (1903), 34 Can. S.C.R. 261, at p. 264, reading: "Evidence which is consistent with two views does not seem to me to be corroborative of either."

That statement is, no doubt, sound, but the application of it must depend on the circumstances. It is a general statement which

must be applied in the light of the surrounding circumstances, and in the light of subsequent cases explaining the nature and extent of the corroboration required, such as *Voyer* v. *Lepage* (1914), 19 D.L.R. 52, 8 Alta. L.R. 139; *McGregor* v. *Curry*,* (1914), 20 D.L.R. 706, at p. 709, 31 O.L.R. 261, where Meredith, C.J.O., said:—

"The corroboration which the statute requires is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony of the party is true."

The learned Judge has believed the defendant; his testimony was corroborated on all the other items of the account; and it seems to me that the cheques and papers produced by Ray Street & Co. support the defendant's claim, that he transferred the moneys standing to his credit, to the deceased, and so dovetail with the other circumstances surrounding the dealings of these two brothers as to add materially to the other evidence corroborating the defendant's whole story; that the defendant's claim on this item cannot and should not be separated from and considered without reference to the other items of his claim, and the evidence corroborative of his story in reference to his claim considered as a whole.

We should, I think, adopt, and in this case apply in favour of the defendant, the principle enunciated by the Appellate Division of Alberta in *Voyer* v. *Lepage*, 19 D.L.R. at p. 56, 8 Alta. L.R. 139, "that while it is true that where there are in issue a number of properties, transactions or other items so distinct, separate and independent that they might form distinct, separate and independent causes of action on the one side or the other, corroborative evidence directed specifically to each is *primâ facie* essential to meet the requirements of the provision of the Evidence Act, yet where an underlying connection between several items is testified to by the interested party, and his evidence is corroborated with respect to some of these items so as to satisfy the mind of the Court not only of the truthfulness and correctness of his testimony with regard to the latter items, but of his general credibility, his evidence is thereby corroborated as to the residue of the items."

*Affirmed by Privy Council (1915), 25 D.L.R. 771.

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I am of the opinion that, even if we did separate this item from the others, and from the evidence and circumstances corroborating them, yet the books and records produced by Ray Street & Co. furnish evidence which could and should aid the Court in arriving at the conclusion that the defendant's story is to be believed.

I would, for these reasons, dismiss the appeal with costs.

Appeal dismissed.

B. C.

C. A.

LOCHEAD v. B.C. ELECTRIC R. Co.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. September 15, 1920.

CARRIERS (§ I K—210)—OPENING GATES ON STREET CAR—NOT STOPPING CAR—PASSENGER ENTERING THROWN FROM CAR—NEGLIGENCE.

A conductor on a street car having opened the gates of the car to enable a person to get on should stop the car, in order to enable him to do so safely, and should see that he is safely on board before allowing the car to proceed, especially if the car is approaching a dangerous curve. Failure to do this is gross negligence on the part of the conductor for which the company is liable, in case injury is sustained.

[*Siner* v. *Great Western R. Co.* (1869), L.R. 4 Exch. 117, distinguished.]

Statement.

APPEAL by plaintiff from the trial judgment in an action for injuries received by being thrown from a street car making a sudden curve as the plaintiff was about to enter. Reversed.

W. D. Gillespie, for appellant; *L. G. McPhillips*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal, and direct judgment to be entered for the plaintiff (appellant) in accordance with the verdict of the jury, as there is, in my opinion, evidence to sustain the verdict.

Assuming that the plaintiff was negligent in boarding a moving tram car, yet the conductor could easily have prevented the consequences of her negligence by doing the obvious thing and that which it was his duty to do, namely, pull the bell-cord.

I think the jury by their verdict shewed their common sense and knowledge of the operation of street railways. When the conductor opened the gates of the car, the car was moving slightly. It was his duty to have at once given the signal to the motorman to stop; he did not do it. The plaintiff seized the side bars and got her foot upon the lower step, the car kept increasing in speed, the conductor standing there and seeing her danger failed to do what was then, as well as at the time of opening the gates, his

obvious duty to do, namely, to stop the car and as a result of that negligence the plaintiff sustained the injuries of which she complains.

I see a very clear distinction between the facts of this case and those of *Siner* v. *Great Western R. Co.* (1869), L.R. 4 Exch. 117. There was no factor of ultimate negligence in that case. The defendants there could not have done anything to avert the plaintiff's injury when her negligence manifested itself.

Macdonald, C.J.A.

Martin, J.A., would allow the appeal.

Martin, J.A.

GALLIHER, J.A.:—I was inclined at the hearing to dismiss this appeal, but on further consideration, and as my brothers are all of the opinion that it should be allowed, I will not dissent.

Galliher, J.A.

MCPHILLIPS, J.A.:—This appeal, in a negligence action for personal injury upon an electric street car, raises a point of some considerable nicety. It would appear that the conductor of the car had stopped the car to take on a passenger and was in the act of closing the gates when the appellant appeared also wishing to board the car. The conductor then proceeded to re-open the gates, the car still proceeding slowly. The appellant accepting, as I think not unreasonably, this apparent invitation to board the car, did so, but when upon the steps of the car, was, by reason of it not being brought to a stop, thrown down upon the car and suffered injuries to leg and shoulder. The cause that gave rise to the fall of the appellant was in the main, the fact that at this point there is a considerable curve and besides the negligence in inviting the appellant to board the car there was negligence in not stopping the car when she had stepped upon the steps, especially when about to go around a sharp curve. All this conduct amounted, in my opinion, to gross negligence upon the part of the conductor.

McPhillips, J.A.

It is to be remembered that a street car service is not to be viewed the same as a railway with trains running at high rates of speed between stations. The truth is that to carry out the service there must be a good deal of mutuality of action and expedition in getting on and off the cars or the service could not be economically or expeditiously carried on. Now the opening of the gates, although the car had not actually stopped, was plainly an intimation to the appellant to step upon the steps

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of the car, and in ordinary course had no curve in the line existed at that point no accident would have taken place; but owing to the curve that ensued which the conductor must have or should have known would ensue, the passenger so invited to board the car was placed in peril and thrown down by reason of the car being negligently allowed to take the curve, the passenger not having arrived at a place of safety upon the car, not yet even upon the floor of the car. The liability of a carrier of passengers for injuries suffered has been tritely stated to be as follows in Indermauer's Common Law, 1914, 12th ed. page 142:—

> To carry safely and securely as far as reasonable care and forethought on his part can go, and if an accident which he could not possibly have prevented takes place he is under no liability.

Here there was every opportunity for the prevention of accident. The gates should not have been opened under the circumstances, or if opened at all, only when the car was brought to a standstill. In inviting the passenger to board the car and thereby accepting her as a passenger, the duty then was to carry her safely which was not done. To proceed around the curve, the passenger in the act of then ascending the steps, was, as I have already said, gross negligence, the car being under the absolute control of the conductor. The conductor was at his post of duty but failing to perform his obvious duty, *i.e.*, all took place in his immediate presence and following his opening of the gates of the car. I cannot persuade myself that the accident that occurred was not due to the carrier's negligence. It may well be said that the thing speaks for itself—and in this case there was no attempt upon the part of the defendant company to shew the want of negligence on its part, relying solely upon what has been claimed to be the contributory negligence of the plaintiff—but contributory negligence is negatived by the general verdict in favour of the plaintiff.

It is of course contended that the case should never have gone to the jury, and the trial Judge has in effect so held, yet he did allow it to go to the jury. He could very properly do this if he was of the opinion that there was some evidence, or that negligence might reasonably be inferred, and with great respect to the Judge's very careful judgment, I am of the opinion that it was a proper case to leave to the jury upon the question of fact. (See *Flannery* v. *Waterford & Limerick Ry. Co.* (1877), 11 I. R. (C.L.) 30;

Dublin etc. R. Co. v. *Slattery* (1878), 3 App. Cas. 1155, as to what will be evidence of negligence. Also see the case which is much in point of *Delaney* v. *Metropolitan Ry. Co.* (1920), 36 T.L.R. 596. In the present case, as in that case, there was evidence from which the jury was entitled to infer negligence.)

Upon careful consideration of all the facts of this case, I am clearly of the opinion that the negligence which was the cause of the accident and the personal injuries to the plaintiff was negligence imputable to the company and for which there is legal liability. The company must in the circumstances be held to have undertaken and to have been charged with the duty to carry the plaintiff safely in so far as reasonable care could provide, but there was an absence of reasonable care and the accident took place which could have been prevented but was not prevented owing to the gross negligence of its servant for which it must be held responsible. (See *Delaney* v. *Metropolitan Ry. Co.*, 36 T.L.R. 596, *per* Bankes, L.J., at page 597).

Further, in the present case we have the finding of the jury in favour of the plaintiff upon facts which in my opinion admit of their reasonably so finding for the plaintiff, and what Lord Loreburn, L.C., said in *Kleinwort* v. *Dunlop Rubber Co.* (1907), 23 T.L.R. 696, at page 697, is peculiarly applicable to this case:—

> To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some plain error of law, which the Court believes has affected the verdict, or some plain miscarriage, before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion. . . . That is, in my opinion, what the finding means, and there is sufficient evidence to support it.

In my opinion the appeal should be allowed and judgment entered for the plaintiff in accordance with the verdict of the jury.

Appeal allowed.

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S. C.

KERRIGAN v. HARRISON.

*Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, and Masten, JJ. June 4, 1920.**

HIGHWAYS (§VC—264)—ENCROACHMENT OF WATERS OF ONE OF THE GREAT LAKES—ROAD CEASING TO EXIST—SOIL COVERED BY WATER VESTS IN CROWN—COVENANT TO REPAIR AND KEEP IN REPAIR ILLEGAL AND UNENFORCEABLE.

Where a road has ceased to exist by reason of the encroachment of the waters of one of the Great Lakes, the soil thus covered by water vests in the Crown and renders a covenant to maintain and repair such road illegal and unenforceable.

[Review of authorities.]

Statement.

APPEAL by defendant from the judgment of FALCONBRIDGE, C.J.K.B., (1919), 46 O.L.R. 227. Reversed.

J. M. McEvoy, for appellant. *J. A. E. Braden*, for respondent.

Mulock, C.J.Ex.

MULOCK, C.J. Ex.:—The defendant, being owner of lots 26 and 27 in the village of Port Stanley, according to registered plan No. 208, by deed dated the 30th November, 1911, in pursuance of the Short Forms of Conveyances Act, conveyed the same, in fee simple, to one Charles M.R. Graham, together with a right of way over the road shewn as Harrison's road on the said plan; and the said deed contained a covenant in these words: "Provided, and it is further agreed, by and between the party of the first part, her heirs and assigns, and the party of the second part, his heirs and assigns, that the party of the second part shall have a right of way to his said lands over a certain road" (describing the road in question) "and the said party of the first part agrees to maintain the said road and bridges thereon in as good condition as the same are now."

By deed dated the 18th February, 1913, in pursuance of the Short Forms of Conveyances Act, the said Graham conveyed to the plaintiff a portion of the lands described in the first above mentioned deed.

The waters of Lake Erie have gradually encroached for a long distance upon the water-front, including the portion of the road in question, which is now under water, and as a road has ceased to exist; and this action is brought for a declaration that, by reason of the covenant in question, the defendant is bound to restore the road and to pay damages for breach of the covenant.

*Clute, J., being absent through illness, and counsel consenting to continue before a Court of three Judges, the hearing was concluded before Mulock, C.J.Ex., Riddell and Masten, JJ.

The evidence shews that the waters of Lake Erie have imperceptibly and gradually advanced upon and overflowed the land where the road once was. The legal effect of this encroachment has been to vest in the Crown the soil thus covered by water: *Rex* v. *Lord Yarborough* (1824), 3 B. & C. 91, 107 E.R. 668; *In re Hull and Selby Railway* (1839), 5 M. & W. 327, 151 E.R. 139; *Foster* v. *Wright* (1878), 4 C.P.D. 438, 446; *McCormick* v. *Township of Pelée* (1890), 20 O.R. 288, 290. Nevertheless, the plaintiff contends that the defendant is still bound by the covenant.

When the defendant entered into the covenant, she was the owner of the road and had the right to maintain it; but, when the soil passed to the Crown, she ceased to be so entitled. Assuming it to be physically possible to rebuild the road, still, the ownership of the soil being in the Crown, the defendant has no right to do so. Under these circumstances, is she bound by her covenant?

The Court cannot absolve a person from a lawful contract. Its duty is to interpret it, and to that end to ascertain the circumstances under which it was entered into, in order to discover whether the parties made the contract upon the implied understanding that a certain state of affairs would continue to exist. If such implied understanding is found, then a term to that effect must be read into the contract. This rule of construction has been expressed in varying language by many Judges, but running through all such definitions is the underlying principle that in the construction of a contract attendant circumstances, as well as the letter of the contract, must be considered. The fact that attendant circumstances are to be considered implies that they may qualify the positive language of the contract itself.

The rule of construction laid down in the leading case of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 833, 834, (122 E.R. 309) by Blackburn, J., is as follows: "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied

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condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

In *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651, the plaintiff had contracted to erect certain machinery on the defendant's premises for a certain sum and to keep it in repair for two years. After a portion only of the work had been finished, the premises had been destroyed by an accidental fire, and it was held that both parties were excused from further performing the contract, Blackburn, J., saying (p. 659): "We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performing the contract, but giving a cause of action to neither."

In *Howell* v. *Coupland* (1876), 1 Q.B.D. 258, the defendant agreed to sell to the plaintiff a quantity of potatoes to be grown on the defendant's land. The crop was attacked with disease, and the defendant was unable to perform the contract, and an action for damages for non-delivery of the quantity contracted for failed, Coleridge, C.J., saying (p. 261): "The true ground, as it seems to me, on which the contract should be interpreted . . . is that by the simple and obvious construction of the agreement both parties understood and agreed, that there should be a condition implied that before the time for the performance of the contract the potatoes should be, or should have been, in existence, and should still be existing when the time came for the performance. They had been in existence, and had been destroyed by causes over which the defendant, the contractor, had no control, and it became impossible for him to perform his contract; and, according to the condition which the parties had understood should be in the contract, he was excused from the performance."

In *Nickoll & Knight* v. *Ashton Edridge & Co.*, [1901] 2 K.B. 126, 137, Vaughan Williams, L.J., expresses the rule thus: "Where a contract is made with reference to certain anticipated circumstances, and where, without default of either party, it becomes wholly inapplicable to any such circumstances, it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made."

In re Shipton Anderson & Co. and Harrison Brothers & Co.'s Arbitration, [1915] 3 K.B. 676, was the case of a contract to sell a specific parcel of wheat. Before the property passed to the purchaser, His Majesty's Government, acting doubtless under the War Measures Act, requisitioned the wheat, whereby it became impossible for the vendors to perform the contract, and it was held that, delivery of the wheat by the seller to the buyer having been rendered impossible by the lawful requisition of the Government, the seller was excused from performing the contract, Lord Reading, C.J., saying (p. 681): "The contract must be taken as an undertaking by the sellers to deliver the goods subject always to this condition, that if the Government requisition the goods and render it impossible by their act for the sellers to perform their contract they should be excused from performance;" and in the same case Lush, J., says (pp. 684, 685): "Inasmuch as there has been no default of the vendor, and inasmuch as that which made it impossible for him legally to perform his obligation was an act of State, it thereby followed that the vendor was excused from performance."

F. A. Tamplin Steamship Co. Limited v. *Anglo-Mexican Petroleum Products Co. Limited*, [1916] 2 A.C. 397, was a case where the defendant company chartered a tank steamship for 60 months for the carriage of oil for the charterers, who were to pay therefor a fixed sum per month. The charterparty, at the outbreak of the war, had nearly three years to run, but the steamer was requisitioned by the Admiralty, whereupon the owners contended that the charterparty had been determined. This the charterers resisted, and the question was whether the requisitioning of the vessel ended or suspended the charterparty. The principle of law underlying the authorities dealing with cases of persons seeking to be excused from performing their contracts is thus stated by Earl Loreburn (p. 403): "When a lawful contract has been made and there is no default, a Court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing

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that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract."

The evidence does not warrant a finding that the defendant could have prevented the waters of the lake from destroying the road and occupying the place where it once was. The road ran along a small portion only of the shore, but the lake for a long distance on each side encroached on and submerged the water-front, making the area thus invaded part of the lake. To maintain the road in its entirety would have required the erection of preventive works in the soil of the Crown. This the defendant would not have been entitled to do.

The plaintiff's counsel contended that, even if the defendant was not bound to rebuild the road, she was liable in damages for not having maintained it, and endeavoured to shew that the destruction of the road was caused by the action of a creek which crossed the road. A careful examination of the evidence satisfies me that the destruction of the road was caused by the action of the waters of Lake Erie, which destroyed not only the road in question but a long, wide strip of the water-front. As the water encroached upon the road, the freehold of the portion thus encroached upon shifted to the Crown and was beyond recovery by the defendant. Gradually the whole of the freehold of what had been the road passed to the Crown. Until the encroachment the plaintiff was in the enjoyment of the letter of his bond. This encroachment created a new situation not existing when the covenant was entered into, and destroyed the very foundation of the covenant. To maintain the road now would require the defendant to do an illegal act, namely, erect works on the property of the Crown. If such was the intention of the parties and had been so expressed in the covenant, it would have rendered it void for illegality, and it would be none the less void if such a term can be inferred. In the absence of evidence, the Court will not infer wrongful intention, and I think the proper construction to be placed upon the covenant is that it was to be binding only in so far as it might be legally performed. Enforcement of a contract to perform an illegal act,

or the award of damages for its non-performance, would be contrary to public policy: the *Shipton* case, *ante*. If parties enter into a contract, the performance of which at the time is legal, but later, by reason of subsequent legislation, becomes illegal, the parties are absolved from it: *Brewster* v. *Kitchell* (1698), 1 Salk. 197; *Metropolitan Water Board* v. *Dick Kerr and Co. Limited*, [1918] A.C. 119.

Irrespective of the question of illegality, above discussed, I am inclined to the view that the destruction of the road, with the legal consequence of the soil passing to the Crown, voided the contract: *Regina* v. *Inhabitants of Hornsea* (1854), 1 Dears. C.C. 291. This case was an indictment for nonrepair of a highway. Part of the road had been destroyed by encroachment of the sea, and it was held that in consequence the municipality was relieved of its obligation to repair, Wightman, J., saying (p. 307): "In order to create an obligation to repair, there must be something in existence capable of being repaired."

That case differs from the present one in that this is a case of alleged contractual liability. Applying to it the rule for construction of covenants, above discussed, and it appearing that since the contract was entered into circumstances have arisen which render the performance of the contract impossible, it may, I think, be reasonably inferred that the parties did not intend the contractor to be bound to do the impossible and that such interpretation may be placed upon the contract by reading into it a term to that effect.

However that be, for the purposes of this appeal I confine my opinion to the view that subsequent events have rendered the performance of the covenant illegal, and the defendant is excused from performing it; and this appeal, I think, should be allowed with costs, the judgment appealed from set aside, and the action dismissed with costs.

RIDDELL, J.:—An appeal from the judgment of the late Chief Justice of the King's Bench in favour of the plaintiff. Riddell, J.

I assume, without deciding, that the covenant sued upon can be taken advantage of by the present plaintiff; but I think that the appeal must succeed upon a ground which does not seem to have been presented to the learned Chief Justice.

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It is apparent that the difficulty has arisen from the gradual erosion by Lake Erie so as to destroy the situs of the road and make the *locus*, part of Lake Erie and navigable water.

The law of this Province is thus expressed in *Volcanic Oil and Gas Co.* v. *Chaplin* (1912), 27 O.L.R. 484, at p. 492, 10 D.L.R. 200, at p. 206 (it is true that the decision of a Divisional Court of the High Court in that case was reversed by the Court of Appeal (1914), 31 O.L.R. 364, 19 D.L.R. 442, but the reversal was on a question of fact only): "If a person owns land adjoining a lake, such as Lake Erie, and the lake by gradual encroachment eats into his land, he loses this land so eaten away, and the King acquires it: *In re Hull and Selby Railway*, 5 M. & W. 327, 151 E.R. 139; *Throop* v. *Cobourg and Peterborough R.W. Co.* (1856), 5 U.C.C.P. 509."

Consequently for the defendant to attempt to reinstate the road would be purpresture and therefore illegal. The law as to a contract to do an act which is illegal is nowhere better or more concisely stated than by Mr. Justice Darling in the *Shipton* case, [1915] 3 K.B. 676, at p. 683: "In my opinion the law does not decree the doing of things impossible nor of things illegal, for that would be a negation of all law. If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy."

The covenant must be read as though it contained the clause, "when and so long as the maintenance is legal." Compare the decision of the late Chancellor on the statutory duty of a municipality under like circumstances in *McCormick* v. *Township of Pelée*, 20 O.R. 288; it should be borne in mind that at that time, while the fee was in the Crown, the care of and supervision over highways was in the municipality. The defendant in the present case did nothing to cause the invasion by the lake. She was not called upon to do anything to prevent it, even if she could have prevented it. Nor is she called upon to ask for any favour from the Crown in order to permit her to work on the old roadbed—even if such favour would be granted, which does not appear.

ONT.

S. C.

I would allow the appeal and dismiss the action, and, in view of the reasonable offer to the defendant, with costs.

Masten, J.

MASTEN, J., agreed with MULOCK, C.J. Ex.

Appeal allowed.

KEAYS v. SHELL GARAGE, Ltd.

B. C.

C. A.

British Columbia Court of Appeal, Martin, Galliher and McPhillips, JJ.A. September 15, 1920.

SALE (§ I A—11)—OF AUTOMOBILE—DELIVERY FROM DISTANT FACTORY—REASONABLE TIME.

What is a reasonable time in which to furnish a new motor car which has to be brought from a distant factory depends upon the circumstances in each case; under the circumstances from November 3 to December 17 was held not to be a reasonable time.

Statement.

APPEAL by plaintiff from the judgment of Gregory, J., in an action on a contract for the sale of an automobile. Reversed.

E. C. Mayers, for appellant; *H. B. Robertson*, for respondent.

Martin, J.A.

MARTIN, J.A., would allow the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I conclude upon the evidence that on November 3 the plaintiff and defendants came to an arrangement by which the defendants were to take back the Nash car they had sold the plaintiff and which had not given satisfaction, at a valuation of $2,450 and furnish a new Nash car at $2,850, the plaintiff on delivery of same paying the difference in cash, $400.

It is not quite clear from the evidence whether this was conditional on the defendants being able to sell the old car for that amount, but in any event they did sell it and that condition, if any such existed, was fulfilled.

Plaintiff has contended that defendants had no right to sell the old car, but I think this cannot be maintained in the face of the evidence.

The trial Judge has found that pending the arrival of the new car there was an arrangement by which the plaintiff was to have the use, without charge, of a Cadillac car. The defendants offered the plaintiff the use of a Cadillac car and also a Dodge car, but plaintiff would not accept either of these.

I am not prepared to disagree with the finding of the trial Judge as to this arrangement.

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Galliher, J.A.

We next come to the time within which the new car was to be delivered. There is no doubt 3 weeks was mentioned, but I think it was a statement of the time in which Eve expected a car could be got here from the factory in Wisconsin, rather than an agreement to have it here in that time.

It then becomes a question whether from November 3 till December 17 (the date when the car was in Victoria ready for delivery) can be said to be a reasonable time under all the circumstances. The trial Judge has so held.

Two things have to be considered in this connection: (*a*) the urgency for having the car as soon as possible, and, (*b*) the efforts made by the defendants to meet this situation.

As to (*a*), certainly after November 7, when the defendants knew that the Cadillac and Dodge cars were not satisfactory to the plaintiff, it must have been apparent to them that every effort should be made to speed delivery, the plaintiff in the meantime having no means of properly carrying on his vocation. Let us examine what was done by defendants.

Eve, the sales manager in Victoria, tried to get a car from the Vancouver agency, but they had none in stock. He then requested them to give him one out of their first shipment from the factory in Wisconsin, and the evidence is that the car which was ready for the plaintiff in Victoria on December 17 was out of that shipment. The following extract is from the evidence of Eve, at page 132:—

> Q. Do you know whether they had cars on order from the factory when you sent your order to them? A. Oh yes; we all have cars on orders, our contract calls for order of cars from time to time. Q. Did you know that Vancouver garage had cars on order and were expecting them as soon as they could come, when you wrote to them? A. Yes. Q. And by writing to them you were getting it quicker than by writing directly to the factory? A. Yes. Q. Why? A. Because they have orders on the way; their orders were placed and their order had to come. Q. Their order would be filled before yours? A. Yes; their order would leave the factory probably before ours got there. They were out of cars, and I knew by that that they must have cars on the way, because they are very seldom out of cars.

Mr. Robertson relies upon this evidence as shewing that the defendants took the speediest and best way of procuring this new car and urges that it proves there were cars on the way for the Vancouver agency at the time he ordered from them and therefore bound to reach here before any order that might be sent direct to the factory.

If I so read that evidence it would make a strong impression on me, but I do not. Upon a casual reading of it, it might appear so, but when carefully read as a whole his reasons for knowing are based on the last three lines. So far as that evidence goes it is not shewn, as I view it, that the Vancouver agency had any orders placed for delivery in the month of November at all, or that any cars were on the way. The only thing we do know is that cars arrived some time on in December, this car among them.

Galliher, J.A.

It seems to me that Eve should have ascertained this fact definitely and not have left it to supposition; or have wired the factory for a rush order. He tries to explain that such wiring would be of no avail, but I am not satisfied with that explanation. He seems to have taken it for granted that there were cars on the way for the Vancouver agency, and troubled no more about it except that he says he wrote to the factory about cars but the letter is not produced, and he can give no date when it was sent.

What is a reasonable time depends upon the circumstances of each case. Under the circumstances of this case, with deference, I find the car was not made available within a reasonable time and the proper efforts to bring that about were not made.

I am of opinion that the plaintiff was justified in repudiating the contract when he did and that the appeal should be allowed.

There should be judgment for the plaintiff for $2,450.

As I have found that there was an arrangement to use other cars pending a reasonable time for delivery of a new car and a refusal to use the cars agreed on, and apparently no great effort made by the plaintiff to continue his business, I do not feel that I should award damages.

As to the tools sued for, the plaintiff has made out no case; in fact, I have a note that Mr. Mayers is not pursuing this feature.

McPHILLIPS, J.A., would dismiss the appeal.

McPhillips, J.A.

Appeal allowed.

CAN.

S. C.

SALT v. CARDSTON.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

HIGHWAYS (§ IV—147f)—ELECTRIC LIGHT POLE IN STREET—GUY WIRE UNGUARDED—INJURY TO HORSEMAN—LIABILITY—MUNICIPAL ORDINANCE—TIME FOR BRINGING ACTION.

Section 20 of the Alta. Statute, 7 Ed. VII. 1907, ch. 37 (an Act to amend an Ordinance to incorporate the Town of Cardston), enacts that "the town shall construct all public works and all apparatus or appurtenances thereunto belonging or appertaining or therewith connected and wheresoever situated, so as not to endanger the public health or safety." Held, that the town was liable under this section for damages caused by a horse running into an unguarded electric light post guy, placed in a public street, and throwing his rider. Held, also, that sec. 87 of the Municipal Ordinance did not apply and the action did not have to be commenced within six months after the damages had been sustained.

[*Salt* v. *Town of Cardston* (1919), 49 D.L.R. 229, reversed, and judgment of Stuart, J. (1919), 46 D.L.R. 179, restored.]

Statement.

APPEAL by plaintiff from the judgment of the Supreme Court of Alberta (1919), 49 D.L.R. 229, in an action for damages for injuries caused by a traveller's horse falling over an unguarded guy wire in the street. Reversed and judgment of trial Judge (1919), 46 D.L.R. 179, restored.

Eugene Lafleur, K.C., and *C. F. Jamieson*, for appellant.

A. H. Clarke, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—While, in my opinion, the damages assessed in this case are somewhat larger than I should have awarded and especially so in allowing the expenses of the wife and daughter in their trip to California with the appellant, I do not think that on this ground alone I should allow an appeal. I am of the opinion that, on the main question, the decision of the Court appealed from ((1919), 49 D.L.R. 229, 15 Alta. L.R. 31), was wrong and that the failure of the respondent to construct the work in question in a proper manner, which was the cause of the accident, did not come within sec. 87 of the statute invoked (Municipal Ordinance, C.O.N.W.T. 1905, ch. 70), and that the limitation therein for bringing an action was, therefore, not applicable.

I concur, therefore, in allowing the appeal with costs and restoring the judgment of the trial Judge (1919), 46 D.L.R. 179.

Idington, J.

IDINGTON, J.:—The trial Judge, 46 D.L.R. 179, found respondent municipal corporation liable for damages sustained by appellant

by reason of the guy wire placed upon the road allowance to support a pole carrying wire for the use of an electric system of lighting.

The Court of Appeal for Alberta reversed his judgment, 49 D.L.R. 229, 15 Alta. L.R. 31, solely upon the ground that the cause of action was barred by sec. 87 of the Municipal Ordinance, C.O.N.W.T. 1905, ch. 70, which reads as follows:

87. Every municipality shall keep in repair all sidewalks, crossings, sewers, culverts and approaches, grades and other works made or done by its council and on default so to keep in repair shall be responsible for all damages sustained by any person by reason of such default, but the action must be brought within 6 months after the damages have been sustained.

He applied, in my opinion, correctly to the construction of this section the *ejusdem generis* rule, relative to the interpretation and construction of statutes.

The express language of the statute in question seems clearly to relate only to the liabilities incidental to the works relative to the maintenance of the highway and clearly does not extend to any of the other manifold businesses which such corporations are in these latter days empowered to carry on, besides the exercise of ordinary municipal jurisdiction over highways.

What the respondent did in its capacity of a corporate company, as it were, to carry on the business of electric lighting, had no necessary relation to its maintenance of the highway in a proper state of repair, or to the specified works of "sidewalks, crossings, sewers, culverts and approaches or grades."

These specified undertakings have each as a rule a necessarily close relation with the maintenance of the highway.

The carrying on of any system of electric lighting has no such necessary relation with the obstruction of any part of the highway and should not, I respectfully submit, be tolerated further than absolutely necessary.

When the municipal corporation sees fit to exercise the power conferred upon it to carry on an electric lighting system, it enters upon a business enterprise which has no implied right to obstruct the road allowance any more than another corporation duly authorised to carry on same.

And I much doubt if sec. 8 in the enactment of 7 Ed. VII. 1907, ch. 37, which is relied upon to justify the erection complained

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of, can, upon a close examination of its express terms, carry anyone acting thereon further than absolutely necessary for the execution of such a work as contemplated therein.

Moreover, it is left on the evidence very doubtful if the structure in question was not erected before this enactment.

Be all that as it may, sec. 20 of same statute, 1907, ch. 37, provides as follows:

> 20. The town shall construct all public works and all apparatus and appurtenances thereunto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety.

It is upon this that the appellant's action rests and not upon any neglect of duty relative to the maintenance of the highway.

And that an action will lie for breach of obligations thus imposed I have no manner of doubt.

We are not referred to any sanction in the way of penalty imposed for the non-observance of such obligations nor can I find any such, or any other reason, why it must not be presumed to be one of those enactments which, in such circumstances, are presumed to carry on or with them a right of action to those suffering from a breach of the observation of the obligations imposed.

There is no express limitation in the Municipal Ordinance applicable determining the time within which the action can be brought. The only statutory limitation therefore is the general one applicable to the like torts.

As to the damages I do not think we should interfere though possibly they are more than I would have assessed and in regard thereto the Appellate Court below, 49 D.L.R. 229, 15 Alta. L.R. 31, might have been entitled to do so.

I think the appeal should be allowed with costs here and in the Court below and the judgment of the trial Judge be restored.

Anglin, J.

ANGLIN, J.:—Not without some misgivings I have reached the conclusion that the failure to place a guard on the guy wire, which was the cause of the plaintiff being injured, was not a case of non-repair within sec. 87 of the Municipal Ordinance, C.O.N.W.T., 1905, ch. 70, but was a case of failure to construct a public work "so as not to endanger the public health or safety" within sec. 20 of ch. 37 of the Alberta Statute, 7 Ed. VII., 1907, and, as such, gave rise to a cause of action when injury resulted therefrom

quite distinct from the default to keep in repair dealt with in sec. 87 of the Consolidated Ordinance. With Stuart, J. (46 D.L.R. 179), I also incline to think that the electric light line in question was not one of the "other works made or done by (the) council," with which sec. 87 deals.

No case of contributory negligence was established. The trial Judge so found and it would not be possible on the evidence to reverse his finding.

I am also of opinion that there should be no reduction in the sum of $10,000 awarded by Stuart, J., as damages, 46 D.L.R. 179. He tells us (at page 193) that he thought that this sum was not excessive but that "it probably errs on the other side." The allowance of $2,500 in respect of travelling expenses, etc., is no doubt in great part very questionable for the reasons stated by McCarthy, J., 49 D.L.R. 229, 15 Alta. L.R. 31. But I am not prepared to say that the whole sum awarded is too large.

I would allow the appeal and restore the judgment of the trial Judge, 46 D.L.R. 179.

Brodeur J.

BRODEUR, J. (dissenting):—We are asked to decide whether or not the defendant municipal corporation was negligent in erecting the guy wire which caused the accident.

The law provided (sec. 20 of 7 Edw. VII., 1907, ch. 37), that the town in constructing all public works and all appurtenances thereto should make them "so as not to endanger the public . . . safety."

Nobody disputes the power of the municipality to erect the pole which was necessary for its lighting system, and it was necessary also that a guy wire should be erected in order to strengthen the poles. If the pole had been erected in the travelling part of the roadway, I could very well realise how dangerous the guy wire, as built, would have been. But the pole and guy wire in question were erected on a part of the roadway which was not used by the public, except by those who had to go to the creek to get some water. I will not say that the plaintiff could not go down the embankment in order to get his cattle back on the travelling road; but in doing so he was bound to exercise the greatest care because he knew he was not riding on the highway which was kept for travellers; and the municipal corporation, in

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erecting the pole and the guy wire at the place where they were installed, could not be considered as negligent in constructing them as they have done, because it was not to be expected that the public would go there.

As to the question of limitation. Sec. 87 of the Municipal Ordinance imposes the duty upon the municipal corporation to keep in repair all works erected by a municipality and provided so that in default the municipality shall be responsible for all damages sustained by any person by reason of such default; but in such case the action must be brought within 6 months after the damages have been sustained.

The electric system which has been adopted by the municipality is, to my mind, one of the works contemplated by the municipal ordinance, since it is especially provided in sec. 95 of the same Act (C.O.N.W.T. 1905, ch. 70), that the municipality is authorised to pass by-laws for the erection of such works. If the guy wire in question was not properly kept, the municipality has failed in its obligation to keep the highway or the works in proper repairs. *Howse* v. *Tp. of Southwold* (1912), 5 D.L.R. 709, 27 O.L.R. 29. In such a case any action instituted by reason of its default must be instituted within 6 months after the damages have been sustained. The present action was instituted long after the period mentioned in the statute.

For these two reasons, it seems to me that the appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—In my opinion the liability of the respondent for the injuries suffered by the appellant rests on sec. 20 of 7 Edw. VII., 1907, ch. 37, being an amendment of the charter of the town of Cardston, which says that

> The town shall construct all public works and all apparatus or appurtenances thereunto belonging or appertaining or therewith connected, and wheresoever situated, so as not to endanger the public health or safety.

I do not think that this is a case where sec. 87 of the Municipal Ordinance of Alberta, C.O.N.W.T. 1905, ch. 70, with its limitation of 6 months for right of recovery, applies. The respondent, as a part of its electric lighting system, had erected poles within the road allowance, and one of these poles was supported by a guy wire unprotected by any guard. The appellant was driving cattle over the bridge at Cardston crossing Lee Creek,

which bridge occupies a portion of the road allowance, and some of the cattle having left the approach to the bridge and taken the roadway leading to the creek the appellant rode his horse down the embankment and started after the steers. It was then almost dusk and the appellant's horse ran astride the guy wire, which, without any guard, was practically invisible at that hour, and the appellant was thrown to the ground and very seriously injured. Under these circumstances I do not think the accident was caused by a want of repair of the highway, but by reason of a defect of construction of the electric light system, so that the limitation of 6 months provided by sec. 87 of the Ordinance does not apply to the appellant's action which was taken after the 6 months.

The question was discussed at Bar whether, assuming that sec. 87 did not apply, the appellant could, in the absence of proof of negligence, succeed against the respondent which, in constructing its electric light line, had exercised a power granted it by statute.

Such a defence is often made, and I may perhaps refer to the recent decision of the Judicial Committee in *Quebec Railway, Light, Heat & Power Co.* v. *Vandry*, 52 D.L.R. 136, [1920] A.C. 662, 26 Rev. Leg. 244, where their Lordships state on what grounds immunity from liability by reason of the exercise of a statutory power may be claimed, 52 D.L.R., at page 146:

> The application of enactments of this kind is familiar and well settled. Such powers are not in themselves charters to commit torts and to damage third parties at large, but that which is necessarily incidental to the exercise of the statutory authority is held to have been authorised by implication and therefore is not the foundation of a cause of action in favour of strangers, since otherwise the application of the general law would defeat the purpose of the enactment. The Legislature, which could have excepted the application of the general law in express terms, must be deemed to have done so by implication in such cases.

The case made by the respondent does not come within the rule so stated. The damage here was caused by reason of the fact that the respondent improperly exercised its statutory authority, in other words, because, in supporting by a guy wire the pole erected by it on a part of the highway, the respondent neglected to protect the guy wire by a guard which would have rendered it easily visible. If the statute be relied on as a defence, the respondent does not come within its terms, for it did not construct the line so as not to endanger the public safety. The

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trial Judge, Stuart, J., 46 D.L.R. 179, stated that he had no doubt that had a board guard been placed on the wire, the accident would not have occurred. The evidence shews that it is customary to place guards over guy wires in places where the public may come in contact with them. Such an accident and the causes that brought it about could, I think, have easily been foreseen. I therefore think that the respondent is liable for the appellant's damages.

In the Appellate Division, 49 D.L.R. 229, 15 Alta. L.R. 31, McCarthy, J., who held that the respondent was liable, would have reduced the amount of damages granted by the trial Judge for necessary expenses of the appellant. It is now well settled that where the jury, or the Judge acting as a jury, has not taken into consideration matters which should not have been considered, the verdict ought not to be set aside or a new trial directed simply because the amount of damages may seem excessive to an Appellate Court. *C.P.R. Co.* v. *Jackson* (1915), 27 D.L.R. 86, 52 Can. S.C.R. 281. Here the trial Judge undoubtedly could consider the expenses to which the appellant was put by reason of this accident. Even if he granted him some expenses which I would be inclined to think were not reasonably connected with the accident, still I feel that I should not interfere with his decision and substitute my estimate of the necessity of the expenses for the one which he formed at the trial.

I would therefore allow the appeal with costs here and in the Appellate Division and restore the judgment of the trial Court.

Duff, J.

DUFF, J.:—I think the Judge of the Court below failed to appreciate the exact significance of sec. 20 of the Act of 1917. It imposes, I think, a substantive obligation upon the municipality and its office is not restricted to limiting the protection which the town would derive from the statutes affecting it in respect of the construction of public works. The scope of the obligation I shall speak of presently.

Mr. Clark's argument based on sec. 87 fails, I think, for this reason, that although the subject matters of the two sections may in some slight degree overlap, I think it is quite clear that the conclusion of the trial Judge that what is complained of here was done in the course of construction, is a conclusion which is unassailable.

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As to the scope of the obligation imposed by section 20, I think the effect of the section is that where public works are constructed in such a manner as to endanger, in fact, the public health and safety, the town is *primâ facie* responsible for any injuries arising from this circumstance; but in accordance with the long series of decisions relating to provisions expressed in similarly unqualified language, the town may escape liability in such cases by shewing that it has done everything possible for the protection of the public health or safety in view of all reasonably likely contingencies. I think the appeal should be allowed and the judgment of Stuart, J., restored.

Appeal allowed.

SPRATT v. TOWNSHIP OF GLOUCESTER.

ONT.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Ferguson, JJ.A. June 11, 1920.

MUNICIPAL CORPORATIONS (§ II G—231)—CONSTRUCTION OF DRAINAGE WORKS—STATUTORY AUTHORITY—INJURIOUS AFFECTION OF LANDS—LIABILITY OF MUNICIPALITY.

No action lies for damages for injurious affection of lands caused by the construction of certain drainage works, where such works are constructed under statutory authority, the only remedy of a land-owner whose lands have been so affected being to seek compensation under sec. 98 of the Municipal Drainage Act, R.S.O. 1914, ch. 198, and sec. 325 of the Municipal Act, R.S.O. 1914, ch. 192, and such claim is barred by sec. 326 of the latter Act if not made within one year.

[*Corporation of Raleigh* v. *Williams*, [1893] A.C. 540, followed. See Annotation, 21 D.L.R. 286.]

Statement.

APPEAL by plaintiff from the judgment of the Drainage Referee, dated March 28, 1919. The following statement of facts is taken from the judgment of Meredith, C.J.O.

The action is brought to recover damages alleged to have been sustained owing to the appellant's land, consisting of the east half of lot number 27 and the east half of the north half of lot number 28 in the 6th concession Rideau front in the township of Gloucester, being overflowed and otherwise injured, as he alleges, by the construction by the respondent of certain drainage works.

The action was, by an order dated the 1st March, 1919, referred to the Drainage Referee, under the provisions of the Municipal Drainage Act.

The acts complained of are the following:—

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1. Depositing earth and materials upon the base-line road, raising its elevation, and thereby penning back upon the appellant's land water which would otherwise escape from it.

2. Blocking up a culvert which had been built by the respondent under and across the base-line road, and thereby taking away the means that had been provided for permitting the water which collected on the appellant's land and the land of adjacent owners to escape across the road.

3. The construction in 1914 of the Findlay creek drain, which was designed to carry a large volume of water from lands lying to the west of the appellant's land, but which was not of sufficient capacity to do so, with the result that the water brought down by the drain is carried upon the appellant's land in the winter and spring seasons, and he is thereby prevented from working and cropping his land to advantage, and noxious weeds are brought down and deposited on his land.

4. That, as the result of the construction of this drain, the appellant's land has been divided into two parts, and that it is a "trap" and a source of danger to his horses and cattle.

5. That, during the construction of this drain, poor and infertile soil in large quantities was dug up and deposited on his land.

The Referee dismissed the action with costs.

F. B. Proctor, for appellant. *F. H. Chrysler*, K.C., for respondent.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—All of the works the effect of which, as the appellant contends, is injuriously to affect his land, were constructed under statutory authority, and no action lies for the recovery of any damages resulting from their construction. *Corporation of Raleigh* v. *Williams*, [1893] A.C. 540, is conclusive as to this, and also as to the only remedy of a land-owner whose lands have been so affected being to seek compensation under the provisions of what is now, though somewhat changed in form, sec. 98 of the Municipal Drainage Act, R.S.O. 1914, ch. 198, and what is now sec. 325 of the Municipal Act, R.S.O. 1914, ch. 192, and any such claim is now barred by sec. 326 (1)* of the latter Act.

*326.—(1) Except where the person entitled to the compensation is an infant, a lunatic, or of unsound mind, a claim for compensation for damages

The only question which remains to be considered is whether the claim of the appellant, based upon the raising of the level of the base-line road and the closing up of a culvert which at one time passed under it, is maintainable.

The ground upon which counsel rested this claim was that, assuming that the respondent had the right to raise the level of the road, even if the raising of it had the effect of preventing the surface-waters that would otherwise have escaped across the road from taking that course, it had no right to bring down waters from the upper lands by means of its drains and to place what was in effect a dam upon the roadway, and thereby prevent those waters from escaping and to back them on the appellant's land.

It is quite clear that, apart from the question of whether more water is brought down by the drains from the upper lands to the appellant's land than would have come there had the drains not been constructed, and the effect of the raising of the level of the base-line road forming a barrier which prevented these waters flowing away, the appellant has no cause of action. The respondent had the right to raise the level of the road, and by that means to prevent surface-water that would otherwise have flowed upon it from going there.

The raising of the road, by depositing upon it the material removed in digging the drain, was part of the drainage scheme as recommended by the engineer; and it follows that, if the appellant sustained damage by reason of waters which would have escaped from his land had that not been done being prevented from escaping, his remedy was to claim compensation under the Act; and, for the reasons already given, his claim for compensation is barred by the limitation provision of the Municipal Act.

As I have reached the conclusions I have stated, the appeal fails, and it is unnecessary to determine whether or not the conclusion of the Referee that the appellant has not been injured by the works of the respondent is right, though as at present advised I see no reason for differing from that conclusion.

Since the foregoing was written, counsel for the appellant has referred to *Rex* v. *Marshland Smeeth and Fen District Com-*

resulting from his land being injuriously affected shall be made in writing, with particulars of the claim, within one year after the injury was sustained, or after it became known to such person, and, if not so made, the right to compensation shall be forever barred.

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missioners (1919), 121 L.T. 599, and has called attention to the fact that the evidence is that the drain passing through the appellant's land was dug deeper and wider than was authorised by the by-law under the authority of which it was dug. It is true that that is shewn, but it is also shewn that in digging a dredge was used, and that it is impracticable when a dredge is used to avoid this; and there is also the further difficulty in the appellant's way that there is nothing to shew how far, if at all, this contributed to the damage which the appellant alleges that he has sustained.

In any case, any claim in respect of this falls within the very wide provisions of sec. 98 of the Municipal Drainage Act, and the claim, not having been made within two years, (sub-sec. 3), is barred.

The case referred to is distinguishable. If inconsistent with the decision of the Judicial Committee in *Corporation of Raleigh* v. *Williams*, it cannot be followed, but it is not inconsistent with that case. In that case the turning point was that the Legislature had provided for the appointment of an engineer to recommend what work should be done, and had authorised the council to pass a by-law for carrying out his recommendation, and that the corporation, whose council acted in good faith upon his recommendation, was not a wrongdoer even if the work caused injury, and that a person who suffered injury must seek for compensation under the provisions of the Act providing for compensation to persons injured.

The *Raleigh* case was decided on a drainage Act in which the provision for compensation was contained; the transfer of that provision into the Municipal Act has not effected any change in the law. This seems clear. The provisions of sec. 325 of the Municipal Act are in terms applicable to making compensation for injuriously affecting land by the exercise of the powers of a corporation under the Act, "or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act."

I would dismiss the appeal, but, under all the circumstances, the dismissal should be without costs.

Appeal dismissed.

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Judicial Committee of the Privy Council, Viscount Haldane, Lord Moulton, Lord Sumner, and Lord Parmoor. June 25, 1920.

EXPROPRIATION (§ III C—135)—AGREEMENT FOR EXTENSION OF TIME FOR PAYMENT OF AMOUNT AWARDED—PAYMENT INTO COURT—COURT TAX—RIGHT OF OWNER TO FULL AMOUNT OF AWARD.

In an expropriation proceeding by the City of Montreal for a municipal improvement, involving several properties, it was agreed that an extension of time was to be granted for payment of some of the claims until the whole matter was settled, upon payment into Court of the compensation awarded in the particular case. Upon payment into Court the amount paid in became subject to two charges of one per cent. each and no provision was made in the agreement for payment of this charge. Upon payment out to the person whose property was expropriated these charges were deducted from the amount paid. Their Lordships held that the party whose property was expropriated was entitled to payment of the whole amount of the compensation awarded, and that the city must pay the tax charges.

[Review of legislation and authorities.]

Statement.

APPEAL from the Superior Court sitting in review for the District of Montreal (1917), 53 Que. S.C. 337, 24 Rev. de Jur. 161, maintaining the action of the plaintiff, and unanimously reversing the judgment of the Superior Court, in an action to recover the balance of compensation awarded in expropriation proceedings, the appellant having deducted certain Court taxes from the amount paid over. Affirmed.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—In 1912 and 1913 the City of Montreal had in view a municipal improvement, consisting in the extension of the Rue du Palais, or Boulevard St. Joseph, in the Quartier St. Denis of the city, for which it was necessary to acquire a considerable amount of land then in private hands. The city had special powers of acquiring land by compulsory purchase under a statute, which constitutes and is called its charter, 62 Vict., 1899 (Que.), ch. 58, secs. 421-444 of which deal expressly with such a point as is now raised, but, either because that Act was inapplicable to the new improvement, or for some other reason, a further Act, 2 Geo. V., 1912, ch. 56, was passed, called An Act to amend the charter of the City of Montreal, sec. 33 of which provided that, failing acquisition by private agreement, the city might acquire the necessary lands under the provisions of arts. 7581 to 7599 inclusive of the general Expropriation Act, R.S.Q. 1909.

Negotiations with the separate proprietors, of whom there were between 160 and 170, came to nothing, and in June, 1913, the

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city proceeded to exercise these new powers of expropriation and gave the necessary notices. The respondent, Dufresne, owned 3 plots. He refused $5,987, the price offered, and compensation amounting to $19,940 was awarded to him by duly appointed arbitrators.

Article 7598 of the Expropriation Act, R.S.Q., 1909, contemplates payment of the compensation awarded within 2 months of the date of an award. The properties were, however, numerous, the titles in some cases involved a considerable amount of investigation, the aggregate compensation ultimately awarded was a large sum, $2,273,638; and the city, no doubt wishing to deal with all the proprietors together, allowed the statutory period to elapse without making payments to them. There does not appear to have been any dispute at this stage, and the city even resolved to make some special arrangements for the convenience of the poorer proprietors. In the meantime, under date April 24, 1914, an agreement with the city was signed by the whole body of expropriated proprietors, granting an extension of time for payment, and, pursuant to this agreement, the city made an aggregate payment into Court on May 9, 1914.

The terms of the agreement were *inter alia* as follows:—

Nous soussignés, propriétaires expropriés en cette affaire, consentons que le délai fixé par la loi (art. 7581 et suivants des Status Refondus de la Province de Québec, 1909), pour permettre à la Cité de payer les montants accordés par les sentences arbitrales rendues en cette affaire, soit prolongé jusqu'au 1er juin prochain. Le délai de deux mois fixé par l'article 7598 des Status Refondus de Québec, 1909, sera censé n'expirer que le 1er juin prochain.

La Cité devra déposer les dits montants entre les mains du Protonotaire de la Cour Supérieure du District de Montréal, suivant les dispositions des articles 5781 et 7600 des Status Refondus de Québec, 1909, et ce paiement aura le même effet que s'il eût été fait dans les deux mois de la date de la reddition des sentences arbitrales.

[We, the undersigned, dispossessed proprietors in this matter agree that the extension fixed by the Act (art. 7581, R.S.Q. 1909) to permit the city to pay the amount allowed by the award of arbitrators made in this matter be extended to 1st June next.

The extension of 2 months, fixed by art. 7598, R.S.Q. 1909, shall be considered to expire only on 1st June next.

The city shall deposit the said amounts with the Prothonotary of the Superior Court of the District of Montreal, according to provisions of arts. 5781 and 7600, R.S.Q. 1909, and such payment shall have the same effect that it would have had had it been made in the 2 months from the date fixed by the award.]

When money is paid into Court, or, which is the same thing, is deposited in the hands of the Prothonotary of the Superior Court of the District of Montreal, it becomes subject to 2 charges, each of 1%, namely, a tax imposed by 12 Vict., 1849, ch. 112, entitled Acte pour pourvoir à la construction et réparation de Maisons de justice et de Prisons dans certains endroits de Bas-Canada. [An Act to make provision for the erection or repair of Court Houses and Gaols at certain places in Lower Canada]; and a further charge for the expenses of the Protonotaire, imposed by an order of the Lieutenant-Governor of the Province of Quebec in Council under the provisions of arts. 3550 and 3555 of R.S.Q. 1909. This latter charge has been imposed under earlier authority as far back as 1861. No question has been raised before their Lordships as to the validity and applicability of these provisions in the present case.

The above-mentioned agreement made no provision at all with regard to these 2 charges, each of 1%. It is hardly possible that their existence should have been overlooked by the parties to the agreement, and indeed, the resolution of the City of Montreal above referred to, which is only 6 weeks later in date than the agreement, makes special mention of them, though not so as to affect the present respondent. The questions in this appeal, which relate entirely to these charges, must, therefore, be decided by considering the nature of the charges themselves and the provisions of the articles relating to expropriation, which the City of Montreal put in force.

The sum paid to the Protonotaire on May 9, 1914, was the aggregate compensation awarded, viz., $2,273,638, with legal interest accrued to date, viz., $56,834. On July 7, the Court, on the motion of the City of Montreal, made an order for payment out of Court in favour of the present respondent. M. Dufresne's title was clear and simple: a certificate of search by the Registrar of the Division of Jacques-Cartier and Hochelaga, in which the properties lay, shewed 3 charges on them, amounting to $251.88, $1,560 and $728.28. The city paid a few dollars for Court costs: the respondent consented to an order, and the following order was made:—

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Que la dite somme soit payée et distribuée comme suit, savoir;—

Montant déposé	$20,168.38
1er—Au protonotaire pour honoraires et taxes sur deniers déposés	403.37
2ème	251.88
3ème	1,560.00
4ème	728.28
5 —A Elphège Dufresne, propriétaire la balance des deniers	17,224.85
	$20,168.38

[That the said sum be paid and distributed as follows:—

Amount deposited	$20,168.38
1st. To the Prothonotary for fees and taxes on the money deposited	403.37
2nd.	251.88
3rd.	1,560.00
4th.	728.28
5. To Elphège Dufresne, owner of the balance of the money	17,224.85
	$20,168.38]

The sum of $403.37 is the amount of the two imposts of 1% above-mentioned, and the effect of the order is that the sum, which reached Dufresne's hands, or was paid to his use, fell short of the compensation awarded him, and interest due thereon by $403.37. It is to recover this sum from the City of Montreal that the present action was brought, and the proceedings taken were in the proper form in which to obtain a decision as to the incidence of the charges under the circumstances of the case. The action is a test action.

The provisions, under which these sums are imposed, are for present purposes neutral. The words of the Act of 1849 are:—

Qu'il soit statué qu'il sera prelévé et payé a Sa Majesté une taxe ou droit de 1% sur tous les deniers qui, après la passation de cette acte, seront consignés dans toute Cour civile.

[And it be enacted that there shall be levied and paid to Her Majesty a tax or duty of 1% upon all moneys which after the passing of this Act shall be deposited in any Civil Court.]

No provision is made by which one party can transfer the burden of the tax to another, or recover it over against others. No person is ordered to pay. The Crown taxes the deposit, takes its impost where it finds it, and leaves any rights and obligations arising out of this subtraction to be decided by the application of such law or contract as may be material.

The provisions of the Expropriation Act are to the following effect. Where an award of compensation is made, and the expropriating party has paid the amount of it into Court, he becomes at once entitled, by force of the award itself, to take immediate possession, and to exercise the rights, in respect of which the compensation was awarded (art. 7595). On the other hand, an expropriatee, who is not paid the full amount awarded in capital, interest and costs within 2 months after the award, may recover the property and possession of his land or rights by ordinary civil action against the expropriator (art. 7599). These articles deal, therefore, with rights and remedies, when no difficulty supervenes upon the making of the award. There is, however, another case, namely, the existence or the fear of the existence of hypothecary claims, and in such a case the expropriator, who is willing to pay, ought not to be harassed, delayed or defeated by the lapse of the time required to ascertain who is entitled to the money, a time which might easily exceed 2 months. In such a case, which is a case quite distinct from that contemplated in art. 7595, art. 7599 gives him an alternative, which at the same time prevents an action being taken against him under art. 7598 for recovery of the property by the expropriator and enables him to deposit the amount of the award forthwith and free himself from the risk of paying the wrong person. Its material provisions are as follows, R.S.Q. 1909:—

7. Ratification of Title.

7599. 1. If the party taking the expropriation proceedings has reason to fear any hypothecary claims or has other reasons, he may deposit the amount of the compensation with the prothonotary of the district in which the lands to be expropriated are situated, with 6 months' interest, together with a copy of the award. 2. The award shall thereafter be considered a title to the lands therein mentioned, and proceedings shall be had to obtain confirmation of the title in the same manner as for other confirmations of title. 3. The judgment in confirmation of title shall forever bar all claims against the lands, including dower not yet open, as well as any mortgage or incumbrance upon the same. 4. The Court shall grant such order for the distribution, payment or investment of the amount of the compensation, and for securing the rights of the parties interested, which it deems expedient, according to law and equity. 5. The costs of the proceedings shall be paid by the party designated by the Court. 6. If the judgment in ratification of title is obtained in less than 6 months after the deposit of the amount of the compensation with the prothonotary, the Court shall order that a proportionate part of the interest be refunded to the party who made the deposit. If the judgment is not rendered until after the six months, the Court shall order

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that such additional sum as it may think right be deposited to meet the amount of the interest.

The exercise by the expropriator of the right to pay money into Court under the provisions of this article is optional. It is given him for his benefit to relieve him from a specified difficulty, or from difficulties of a similar character, and he can resort to it or not as he pleases. It follows that its language must be carefully scrutinised, when he claims that it applies to a new case. New the present case certainly is. There is no reason to suppose that it was from fear of hypothecary claims that resort was had to payment into Court, and indeed in Dufresne's case the charges on the property seem to have been simple claims, which were at once ascertained by reference to the register. No "other reasons" of a similar character are alleged. In fact, it is the appellants' case that the money was paid into Court under the agreement for an extension of time above referred to, and this agreement is not even alleged to have been necessitated by the existence or the fear of hypothecary claims. The agreement itself is not a "reason" within the meaning of the article.

The appellants have laid considerable stress on the terms of this agreement, and have contended that by reason of the words, "la Cité devra déposer les dits montants entre les mains du Protonotaire de la Cour Supérieure du District de Montréal," payment into Court was made obligatory on the city, and accordingly the mere fact of such payment operated as a complete discharge of all the obligations cerated by the award. The trial Judge accepted and the Superior Court, sitting in review, rejected this contention. In so far as it turns on the words "devra déposer les dits montants," the question is one merely of translation and of construction, on which their Lordships need say no more than that they do not differ from the view taken in the judgment appealed against. Further, the words of the agreement do not make any mention of art. 7599, and would be satisfied by giving them the effect of preventing the expropriated owners from resorting to their remedies under art. 7598 on an allegation that the specified period of 2 months had elapsed without payment being made. Their Lordships will, however, examine the question, as it was examined in the Courts below, upon the assumption that the provisions of the article are available to the appellants.

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The effect of the contention is that a debtor without having sought out his creditors, and without having paid the amount of his indebtedness into their hands or those of their authorised agents, can obtain a complete discharge from his obligations by payment to a third person, even although the result of the course so taken must be that payment in full will never be made to those creditors or to their use at all. There are no express words in the article which have that effect, and, the whole proceeding expressed in the article being taken to relieve the expropriator from an embarrassment, it is difficult to find any justification for giving him by implication a greater benefit than is afforded by that relief itself. If hypothecary claims are feared, the express operation of the article enables him to protect himself from having to pay twice over, that is from having to pay the awarded compensation and something more; why is it to be assumed that it has further an implied operation, which will secure him a discharge from his obligation under the award by paying something less than the awarded sum?

In effect, the express provisions of the article negative any such implication. The expropriator's right is to deposit with the prothonotary, not to pay the amount to him. It is within the power of the Court to order the expropriator to pay the costs of the proceeding, which is inconsistent with the mere payment into Court being his discharge, nor can the sum in dispute in the present case be regarded as costs of the proceeding, which it would be within the power of the Court to award. The expropriator has to deposit 6 months' interest in Court, 6 months being apparently the time expected to be occupied in the proceedings preliminary to judgment in ratification of title. The pronouncement of this judgment forever bars all claims against the lands. After all, the length of time necessary for investigating the rights of parties claiming in an hypothecary interest cannot depend on the expropriator, who did not create them. Their complexities arose between and concern the expropriatees and the claimants, yet, if this investigation takes less than 6 months, the expropriator gets some interest back, and, if it takes more, the Court "shall" order him to make a further deposit to meet the amount of the interest. These provisions are quite inconsistent with the view that payment into Court is in itself an acquittance and discharge to the expropriator.

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Their Lordships are accordingly of opinion that, at the time when the tax now in question was levied on the fund in Court, the expropriators, now appellants, had not discharged their obligation to pay the sum named in the award, and that, as the sum remaining in Court available to be paid out in satisfaction of the compensation awarded fell short of the total amount of that compensation, it is still incumbent on the appellants to pay to the respondent the residue. The judgment appealed against was therefore right, and their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs. In accordance with the terms, by which the appellants undertook to abide, as a condition of special leave to appeal being granted, these costs will be taxed as between solicitor and client.

Appeal dismissed.

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PRICE BROS. AND Co. v. THE BOARD OF COMMERCE OF CANADA.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. April 6, 1920.

CONSTITUTIONAL LAW (§ II B—360)—NEWSPRINT—REGULATION OF SALE OF BY BOARD OF COMMERCE—COMBINES AND FAIR PRICES ACT—DEFENCE, PEACE, ORDER AND WELFARE OF CANADA—JURISDICTION OF BOARD.

Newsprint cannot be deemed to be a "necessary of life" and an order of the Board of Commerce regulating the price, and forbidding the accumulation and withholding from sale beyond a certain quantity, is not within the jurisdiction conferred on the Board by the Combines and Fair Prices Act, 9-10 Geo. V. 1919, ch. 45.

A clause in the order requiring the furnishing at certain times, and at fixed prices, defined quantities of newsprint to designated purchasers could not have been deemed necessary "by reason of the existence of real . . . war . . . for the security, defence, peace, order and welfare of Canada" and that an Order in Council purporting to confer on the Paper Controller jurisdiction to make it, exceeded the power vested in the Governor-in-Council by sec. 6 of the War Measures Act, 5 Geo. V. 1914, (2nd sess.), ch. 2.

Statement.

APPEAL by the appellant, Price Brothers and Co., Ltd., from an order of the Board of Commerce, dated February 6, 1920, by leave of Anglin, J., in Chambers, granted under sec. 41 (2) of the Board of Commerce Act, 9-10 Geo. V. 1919, ch. 37. The order purports to have been made by the Board in the exercise of jurisdiction conferred on it by the Board of Commerce Act and the Combines and Fair Prices Act, 9-10 Geo. V. 1919, ch. 45, and also of jurisdiction formerly exercised by R. A. Pringle, K.C.,

as Paper Controller, which the Governor-in-Council purported to vest, in a modified and extended form, in the Board of Commerce, by Order in Council dated January 29, 1920.

Lafleur, K.C., and *Geoffrion*, K.C., for appellant.

Biggar, K.C., for Attorney-General of Canada.

DAVIES, C.J.:—I take no part in this judgment, having been sworn in as Administrator of the Government during the argument.

IDINGTON, J.:—This appeal is launched pursuant to an order of my brother Anglin under and by virtue of sec. 41, sub-sec. 2, of the Board of Commerce Act, against an order of said Board dated February 6, 1920, which ordered and declared as follows:—

1. That any price on the sale of roll newsprint exceeding eighty dollars per ton car lots shall be deemed to include an unfair profit and the said company is hereby, and until the further order of this board, restrained and prohibited from the making or taking of unfair profits for or upon the holding or disposition of said necessary of life, to wit, newsprint; that is to say, at any price which is to be deemed as aforesaid to include an unfair profit.

2. That the said company be and it is hereby restrained and prohibited from accumulating and with-holding from sale as aforesaid any quantity beyond amounts aforesaid of the said necessary of life, namely, newsprint.

And further specifically directed the appellant forthwith not later than February 10, 1920, to ship free on board cars one car standard newsprint as described consigned to the Montreal *Star* newspaper at Montreal, at the price of $80 a ton, and thereafter weekly as prescribed; and each of two other publishing companies in Montreal, quantities of paper as described at same price and on same terms.

The order recites as follows:—

That Price Brothers and Company, Limited, hereinafter called the company, are under obligation to supply newsprint to Canadian publishers at the rate of eleven thousand two hundred and fifty tons per annum at prices heretofore lawfully fixed:

And that the company is now supplying newsprint to Canadian publishers at the rate of approximately two thousand five hundred tons per annum, but has not delivered further supplies in Canada under its said obligation; and that newsprint is a necessary of life under the Combines and Fair Prices Act; and that the said company is accumulating and with-holding from sale the said necessary of life beyond an amount thereof reasonably required for the ordinary purpose of the business of the said company; and the undersigned deeming it expedient in exercise of the powers and authority of the Board of Commerce under the Board of Commerce Act and under the Combines and Fair Prices Act, and under and by virtue of the order of His Excellency the Governor-General-in-Council concerning paper control dated January 29, 1920, and numbered P.C. 230, to order and declare as herein set forth.

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The said Order in Council dated January 29, 1920, is as follows:—

His Excellency the Governor-in-Council, on the recommendation of the Minister of Finance, is pleased to order and it is hereby ordered that until the publication of a Proclamation by the Governor-General-in-Council under the authority of the War Measures Act, 1914, declaring that war no longer exists the Board of Commerce of Canada, shall—

(a) have, exercise and perform all powers, jurisdiction, authority and duties which were heretofore or are exercisable by the Commissioner and Controller of Paper, provided that the Orders of said Board with respect to newsprint paper, sulphate and sulphide, shall be effective and have the force of law as and when made and shall not require confirmation by Order in Council, nor shall the exercise by said Board of any of said powers or the performance by said Board of any of said duties, be subject to appeal except as by the Board of Commerce Act provided;

(b) be appointed such Commissioner and Controller of Paper;

(c) have jurisdiction, power and authority to direct, require and compel shipment by manufacturers of newsprint paper of such quantities of newsprint paper as, in the opinion of the Board, are necessary and can be provided from any paper mill or persons, place or places in Canada;

(d) shall have power and jurisdiction to order and direct that the breach or non-observance by any person or corporation of any order or direction which the said Board may make or give under authority of this Order shall entail the same consequences and liability for the same penalties as are provided by sec. 20, sub-sec. (2), of the Combines and Fair Prices Act, including the cumulative responsibilities of co-directors and associate directors and officers of companies and corporations, and that all other provisions of law as to the jurisdiction of Courts and otherwise as to procedure to enforce orders as set forth in the said Acts shall apply to all matters hereunder; and shall have all powers and authority to continue and carry on to completion all business and proceedings now pending in the office of the Commissioner and Controller of Paper.

The War Measures Act of 1914, 5 Geo. V. (Can., 2nd sess.) ch. 2, was assented to on August 22, 1914, and the only war then in existence and to which it doubtless related, was that which shortly before that time had begun with Germany and Austria.

Practically that ended with the armistice of November 11, 1918, but it must be held in law to have existed until the signing of the treaty of peace.

That was declared by an Imperial Proclamation to have taken place on June 29, 1919. The assent of Germany had been given the day before, and later that of Austria was given on September 10, 1919.

The section 6 of the War Measures Act is that which enabled the Governor-in-Council to "make from time to time such orders and regulations as he may by reason of the existence of real or

apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada," and that specifically assigns a number of subject matters as within the classes of subjects intended to be comprehended therein.

True the section provides for and anticipates a possibly wider range of subjects, but for the present purpose I have not heard of any such having arisen.

That which we have to deal with, if by any reasonable possibility at all within the operative ambit of the Act, I think must fall within sec. 6, sub-sec. (e), which reads as follows:—"(e) trading, exportation, importation, production and manufacture."

It certainly is not covered by either "exportation" or "importation." Nor can it fall within such "trading" as conceivably within the range of what a war measure often has to deal with and forbid or enforce if reason is at all applicable as I hold it must be to deal sensibly with the madness of war and all implied therein.

I have much difficulty in seeing how anything in sub-sec. (e) can apply to the mere direction of selling newsprint paper by a manufacturer thereof to a person wishing to use it. Indeed, after much consideration, I cannot think how that purely business transaction of a very ordinary type can be said to have any relevancy to the matters therein specified of possibly vital importance in many ways conceivable in a state of war.

Section 6, sub-sec. (f), "appropriation, control, forfeiture and disposition of property and of the use thereof," clearly extends only to the taking and using of private property in such a way as the authorities concerned may require to meet the exigencies of the case.

The entire item certainly does not cover anything comprehended in what we have to consider in way of regulating the private dealings between parties carrying on their respective businesses.

Indeed the argument of counsel referred only to the possibilities of mystery and secrecy which might arise and could not reasonably ever be disclosed, but in fact the time therefor has ceased and it is hard to conceive that it ever existed in relation to what is here in question. Nothing forbidding the disclosure in a

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free country would seem to have existed in that which is involved herein.

Then, from the point of view of the War Measures Act, we come to the Order in Council of December 20, 1919, which I submit recognises to the fullest extent the termination of the war, yet strangely excepts from the general operation of all such orders and regulations as needed therefor and are to be repealed, the item of "pulp and paper control"—with 8 other items.

I can conceive of problems in way of liquidation, as it were, of such items as "internment operations" and "trading with the enemy," requiring a reservation, but I am quite unable to conceive how the item of "pulp and paper control" can fall therein or thereunder.

Each transaction relative thereto had been already liquidated by the delivery of paper and payment therefor.

In the last desperate resort, as it were, the justification for the order is rested upon the Combines and Fair Prices Act, 9-10 Geo. V. 1919, ch. 45, and the powers of the Board of Commerce thereunder.

Section 16 of said Act reads as follows:—

> 16. For the purposes of this Part of this Act, the expression "Necessary of life" means a staple and ordinary article of food (whether fresh, preserved, canned, or otherwise treated) clothing and fuel, including the products, materials and ingredients from or of which any thereof are in whole or in part manufactured, composed, derived or made, and such other articles of any description as the Board may from time to time by special regulation prescribe.

I am unable to understand how newsprint can under such a definition of "necessaries of life" fall thereunder, or anything the Board of Commerce by any due observance of the *ejusdem generis* rule, which must be adhered to, in the interpretation and construction thereof, may see fit to include within the definition, can be held as falling thereunder.

I am, therefore, of the opinion that the Order in Council now in question cannot be properly maintained and hence that this appeal should be allowed with costs.

Duff, J.

DUFF, J.:—A careful review of all the considerations presented on the argument has only confirmed my opinion that the fourth paragraph of the order impeached on the appeal cannot be sustained as emanating from any authority given by the War Measures Act, 1914, 5 Geo. V. (2nd sess.), ch. 2.

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In this connection the sole point requiring examination is that which arises out of Mr. Biggar's contention in his admirable argument that Orders in Council made by the Governor-General-in-Council professedly under the authority of sec. 6 of that Act are not judicially revisable. I think such orders are reviewable, in this sense that when in a proper proceeding the validity of them is called into question, it is the duty of a Court of Justice to consider and decide whether the conditions of jurisdiction are fulfilled and if they are not being fulfilled, to pronounce the sentence of the law upon the illegal order.

One of the conditions of jurisdiction is, in my judgment, that the Governor-in-Council shall decide that the particular measure in question is necessary or advisable for reasons which have some relation to the perils actual or possible of real or apprehended war, (I leave the case of insurrection out of view as having no relevancy) or as having some relation to the prosecution of the war or the objects of it.

The recitals of the order of December 20 are I think in themselves sufficient to constrain any Court to the conclusion that the order of January 29 was not preceded or accompanied by any such decision.

As to the first and second paragraphs of the order of the Board of Commerce, I adhere without any doubt whatever to the opinion expressed in the course of the argument that the classes of articles which the Board is authorised to bring by regulation within the category "necessaries of life" do not comprehend articles which are not necessarily by reason of their value required for some purposes connected with the physical life of the individual.

Anglin, J.

ANGLIN, J.:—Price Bros. & Co., Ltd., appeal from an order of the Board of Commerce, dated February 6, 1920, by leave of a Judge of this Court granted under sec. 41 (2) of the Board of Commerce Act, 9-10 Geo. V. 1919, ch. 37. The order purports to have been made by the Board in the exercise of jurisdiction conferred on it by the Board of Commerce Act and the Combines and Fair Prices Act, 9-10 Geo. V. 1919, ch. 45, and also of jurisdiction formerly exercised by R. A. Pringle, K.C., as Paper Controller, which His Excellency the Governor-in-Council purported to vest, in a modified and extended form, in the Board of Commerce by Order in Council dated January 29, 1920.

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While several questions are formulated in the petition on which leave to appeal was obtained, they all seem to resolve themselves into one—the power of the Board to make the impugned order. Three clause of it—Nos. 1, 2 and 4—are especially challenged. Clause No. 1 prohibits the appellant from taking any price exceeding $80 per ton for newsprint, declaring that any price in excess of that sum "shall be deemed to include unfair profit." Clause No. 2 forbids the appellant accumulating and with-holding from sale any quantity of newsprint beyond an amount reasonably required for the ordinary purposes of its business. These two clauses are upheld by counsel representing the Attorney-General of Canada on the ground that newsprint was rightly declared by the Board to be "a necessary of life" within sec. 16 of the Combines and Fair Prices Act, and that as such the Board was empowered to deal with it as it did in those clauses.

The argument covered a wide field, the constitutionality of both statutes involved being challenged and various questions discussed as to the construction and sufficiency of the findings of fact in the order. In the view I take of the matter, however, it seems necessary only to consider on this branch of the case whether the finding or declaration that newsprint is a necessary of life within sec. 16 of the Combines and Fair Prices Act can be upheld. If it cannot, the jurisdiction of the Board to make clauses 1 and 2 of its order cannot be maintained under that Act and the Board of Commerce Act; so far as they may be supported under any powers vested in the Board as Paper Controller they may be more conveniently considered with clause 4, which, it is common ground, can be supported only under the latter powers.

By clause 4 the appellant is required to furnish at certain times to named purchasers and at fixed prices defined quantities of newsprint. The appellant challenges the power of Parliament to confer jurisdiction to make such an order on the ground that it involves an undoubted invasion of the field of "property and civil rights" assigned by the B.N.A. Act to the legislative jurisdiction of the Provinces; and it also maintains that the Orders in Council under which the Board has acted were not authorised by the War Measures Act, 1914, under which they purport to have been made. I find it unnecessary to pass upon the alleged invasion of provincial rights and therefore refrain from any expression of

opinion upon it. *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96, at 109.

By sec. 5 of the War Measures Act, 1914, it is enacted that war (by which, I take it, is meant the "real war" during which, only, under sec. 3, sec. 6 is in force) declared to have existed since August 4, 1914, "shall be deemed to exist until the Governor-in-Council by proclamation published in the *Canada Gazette* declares that it no longer exists."

It is common ground that such a proclamation has not yet been made or published. Therefore "real war" is still existing for the purposes of sec. 3; and sec. 6 is consequently still in force.

Now sec. 6 empowers the Governor-in-Council to make such orders and regulations "as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada;" and in particular in regard to "trading, exportation, importation, production and manufacture," and "appropriation, control, forfeiture and disposition of property and of the use thereof."

Assuming the validity of this legislation both as being restricted to a field within sec. 91 of the B.N.A. Act and as not involving a delegation of powers beyond the competence of Parliament, whether the Orders in Council on which the Board must rely to justify the exercise of the powers which it asserts as Paper Controller are within its purview must still be considered.

In view of the provisions of the statute, 9-10 Geo. V. 1919, ch. 63, I think the validity of the Orders in Council therein recited is probably not now open to question on the ground that they transcend the jurisdiction which the War Measures Act, 1914, purports to confer on the Governor-in-Council; and it may also perhaps be assumed that Parliament thereby recognised the office of "Commissioner and Controller of Paper" as one not personal to Mr. Pringle but as an office which would continue, should he resign or be removed therefrom, and might thereupon be filled by appointment of the Governor-in-Council. But, having regard to the apparent purpose of that statute, to its title and recital and to the use in sec. 1 of the past participle "begun" and the omission of any such future perfect adjectival phrase as "which shall have been begun," I cannot think it was intended

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thereby to enlarge the scope of the jurisdiction intended to be conferred on the Governor-in-Council by the War Measures Act, 1914, or to enable the Paper Controller to exercise powers greater or more extended than under that Act the Governor-in-Council is authorised to vest in him, or to extend his powers further than might be necessary to carry to completion and final disposition work begun by him within powers for conferring which the War Measures Act, 1914, rightly construed may be invoked as authority. In particular, I cannot regard the statute of 1919 (ch. 63) as repealing or dispensing with the condition expressed in sec. 6 of the War Measures Act that orders and regulations made thereunder must be such as the Governor-in-Council "may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, or welfare of Canada."

If that Act was designed to authorise the Paper Controller, whether directly or through the medium of an Order in Council, to interfere with property and civil rights, as the Board purports to do by the order appealed from, its constitutionality would certainly call for very grave consideration.

Passing over as not material several intervening Orders in Council—one of July 7, 1919, one of December 1, 1919, one of December 15, 1919, and two of January 5, 1920, providing means for making orders of the Paper Controller effective, one of December 30, 1919, approving orders of the Controller fixing prices on newsprint from January 1 to July 1, 1920, two of January 22, 1920, accepting Mr. Pringle's resignation and appointing R. W. Breadner in his stead and one of January 29, accepting Breadner's resignation, we come to the vitally important Order in Council—that of January 29, 1920, appointing the Board of Commerce as Paper Controller with extended powers and jurisdiction. The approval of the Governor-in-Council, theretofore required before orders of the Paper Controller became effective, was thereby dispensed with, and the appeal to the Paper Controller Tribunal, established under Order in Council of September 16, 1918, was abolished. In lieu thereof the orders and acts of the Board as Paper Controller were made subject to appeal only as provided by the Board of Commerce Act, under which the present appeal is brought. In addition to "all powers, jurisdiction, authorities

and duties . . . heretofore exercisable by the Commissioner and Controller of Paper," the Board was expressly vested with jurisdiction, power and authority to direct, require, and compel shipment by manufacturers of newsprint paper of such quantities of newsprint paper as, in the opinion of the Board, are necessary and can be provided from any paper mill or persons, place or places in Canada.

I shall assume that the terms of this Order in Council, if valid, are wide enough to clothe the Board with power to make its order of February 6, now appealed from. To support that order, so far as it depends on the Board's jurisdiction as Paper Controller, it is essential that the Order in Council now under consideration should be maintained. In so far as it provides for the appointment of the Board as Paper Controller and purports to confer on it powers necessary to carry to completion matters begun by the Paper Controller before July 7, 1919 (when ch. 63 of the statutes of that year was assented to), its validity may be assumed. But the Board's order of February 6 is not restricted to such matters. On the contrary, it deals with distinctly new matters—matters not theretofore begun—the fixing of the price of newsprint and its accumulation by Price Bros. from the date of the order until March 15, and the supply of that commodity by Price Bros. in fixed quantities and at fixed prices to certain consumers for future periods. Can the validity of an Order in Council passed on January 20, 1920, under the War Measures Act, 1914, conferring power to make such an order be maintained?

The common knowledge possessed by every man on the street, of which Courts of justice cannot divest themselves, makes it impossible to believe that the Governor-in-Council on January 29, 1920, deemed it "necessary or advisable for the security, defence, peace, order and welfare of Canada . . . by reason of the existence of real or apprehended war, invasion or insurrection," to confer on the Paper Controller such powers as the Board has purported to exercise by its order now in appeal. Advisability or necessity, however great, arising out of post-war conditions is not the same thing as, and should not be confounded with, advisability or necessity "by reason of the existence of real or apprehended war."

Real war had long since ceased, although, in a fictitious sense, the continued existence of it for some purposes is provided for by

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sec. 5 of the War Measures Act, 1914. That in passing the Order in Council of January 29, 1920, the Governor-in-Council was actuated by any apprehension of war, invasion or insurrection is not suggested.

If further evidence were needed that the Governor-in-Council was apprised that emergency legislation by Orders in Council was no longer necessary or advisable by reason of the existence of war, it is furnished by his own Order in Council of December 20, 1919, which recites that "so far as affects the question under consideration" (*i.e.*, the duration of emergency legislation by Orders in Council) the provisions of the Consolidated Defence of the Realm Acts, 1914, of the United Kingdom, 5 Geo. V. 1914, ch. 8 (see p. lxxxvii. of 1915 Can. Stats.), and of the War Measures Act, 1914, while varying considerably, "were enacted for the same purposes"—that a legal committee appointed in England by His Majesty's Government had reported that the legislative powers conferred on the Government by the former Act "can be exercised only during the war and that the orders and regulations made by the Government under the statute could not have any valid operation after the termination of the war," and also that "the powers are given by reason of the national emergency and vest the Executive with an authority so wide that we think it must have been intended only to exist during the existence of the emergency."

The Order in Council of December 20 further recites that:

> It must be realized that although no proclamation has yet been issued declaring that the war no longer exists actual war conditions have in fact long ago ceased to exist, and consequently existence of war cannot longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security, defence, peace, order and welfare of Canada.

It is true that, while many Orders in Council passed under the War Measures Act, 1914, were repealed by the Order in Council containing these recitals, the Orders in Council respecting "Pulp and Paper Control" were directed to remain in force, as were those respecting some eight other subjects; but this may have been—probably was—because, as in the case of "Internment Operations" for instance, it was necessary to carry to completion and wind up work and undertakings begun during the war and still unfinished.

In view of the foregoing facts, however, in my opinion it cannot be suggested, without imputing bad faith to the Governor-in-Council, that in making the Order in Council of January 29, 1920, he professed to do something which he "deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of real or apprehended war, invasion or insurrection."

It is noteworthy that, under the opening paragraph of that Order in Council, the powers which it purports to confer on the Board are to be exercised not so long as the Governor-in-Council deems necessary for the security, etc., of Canada by reason of the existence of war, but "until the publication of a proclamation by the Governor-in-Council under the authority of the War Measures Act, 1914, declaring that the war no longer exists."

A very strong indication is thus afforded that the Governor-in-Council must have acted in January, 1920, under the erroneous impression—I say it with all respect—that until the actual publication of a peace proclamation in the *Canada Gazette* his legislative powers under sec. 6 of the War Measures Act were absolute and unqualified and were not subject to the condition that their exercise must be deemed by him "necessary or advisable for the security, etc., of Canada by reason of the existence of real or apprehended war, invasion or insurrection."

Confronted with the alternatives of an imputation of bad faith or of finding that there has been an attempted exercise of power through overlooking, or under a mistaken view as to the effect of, a condition requisite for its exercise imposed by the Act conferring it, I have no hesitation in choosing the latter.

I am therefore of the opinion that the order appealed from exceeds any powers which it was competent for the Governor-in-Council on January 29, 1920, to confer on the Paper Controller, and cannot be supported under the Board's jurisdiction to discharge the duties of that office.

On the other branch of the case I am of the opinion that the Board erred in declaring newsprint to be a "necessary of life" under sec. 16 of the Combines and Fair Prices Act, 9-10 Geo. V. 1919, ch. 45, and that it therefore exceeded its jurisdiction as administrator of that Act in making the order appealed from. Sec. 16 is as follows:—

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16. For the purposes of this Part of this Act the expression "Necessary of life" means a staple and ordinary article of food (whether fresh, preserved, canned or otherwise treated), clothing and [*sic*] fuel, including the products, materials and ingredients from or of which any part thereof are in whole or in part manufactured, composed, derived or made, and such other articles of any description as the Board may from time to time by special regulation prescribe.

The following three rules of construction are so well known that it seems almost pedantic to re-state them; but their co-ordination and relations *inter se* are perhaps not always equally well understood.

Lord Wensleydale's golden rule, that the grammatical and ordinary sense of words is to be adhered to unless that would lead to some absurdity, repugnance or inconsistency so great as to convince the Court that the intention could not have been to use them in that ordinary signification, applies to general words, as to other words. *Generalia verba sunt generaliter intelligenda*, 3 Co. Inst. ch. 21, p. 76; *Att'y-Gen'l* v. *Mercer* (1883), 8 App. Cas. 767, at 778.

On the other hand, general words must be restricted to the fitness of the subject matter (Bacon's Maxims, No. 10) and to the actual apparent objects of the Act (*River Wear Commissioners* v. *Adamson* (1876), 1 Q.B.D. 546; (1877), 2 App. Cas. 743, at 750-1, 757-8), following the intent of the Legislature to be "gathered from the necessity of the matter and according to that which is consonant to reason and good discretion." *Stradling* v. *Morgan* (1558), 1 Plowd. 199, 75 E.R. 305; *Cox* v. *Hakes* (1890), 15 App. Cas. 506, at 517-8.

Where general words are found, especially in a statute, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category (*Reg.* v. *Edmunson* (1859), 2 E. & E. 77, 121 E.R. 30, 28 L.J. (M.C.) 213), unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification.

Recent applications of the rule last stated, and usually known as the *ejusdem generis* rule, are to be found in the judgments in the House of Lords in *Stott (Baltic) Steamers, Ltd.* v. *Marten*, [1916] 1 A.C. 304, and the judgment of Sankey, J., in *Att'y-Gen'l* v. *Brown*, [1920] 1 K.B. 773, 36 T.L.R. 165.

At first blush the words "of any description" appended to the general words "other articles" would almost seem to have been inserted to indicate an intention to exclude the application to this section of the *ejusdem generis* rule, and to require that the general words "other articles" should here be given their ordinary general construction. Yet, although no authority has been cited where that rule has been applied notwithstanding the addition of the words "of any description" to such general words as "other articles," it has frequently been acted on where the equally comprehensive word "whatsoever" (see Stroud's Judicial Dictionary, 2nd ed., p. 223) has been appended to similar general words, such as "other persons." Thus, in construing the phrase "no tradesman, artificer, workman, labourer, or other person whatsoever" of the Sunday Observance Act of 1677 it has been held that a farmer (*Reg.* v. *Cleworth* (1864), 4 B. & S. 927, 122 E.R. 707), a barber (*Palmer* v. *Snow*, [1900] 1 Q.B. 725), and a coach proprietor (*Sandiman* v. *Breach* (1827), 7 B. & C. 96, 108 E.R. 661), are not within its purview. In *Fish* v. *Jesson* (1689), 2 Vern. 114, 23 E.R., 682 a devise of "all debts, accounts, reckonings and demands whatsoever," made to a servant, was held not to include a trunk belonging to the testator in his hands at the date of the will and at the death of the testator which contained jewels, medals, etc. Again in *Harrison* v. *Blackburn* (1864), 17 C.B. (N.S.) 678, 144 E.R. 272, the description in a bill of sale—"all and every the household goods and furniture, stock in trade, and other household effects . . . in . . . or about . . . the dwelling-house . . . and all other the personal estate whatsoever" of the assignor—was held not to carry his term or interest in the house. In *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted*, [1907] A.C. 264, at 268, Lord Halsbury referred to

> a very familiar canon of construction that, where you have a word which may have a general meaning wider than that which was intended by the Legislature, when you find it associated with other words which shew the category within which it is to come, it is cut down and overridden according to the general proposition which is familiarly described as the *ejusdem generis* principle.

In the present case far from indicating that an application of the restrictive rule would probably defeat the object of the statute or that there is good reason for believing that the Legislature intended the general words it has used to bear a more extended

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meaning than if restricted to things similar in kind to those by the enumeration of which they are preceded, consideration of the character of the Act and of the context as a whole rather leads to the contrary view—that Parliament cannot have meant that the words "other articles" should bear their ordinary broad signification. In the first place, if they did, the enumeration of articles of food, clothing and fuel was quite unnecessary and the restriction to articles "staple and ordinary," the careful particularisation of "the products, materials and ingredients from or of which any thereof are in whole or in part manufactured, composed, derived or made," and the specification, in the case of food, "whether fresh, preserved, canned or otherwise treated," serve no purpose. If the words "other articles of any description" mean "anything whatsoever," the section may be paraphrased thus: "Necessary of life" means any article of any description which the Board of Commerce may from time to time by special regulation declare to be such. Can it be that that is what Parliament intended? *In re Stockport Ragged, Industrial and Reformatory Schools*, [1898] 2 Ch. 687, at 696.

Moreover, if sec. 17, taken with sec. 28, should be regarded as an enactment in the nature of criminal law—as counsel representing the Attorney-General contended, and I incline to think rightly—the Board would thus be enabled by its mere declaration to render criminal the accumulation or withholding from sale, to the extent stated in sec. 17, of any article whatever, however little likely to be regarded as a necessary of life as that term is ordinarily understood. It is to me inconceivable that Parliament meant to confer such wide and unheard of powers. I rather think that no one would be more surprised and shocked than the legislators themselves were they informed that they had done so. I am therefore satisfied that Parliament must have intended that the words "other articles of any description" in sec. 16, notwithstanding their obvious and emphasised generality, should receive a much more restricted construction; and no other restriction that can be put upon them occurs to me which has so much to commend it, as being probably that which Parliament had in mind, as that embodied in the well-known maxim *noscuntur a sociis*. Parliament was dealing with articles of food, clothing and fuel. It had these present to its mind. It must be taken to

have been fully cognizant of the legal maxim just quoted and of its embodiment in the *ejusdem generis* rule of construction so frequently acted on by the Courts. What more natural than that it should have meant "other articles" to comprise only things which like food, clothing and fuel are requisite to maintain the physical health and vitality of the human body? Medicines have been suggested as falling within such a category; and there are, no doubt, some few other things essential to the life, health and sustenance of the body which are not strictly articles of food, clothing or fuel for which Parliament thought it well to provide. I cannot conceive of any genus or category that would include newsprint with articles of food, clothing and fuel. Nor, in my opinion, had there been no definition whatever of the term "necessary of life," would the Board have been justified in treating newsprint as such.

Even restricted as I think it should be, the discretion vested in the Board by its mere declaration to constitute criminal offences in regard to matters not specified by Parliament may seem open to some objection. But it is certainly much less objectionable than the unlimited and unqualified power for which counsel representing the Attorney-General contended.

I am for these reasons of the opinion that the order appealed from cannot be sustained either under the jurisdiction of the Board of Commerce as administrator of the Combines and Fair Prices Act or under that which it may lawfully exercise as Paper Controller.

The appeal should be allowed with costs.

Brodeur J.

BRODEUR, J.:—This is an appeal by Price Brothers & Co. from an order of the Board of Commerce passed on February 6, 1920, by which they were restrained from accumulating newsprint and were ordered to sell their goods to three Montreal publishers.

This order was made under the provisions of the War Measures Act of 1914 and under the Board of Commerce Act and the Combines and Fair Prices Act of 1919.

It is contended on the part of the appellants that the Board was without jurisdiction for making such an order and that it was beyond the powers of the Dominion Parliament to make or authorise it.

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The Attorney-General upholds the legality and the validity of the order and claims that the power of the Federal Parliament to look after the defence of the country rendered valid any legislation passed for the purpose of regulating the channels through which a particular commodity should move and the price at which it could be sold. He would consider that the Federal Parliament could then secure to newspapers an adequate supply of paper, and that such legislation would be a measure of defence.

The War Measures Act of 1914 on which the order in question is based was very wide. But it never contemplated that the price at which newspapers would be supplied with their raw material should be fixed by the Government or by some other authority.

The Act contemplated measures that would be rendered necessary for the defence of the country, as the censorship of the news, the arrest, detention and deportation of undesirable persons or of enemy subjects, the levy of an army, the control of the transport by land, air and water, the control of the food for war purposes and maintaining the forces. But it seems to me that it requires a great deal of imagination to include in those war measures the supply of newsprint to the press, and especially the exact price at which the newspapers should be supplied with paper.

It is certainly not what Parliament intended to authorise when they gave the Governor-in-Council the power to pass Orders in Council of the nature of defensive measures.

Besides, these powers could be exercised only during the war. We have in the record proclamations stating formally that in the opinion of the Government the state of war has ceased to exist. The order which is attacked being posterior to the declarations made that the war is at an end, it was passed at a time when the power, if it ever legally existed, had ceased to have force and effect.

It is contended by the Attorney-General that the Federal Parliament, in view of its power to regulate trade and commerce, could pass the legislation embodied in the Acts in question.

The words "regulation of trade and commerce" may cover a very large field of possible legislation and there has been much discussion as to their limits. They were first considered in the

Parsons case, 7 App. Cas. 96, in 1881; and there it was stated that these words in their unlimited sense would include every regulation of trade ranging from commercial treaties with foreign governments down to minute rules for regulating particular trades, but a consideration of the context and of other parts shews that these words should not be used in their unlimited sense. The collocation of the regulation of trade and commerce with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of those who framed the B.N.A. Act.

Views to the same effect have been expressed by the Privy Council in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, and in *City of Montreal* v. *Montreal Street Railway*, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541.

The last case where this power of regulating trade and commerce has been considered by the Privy Council, is *Att'y-Gen'l for Canada* v. *Att'y-Gen'l of Alberta* (*Insurance Reference* case), 26 D.L.R. 288, [1916] 1 A.C. 588; and it was held there that "the regulation of trade and commerce does not extend to the regulation of a particular trade."

In the Combines and Fair Prices Act, there is an attempt to regulate the trade of those who are engaged in the trade of necessaries of life, as there was an attempt in the insurance legislation to regulate the trade of those engaged in the business of insurance.

That power cannot, in view of the above decisions, be exercised by the Federal Parliament.

On the whole, I have come to the conclusion that the Board of Commerce has no jurisdiction to pass the order of February 6, 1920, and that the appeal should be allowed with costs.

MIGNAULT, J. (dissenting):—This is an appeal, by leave of a Judge of this Court, on certain questions as to the jurisdiction of the Board of Commerce of Canada to make the order complained of by the appellant. The Attorney-General of Canada appeared to defend the order, and the questions of jurisdiction submitted were exhaustively argued.

The main provisions of this order are preceded by a kind of preamble stating that the appellant is under obligation to supply newsprint to Canadian publishers at the rate of 11,250 tons per annum at prices heretofore lawfully fixed, but is now supplying

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it at the rate approximately of 2,500 tons per annum, and has not delivered further supplies in Canada; that newsprint is a necessary of life under the Combines and Fair Prices Act; that the appellant is accumulating and withholding the said necessary of life beyond an amount thereof reasonably required for the ordinary purposes of its business; and it is declared that the Board of Commerce deems it expedient, in the exercise of its powers and authority under the Board of Commerce Act and the Combines and Fair Prices Act, and under and by virtue of the Order in Council of the Governor-General-in-Council concerning paper control, dated January 29, 1920, and numbered P.C. 230, to order and declare as follows:

1. That any price on the sale of roll newsprint exceeding eighty dollars per ton car lots shall be deemed to include an unfair profit and the said Company is hereby, and until the further order of this Board, restrained and prohibited from the making or taking of unfair profits for or upon the holding or disposition of said necessary of life, to wit., newsprint, that is to say, at any price which is to be deemed as aforesaid to include an unfair profit.

2. That the said Company be and it is hereby restrained and prohibited from accumulating and with-holding from sale as aforesaid any quantity beyond amounts aforesaid of the said necessary of life, namely, newsprint.

3. The clauses above numbered 1 and 2 are to be deemed interim provisions and are to remain in force until the fifteenth day of March, 1920, with leave to the Company to move to rescind them and to any other person concerned to renew and extend the said provisions.

4. Under the special authority vested in the undersigned by virtue of said Order in Council and otherwise existing under the said Acts the undersigned direct that the said Price Brothers and Company, Limited, do—

(a) Forthwith and not later than the tenth day of February, 1920, ship free on board cars on the railway at or nearby a mill of the said Company, one car standard newsprint 32 lb. basis, 72 inch rolls, 33 inches diameter, pulpwood cores with metal ends consigned to the publishers of The Montreal *Star* newspaper at Montreal, Quebec, freight charges collect, at the price of eighty dollars per ton, bill of lading to be attached to bill of exchange, and that the said Company do thereafter in each and every period of seven days computed from time to time from and including the said tenth day of February make such shipments of the like commodity to the said consignee in the same manner and on the same terms in all respects so that the said publishers shall receive in all 93 tons of said newsprint in each and every consecutive period of seven days so computed until further order; the carload first herein mentioned is to be included in computing the first week's shipment of 93 tons.

(b) Forthwith and not later than the tenth day of February, 1920, ship free on board cars on the railway at or nearby a mill of the said Company one car standard newsprint 32 lbs. basis, consisting of 30 rolls, 16¾ inches, and the balance of the said cars in rolls 33¼ inches, all of said rolls to be from 30 to 32 inches in diameter, 3 inch iron cores consigned to The *Herald* Publishing

Company, Limited, Montreal, Quebec, freight charges collect at the price of eighty dollars per ton, bill of lading to be attached to bill of exchange, and that the said Company do thereafter in each and every period of ten days from and including said tenth day of February make such shipments of the like commodity to the said consignee in the same manner and on the same terms, so that the said The *Herald* Publishing Company, Limited, shall receive one car load composed as aforesaid of said newsprint in each and every consecutive period of ten days computed from said tenth day of February until further order.

(c) That the said Company do forthwith ship from a mill as aforesaid, consigned to Poirier, Bessette and Cie, 129-133 Rue Cadieux, Montreal, one car load standard newsprint 32 lb. basis, consisting of 29 inch rolls, diameter from 30 to 33 inches, with paper cores from 3 to 4 inches, the price and terms and means of shipment and payment to be as aforesaid, and each month hereafter on or before tenth day thereof the said Price Brothers and Company, Limited, shall make a like shipment to said consignees in the same manner and on the same terms.

The petition for leave to appeal submits seven questions which, in so far as they involve the jurisdiction of the Board, can be reduced to two:

1. Was the order in question authorised by the Dominion Parliament? and 2. Had the Dominion Parliament power to authorise it?

If the answer to either question be in the negative, the Board must be held to have acted without jurisdiction, and if a negative answer be given to the first question, it will be unnecessary to reply to the second.

Paragraphs 1 and 2 of the order involve the question whether newsprint is a necessary of life under the Combines and Fair Prices Act, 1919, 9-10 Geo. V. ch. 45. It is so declared in the order appealed from.

The definition of "necessary of life" is given by sec. 16 of the statute in the following terms: (See judgment of Idington, J., *ante* 290.)

It is obvious from this defirition that in the contemplation of Parliament necessaries of life are primarily articles necessary to sustain life, as distinguished from luxuries. Being necessaries of life, and the requirements of human life being of infinite variety, they cannot be confined to staple and ordinary articles of food, clothing and fuel, and as it was impossible to enumerate them, the Board was given the power from time to time to declare "such other articles of any description" as it might from time to

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time by special regulation prescribe, to be necessaries of life. It is argued that the *ejusdem generis* rule should be applied here and that the defining power of the Board should be restricted to articles of the same kind as staple and ordinary articles of food, clothing and fuel. But to so hold would defeat the will of Parliament, for, as I have said, the requirements of human life vary *ad infinitum*, and it would not be difficult to enumerate articles useful or necessary for the purposes of human life which are neither food, nor clothing, nor fuel, such as medicine for the sick, crutches for the lame and eyeglasses for persons with defective eyesight. I think the intention of Parliament to exclude the *ejusdem generis*, or *noscitur a sociis* rules is sufficiently shewn here by the words "such other articles of any description" (see *Larsen* v. *Sylvester*, [1908] A.C. 295, where the House of Lords held that the *ejusdem generis* rule was excluded by the words, "frosts, floods, strikes . . . and any other unavoidable accidents or hindrances of what kind soever"), and the general scheme of the Act is to entrust to the Board of Commerce the power of defining what articles, other than food, clothing and fuel, are necessaries of life, any complete or exclusive enumeration being impossible. I would not therefore cut down the generality of the terms of sec. 16 by resorting to the rule, undoubtedly very useful in many cases, that general terms following special ones are to be restricted to the kind of things specially enumerated. Moreover, if the *ejusdem generis* or *noscitur a sociis* rules apply, the powers of definition conferred upon the Board are entirely meaningless, for the enumerated articles alone could be considered necessaries of life.

This does not mean, however, that this power of definition must not be exercised reasonably, in other words, that the articles which the Board declares to be necessaries of life should not have some relation to the requirements of human life, varied and difficult to define *a priori* though they may be. And I must say that I fail to discover any possible connection between the requirements of human life and newsprint paper. It even appears almost an abuse of language to call it a necessity of life. Whatever place newspapers may occupy in modern society, and it is no doubt a very important one, and however indispensable newsprint may be for educational and other like purposes, it certainly

does not proximately or even remotely come within the class of things that can be used for the requirements of human life. I therefore am of opinion that the Board acted without jurisdiction in declaring it a necessary of life.

This conclusion shews that pars. 1 and 2 of the order complained of cannot be supported under the authority of the Board of Commerce Act or the Combines and Fair Prices Act, 1919, and these paragraphs therefore were not authorised by Parliament. This being so, it is unnecessary to determine in this case whether Parliament could validly pass these two Acts.

Paragraph 4 of the order is based on different considerations and the authority of the Board of Commerce to order the supply of newsprint to the consumers therein mentioned can only be supported under the authority vested in the Board as Commissioner and Controller of Paper by virtue of the Order in Council of January 29, 1920, and the Orders in Council that preceded it.

It may be remarked that the office of Paper Controller was created at the height of the war by various Orders in Council adopted by the Governor-General-in-Council, whereby the powers of the Controller were defined and gradually, as occasion required, increased. The powers, jurisdiction and authority of the Paper Controller were recognised and confirmed by the Dominion statute, 9-10 Geo. V. 1919, ch. 63, assented to on July 7, 1919, and were continued until the publication in the *Canada Gazette* of a proclamation by the Governor-in-Council declaring that the war which commenced on August 4, 1914, no longer exists.

The Orders in Council concerning the Paper Controller and paper control were made by the Governor-General-in-Council under the authority of the War Measures Act, 1914, and were recognised as having been so made by the statute of 1919 above mentioned. This is a direct confirmation by Parliament of the authority exercised by the Governor-General-in-Council under the War Measures Act, 1914, and in so far as the Orders in Council mentioned in the statute are concerned, certainly precludes any question whether in making them the Governor-General-in-Council acted within the authority conferred by the War Measures Act, 1914. It is to be noted that the statute of 1919 was passed several months after the armistice of November 11, 1918, had put an end to active military operations, and after the treaty of peace with Germany was signed, although before its ratification.

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Inasmuch, however, as the Governor-General-in-Council made important orders after the passing of the statute of 1919 concerning paper control, among them that of January 29, 1920, on which paragraph 4 of the order in question is based, I will briefly examine whether the authority of the Governor-General-in-Council can be sustained under the War Measures Act, 1914.

Much stress is laid on the words of sec. 6 of the Act empowering the Governor-in-Council to make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada. And it is argued that these powers can be exercised only during the existence of real or apprehended war and that no such condition now exists.

It appears sufficient to answer that by sec. 3 of the Act, the provisions of sec. 6 are only in force during war, invasion, or insurrection, real or apprehended; that by sec. 4, the issue of a proclamation by His Majesty, or under the authority of the Governor-in-Council, is conclusive evidence that war, invasion or insurrection, real or apprehended, exists and has existed for any period therein stated, and of its continuance until, by the issue of a further proclamation it is declared that it no longer exists; that by sec. 5 it is declared that war has continuously existed since August 4, 1914, *and shall be deemed to exist* until the Governor-in-Council by proclamation published in the *Canada Gazette* declares that it no longer exists; and that no such proclamation has yet been published. This, I take it, precludes us from holding that war having ceased, the jurisdiction of the Governor-in-Council under the War Measures Act can no longer be exercised.

The appellant also relies on the Order in Council of December 20, 1919. This Order in Council recites that a report from the Minister of Justice has been laid before the Governor-General-in-Council,

> directing attention to the present situation with regard to the Government Orders and Regulations which were sanctioned under the authority of the War Measures Act, 1914, and which still remain in operation.

The report refers to the terms by which authority is conferred upon the Governor-in-Council by sec. 6 of the War Measures

Act, 1914, and to the report made by the legal committee appointed in England to consider and report upon the interpretation of the term "period of war," which report states that

in our opinion the true construction of the section is that the regulations so issued can operate only during the continuance of the war. The purpose expressed is for securing the public safety and the defence of the realm, which we think mean the public safety so far as threatened by our enemies in the present war and the defence of the realm against these enemies. The powers are given by reason of the national emergency and vest the executive with an authority so wide that we think it must have been intended only to exist during the existence of the emergency.

The Minister of Justice observes that the provisions of the Defence of the Realm (Con.) Act, 1914, of the United Kingdom, and of the War Measures Act, 1914, of Canada, vary considerably, but so far as affects the question under consideration they were enacted for the same purpose, and the considerations upon which the opinion of the Committee proceeds are very pertinent to the question as to the operation of the Canadian Orders and Regulations. He adds:

It must be realised that although no proclamation has yet been issued declaring that war no longer exists, actual war conditions have in fact long ago ceased to exist, and consequently the existence of war cannot longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security, defence, peace, order and welfare of Canada.

The Armistice which concluded hostilities became effective on the 11th November, 1918, the expeditionary force has since been withdrawn and demobilized and the country generally is devoting its energies to re-establishment in the ordinary avocations of peace.

In these circumstances the Minister considers that the time has arrived when the emergency Government legislation should cease to operate.

The report of the Minister of Justice apparently recommended the repeal of the emergency Government legislation generally, but it evidently was not acted upon in this wide sense, as is shewn by the enacting clause of the Order in Council which reads as follows:

Therefore His Excellency the Governor-General-in-Council, on the recommendation of the Minister of Justice, is pleased to repeal all Orders and Regulations of the Governor-in-Council which depend for their sanction upon sec. 6 of the War Measures Act, 1914, and the same are hereby repealed as from the first day of January, 1920, *with the exception of the Orders and Regulations enumerated and included in the annexed schedule, which latter Orders and Regulations* shall continue in force until the last day of the next session of Parliament.

The schedule enumerates nine subjects as to which the Orders in Council and Regulations of the Governor-in-Council are to

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remain in force, among them, and the first in the list, "Pulp and Paper Control."

I think therefore that the appellant can found no argument on this Order in Council of December 20, 1919. It obviously must be taken as a whole, and the report of the Minister of Justice must be read either as being subject to the exceptions made by the Order in Council, or as not having been adopted as to these exceptions. In other words, as to the excepted orders and regulations, the considerations expressed by the Minister do not apply. Even if the Order in Council could be given the absolute and sweeping effect contended for, it cannot, in so far as paper control is concerned, prevail against the express provisions of the statute of 1919.

Nor can this Order in Council be held to be, as was somewhat timidly suggested, the peace proclamation referred to in sec. 5 of the War Measures Act, 1914, and in the statute of 1919.

It would be a singular process of reasoning, if I may say so with deference, to apply an Order in Council with specific exceptions as if it had contained no such exceptions. This is not construing the Order in Council, it is striking out and disregarding some of its most material provisions.

The situation consequently is this; no peace proclamation as provided in the War Measures Act, 1914, and the statute of 1919 has been published and therefore, in so far as concerns paper control and the powers of the Paper Controller, the legal presumption of the existence of war, which I take to be *juris et de jure*, cannot be rebutted. That this legal presumption may be contrary to existing facts is a matter for the consideration of Parliament that enacted it, but not for a Court of law which is bound by it. The anomaly of such a situation calls for action by Parliament or by the Governor-in-Council to bring it to an end, but no such action appears to me to be open to this Court.

I may add that a considerable number of Orders in Council are printed in the appeal book, notably one of November 3, 1917, mentioned in the statute of 1919, and by which the Paper Controller was authorised to fix the price and distribution of newsprint paper. It cannot be said that any real departure from these Orders in Council is made by the Order in Council of January 29, 1920, but the same policy, as a measure adopted under the War Measures

Act, 1914, has been continued, and the resistance of the appellant to this policy has led to the making of the order here in question.

The appellant cited two proclamations of His Majesty, the King, published in the *London Gazette* of July 1, 1919.

The first proclamation refers to the signing of the peace treaty with Germany, and orders that upon the exchange of the ratifications thereof, the said treaty of peace be inviolably observed.

The second proclamation states that whereas it has pleased Almighty God to bring to a close the late widespread and sanguinary war in which His Majesty was engaged with Germany and her allies, therefore His Majesty commands that a general thanksgiving to Almighty God for His manifold and great mercies be observed throughout His Majesty's Dominions on Sunday the sixth day of July then instant.

Surely these proclamations cannot do away with the necessity of the proclamation of peace, required by the War Measures Act, 1914, and the statute of 1919. And it may further be added that by an Order of His Majesty the King in Council, dated February 9, 1920, and published in an extra of the *Canada Gazette* of March 29, 1920, the war is declared terminated on January 10, 1920, only as to Germany and not as to the other belligerents. This shews that the proclamations published in the *London Gazette* of July 1, 1919, cannot be given the effect contended for by the appellant.

It cannot be successfully contended that the War Measures Act, 1914, transcends the powers of Parliament. It must therefore be given full effect and until it is repealed or until the peace proclamation is published, the authority of the Governor-in-Council to make these Orders in Council cannot be disputed. No question of encroachment on provincial powers of legislation under these circumstances can arise.

It has been argued that paper control has no connection with the purposes mentioned in the War Measures Act, 1914, as justifying the Governor-in-Council in making the orders and regulations therein authorised. It seems to me that unless I am ready to impute bad faith to the Crown, I should not take upon myself to determine whether its orders are necessary or advisable for the security, defence, peace, order and welfare of Canada. It is

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indeed conceivable that paper control may be very important in the national interest in the case of an emergency like war. I would, however, consider it sufficient to say in this case that no reason has been shewn why this Court should undertake to revise and set aside the discretion exercised by the Governor-in-Council under the War Measures Act, 1914, in relation to the control of paper which discretion received the approval of Parliament, as shewn by the statute of 1919.

My opinion consequently is that par. 4 of the Order in Council complained of is of binding force. I would, however, for the reasons above stated, strike out pars. 1 and 2, allowing the appeal to that extent, with costs. *Appeal allowed.*

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Sutherland and Masten, JJ., and Ferguson, J.A. June 30, 1920.

COSTS (§ II—28)—CLAIM FOR DAMAGES—NO QUESTION OF TITLE INVOLVED —AMOUNT WITHIN JURISDICTION OF COUNTY COURT — ACTION IMPROPERLY BROUGHT IN SUPREME COURT.

Where a plaintiff's claim, however framed, is in reality for damages for interfering with bars which he has put up across a right of way by taking them down and refusing to replace them, and the amount claimed being within the jurisdiction of the County Court, there is no question of title involved and the County Court has jurisdiction to try the issue. Such an action is improperly brought in the Supreme Court and costs can only be allowed on the County Court scale.

[*Bragg* v. *Oram* (1919), 50 D.L.R. 623, 46 O.L.R. 312, distinguished.]

Statement.

Appeal by the defendants from order of ORDE, J., (1920), 47 O.L.R. 217. Reversed.

Peter White, K.C., for appellants; *C. A. Payne*, for respondent.

Sutherland, J.

SUTHERLAND, J.:—This is an action wherein the late Chief Justice of the King's Bench gave a declaratory judgment, as claimed, with damages fixed at $5 and costs. The costs were taxed, by the local Taxing Officer at Belleville, on the Supreme Court scale. An appeal from the taxation was taken, which, by the judgment of Orde, J., dated the 24th February, 1920, was dismissed. This appeal is from this latter judgment.

The plaintiff, George M. Parry, is the owner of the rear half of lot No. 17 in the 3rd concession of the township of Sidney, in the county of Hastings, and the defendant James A. Parry of the adjoining west quarter of lot No. 18 in the said third concession. Both parcels were owned by Caleb Parry, who, by his will, dated

the 27th March, 1871, devised the first mentioned parcel to William Hubbard Parry (father of the plaintiff), his heirs and assigns, and the second mentioned parcel to Lester Harvey Parry (father of the defendant Parry), his heirs and assigns, together with "a right of way to and from the land hereby devised to my son William Hubbard Parry to and along the road now used as a means of entrance from the main road to the lands hereby devised to my said son William Hubbard Parry, each to keep one-half of the said road or way in repair."

It appears that until quite recently bars of a certain length and weight erected by the plaintiff, or his predecessors in title, had been placed across the road in question, which the defendant Parry and his predecessors in title, when requiring to use the right of way, were accustomed to take down and put up. The respective parties had for many years seemed to acquiesce and agree that, for the plaintiff's protection and in reasonable limitation of the defendants' rights, such bars were suitable and sufficient. Some time prior to the commencement of this action, however, without the consent of the defendants, the plaintiff put up bars longer and heavier, and which the defendants alleged were more difficult to take down and put up, and so imposed a greater restriction and burden upon them. Thereafter, when they required to make use of the right of way, while they took these bars down, they did not replace them. The plaintiff thereupon began this action by writ of summons bearing date the 23rd June, 1919, and asked for a declaration that he is entitled to maintain and keep up certain bars on the "right of way of the defendants," and that "the defendants be ordered to put up said bars after taking same down to pass along the right of way enjoyed by the defendants on the plaintiff's lands, and for damages."

In his statement of claim the plaintiff alleges that he and his predecessors in title had, as of right and without interruption for upwards of 40 years, maintained certain bars across the said right of way which had been put up to enclose his barnyard, "to prevent cattle from straying therefrom, or on his lands, necessitating the letting down of such bars in passing to and fro along said right of way." He further alleges that, "in violation of the right of the plaintiff to maintain the bars across the right of way, and have same returned to their proper and usual place after user thereof

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by the defendants and others, when the same were up as aforesaid, the defendants removed the said bars on several occasions, and refused to replace them," and further that, by reason of this conduct on the part of the defendants, "horses and cattle of the defendants and others have strayed on to" his lands, and he has been forced to replace the bars to protect his property. He accordingly claimed a declaration as mentioned, and the sum of $50 for damages.

The defendant Frank Jeffry is tenant of the defendant James A. Parry.

The defendants plead that they always permitted the plaintiff to enjoy, without "interruption of user," "all rights in the right of way" as used at the time "of the last will and testament of the said Caleb Parry deceased," and that the right of way was continuously and uninterruptedly so used until a short time before the commencement of this action, when the plaintiff replaced the old bars by others, "which are heavier and of greater trouble to install." They further say that they had thereupon notified the plaintiff that they would no longer permit the use of bars of such dimensions, and advised him that he must restore the old bars or use bars of like dimensions or size.

The defendants also plead that until the heavier bars were installed they always replaced the old bars in position after using the right of way. They admit that owing to the increased size and weight of the new bars they threw them down, and refused to permit the plaintiff to maintain the said right of way in a manner different from the way in which it had theretofore been maintained. The judgment declares "that the plaintiff is entitled to maintain and keep bars on the right of way," and "that it is the duty of the defendants to replace said bars in their proper place after their user thereof." Whatever the construction and effect of the judgment, it is not in question, as no appeal was taken therefrom.

While the plaintiff in his statement of claim makes no reference to the change in the length and weight of the bars, the defendants expressly raise this question.

So long as the old bars were left across the road, the defendants had raised no question as to the limitation, to that extent, of their user of the right of way. It was only when the plaintiff assumed

the right to put longer and heavier bars across the road, and thus increased the burden of the restriction, that the defendants objected, and, though obliged to take the bars down, in order to use the right of way at all, refused to replace them.

The Taxing Officer was of opinion that the case came within the County Courts Act, R.S.O. 1914, ch. 59, sec. 22 (1) (*d*), which is as follows:—

"(1) The County and Districts Courts shall have jurisdiction in:— . . .

"(*d*) Actions for the obstruction of or interference with a right of way or other easement where the sum claimed does not exceed $500, unless the title to the right or easement is in question, and in that case also where the value of the land over which the right or easement is claimed does not exceed that amount."

He stated, in his reasons for taxing the bill on the Supreme Court scale, that "the case, therefore, falls within clause (*d*) of sub-sec. (1) of sec. 22, R.S.O. ch. 59, an action for an obstruction to, or interference with, an easement, and the County Court has jurisdiction only if the value of the lands over which the right or easement is called in question does not exceed $500." But it is not the plaintiff's right of way which is in question or affected. What has caused the difficulty is the putting up of longer and heavier bars by the plaintiff, which interfere with the use of the right of way of the defendants as theretofore enjoyed by them. Clause (*d*) does not, in my view, apply, and that was the opinion also of Orde, J.

[Quotation from the reasons for judgment of ORDE, J.]

I am unable to agree that the case of *Bragg* v. *Oram*, (1919), 50 D.L.R. 623, 46 O.L.R. 312, has no application here. In that case Middleton, J., in writing an opinion concurred in by other members of the Court, says (46 O.L.R. at p. 316, 50 D.L.R. at p. 626):—

"At the trial judgment was given in favour of the plaintiff, awarding an injunction restraining the defendants from further ploughing the streets or otherwise obstructing access to the plaintiff's land.

"Upon the record it is hard to see what issue there was for trial. The plaintiff's title is admitted, the right to use the streets is not denied. All that is said is that it was not practicable to farm the defendants' lots without ploughing up the streets, and that the

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defendants were ready to permit the plaintiff to use the old farm-lane if he objected to going on the ploughed land." And again (46 O.L.R at p. 317, 50 D.L.R. at p. 626): "I think that the action comes under clause (*b*), 'Personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed $500,' and that the action is a personal action within the meaning of that clause. It is nothing more than an action for damages for an obstruction to a highway and for the abatement of the nuisance caused by the obstruction.

"Under sec. 28 the Court (County Court) can grant all appropriate remedies in any action where the cause of action is within its jurisdiction.

"An injunction or a mandatory order is a remedy, and it is not a cause of action."

If the defendants had sued the plaintiff for damages for interference with their right of way, enjoyed in a particular way for many years, by erecting and maintaining longer and heavier bars than had theretofore been in use, and incidentally had asked for an abatement of the nuisance thereby caused, the action would have been one within the competence of the County Court, under clause (*b*), provided the claim were not for a larger amount than $500. Because the position of the parties is reversed, and the plaintiff, having replaced the old by new and longer bars, and thus created the difficulty, brings an action for a declaration that he is entitled so to interfere with and obstruct the defendants' right of way, the real issue is not thereby altered. Orde, J., seems to have thought that the defendants, by pleading as they did, had put themselves in a position which had prejudiced them. He says (47 O.L.R. at pp. 220, 221):—

"This defence was a distinct assertion by the defendants that the nature of the right of way which they were entitled to enjoy over the plaintiff's land was different from that asserted by the plaintiff, or, to put it in another form, the defendants challenge the claim of the plaintiff to do what he likes with his own by setting up an easement which interferes with the plaintiff's enjoyment of his own property. Although the point may be a narrow one, that issue, in my judgment, involves a question of title, namely, what is the nature and extent of the defendants' easement,

or the nature and extent to which the plaintiff's title to the servient tenement is affected by that easement?"

He goes on further to say (p. 221):—

"The case, therefore, if within the jurisdiction of the County Court, must fall within the class of cases over which, by clause (c) of sec. 22, sub-sec. 1, of the County Courts Act, the County Court has jurisdiction if the value of the land does not exceed $500, and the sum claimed does not exceed that amount. The sum claimed does not exceed $500; but is the value of the land less than a sum exceeding $500?"

He says that he must assume that the Supreme Court has exclusive jurisdiction unless the statute clearly confers it upon the County Court, and adds that there was no evidence that the interest of the plaintiff in or right over his own land sought to be curtailed by the defendants was less than $500. He also adds (pp. 221, 222):—

"It ought not to be overlooked that the issue which the defendants chose to bring before the Court was in substance of their own making. They raised that issue by the nature of their defence in a Supreme Court action. The burden is on them to establish that the County Court has jurisdiction, and they have, in my judgment, failed to do so."

In reality, however, the plaintiff, knowing of the manner in which the right had always been enjoyed by the defendants, and apparently agreed to and acquiesced in by him, interfered with it, then began an action, and filed a statement of claim alleging that he and his predecessors in title, without interruption for upwards of 40 years had maintained certain bars across the right of way, but without disclosing that he had recently taken these bars down and erected in their place longer and heavier bars. In consequence he made it impossible for the defendants to plead otherwise than they did unless they were prepared to submit to any kind of bars, however difficult and burdensome to remove and restore.

The title to the land of the plaintiff and defendants is not in dispute. The terms of the right of way were clearly set out in the will. There is no reference to bars therein, and no suggested limitation of the defendants' right of way. It would seem as though the onus were upon the plaintiff to shew the right to maintain even such bars as were there before he took them down and substituted

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larger. The location or width of the road over which the right of way runs is not in question. The manner in which the right of way should be used by the defendants and the extent, if any, to which their free and full enjoyment should and could reasonably be curtailed, for the protection of the plaintiff, had been defined by the parties by bars of a certain length and width, erected, maintained, and acquiesced in for many years. I am unable to see that any question of title arises. The plaintiff's claim against the defendants is in reality for damages for interfering with the bars put up by him across the right of way, by taking them down and not replacing them, and for a mandatory order, as supplemental to that claim, compelling the defendants so to replace them if they take them down, and the amount claimed for damages is within the competence of the County Court.

I would allow the appeal with costs of the motion and appeal.

Mulock, C.J.Ex.

MULOCK, C.J. EX., agreed with SUTHERLAND, J.

Ferguson, J.A.

FERGUSON, J.A.:—Had the defendants brought an action to restrain the plaintiff from wrongfully—that is, contrary to the terms of the reservation thereof—interfering with the defendants' right of way, by erecting and maintaining heavier bars than had heretofore been in use—that action would seem to me to have been within the competence of the County Court: see R.S.O. 1914, ch. 59, sec. 22 (1) (*d*); and I fail to see why, when the position of the parties is reversed, by the plaintiff bringing an action for a declaration that he is entitled to obstruct or interfere with the right of way, the issue is thereby altered.

There was no counterclaim by the defendants: the only question for decision and the only question decided was—Could the plaintiff lawfully interfere with the right of way reserved to the defendants, in the manner and to the extent he claimed?

I would allow the appeal with costs.

Masten, J.

MASTEN, J. (dissenting):—Appeal from the decision of Orde, J., on appeal from the taxation of the plaintiff's costs by the Local Taxing Officer at Belleville.

The appeal relates to the scale upon which the costs are to be taxed, and depends upon whether or not the County Court had jurisdiction to entertain the action.

The action is for a declaration of a right in lands and raises the question of the nature and extent to which the fee simple of

which the plaintiff is admittedly seised is infringed or limited by an easement to which the defendants are admittedly entitled.

Easements are by their nature infinite in their variety. In the present case some easement is admitted. The question is, what is its exact extent? To state the situation more specifically, Caleb Parry, by his will dated the 7th March, 1871, and registered on the 24th September, 1872, devised to the plaintiff the rear half of lot 17 in the 3rd concession of the township of Sidney, and to the defendant Parry the north-west quarter of lot 18 in the same concession, together with "a right of way to and from the lands hereby demised to him over the land hereby demised to my son William Hubbard Parry to and along the road now used as means of entrance from the main road to the land hereby devised to my said son William Hubbard Parry, each to keep half the said road or way in repair."

In the statement of claim the question in dispute is set forth as follows:—

"4. The plaintiff and his predecessors in title, as of right and without interruption for upwards of 40 years, have maintained certain bars across the said right of way and on the lands of the plaintiff, which said bars are removable and were used by the plaintiff and his predecessors in title in enclosing his barnyard, to prevent cattle from straying therefrom, or on his said lands, necessitating the letting down of such bars in passing to and fro along said right of way, whenever the said bars were up so enclosing said barnyard, but in no way preventing the use of said right of way, but solely for the protection of the plaintiff's property and enjoyment of his lands, as was intended by said testator and as so enjoyed for 40 years.

"5. The defendants, in violation of the right of the plaintiff to maintain the bars across the said right of way, and have same returned to their proper and usual place after user thereof by the defendants and others, when the same were up as aforesaid, removed the said bars on several occasions, and refused to replace same after using the said right of way and threw said bars out into the open field, and still refuse to return the said bars to their proper place.

"6. By reason of the conduct of the defendants as aforesaid, the horses and cattle of the defendants and others have strayed

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or to the lands of the plaintiff, and the plaintiff has been forced to replace the said bars in their proper place to protect his said lands and pr perty and enclose his barnyard as aforesaid, and has been otherwise damnified and injured, and the defendants defy the plaintiff to prevent them from so conducting themselves."

The defendants, by their defence, set up:—

"3. The defendants further say that the plaintiff herein, in violation of and contrary to any rights given him under the will of the said Caleb Parry, deceased, and any rights which he acquired by user or otherwise, constructed across the said right of way bars which were out of all proportion to the old bars which were in use thereupon, the new bars being larger and more cumbersome than the bars formerly and for many years used by both parties.

"4. The defendants say that the new bars used by the plaintiff herein, in place of the old bars which had always been maintained, were larger, heavier, and of greater trouble to install, and that the defendants herein notified the plaintiff that they would no longer permit the use of bars of such large dimensions, which the latter had been using, and advised the plaintiff herein that he must restore the old bars, or bars of like dimension or size.

"5. The defendants say that the plaintiff refuses to maintain the bars across the right of way as they had been used according to the terms of the will of the said late Caleb Parry, deceased, and that the defendants herein, in order to enjoy their right of user of the said land, and owing to the difficulty of restoring the bars which the plaintiff was inserting, owing to their increased size and weight, threw down the said bars and refused to permit the plaintiff to maintain the said right of way in a manner different from the way in which it had always been used by their predecessor in title and by himself and the defendants herein."

The action was tried before the late Chief Justice of the King's Bench, and the judgment as settled and entered is as follows:—

"1. This Court doth order and declare that the plaintiff is entitled to maintain and keep bars on the right of way of the defendants over the land of the plaintiff in question, being all and singular that certain parcel or tract of land and premises situated, lying, and being in the township of Sidney, in the county of Hastings, and being the rear half of lot number 17 in the 3rd concession of the said township of Sidney, in the county of Hast-

ings, and that it is the duty of the defendants to replace the said bars in their proper place after the user thereof.

"2. This Court doth further order and adjudge that the plaintiff do recover against the defendants the sum of $5.00."

This judgment has not been appealed against, and stands as a final adjudication of the rights of the parties.

No direction having been given by the trial Judge as to the scale of costs, it became the duty of the Taxing Officer on taxation to determine the scale. He ruled that the costs should be taxed on the Supreme Court scale, and his decision was on appeal confirmed by Orde, J. From that decision an appeal is brought to this Court. All technical objections to the appeal were expressly waived by counsel for the respondent.

The question depends on whether or not the action was of the proper competence of the County Court.

I agree with the conclusion of the learned Judge in Chambers that this is not an action "for the obstruction of or interference with a right of way or other easement," within the provisions of clause (*d*) of sub-sec. (1) of sec. 22 of the County Courts Act, R.S.O. 1914, ch. 59.

If the defendants were bringing the action, much might be said for that contention, but what the plaintiff really seeks is a declaration by the Court of the extent to which his fee simple in the said lands is limited, modified, or lessened by the easement which admittedly exists. In other words, what is the nature and extent of the defendants' easement and to what extent does it cut down the plaintiff's dominion as owner in fee simple of the rear half of lot 17?

I also agree that "the case . . . . if within the jurisdiction of the County Court, must fall within the class of cases over which, by clause (*c*) of sec. 22, sub-sec. 1, of the County Courts Act, the County Court has jurisdiction" (47 O.L.R. at p. 221). Under that sub-section, the first question is whether the title to land possessing a value exceeding $500 is in question.

The question being as to the nature and extent of the plaintiff's rights in the rear half of lot 17—and how far they are infringed by the defendants' easement—the subject-matter of the action is the whole of the rear half of lot 17, and I think that for the purpose of establishing the jurisdiction of the County Court the onus was on

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the defendants to shew that the plaintiff's lands were of less value than $500. So far as appears on this appeal, that has not been done.

As to title, the question of the jurisdiction of the County Court must be determined by the issues raised on the pleadings, and not by the evidence at the trial: *Worman* v. *Brady* (1888), 12 P.R. (Ont.) 618; *Neely* v. *Parry Sound River Improvement Co.*, (1904), 8 O.L.R. 128.

The plaintiff asserts that he is the owner of the west half of lot 17, and that the defendants trespass on the same. The defendants admit the plaintiff's title to lot 17, and that they have entered on the same, but say that they so entered as of right, pursuant to an easement whereby they enjoy a right of way over the said lands.

The plaintiff, again admitting that the defendants are entitled to a certain easement giving them a right of passage over the lands in question, alleges that such right of passage is legally exercisable by the defendants only on condition that they, the defendants, restore and replace such bars, etc., as the plaintiff may establish over the right of way, for the reasonable protection and use of his own lands.

The defendants admit that the right of way is on condition that they restore to place the bars guarding the right of way, but allege that by such condition they are bound to restore to place no longer or heavier bars than those heretofore customarily used to guard the entrance to the right of way—and on that statement the plaintiff joins issue.

By the judgment, there is a declaration, which is now *res judicata*, negativing the defendants' claim that they are of right entitled to passage in the manner and on the terms asserted by them, and their right in that regard is thus denied both on the pleadings and by the judgment. In order to determine the question raised, it was necessary to ascertain and define the defendants' easement, and thus ascertain how far the plaintiff's dominion over his lands is lessened or modified: *Moffatt* v. *Carmichael*, (1907), 14 O.L.R. 595, at p. 597. But to define the limits and extent of the incorporeal hereditament which the defendants hold as appurtenant to the dominant tenement is to determine a question of title, not the devolution of the title, but the concomitants and conditions

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appertaining to the exercise of the right as originally created. To determine what the easement was, evidence must be given, not only of the will of Caleb Parry, but also of the situation and of the surrounding circumstances upon which the will operated.

This was what was in controversy between the parties, for the plaintiff's right, in the terms asserted by him, is denied by the defendants. This, as it seems to me, brings the case squarely within the reasoning of the Court of Queen's Bench in *Regina* v. *Everett*, (1852), 1 E. & B. 273, 118 E.R. 439.

In that case it was determined that where the existence of the right (in that case to a toll) was in issue, it necessarily involved the title to that right. Here some right of passage is admitted, but not the right which the plaintiff claims.

The case of *Bragg* v. *Oram*, 46 O.L.R. 312, 50 D.L.R. 623, is relied on for the defendants, but in that case the title to the right of way—a public highway—was not in dispute, and I am unable to see how that case can be applied here.

I agree also with the decision of my brother Orde upon the other points discussed by him in the Court below, and would dismiss the appeal with costs.

Appeal allowed (MASTEN, J., *dissenting*.)

PAQUET v. CORPORATION OF PILOTS OF QUEBEC HARBOUR.

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Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Atkinson, and Duff, J. July 22, 1920.

PILOTS (§ I—4)—CORPORATION OF PILOTS OF QUEBEC HARBOUR—RIGHTS SINCE PASSING OF CANADA SHIPPING ACTS—RIGHT OF MINISTER OF MARINE AND FISHERIES TO DIRECT TO WHOM PILOTAGE DUES ARE PAYABLE.

Since the coming into force of 4-5 Geo. V. 1914, ch. 48, amending Part VI. of the Canada Shipping Act, R.S.C., 1906, ch. 113, all powers vested in the Corporation of Pilots of Quebec Harbour are transferred to and vested in the Minister of Marine and Fisheries and all powers of the corporation with respect to the management and control of pilots and their duties, the collection of pilotage dues and the management and control of pilotage are repealed, and the Minister is enabled to direct that the payments of pilotage dues shall be made to the pilot employed and no other.

[Judgment of the Court of King's Bench (1918), 27 Que. K.B. 409, reversed, and that of the trial Judge (1917), 53 Que. S.C. 220, restored.]

Statement.

APPEAL by defendant from the judgment of the Court of King's Bench (1918), 27 Que K.B. 409, in an action by plaintiff to recover pilotage dues alleged to be due to it. Reversed.

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The judgment of the Board was delivered by

VISCOUNT HALDANE:—In this case the Attorney-General for the Dominion of Canada has been made a co-appellant, as the appeal raises questions in which the Dominion Government has a direct interest.

In 1917 the respondent corporation brought the action out of which the appeal arises, in the Superior Court of the Province of Quebec, against a pilot named Paquet, who was one of the members of the corporation, to recover a sum of about $532, being the amount earned by him for services as a pilot of the harbour of Quebec. In the Court of first instance, Dorion, J., decided for the defendant (1917), 53 Que. S.C. 220, but on appeal to the Court of King's Bench for the Province this decision was reversed by a majority of the Judges of that Court, Cross, J., dissenting (1918), 27 Que. K.B. 409. Paquet died subsequently, and his personal representative is the first appellant.

The plaintiff corporation consists of the licensed pilots of the harbour of Quebec and below. In 1860 they had been incorporated by a statute of the then Province of Canada. Under that statute the pilots had to hand over their earnings to the corporation, and out of the fund so constituted the former were paid by the latter, who were to distribute the surplus among the pilots.

After the quasi-federal distribution of legislative powers which was affected by the B. N. A. Act in 1867, it is clear that the power to pass laws regulating the pilotage system of the harbour was given exclusively to the Dominion Parliament. Navigation and shipping form the tenth class of the subjects enumerated as exclusively belonging to the Dominion in sec. 91 of the Act, and the second class in the section, the regulation of trade and commerce, is concerned with some aspects at least of the same subject. Whether the words trade and commerce, if these alone had been enumerated subjects, would have been sufficient to exclude the Provincial Legislature from dealing with pilotage, it is not necessary to consider, because, in their Lordships' opinion, the introduction into sec. 91 of the words "navigation and shipping" puts the matter beyond question. It is, of course, true that the class of subjects designated as "property and civil rights" in sec. 92 and there given exclus-

ively to the Province would be trenched on if that section were to be interpreted by itself. But the language of sec. 92 has to be read along with that of sec. 91, and the generality of the wording of sec. 92 has to be interpreted as restricted by the specific language of sec. 91, in accordance with the well established principle that subjects which in one aspect may come under sec. 92 may in another aspect that is made dominant be brought within sec. 91. That this principle applies in the case before their Lordships they entertain no doubt, and it was, therefore, in their opinion, for the Dominion and not for the Provincial Legislature to deal exclusively with the subject of pilotage after Confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected.

The Dominion Parliament, after Confederation, passed what is now ch. 113 of the Revised Statutes of Canada, the Canada Shipping Act, 1906. Part VI. of that Act dealt with Pilotage. By sec. 411 the pilotage district of Quebec is defined, and by sec. 413 the Dominion Minister of Marine and Fisheries is to be the pilotage authority, in whom all the powers of the Harbour Commissioners of Quebec are vested. By subsequent sections the Minister was given powers to regulate the qualifications of pilots, the management and maintenance of their boats and the distribution of their earnings, the performance of their duties, and, subject to the limitation referred to in the case of the Quebec District, the mode and amount of remunerating the pilots, and the establishment of superannuation funds; but the alteration of the rates for pilotage in the Quebec District and of the administration or distribution of their earnings was excluded from the power of the Minister by sec. 434. For some purposes, other than those specifically conferred on the Ministers, the respondent corporation retained powers, and among them were rights in certain cases to demand from the masters of ships pilotage dues. Out of the sums thus received the treasurer of the respondent corporation was to set aside 7% for a pilot fund, and the corporation was to account to the Minister for the administration of this fund, which was due to be employed for superannuation purposes.

It is, however, in their Lordships' view unnecessary to determine precisely what powers remained to the respondent

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corporation after the passing of the Canada Shipping Act of 1906, for in 4-5 Geo. V. 1914, ch. 48, another statute amending it was passed by the Dominion Parliament, and this statute applies in the case before them. It provides by sec. 1 that the Minister, subject to the provisions of the general Canada Shipping Act, is to have charge of the control and management of the pilots and their boats for the pilotage district of Quebec, and of all questions respecting pilotage arising in connection with such district, and of the collection of pilotage dues in respect of such district; and that all powers vested in the Corporation of Pilots of Quebec under Part VI. of the Canada Shipping Act are transferred to and vested in the Minister. By sec. 2 all powers of the Corporation of Pilots with respect to the management and control of pilots and their duties, the collection of pilotage dues and the management and control of pilotage, were thereby repealed. By sec. 3 nothing in the Act was to be deemed to affect any power possessed by the corporation in connection with the management and disposal of the pilot pension fund, but such power was to be exercised under the supervision of the Minister as theretofore.

In their Lordships' opinion it is plain that whatever powers to demand dues, or to call on a pilot to hand over his earnings as received, may have survived to the respondent corporation after the passing of the general Canada Shipping Act, R.S.C. 1906, ch. 113, are now extinguished by the first and second sections of the Act of 1914. What right the corporation may have had as between itself and the original defendant Paquet to demand from him a contribution to the superannuation fund is not a question which is before their Lordships. It is enough for them to say that they are unable to take the view of the majority of the Judges in the Court of King's Bench, 27 Que. K.B. 409, that there is no repeal of the title of the respondent corporation to receive the pilotage dues which a pilot may now earn. The result of the Act of 1914, 4-5 Geo. V. ch. 48, is to get rid altogether of the old title of the corporation, and to enable the Minister to direct that the payment shall be made to the pilot employed and no one else.

They will, therefore, humbly advise His Majesty that the judgment of the Court of King's Bench, 27 Que. K.B. 409, which was in favour of the corporation as plaintiffs, should be reversed and that of Dorion, J., dismissing the action with costs, 53 Que.

S.C. 220, should be restored. The appellant Paquet will have his costs here, in so far as he has incurred costs, and in the Court of King's Bench. The Attorney-General for Canada, in accordance with the usual practice, will receive no separate costs.

Appeal allowed.

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CITY OF QUEBEC v. BASTIEN.

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Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Atkinson, and Duff, J. July 15, 1920.

MUNICIPAL CORPORATIONS (§ II G—231)—ACT OF INCORPORATION OF CITY OF QUEBEC—AUTHORITY TO CONSTRUCT WATER-WORKS—DAMAGE TO PROPERTY OWNER BY ABSTRACTION OF WATER—LIABILITY.

Section 520 of the Act of Incorporation of the City of Quebec empowers the corporation to make any water-works it requires, within the limits specified, and to take as much water as it pleases for the supply of the city, but the corporation must pay any damages from time to time occasioned by its water-works to buildings or lands including damage by abstraction of water. Section 522 enables the corporation to purchase lands, servitudes, usufructs or hereditaments and if it chooses to take this course it may so get rid of present or future liability to pay for by way of damage, but it is not necessary that it should take this course.

Statement.

APPEAL by defendants from the judgment of the Court of King's Bench for the Province of Quebec (appeal side), (1916), 32 D.L.R. 499, 25 Que. K.B. 539, affirming the judgment of the Superior Court of Quebec in an action for damages to the plaintiff's business by the installation of additional intake pipes on the River St. Charles for its water-works system. Affirmed.

The judgment of the Board was delivered by

Viscount Haldane.

VISCOUNT HALDANE:—The actual field of controversy in the argument at the Bar in this appeal turned out to lie within narrow limits. The only question that really arose proved to be whether the appellants, in exercising a statutory power which undoubtedly entitled them to do what they actually have done, could do it without paying for the damage they have inflicted.

In 1846 the then Parliament of Canada passed an Act for the supply of the city of Quebec with water, and, after various amending Acts had been passed, the relevant provisions on the subject were consolidated in an amending Act of 29 Vict. 1865, (Can.) ch. 57, entitled "An Act to amend and consolidate the provisions contained in the Acts and Ordinances relating to the

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incorporation of and the supply of water to the City of Quebec." The most important provisions of this statute are reproduced in the existing Act to amend the Acts respecting the Corporation of the City of Quebec, passed by the Legislature of the Province of Quebec, 59 Vict. 1895, ch. 47, art. 12. They are included in a compilation of which paras. 520 and 522 include the relevant sections of this statute, and are as follows:—

520. The corporation of the City of Quebec is authorised to make, erect, construct, repair and maintain, in the City of Quebec, and without the limits of the said city for a distance of 50 miles, water-works, together with all appurtenances and accessories necessary to introduce, convey and conduct throughout the said city and parts adjacent a sufficient quantity of good and wholesome water, which the said corporation is authorised by the present Act to take and distribute for the use and supply of the inhabitants of the said city and the parts thereto adjacent; and also to improve, alter or remove the said water-works or any part or parts thereof; and to change the site of the several engines and places or sources of supply thereof; and also to erect, construct, repair and maintain all the buildings, houses, sheds, engines, water-houses, reservoirs, cisterns, ponds and basins of water and other works necessary and expedient to convey water to the said city, and parts adjacent thereto:—For this purpose the said corporation may purchase, hold and acquire any lands, tenements and immovable estates, servitudes, usufructs and hereditaments in the said city, or within a circuit of fifty miles from the limits of the said city; and also to make contracts for the acquisition of lands necessary for the said water-works; acquire a right of way whenever it may be necessary; pay any damages occasioned by such works either to buildings or lands; enter into and make agreements and contracts with any person for the construction of the said water-works in whole or in part; superintend and direct the works completed; name and appoint an engineer and all officers and labourers necessary, and fix their salaries or wages; enter during the day-time, upon the lands of private individuals for the purposes aforesaid and also make excavations and take and remove stones, soil, rubbish, trees, roots, sand, gravel and other materials and things, but by paying or offering a reasonable compensation for the said materials and things, and by conforming in all things with the provisions of this section. 29 Vict., ch. 57, art. 36, para. 1; 59 Vict., ch. 47, art. 12.

522. All bodies politic or corporate, or corporate or collegiate corporations, aggregate or sole, communities, husbands, tutors or guardians, curators, *grevès de substitution*, executors, administrators and other trustees or persons whatsoever, are authorised to sell to the said corporation such lands, tenements, servitudes, usufructs and hereditaments, which the said corporation may require for the purpose of the present section, and which they may be possessed of in their present qualities; they may also agree with the said corporation in the same way as private individuals, respecting all matters relative to the works mentioned in the tenth and eleventh sub-sections (*arts. 524 and 525 hereafter*) of the present section; and all contracts, agreements, references to arbitrators, sentences and verdicts rendered for or against them, shall be equally binding upon those whom they represent, wherever the property or interests of such may be concerned. 29 Vict., ch. 57, art. 36, para. 3.

The interpretation of sec. 520 appears to their Lordships to be clear. The corporation is empowered to make any water-works it requires, within the limits specified, and to take as much water as it pleases for the supply of the city. It may purchase any interests in land or any servitudes it desires. All this is rendered lawful, but the corporation must, by way of compensation for actual injury done, pay any damages from time to time occasioned by its water-works to buildings or lands, including damage by abstraction of water. Section 522 contains a power enabling the corporation to purchase lands, servitudes, usufructs or hereditaments, and, if it chooses to take this course, it may so get rid of present or future liability to pay for by way of damage, which might prove to be of a continuing or recurring character. But it need not take this course, if it prefers to remain under the continuing or recurring liability which sec. 520 imposes.

The river St. Charles flows from the north-west down to the city of Quebec. In 1851 the appellants, the corporation, acting under the powers they originally possessed, erected a dam up the river, about 8 miles above the city, and there established the intake of their water supply. In the first instance the supply pipe was an 18-inch one. About 1883 this pipe had a 30-inch one added to it, to provide for the requirements of the growing city, and, before 1914, a third pipe, of 40 inches in diameter, was added.

The respondent has a mill on the river about half a mile below the intake of the appellants, which he uses as a tannery. In August, 1914, he commenced the action out of which this appeal arises, alleging that the appellants' abstraction of water had deprived him of the pressure necessary for working his mill, and claiming damages. All other questions, including that of the quantum of damages, have been finally disposed of in the Courts below, and the question which remains is whether the appellants are under any liability at all for damages for taking the water. Their case is, firstly, that they have not been shewn to have acted negligently or outside their powers, that the Legislature having authorised them to take the water in the way they have done, they have committed no wrongful act, and, secondly, that in any case no damage has been occasioned to buildings or lands within the meaning of sec. 520.

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In their Lordships' view, if the appellants are wrong on their first point, they are not entitled to succeed on their second point. Article 503 of the Civil Code of Quebec, which does not materially alter the common law, provides that—

> He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs.

This provision, in their Lordships' view, must be taken, having regard to the character of the common law on the subject in Quebec, to mean that the lower riparian owner has a right and title to the natural flow of the water as an incident of his right of property in his land. This right and title may be surrendered by the constitution of a servitude in favour of an upper riparian owner. But that not having been done, damage occasioned to the enjoyment of this right is, in law, damage to the land within the language of sec. 520. The only point open to the appellants is thus their first point, and on this subject their Lordships are of opinion that the contention maintained at the Bar for the appellants fails. It is true that what was done was rendered lawful by sec. 520. But it was rendered lawful, if the appellants had not, under sec. 522, bought up the proprietary rights which might be injured under art. 503 of the Code or otherwise, only under the condition subsequent that the appellants should, notwithstanding that there was no *injuria*, pay, under a liability imposed by sec. 520, for the *damnum* which should from time to time prove to have been occasioned.

This was in substance the view taken of the law by Roy, J., the Judge of the Superior Court of Quebec who tried the action. The majority of the Judges who heard the case in the Court of King's Bench on appeal have come to the same conclusion as he did (1916), 32 D.L.R. 499, 25 Que. K.B. 539. In this conclusion their Lordships concur. They are unable to accept the reasoning of Cross, J., who dissented. That Judge thought the appellants had been given power to supply all the inhabitants of the city of Quebec, and to take all they needed for this purpose. No doubt this is so, but when the Judge proceeds to suggest that in being given such a power the appellants have been put into a position not differing from that of a landowner, who may take and consume the water for the reasonable needs of his land,

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their Lordships cannot agree with him. The appellants have been put by the statute into the position of being able lawfully to take the water, and, if necessary, all the water in the river, without any of the restrictions which under the Code and by the common law would restrain the action of an ordinary riparian landowner in doing so, but they have been freed from these restrictions only upon condition that they should pay for *damnum* occasioned.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs. Having regard to the special terms on which leave to bring the appeal was granted to the appellants, their Lordships think that these costs before this Board should be given in the circumstances as between solicitor and client. *Appeal dismissed.*

THE KING v. PAULSON.

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Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Viscount Cave, Lord Dunedin, and Lord Atkinson. August 2, 1920.

MINES AND MINERALS (§ II B—56)—MINING LEASE—DOMINION LANDS ACT—RENT PAID IN ADVANCE—ACCEPTANCE STATED TO BE CONDITIONAL—SUBSEQUENT CANCELLATION OF LEASE.

Where land is held under a mining lease under the provisions of the Dominion Lands Act, and the rent for the year has been paid in advance and accepted by the Department, the Crown cannot cancel the lease in the middle of the term, without notice, for failure to develop the mines, although the letter acknowledging receipt of the rent stated that the amount was only accepted conditionally pending a decision on the lessee's application for an extension of time to begin work on the mine.

[Review of legislation and authorities.]

Statement.

APPEAL by special leave from a judgment of the Supreme Court of Canada, dated December 29, 1915, 27 D.L.R. 145, 52 Can. S.C.R. 317, which reversed a judgment dated April 15, 1914, of the Exchequer Court of Canada, 20 D.L.R. 787, 15 Can. Ex. 252, by which latter judgment it had been declared that a lease, dated August 8, 1904, granted by the Crown to first-named respondent had been forfeited or cancelled and set aside. Affirmed.

The judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON:—In the information filed by the Crown, out of which this appeal has arisen, it was prayed not only that this lease of August 8, 1904, should be declared as above, but that in the alternative it might be adjudged, in the event of the latter being found not to have been forfeited, that a subsequent lease dated June 28, 1910, made by the

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Crown to the second respondent had been made inadvertently and should be cancelled, and that it should be adjudged that the International Coal and Coke Co. should be ordered to indemnify the appellant for all expenses, loss, or damage resulting from the refusal of the plaintiff to revive the lease which had been granted to the respondent Paulson. By the decree of the Supreme Court of Canada it was ordered and adjudged that the appeal should be allowed, the judgment of the Court of Exchequer reversed, and the information of His Majesty dismissed, and that His Majesty should pay to the appellant Paulson his costs in the Court of Exchequer and in the Supreme Court. No order was made on the prayer for alternative relief.

Section 23 of the Dominion Lands Act, R.S.C. 1886, ch. 54, provides as follows:—

Sections 11 and 29 in every surveyed township throughout the extent of the Dominion lands are hereby set apart as an endowment for purposes of education, and shall be designated school lands: and they are hereby withdrawn from the operation of the clauses of this Act which relate to the sale of Dominion lands and to homesteads therein: and no right to purchase or to obtain homestead entry shall be recognised in connection with the said sections, or any part of them.

By sec. 24 it is directed that school lands shall be administered by the Minister of the Interior under the direction of the Governor-in-Council.

Section 47 of the same statute runs thus:—

Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry but shall be disposed of in such manner and on such terms and conditions as are, from time to time, fixed by the Governor-in-Council, by regulations made in that behalf.

By Order in Council of June 11, 1902, in virtue of the provisions of sec. 47 of the Dominion Lands Act, the issue of leases of school lands in Manitoba and the North-west Territories for coal-mining purposes was authorised for the development of coal mines underlying such school lands, subject to the following terms and conditions. The first and sixth of which are alone material on the hearing of this appeal—

(1) Leases of school lands for coal-mining purposes shall be for a period not exceeding 10 years and shall only be granted to applicants, in the order of their applications, who have satisfied the Minister of the Interior of their means and ability to work efficiently the mines applied for.

(6) Failure to commence active operations within 1 year and to work the mine within 2 years after the commencement of the term of the lease, or

to pay the ground rent or royalty as before provided, shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown.

The term of 10 years mentioned in the first condition was afterwards extended to 20 years.

In their Lordships' view these are dominating provisions. Any clauses introduced into leases of mines or mining rights purporting to have been granted under the authority of the Order in Council inconsistent with them, or encroaching upon them, would be unauthorised and might be *ultra vires*. It would be wholly otherwise if the clauses of such leases merely prescribed the mode in which and the methods by which the general power or authority given by the Order in Council should be exercised in the cases of particular leases. There would not be in such cases any inconsistency or conflict in the contents of the two documents.

The lease impeached is dated August 8, 1904. It is expressed to be made between His Majesty King Edward VII., represented by the Minister of the Interior of Canada, styled therein, where the context permitted, the Minister, and including the successors in office of such Minister, of the first part, and Paul A. Paulson therein called the lessee of the second part. It begins with the following recitals:—

> And Whereas by an Order-in-Council, dated the Eleventh day of June in the year of Our Lord one thousand nine hundred and two, as amended by an Order-in-Council, dated the Twenty-sixth of the same month, the Minister is authorized to issue leases of School Lands for coal mining purposes, and the development of coal mines under such lands, for the term and subject to the restrictions and limitations in and by the said Orders-in-Council prescribed.
>
> And Whereas the lessee having applied for a lease under the said Orders-in-Council for the said lands hereinafter described, the Minister has granted such application upon the terms and conditions herein contained, such terms and conditions being in accordance with the requirements of the said Orders-in-Council.

And by it:—All mines, seams and beds of coal in, on or under the tracts or parcels of land therein described, with full power to search for, work, mine and carry away the said coal, were demised to the lessee for a term of 20 years from the date thereof at the yearly rent of $96 payable half-yearly in advance on January 15, and July 15, in each year, together with the royalties therein mentioned. The lease is expressed to be granted on several conditions. Those numbered 12, 14, 16 and 17 are alone material in the present appeal. They run as follows:—

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12. That the lessee shall commence active operations upon the said lands within one year from the date of the commencement of the said term and shall work a mine or mines thereon within two years from that date and shall thereafter continuously and effectually work any mine or mines opened by him unless prevented from so doing by circumstances beyond his control or excused from so doing by the Minister.

14. That no waiver on behalf of His Majesty, His Successors or Assigns, of any such breach shall take effect or be binding upon him or them unless the same be expressed in writing under the authority of the Minister, and any waiver so expressed shall extend only to the particular breach so waived and shall not limit or affect His or their rights with respect to any other or future breach.

16. That any notice, demand, or other communication which His Majesty or the Minister may require or desire to give or serve upon the lessee may be validly given or served by the Secretary or the Assistant Secretary of the Department of the Interior.

17. That in case of default in payment of the said rent or royalty for six months after the same should have been paid or in case of the breach or non-observance or non-performance on the part of the lessee of any proviso, condition, term, restriction or stipulation herein contained and which ought to be observed or performed by the said lessee and which has not been waived by the said Minister, the Minister may cancel these presents by written notice to the said lessee and thereupon the same and everything therein contained shall become and be absolutely null and void to all intents and purposes whatsoever, and it shall be lawful for His Majesty or His Successors or Assigns into and upon the said demised premises (or any part thereof in the name of the whole) to re-enter and the same to have again, repossess and enjoy as of His or their former estate therein anything herein contained to the contrary notwithstanding.

It was argued, not very strenuously however, that according to the proper construction of the sixth of the conditions prescribed by the Order in Council of June 11, 1902, on the failure of the lessee to commence active operations within 1 year from the date of the lease, or on his failure to work the mine within 2 years from that date, or on his failure to pay the ground rent or royalties as provided, the lease became absolutely null and void. If this were so, than a lessee, by doing any one of these things, and taking advantage of his wrong by relying on his own default, could escape from the burdens of his lease. A lessee so relying on his own wrong, could not compel his lessor to enforce against him the forfeiture of the lease; so that when this maxim is applied even to a condition most absolute in form, it reduces the condition in operation to one merely providing that the lease should only be void at the option of the innocent party (*Quesnel Forks Gold Mining Co.* v. *Ward*, 50 D.L.R. 1, [1920] A.C. 222). Again, the

words of the condition are, "shall subject the lessee to the forfeiture of the lease and to the resumption of the land," which in their Lordships' view merely means that the lessee shall render himself liable to have his lease forfeited at the option of the Minister. The Minister is thus empowered to determine the lease, but no provision is contained in the Order in Council as to how, or by what method he is to exercise this power. It was contended (rightly, as their Lordships think) that a method is prescribed by clause 17 of the lease. This condition is wider in its scope than clause 6 of the Order in Council, but having regard to the provisions of the 1st and 12th of these clauses, it covers the three defaults with which the former is conversant, namely, the failure of the lessee to commence active operations within the first 12 months from the date of the lease, his failure to work the mine within 2 years from the same date, and his failure to pay the ground rent and the royalty reserved.

The parties have used the words "may cancel" the lease. It is not found in the Order in Council, but the intention is plainly this, that the lease, if any of the defaults mentioned in it have occurred, was to be voidable at the option of the Minister; and could be put an end to by the service on the lessee of a notice in writing, and this notice in writing so served thereby becomes the effective instrument for the purpose desired. Cancellation has no retrospective operation. It does not make a lease void *ab initio*. *Nelthorpe* v. *Dorrington* (1686), 2 Lev. 113; *Bolton* v. *Bishop of Carlisle* (1793), 2 Hy. Bl. 259, 126 E.R. 540; *Re Way's Trusts* (1864), 2 DeG. J. & Sm. 365, 46 E.R. 416. Nothing material, therefore, turns upon the use of this word.

In fact the lessee, Paulson, never commenced active mining operations on the lands demised within the meaning of the Order in Council and of the lease, and never worked the mines, but went into possession of the lands as far as was practicable, and paid the rent reserved in advance as it accrued due up to and inclusive of July 15, 1910, practically for 6 years. On July 14, 1909, Keyes, the secretary to the Department of the Interior, wrote to Lewis & Smellie, the solicitors of the lessee, acknowledging the receipt of the cheque for the rent for the year ending July 15, 1910, and informing them that the amount was only accepted conditionally pending a decision on the lessee's application for an extension of

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time to begin to work the mine. That letter was apparently inadvertently addressed to Winnipeg instead of Ottawa for, on July 28, 1909, Lewis & Smellie received from this same Keyes a letter which ran as follows:—"Gentlemen, I enclose herewith a letter dated the 14th instant which was inadvertently addressed to Winnipeg instead of Ottawa, enclosing receipt in favour of P. A. Paulson for 96.00 dollars."

That cheque must have been cashed by the Department, for in a letter dated September 13, 1909, addressed to Messrs. Lewis & Smellie and signed L. Pereira, Assistant Secretary, the writer informed them that Paulson's application for an extension of time had been refused, that his lease "has been cancelled," and that a refund cheque would be forwarded to the addressees within the course of a day or two in favour of Paulson for $96 "paid as rental for the current year ending the 15th of July, 1910, which, as you were advised by letter of the 14th of July, was only accepted conditionally." By a refund cheque is obviously meant a cheque drawn by or on behalf of the Minister in favour of Paulson or of Lewis & Smellie. It is denied on behalf of the first respondent that such a cheque was ever received by him or his solicitors. It was for the appellant to prove that it had been sent. No evidence whatever was given to that effect.

No tender has ever been made to the lessee or his solicitors of this sum of $96 so paid and received. The information filed upon January 15, 1913, 18 months after it had been received does not contain any offer to refund it, or any excuse for its detention. In their Lordships' view it must now be treated as having been, in July, 1909, accepted unconditionally, though that, as will presently appear, is a matter of no consequence.

Before considering what is the effect of that receipt having regard to clause 14 of the lease providing that no waiver on behalf of the lessor shall have effect or be binding upon him unless expressed in writing, it will be desirable to consider the mode of dealing adopted by the parties with reference to their respective rights and obligations under this lease. It is not pretended and is not the fact that the lessee was from first to last guilty of any breach of any covenants or any condition contained in the lease other than his failure, as required by its 12th clause, to commence active mining operations on the land within 1 year from the

commencement of his term, and to work a mine or mines on the lands within 2 years from that date. He has entirely failed to do either of these things and his failure is the sole foundation for the present suit. But the obligation imposed upon him by this clause 12 is qualified by this, that he is not bound to fulfil either obligation if he be prevented from doing so by circumstances beyond his control, or be excused from doing so by the Minister. Both these events are alleged to have happened. He has, he contends, during all the time up to the cancellation, been prevented from commencing active operations on the lands, or working a mine upon them by circumstances beyond his control, and in consideration of that fact, apparently, the Minister has frequently extended his time for commencing active operations or opening a mine on the lands. These extensions were invariably given by letters written by Keyes, the secretary of the Department. The last was given by a letter dated November 25, 1907, addressed to the lessee's solicitors, which ran thus:—

Ottawa, 25th November, 1907.

Gentlemen,

With reference to your letter of the 15th ultimo in regard to the application of Mr. Paul A. Paulson for an extension of time within which to begin operations under his lease for coal mining purposes of the East half of Section 29, Township 7, Range 4 West of the 5th Meridian, I beg to say that in view of the representations made in your letter, Mr. Paulson will be granted an extension of time until the 1st February, 1909, for this purpose.

Your obedient servant,
(Sgd.) P. G. KEYES,
Secretary.

In their Lordships' view this letter amounts in effect, though possibly not in form, to a waiver in writing of all antecedent breaches of his covenant of the kind mentioned, of which the writer was aware at the time it was written.

On June 24, 1908, the lessee's solicitors sent to Keyes a cheque for $96 in payment of the rent for the year ending July 15, 1909, and received on June 30, 1908, a receipt for the same in a letter from Keyes running thus:—

Ottawa, 30th June, 1908.

Gentlemen,

I enclose, herewith, a receipt in favour of Mr. Paul A. Paulson for $96.00 in payment of the rental for the year ending the 15th July, 1909, for coal mining purposes of the East half of Section 29, Township 7, Range 4 West of the 5th Meridian, Coal Berth No. 3 School Lands.

Your obedient servant,
(Sgd.) P. G. KEYES,
Secretary.

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The excuse given by the lessee for his inaction is repeated in several letters from time to time. It is shortly this. His land is described as East half, Section 29. The adjoining section abutting upon it and belonging to his co-respondent, is Section 28. There is no outcrop of coal on Section 29. There is on Section 28. The seam of coal under Section 29 is several hundred feet below the surface. The coal is being mined in Section 28 to the north of Section 29, and the tunnels made in the former section were being steadily pushed south towards the latter section so as ultimately to tap its underlying seam. As soon as these tunnels, about 2½ miles in length, had effected a junction with the coal under Section 29 the latter could be won and carried away. To mine it till then was impracticable.

On March 11, 1909, when the respondents' solicitors applied for a further extension of time, from February 1 to July, 1910, which was not granted, they stated in their application that unless some unforeseen accident should occur, these tunnels would reach the East half of Section 29 before July 15, 1910. Something occurred, however, in the month of November, 1908, which may have destroyed all hope of further extension. The International Coal and Coke Co. apparently coveted East half, Section 29. They knew, of course, that their tunnels were being driven up towards its boundary, and on November 27, 1908, they asked the Dominion Land agent for a lease of it. By letter of December 14, 1908, Keyes, the secretary, replied on behalf of the Department to the effect that the application could not be entertained, as this half section was already under lease to Paulson for coal mining. This application, though refused for the time, appears to have a good deal to say as to what subsequently happened in this case. On March 9, 1909, the company returned to the assault, making a case against Paulson's being allowed to hold his lease longer.

In reply, a letter was written from the Department apparently by the Minister, informing the agent of the company (Whiteside) that, as the company had already applied for a lease of the coal mining rights on the land No. 29. in the event of the present lease being cancelled, the application made by the company would be given immediate consideration. Again, on August 24, 1909, the company wrote to the Minister of the Interior referring to Section 29, and stating that their gangways were getting very close to this

section, and that he would confer a great favour upon the manager of the company if he would find out as soon as possible what could be done with regard to this matter. From a report from Checkley to the Minister, dated September 1, 1909, which was received in evidence, it is stated that the Coal and Coke Co. had asked for the cancellation of Paulson's lease, as he had done nothing on the land, and that the East half of Section 29 was absolutely essential for the proper development of the company's property, and asked for instructions whether the extension of time till July 15, 1910, asked for by Paulson, was to be granted or whether his lease should be cancelled and one granted to the International Co. The Minister lost no time in making his selection between these alternatives. In the fourth paragraph of the information it is stated that on that very day he made up his mind that Paulson's lease should be cancelled, and that he had by memorandum given directions to that effect pursuant to which the letter of September 13, 1909, was written.

Their Lordships, happily, have not to decide whether the cancellation of Paulson's lease is really due to the latter's omission to commence active mining operations or to work the mines on the land demised by his lease between November 25, 1907, and September 13, 1909, or is due to the sinister importunities of the International Coal and Coke Co.; but one thing is clear, that it is rather difficult to reconcile the statements contained in the letter of date of September 13, 1909, with these revelations touching the too successful efforts of the company, in their own interest, to oust Paulson from the holding for which he had paid the rent and received no benefit for a period of practically 6 years.

The next matters for consideration are, first, what is the true effect, after a breach of covenant or contract involving a liability to forfeiture has occurred, of the payment of rent by the tenant and the receipt of it by the landlord with full knowledge of the breach; and, second, whether the presence in the lease or contract of tenancy of a provision such as that which exists in the lease in the present case, that waiver of a breach shall not be operative unless expressed in writing, destroys or modifies that effect, and if the latter, to what extent. The authorities appear to their Lordships to establish that the landlord, by the receipt of rent under such circumstances, shews a definite intention to

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treat the lease or contract as subsisting, has made an irrevocable election so to do, and can no longer avoid the lease or contract on account of the breach of which he had knowledge.

They further think the presence in a lease or contract of a provision requiring a waiver to be expressed in writing, such as exists in the present case, does not render inapplicable the principle established, and does not enable the landlord at the same time to blow hot and cold, to approbate and reprobate the same transaction, to say to his tenant, "You were my tenant under a lease or contract of tenancy all the time during which the rent which you have paid me and which I hold, has been accruing," and at the same time to say to him, "You were only my tenant for half that time, and were a mere trespasser during the other half, for I evicted you or cancelled your lease in the middle of the time for which you paid me, I had no right to more than half the rent you paid, but I'll keep the whole of it." It would be wrong and unjust on the part of the landlord so to treat the tenant; to hold in fact the price of what the latter paid for, the enjoyment of his holding for the entire time during which the rent actually paid was accruing, and yet to deprive him of half of that very property. In delivering his opinion in *Croft* v. *Lumley* (1858), 6 H.L. Cas. 672, 10 E.R. 1459, Bramwell, B., as he then was, at 706, when referring to waiver, said:—

> Now, this question supposes there was a breach of covenant giving a right of re-entry; and it supposes therefore, that if the lessor elected not to treat the lease as void, rent was due to him . . . Now, I take it to be clear that the lessor could not do an act affirming the tenancy, and yet say he did not elect not to treat the breach as a forfeiture; for instance, he could not distrain for rent due at Christmas and at the same time effectually say that he did not elect to treat an antecedent breach of covenant as a forfeiture; his act would be taken to be rightful and bind him, rather than his words make his act wrong.

In *Clough* v. *London and N. W. Railway Co.* (1871), L.R. 7 Ex. 26, Mellor, J., delivering the judgment of a Court composed o Byles, Blackburn, Mellor, and Lush, JJ., after quoting from Com. Digest Election C. 2: "If a man once determines his election it shall be determined for ever," said at p. 34:—

> The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment when the tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid

the lease. On the other hand, if by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election and cannot afterwards waive the forfeiture: *Jones* v. *Carter* (1846), 15 M. & W. 718, 153 E.R. 1040.

But the point is that he cannot do both at the same time. He cannot by receiving 12 months' rent determine that the lease was a subsisting lease while that rent was accruing, and in the middle of that period determine that it no longer subsists. In *Birch* v. *Wright* (1786), 1 Term Rep. 378, 99 E.R. 1148, the defendant was before the year 1777 tenant from year to year to a Mr. Bowes of the lands in suit at the yearly rent of £223 10s., payable half-yearly on May 12, and November 22 in each year. On November 22, 1785, the defendant paid all the rent then due except £84 15s., which remained unpaid. The plaintiff and another had become entitled to the reversion in May, 1785; they brought an ejectment and laid the demise on April 6, 1785. In Trinity term, 1785, they obtained judgment, and in September, 1785, served notice on the defendant requiring him to attorn to them and pay them the money in his hands. He refused, a writ of possession was thereupon executed and he left the lands. An action was then brought for use and occupation, a verdict was found for the plaintiff subject to the opinion of the Court on a case stated. The question for the opinion of the Court was whether the plaintiff was entitled to recover any and what sum in the action. Ashhurst, J., in giving judgment, said at p. 379:—

> From April 6, 1785, to the time of recovering in the action of the ejectment, in my opinion the plaintiff is precluded from recovering in this form of action; for that would be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser and that of a lawful tenant, during the same period.

Buller, J., at p. 387, says:—

> The action for use and occupation is founded on contract; and unless there were a contract either express or implied, the action could not be maintained . . . In the present case the plaintiff . . . has brought his ejectment and obtained judgment on it which is insisting on the tort and he cannot be permitted to blow hot and cold at the same time. The action for use and occupation and the ejectment when applied to the same time are totally inconsistent; for in the one the plaintiff says the defendant is his tenant, and therefore he must pay him rent, and in the other he says he is no longer his tenant, and therefore he must deliver up the possession.

So in the present case the appellant says to Paulson: "I received and kept your rent accruing up to July 15, 1910, because you were my tenant for the whole of that period and owed it to me,"

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and at the same time says, "you were only my tenant for half that period, from that time you were a trespasser because I cancelled your lease and you did not owe me the rent you paid, but which I will hold."

In *Jones* v. *Carter*, 15 M. & W. 718, 153 E.R. 1040, it was decided that service by a lessor upon a lessee of a declaration in ejectment for the demised premises for a forfeiture operates as an election by the lessor to determine the term, and he cannot afterwards (although there has not been any judgment in ejectment) sue for rent due or after the service of the declaration. In *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360, Willes, J., expressed his full approval of the principle upon which *Jones* v. *Carter*, *supra*, was founded, namely, that the bringing of the action of ejectment was equivalent to the ancient entry. It was an unequivocal act in the sense that it asserts the right of possession on every ground that may turn out to be available to the party claiming to re-enter. *Jones* v. *Carter* was also approved of by Lord Blackburn in *Scarf* v. *Jardine* (1882), 7 App. Cas. 345. If its principle applies to cancellation of a lease based upon breaches of the covenants contained in the lease, then it may well be that the appellant bases his act of cancellation on all the breaches which have occurred since November 22, 1907, until the last extension of time was given, though the rent has been paid during the entire interval.

The case of *Davenport* v. *The Queen* (1877), 3 App. Cas. 115, resembles the present case in many respects. There the Crown under powers conferred by several statutes granted a lease to a lessee who failed to cultivate as he had covenanted to do one-sixth of the land demised within the first year of the term, thus rendering the lessee liable to a forfeiture. Rent was, however, received by the Government with full knowledge of the breach. Notices were published in the *Gazette* of 1869, 1870 and 1871, to the effect that the rent would only be received conditionally. The rent was payable in advance. The first payment was to be made on September 22, 1867, and all subsequent payments on January 1, from 1869 to 1875 inclusive. Judgment was delivered by Sir Montagu Smith, and it was held that even assuming that a forfeiture had accrued it was waived by the receipt of rent, notwithstanding the notifications that when money is paid and received as rent under a lease a mere protest that it is accepted

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conditionally and without prejudice to the right to insist on a prior forfeiture cannot countervail the fact of the receipt. Having regard to all these matters their Lordships are of opinion that it was not competent for the Minister to cancel the lease of the respondent Paulson on September 13, 1909, as he purported to do. It may well be that many cases may occur to which the clause as to waiver would be applicable; what their Lordships think is that it is not applicable in the present case under all its circumstances.

Having come to this conclusion it is unnecessary for their Lordships to deal with the point of the sufficiency of the steps taken to effect cancellation of the defendant's lease. The words of clause 17 are:—"The Minister may cancel these presents by written notice to the said lessee, and thereupon" everything therein shall become void, etc. Under this clause the notice is the operative instrument. The cancellation is effected by it. Instead of serving a notice running thus "your lease is hereby cancelled," the words are "has been cancelled." The letter is a reply to the appellant's letter of March 11, 1909, and for all that appears on the face of the letter the lease might have been cancelled at any time during the 6 months between March 11 and September 13.

Again, there is no satisfactory evidence that Lewis & Smellie were ever clothed with authority by Paulson to receive such a notice on his behalf. One has little moral doubt that the receipt of this letter came to the respondent's knowledge, but the service of such documents as this should be fully proved by legal evidence. The inclination of their opinion is that the appellant loses on both these points.

Their Lordships are therefore of opinion that the decision appealed from was right and should be affirmed, and this appeal be dismissed. The appellant will pay Paulson's costs. There will be no order respecting the costs of the other respondents. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

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Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin and Lord Atkinson. August 5, 1920.

LANDLORD AND TENANT (§ II D—37)—EMPHYTEUTIC LEASE—PURCHASER OF AT JUDICIAL SALE FOR TAXES—TRANSFER TO SUB-LESSEE—TERMS—SPECIAL CLAUSE—RIGHTS AND LIABILITIES OF PARTIES.

The purchaser assumes, when purchasing the unexpired term of an emphyteutic leasehold, at a judicial sale for taxes, all the liabilities and obligations of the original lessee, although a transfer of the emphyteutic leasehold in good faith relieves such purchaser of future obligations to the emphyteutic landlord.

The City of Quebec having purchased such a leasehold for taxes, sub-leased the premises; the sub-lease containing the following clause: "It is agreed between the parties that the said City of Quebec shall be held and obliged to give to the said . . . a deed of sale of all its rights and claims upon the said emphyteutic lease when the said sum of $200 shall have been wholly paid and thereupon the said . . . shall enter into full proprietorship of the said estate subject always to the payment of said emphyteutic rental."

Their Lordships held that this clause meant that the sub-lessee, on payment of the sum of $200, acquired the option of requiring the city to execute a deed conveying to her all its right, property and interest in the emphyteutic lease for the residue of the term. The city was bound to sell and convey their interest in the lease if requested to do so, but the obligation was not reciprocal and the sub-lessee was not bound to make such request if she did not desire to do so, and no request having been made the city was liable for arrears of the emphyteutic rent and for damages for failure to deliver up possession at the end of the term and for breach of covenant to keep the premises in repair.

Statement.

APPEAL from the judgment of the Supreme Court of Canada (1918), 40 D.L.R. 522, 56 Can. S.C.R. 288, reversing the judgment of the Court of King's Bench, appeal side, which had affirmed the judgment at the trial (1916), 49 Que. S.C. 307, in an action brought by appellant as to whether or not the purchaser of the unexpired portion of an emphyteutic lease, acquired at a judicial sale, had become personally responsible to the lessor for the rent or emphyteutic canon and the other obligations of the original lessee.

The judgment of the Board was delivered by

Lord Atkinson.

LORD ATKINSON:—The point for decision in this appeal is a very short one, although it has given rise to considerable division of judicial opinion. The facts too are comparatively few and simple. The appellant and his late brother, Georges Lampson, deceased (of whom the appellant is the universal legatee), by two emphyteutic leases, both dated March 22, 1888, demised to one Claude Giguère each of 2 plots of ground respectively in Champlain Ward in the city of Quebec, each for a term of 25 years from April 30, 1888, at a rent in each case of 25 dollars per annum, payable half-yearly on May 1, and November 1, in each year.

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Each lease contained two covenants by the lessee: first, that he would build a good house with brick or stone chimney within 2 years from the date of the lease, and keep the same in order and repair during the term of the lease; and secondly, that he would at the end of the lease give up the rented premises to the lessor in good order and repair together with all improvements.

The true nature of an emphyteutic lease under the Civil Code of Lower Canada is not disputed. It is a contract by which the proprietor of an immovable conveys it for a time to another for a term not less than nine nor more than 99 years, the lessee undertaking (1) to make improvements, (2) to pay to the lessor an annual rent, and such other charges as may be agreed upon. (Art. 567, C.C.) So long as the term lasts the lessee has all the rights attached to the quality of a proprietor; he may alienate, transfer or hypothecate the immovable leased, without prejudice, however, to the lessor's rights (arts. 569-570 C.C.). His interest may be seized as real property under execution against the lessee at suit of his creditors, and sold (art. 571 C.C.). He holds subject to all the real right and land charges to which the property is subject (art. 576 C.C.). He is bound to make the improvements he has undertaken to make. He is bound to execute all necessary repairs (art. 577 C.C.).

Claude Giguère, the lessee, entered into possession, built a house as stipulated, and remained in occupation till July 5, 1893, when by a notarial deed he conveyed and assigned all his interest under these leases in the premises respectively demised by them to one Joseph Côté. During the same year Côté omitted to pay to the respondents the taxes due to them in respect of the demised premises. The respondents sued him to recover these taxes, with the result that his estate and interest under the leases was taken in execution by the sheriff, who on April 6, 1894, sold it to the respondents, and by deed dated October 10, 1894, conveyed it to them. The respondents became liable to pay to the lessor or his representative the rents reserved by these leases, and to perform all the covenants by the lessee contained in them.

The respondents immediately after their purchase took possession of the premises purchased, and some months before the date of the sheriff's conveyance to them, by a notarial deed dated

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July 31, 1894, leased them for a period of 2 years, *i.e.*, from August 1, 1894, to August 1, 1896, at an annual rent of $100 to one Madame Falardeau, wife of David Falardeau.

This sub-lease, for such it may be styled, contained covenants by the sub-lessee, Madame Falardeau, to pay quarterly in advance to the respondents the rent reserved, to pay to the appellant the rent reserved by the emphyteutic lease, to keep the premises in repair during her term, and at the end of the term to deliver them up in good repair and condition. This lease contained the following clause upon the construction of which the question for decision mainly turns:—

Il est convenu entre les parties que ladite Cité de Québec sera tenue et obligée de consentir à la dite Dame Falardeau, un titre de vente de ses droits et pretentions sur les dits baux emphytéotiques lorsque ladite somme de deux cents piastres aura été entièrement payée, et alors la dite Dame Falardeau entrera en pleine propriété du susdit immeuble sujet toutefois au paiement de ladite rente emphytéotique.

[It is agreed between the parties that the said City of Quebec shall be held and obliged to give to the said Madame Falardeau a deed of sale of all its rights and claims upon the said emphyteutic lease when the said sum of $200 shall have been wholly paid and thereupon the said Madame Falardeau shall enter into full proprietorship of the said estate subject always to the payment of said emphyteutic rental.]

Madame Falardeau immediately on the execution of this lease of July 31, 1894, went into possession of the premises demised to her. She completed the payment of the sum of $200 within the term of the sub-lease. Before the expiration of this term a dispute had arisen between Madame Falardeau and the respondents as to whether a passage was or was not included in the premises demised by the emphyteutic lease. The consequence of this was that the respondents and Falardeau being unable to agree the respondents never executed a deed conveying to her an interest in the premises demised by the emphyteutic lease.

Madame Falardeau continued in occupation of the premises for some ten years from the date of her lease, and then sub-let them to different tenants, who continued in occupation of them up to and after the expiration of the emphyteutic lease on May 1, 1913. In the interval between the expiration of the sub-lease, on August 1, 1896, and the expiry of the emphyteutic lease some rent was paid from time to time by Madame Falardeau to Lampson,

but at the time the action was instituted the rent reserved by the emphyteutic lease was largely in arrear, and the premises demised by it were out of repair.

On September 8, 1915, the appellant instituted a suit against the respondents in the Superior Court of Quebec for the recovery of the $150 arrears of the emphyteutic rent, $100 damages in respect of the respondents' failure to deliver up possession at the expiration of that lease, and $745 damages in respect of their breach of covenant to keep the premises in repair and for the recovery of possession of these premises.

On September 8, 1915, the respondents filed a plea to the effect that they had parted with all their rights to the property in question; that Madame Falardeau had become the lessee of the premises by the execution of the deed of July 31, 1894 (the sub-lease); that since that date she had been treated as owner of the property; that as such it was her duty to keep the premises in repair. The appellant, on September 16, 1915, delivered an answer to this plea denying that Madame Falardeau had become the emphyteutic lessee of the property, and on the same day raise on demurrer an issue of law to the effect that the rights of the appellant were unaffected at law by the dealings between the respondents and Madame Falardeau.

The demurrer was argued before Lemieux, C.J., who decided in the appellant's favour (1916), 49 Que. S.C. 307, ordering that the respondents should quit and deliver up possession of the property demised by the emphyteutic lease, should pay to the appellant $150 in respect of the arrears of the emphyteutic rent, and $100 damages in respect of the failure of the respondents to deliver up at the end of the term the demised premises in good repair and condition. On appeal by the respondents from this decision to the Court of King's Bench at Quebec the appeal was dismissed by a Court composed of Archambeault, C.J., and Trenholme, Lavergne, Cross and Pelletier, JJ. From this judgment the respondents appealed to the Supreme Court of Canada, composed of Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. Judgment of the Court was on March 5, 1918, delivered by Fitzpatrick, C.J. (Duff and Anglin, JJ., dissenting), allowing the appeal and setting aside the judgment appealed from. From this judgment of the Supreme Court of Canada

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(1918), 40 D.L.R. 522, 56 Can. S.C.R. 288, the present appea has been brought. It would appear to their Lordships as if the Chief Justice had based his judgment on the assumption that this contested clause beginning with the words "Il est convenu" [it is agreed], simply embodied a bald and precise agreement on the part of Madame Falardeau to pay to the respondents a sum of $200 and to purchase from them all their estate rights, title and interest in the emphyteutic lease for the unexpired residue of its term, and an agreement on the part of the respondents, equally bald and precise, to sell the same to her; that she went into and retained possession of the demised premises under and by virtue of that agreement of purchase and sale; that her possession of these premises was solely attributable to it; and that when she paid the respondents $200 as she in fact did, the property purchased passed to and became vested in her under the several provisions of the Code to which he referred without any deed conveying or assigning it ever having been executed. He said (40 D.L.R. 522, at p. 525):—

> I construe that clause, read with all that precedes, to mean that, when the sum of 200 dollars has been paid, Mrs. Falardeau becomes the owner of the unexpired term of Giguère's lease acquired by the city under the sheriff's title and, in addition, the city binds itself to give a deed conveying to Mrs. Falardeau all its rights and pretensions to the unexpired portion of the lease.

In their Lordships' view it is not necessary for them to decide whether the Chief Justice was right in the opinion he apparently formed as to the operation and effect of the various articles of the Code to which he referred in a case in which the facts were as he apparently assumed them to be in the present case; because their Lordships, with all respect to the Chief Justice, take a view entirely different from that which he apparently formed, both as to the proper construction of the contested clause itself and as to the nature, significance and effect of Madame Falardeau's action.

In their Lordships' view the contested clause, when properly construed, means this: that Madame Falardeau, on payment of the sum of $200, acquired the option of requiring the respondents to execute a deed (*titre de vente*) conveying to her all their rights, property and interest in the emphyteutic lease for the residue of its term. And that when these two conditions had been fulfilled (*alors*) thereupon Madame Falardeau would enter into

full proprietorship of the aforesaid immovable, subject always to the payment of the emphyteutic rent. The City of Quebec was bound to sell and convey to her their interest in the lease if she required them to do so. But that obligation was not reciprocal. She was not bound to purchase if she did not desire so to do. The conclusion at which their Lordships have arrived as to the proper construction of the contested clause is in exact accordance with the opinion expressed by Pelletier and Lavergne and Anglin, JJ., in the following passages in their judgments:—

Pelletier, J., says:—

L'acte que nous avons devant nous est un bail avec une clause déclarant que, au cas de l'accomplissement de deux conditions, Madame Falardeau pourrait devenir propriétaire; ces deux conditions sont: (1) le paiement de 200 dollars par Madame Falardeau à la Cité de Québec; (2) la passation d'un titre. La clause du bail citée plus haut dit que c'est alors, c'est-à-dire après l'accomplissement de ces deux conditions, que Madame Falardeau entrera en propriété de l'immeuble en question.

Pour que Madame Falardeau serait devenue propriétaire, il fallait démontrer d'abord qu'elle avait payé les 200 dollars, et en second lieu que l'acte de transmission par la Cité de Québec à elle avait été passé.

[The document which we have before us is a lease containing a clause which declares that, in the event of the fulfilment of two conditions, Madame Falardeau would become the proprietor.

The two conditions are as follows:—(1) The payment of $200 by Madame Falardeau to the City of Quebec; (2) The drawing up of a title deed.

The clause of the lease cited above said that *thereupon*, that is to say, after the fulfilment of these two conditions, Madame Falardeau shall enter into proprietorship of the immovable in question.

In order that Madame F. might become the proprietor, it must be proved, in the first place that she had paid the $200, and in the second place that the deed of transfer had been given by the City of Quebec to her.]

As put by Lavergne, J.:—

Madame Falardeau pouvait devenir propriétaire en vertu du bail et de ces conditions après avoir payé la somme de 200 dollars; secondement, par la passation d'un titre après l'exécution de ces deux premières conditions; il est dit dans le bail: "c'est alors que Madame Falardeau entrera en pleine propriété de l'immeuble." Il n'y a jamais eu le titre donné par la Cité de Québec à Madame Falardeau.

[Madame Falardeau could become proprietor by virtue of the lease and of these conditions first after having paid the sum of $200; secondly, by the drawing up of a deed of transfer after the execution of the two first conditions.

The lease contains a clause: "Thereupon Madame Falardeau shall enter into full proprietorship of the immovable." The City of Quebec has never given this deed to Madame Falardeau.]

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If this construction of the contested clause be its true construction, as their Lordships think it is, it appears to them to be wholly irrelevant to discuss the question whether or not a deed was necessary to pass the property to Madame Falardeau, for the obvious reason that she had bargained to get a deed, and the City of Quebec contracted to give it to her. They are bound to give her what they contracted to give her, whether it be necessary or not. Madame Falardeau did not go into possession under or by virtue of an agreement to purchase. She went into possession under and by virtue of her sub-lease. She might never exercise her option to purchase. While that lease lasted she was bound to pay not only the rent reserved by the sub-lease, but also the rent reserved by the emphyteutic lease. She over-held no doubt after her term of 2 years had expired. The result of her over-holding is that a tacit renewal of the sub-lease took place for another year; but if she continued liable in that character to pay the head rent to Lampson from time to time, any payments she made of that head rent therefore became wholly neutral facts; because they were equally consistent with her having had vested in her all the interest in the emphyteutic lease the respondents could give her, or her being only entitled to the yearly tenancies mentioned. The counsel for the respondents relied much upon the principle embodied in the Code that a deed was to be construed according to the intention of the parties to it, but he appeared to their Lordships to discard the necessary qualification to be observed in the application of this principle, namely, that the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself. The circumstances surrounding the making of a deed may, if it be ambiguous, give to its words a special meaning; but if the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses; disregard what we said, and construe it according to what we meant to say, but did not say." The case of *Stevenson* v. *Rollitt* (1912), 42 Que. S.C. 322, was cited by the respondents' counsel in support

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of his contention. It does not support either of the propositions for which it was cited. The head-note runs:—

A promise of sale with actual possession of the thing sold is not equivalent to sale and does not cause the property therein to pass if the intention of the parties to the contrary appears from the terms of the contract. Hence, in a promise of sale, in which the price is made payable by instalments, a covenant that the parties will execute a deed of sale as soon as the two first instalments are paid, is a suspensive condition upon the event of which only the sale is complete and the property passes.

And at 328, Archibald, J., the presiding Judge, said:—

In this instance there is no resolutory condition. But there is also nothing to indicate that it was the intention of plaintiff to deliver the property and to give actual possession thereof, until the title had been granted by the plaintiff.

This shews that it is the language of the contract which governs, and that a formality for which it stipulates must be observed, though not absolutely necessary to effect the end in view. In truth, what the parties quarrelled about in this case was the precise nature and extent of the physical immovable bargained for. Mrs. Falardeau insisted that the parcels demised by the emphyteutic lease embraced a certain passage. The respondents insisted it did not. She naturally insisted on getting what she supposed she purchased. The respondents naturally refused to convey what they contended they never contracted to sell. The language used by the respective parties in this controversy cannot be relied upon to alter the rights conferred by their written contract. Their Lordships are of opinion that this appeal succeeds, that the judgment appealed from, 40 D.L.R. 522, 56 Can. S.C.R. 288, was erroneous and should be reversed and that of the Court of King's Bench of Quebec (appeal side) was right and should be affirmed, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellant in the appeal and in the Courts below. *Appeal allowed.*

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Saskatchewan Court of King's Bench, Taylor, J. September 18, 1920.

HUSBAND AND WIFE (§ II E—80)—SEPARATION AGREEMENT—TERMS OF—DIVORCE PROCEEDINGS ON ACCOUNT OF ADULTERY—NOT A VIOLATION OF TERMS OF AGREEMENT—INTERIM ALIMONY.

A clause in a separation agreement between husband and wife that the husband "will not at any time require the wife to live with him or institute or take any legal proceedings or other steps whatsoever to that end, and will not molest or interfere with her in any way whatsoever," is not broken by the husband commencing legal proceedings for divorce on

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account of adultery, and the plaintiff is at liberty to set up the agreement as a release of a claim for interim alimony. The question of interim costs, however, is on a different basis and will be given to the wife, where she swears that she is without funds with which to contest the action, and that she has a good defence.

[*Thomas* v. *Everard* (1861), 6 H. & N. 448, 158 E.R. 184; *Hunt* v. *Hunt*, [1897] 2 Q.B. 547, followed; *Wood* v. *Wood* (1887), 57 L.J. (Ch.) 1, 57 L.T. 742, referred to.]

Statement. ACTION by husband for divorce on the ground of adultery.

LeR. Johnson, for plaintiff; *L. McTaggart*, for defendant.

Taylor, J. TAYLOR, J.:—In this action, which is an action for divorce by a husband, the defendant moves for interim alimony and costs.

The parties were married on November 13, 1918, and executed a separation agreement on November 22, 1918. The husband alleges that his wife committed adultery on November 17 and 18 at a hotel in the city of Moose Jaw.

In her affidavit in support of this application the defendant denies this allegation and alleges brutal and cruel treatment on the part of the plaintiff. In an affidavit in reply, which has not been further answered, the plaintiff deposes that on the afternoon of November 17, he met his wife in the city of Moose Jaw and she was drunk and refused to go home with him, and on the next afternoon he saw her in a bedroom at an hotel with six men, and she was then drunk. This particular charge has not been met, except in the general allegation in the defendant's affidavit to which I have referred.

The separation agreement follows the usual form, reciting that in consequence of unhappy differences they have agreed to live separate and apart; the plaintiff agrees to pay, and apparently paid, to the defendant $200, which she accepted "in full of all her demands, past, present or future, for support and maintenance, and as a full discharge to the said Otto S. Kuhler of all obligations for her support and maintenance," and the defendant further covenants "that she will not at any time thereafter commence proceedings for compelling the plaintiff to cohabit with her or to allow her any support, maintenance or alimony, and shall not molest the plaintiff in any way."

There is a covenant on the part of the plaintiff "that he will not at any time require the defendant to live with him, or institute or take any legal proceedings or other steps whatsoever to that end, and will not molest or interfere with the defendant in any way whatsoever."

This agreement is produced by the plaintiff as an answer to the defendant's present claim for interim alimony. Her counsel contends that the covenant on the part of the husband "not to molest or interfere with the wife in any way whatsoever" has by these proceedings for divorce been broken, and that the plaintiff cannot now set up this agreement, which he in this way refuses to carry out, as a bar to her claim for alimony or interim alimony. In my opinion this contention is not well-founded. The specific covenant which the plaintiff made in reference to legal proceedings is that he will not at any time require her to live with him or institute or take any legal proceedings or other steps whatsoever to that end. An action for divorce is not a step to that end, but to the contrary, and the covenant not to molest or interfere in any way whatsoever does not appear to have been construed to bar applications for divorce or judicial separation. See Lush on Husband and Wife, 3rd ed., at 495, where it is stated: "A covenant not to molest or interfere with the other party would be a bar to proceedings for restitution of conjugal rights but not to proceedings for judicial separation."

It was held in *Thomas* v. *Everard* (1861), 6 H. & N. 448, 158 E.R. 184, that a suit by a wife in the Divorce Court for a judicial separation was not any breach of the covenant not to "molest or disturb" the husband.

In *Hunt* v. *Hunt*, [1897] 2 Q.B. 547, the Court of Appeal followed *Thomas* v. *Everard*, *supra*, holding that bringing a suit in the Divorce Court for a judicial separation was not a breach of covenant not to molest, and that to make it a breach of covenant there should have been in the separation deed a covenant not to take any legal proceedings.

See also *Wood* v. *Wood* (1887), 57 L.J. (Ch.) 1, 57 L.T. 742.

The conclusion is that the present action of the plaintiff for divorce, whilst not contemplated by, is not barred by the separation agreement; and it is open to the plaintiff to set up the agreement as a release of the claim to alimony. No grounds have been suggested on which the defendant could on equitable grounds be relieved from the release in the separation agreement of any claim to alimony, and of her acceptance of a lump sum for past and future maintenance. Standing unattacked the agreement is an unanswerable defence to the claim to alimony, and as such must also be an

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answer to alimony *pendente lite*. *Powell* v. *Powell and Jones* (1873), L.R. 3 P. & D. 55, and on appeal (1874), L.R. 3 P. & D. 186.

The question as to interim costs is, however, on a different basis. The wife swears that she is without funds with which to contest the action, and that she has a good defence to the action for divorce. The argument of counsel for the plaintiff against providing the wife with interim costs was that the mere fact that the cohabitation ended before the honeymoon was over would be sufficient on which to exercise a discretion to refuse costs, referring to *Miller* v. *Miller* (1869), L.R. 2 P. & D. 13. But as it now stands, each spouse alleges the fault to be in the other, with corroboration to a slight extent of the husband's story in the separation agreement and the relinquishment by the wife of any claim for $200, which is somewhat inconsistent with her present contention. In my opinion this is not sufficient to deprive the wife of her right to interim costs, and she should receive the sum of $200 agreed by counsel to be a reasonable amount.

The application for interim alimony is dismissed, but there will be an order that the plaintiff pay to the solicitors for the defendant, before further proceeding with the action, the sum of $200 for costs of the action. The costs of this application will be costs in the cause. *Judgment accordingly.*

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S. C.

Re THE BOARD OF COMMERCE ACT AND THE COMBINES AND FAIR PRICES ACT OF 1919.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 1, 1920.

CONSTITUTIONAL LAW (I A—3)—LEGISLATIVE POWERS OF PARLIAMENT—REGULATION OF TRADE AND COMMERCE—CRIMINAL LAW—PEACE ORDER AND GOOD GOVERNMENT—COMBINES AND FAIR PRICES ACT, 9-10 GEO. V. 1919, CH. 45, SECS. 18 AND 22.

THE Board of Commerce made an order restraining and prohibiting certain manufacturers of clothing from omitting or refusing to offer for sale in the city of Ottawa their commodities at prices not higher than are reasonable and just; offering the same for sale at prices higher than are reasonable and just; and marking for sale by retail said commodities at prices ascertained by the addition to cost of fifty per cent. or more or made up of cost plus a gross profit of a percentage greater than by the order recognised as fair or a percentage indicated as unfair. The Board is empowered by sec. 18 of the Combines and Fair Prices Act, 1919, to inquire into and prohibit the making of unfair profits on the holding or disposition of necessaries of life, and practices with respect to such holding or disposition calculated to unfairly enhance the cost of such necessaries.

DAVIES, C.J., and ANGLIN and MIGNAULT, JJ., held that the Board had authority to make the order; that Parliament had power to confer the authority on the Board by its jurisdiction to make laws for "the

regulation of Trade and Commerce" and for "the peace, order and good government of Canada" and possibly, except as to the power of the Board to inquire into trade matters, by its jurisdiction to legislate on "Criminal Law."

IDINGTON, DUFF and BRODEUR, JJ., *contra*.

The Board is authorised by sec. 38 of the Board of Commerce Act to require that any order it issues shall be made a rule of any Superior Court of a Province or of the Exchequer Court.

Abstract questions should not be submitted under sec. 32 of the Board of Commerce Act, for the opinion of the Supreme Court of Canada, on a case stated, but the facts of some case pending before the Board should be stated and questions of law arising while considering same should be submitted.

CASE stated by the Board of Commerce for the opinion of the Supreme Court of Canada.

Statement.

The provisions of the Acts in question on this appeal and the order of the Board are set out in the reasons for judgment. The question submitted is whether or not the Board had jurisdiction to make the order and to require that it be made a rule of the Supreme Court of Ontario.

W. F. O'Connor K.C., and *Duncan*, for Attorney-General of Canada.

Lafleur, K.C., for Attorney-General of Alberta.

The opinion of Davies, C.J., and of Anglin and Mignault, JJ., was prepared by Anglin, J.

ANGLIN, J.:—In this case I am to deliver the judgment of my Lord, the Chief Justice, Mr. Justice Mignault and myself. Anglin, J.

The Board of Commerce, constituted under the authority of ch. 37 of 9-10 Geo. V. 1919 (Can.), is by sec. 32 of that Act empowered to "state a case in writing for the opinion of the Supreme Court of Canada upon any question which, in the opinion of the Board is a question of law or of jurisdiction." Purporting to proceed under this provision, the Board presented for determination by this Court a series of six questions—three of them directed to the constitutional validity of certain provisions of the Combines and Fair Prices Act, 9-10 Geo. V. 1919 (Can.), ch. 45, and the other three to the construction of certain sections of the same statute. With a view to meeting a suggestion that Parliament had not intended to authorise the submission of abstract questions for the opinion of the Court, the Board amended the case by adding to it a statement that the questions submitted had arisen in the consideration of certain matters actually pending before it. *Glasgow Navigation Co.* v. *Iron Ore Co.*, [1910] A.C. 293. After hearing argument

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during the winter term, however, the Court was of the opinion that the case as presented was not a "stated case" within the contemplation of sec. 32 of the Board of Commerce Act inasmuch as it did not contain any statement of concrete facts out of which the questions formulated arose. In *Re County Council of Cardigan* (1860), 54 J.P. 792; compare the English O. 34, r. 1, and *Bulkeley* v. *Hope* (1856), 8 DeG.M. & G. 36 at 37, 44 E.R. 302; but was rather, under the guise of a stated case, an unintentional assumption of the power conferred on the Governor-General-in-Council by sec. 60 of the Supreme Court Act, to refer to this Court for hearing and consideration important questions of law or fact touching (a) the interpretation of the B.N.A. Acts, 1867 to 1886, or (b) the constitutionality or interpretation of any Dominion or Provincial legislation.

The attention of counsel having been drawn to this aspect of the matter it was arranged that the case as originally submitted should be superseded by a new case which should contain a statement of facts in some matter or matters pending before the Board and formulate questions of law or jurisdiction which had actually arisen in their consideration, indicating how such questions arose. Such a case was accordingly filed and supplemental argument upon it was recently heard. I am of opinion that inasmuch as by sec. 33 (3) of the Board of Commerce Act the finding or determination of the Board on any question of fact within its jurisdiction is made binding and conclusive, the case as now submitted falls within the intendment of sec. 32 of that statute. It states that the Board proposes to make an order in which, after reciting that it has upon an oral investigation found that in some 36 shops in the city of Ottawa men's ready-made and partly-made suits and overcoats, purchased at a cost of $30 or under, have as a practice been sold at the same percentage of gross profit or margin to the retailers as commodities purchased by them at a greater cost and that unfair profits have been made on such sales and that the merchants concerned have not offered their stocks-in-trade of such commodities for sale at prices not higher than are reasonable and just, but that extenuating circumstances render a prosecution unnecessary, and that in the opinion of the Board fair profits on such commodities may be ascertained on a basis set forth, it will proceed to order that the individuals, firms, and corporations conducting such establishments, naming them, be, and each of them is, restrained and prohibited from

(*a*) omitting or refusing to offer for sale within the city of Ottawa said commodities in accordance with the ordinary course of business at prices not higher than are reasonable and just;

(*b*) offering for sale within the city of Ottawa said commodities at prices higher than are reasonable and just;

(*c*) making or taking upon dispositions within the city of Ottawa by way of sale of said commodities unfair profits being profits greater than those hereinbefore indicated as fair profits;

(*d*) instituting, continuing or repeating the practice of marking for sale by retail within the city of Ottawa either the said commodities or stocks-in-trade of clothing of which said commodities form part at prices calculated or ascertained by the addition to cost of fifty per cent. or more of cost or at prices made up of cost plus a margin or gross profit of (*a*) a percentage greater than by this order recognized as fair, or (*b*) a percentage by this order indicated as unfair, whether or not sales are intended to be actually made at lower prices and in conformity with this order, such practices being in the opinion of the Board designed or calculated to unfairly enhance the price realized upon dispositions by sale of said commodities.

At Bar Mr. O'Connor, representing the Attorney-General, very properly conceded that clauses (a) and (b) of the proposed order would be merely repetitions of the general statutory prohibition implied in sec. 17 of the Combines and Fair Prices Act and are not in a defensible form, and he accordingly abandoned them. As to the remaining clauses (c) and (d), the stated case submits two questions:

(1) Has the Board lawful authority to make the order? (2) Has the Board lawful authority to require the Registrar or other proper officer of the Supreme Court of Ontario to cause the order when issued to be made a rule of said Court?

Section 18 of the Combines and Fair Prices Act purports in explicit terms to confer the authority to make such a restraining or prohibitive order, and sec. 38 of the Board of Commerce Act likewise purports in explicit terms to enable the Board to require that any order made by it shall be made a rule, order or decree of the Exchequer Court or of any Superior Court of any Province of Canada. The questions presented are, therefore, in reality whether these particular provisions are within the legislative jurisdiction of Parliament. They may be more conveniently considered separately.

Upon the policy, efficacy or desirability of such legislation it should be unnecessary to state that an opinion is neither sought nor expressed.

Could Parliament empower the Board to make the order?

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Counsel representing the Attorney-General maintains that it could by virtue of its legislative jurisdiction (a) over "The Criminal Law," (b) in regard to "The regulation of Trade and Commerce," and (c) "To make Laws for the peace, order and good government of Canada" (B.N.A. Act, sec. 91).

Section 17 of the Combines and Fair Prices Act prohibiting the unreasonable accumulation or withholding of "necessaries of life" defined by sec. 18 (recently construed by this Court in the case of *Price Bros. Ltd.* (1920), *ante* p. 286), and requiring that any excess of necessaries of life and all stocks in trade of such necessaries shall be offered for sale at reasonable and fair prices, and sec. 22, which imposes penalties, *inter alia*, for contraventions of sec. 17, may, I think, be held valid (the latter *pro tanto*) as criminal legislation. The provision of sec. 18 authorising the Board to make the inquiries therein provided for and to determine what shall constitute unfair profits may possibly be supported as ancillary criminal legislation, as well as for the purposes of sec. 24.

But I think it is not possible to support, as necessarily incidental to the efficient exercise of plenary legislative jurisdiction over "the criminal law," the further provision of sec. 18 purporting to empower the Court to restrain prospective breaches of the statute, the making or taking of unfair profits, and practices calculated unfairly to enhance costs or prices, or the provisions of sec. 38 of the Board of Commerce Act for making decisions or orders of the Board rules or decrees of the Exchequer Court or of any Provincial Superior Court. The exception at the end of sec. 91 of the B.N.A. Act, although applicable to all the enumerated heads of sec. 92,

> was not meant to derogate from the legislative authority given to provincial legislatures by these 16 sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local and private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of sec. 91. [See *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. 348at 360; see also *Montreal* v. *Montreal St. R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541.]

In so far as the provisions of sec. 18 immediately under consideration may involve an invasion of the field of property and civil rights assigned to Provincial legislative jurisdiction by sec. 92 (12), in my opinion they cannot be supported under sec. 91 (27).

The jurisdiction of Parliament over "The regulation of Trade and Commerce" (sec. 91, sub-sec. 2) has frequently been invoked —usually without success—either in supporting Federal legislation alleged to invade the provincial field or in attacking the validity of Provincial legislation claimed to fall under one of the enumerated heads of sec. 92. In *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96 at 112, the Judicial Committee first points out that these words are not used in an unlimited sense as is apparent from their collocation and from the specific enumeration of several subjects which in their broadest sense the words "the regulation of trade and commerce" would include. Their Lordships suggest "that regulations relating to general trade and commerce were in the mind of the legislature," and that these words (at 113)

> would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern and it may be that they would include general regulation of trade affecting the whole dominion; [but] their Lordships abstain . . . from any attempt to define the limits of the authority of the dominion parliament in this direction.

In *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, it was held that an attempt to make the expression, "the regulation of Trade and Commerce" cover direct taxation of banks so as to exclude provincial power to impose such taxation would unduly strain it. What was said in the *Parsons* case, *supra*, was impliedly approved in *The Local Prohibition* case, [1896] A.C. 348 In *Montreal* v. *Montreal St. R. Co.*, *supra*, Lord Atkinson, after setting out some propositions which *The Local Prohibition* case should be taken to have established with regard to the purview of the exception to the Provincial legislative authority contained in sec. 91 of the B.N.A. Act at its end and the restrictions which must be imposed on the legislative powers of the Dominion over unenumerated subjects exercisable under its jurisdiction "to make laws for the peace, order, and good government of Canada," says, 1 D.L.R. at 686-7, that

> these enactments, secs. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in sec. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in sec. 92, . . . and that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest upon the assumption that these matters also concern the peace, order and good government of the Dominion,

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there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in sec. 91, *viz.*, the regulation of trade and commerce.

Ex facie the last sentence would almost seem to import that legislation properly held to fall within sec. 91 (2) of the B.N.A. Act must not trench upon the provincial field—that Parliament cannot in an otherwise legitimate attempt "to regulate trade and commerce" legislate so as to affect matters with which a Provincial Legislature might deal in some other aspect as falling within "property and civil rights." In *Re Insurance Act (Can.) 1910*, (1913), 15 D.L.R. 251, 48 Can. S.C.R. 260, I was disposed so to interpret his Lordship's language. But if that be its real meaning "the regulation of trade and commerce" would cease to be effective as an enumerative head of Federal legislative jurisdiction. In the more recent decision of *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, the partial interpretation put on head No. 2 of sec. 91 in *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, was again approved and, while it was pointed out that the exclusive power to regulate trade and commerce thereby conferred must, like the expression "property and civil rights in the province" in sec. 92, receive a limited construction, it was held to (18 D.L.R. at 360)

> enable the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the whole Dominion should be exercisable and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade.

The clear effect of this last decision, I take it, is that sec. 91 (2) retains its place and office as an enumerative head of Federal legislative jurisdiction and that legislation authorised by its terms, properly construed, is not subject to the restrictions imposed on Dominion legislation that depends solely on the general "peace, order and good government" clause, but, on the contrary, is effective although it invades some field of jurisdiction conferred on the Provinces by an enumerative head of sec. 92.

Probably the test by which it must be determined whether a given subject matter of legislation, *primâ facie* ascribable to either properly falls under sec. 91 (2) or sec. 92 (13) is this:—Is it as primarily dealt with, in its true nature and character, in its pith and substance (in the language of Viscount Haldane's judgment

just quoted), "a question of general interest throughout the Dominion," or is it (in Lord Watson's words in the *Local Prohibition* case), "from a provincial point of view of a local or private nature?"

In order to be proper subjects of Dominion legislation under "the regulation of trade and commerce" it may well be that the matters dealt with must not only be such as would ordinarily fall within that description, but, if the legislation would otherwise invade the provincial field, must also be "of general interest throughout the Dominion," or, in the language used by Lord Watson in the *Local Prohibition* case, [1896] A.C. 348, at 360, in regard to legislation under the peace, order and good government clause upon matters not enumerated in sec. 91, must be "unquestionably of Canadian interest and importance."

Clement suggests this view in his valuable work on the Canadian Constitution, 1916 ed., at 448 and 688, and it may be that that was all Lord Atkinson, intended when he said that the considerations applicable to the general powers of the Dominion Parliament supplementary to its enumerated powers apply also to the powers conferred on it under the head, "The regulation of Trade and Commerce." Otherwise I find it difficult to reconcile his views with those expressed in the *Parsons* case, 7 App. Cas. 96, and in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330.

The regulation of the quantities of "necessaries of life" that may be accumulated and withheld from sale and the compelling of the sale and disposition of them at reasonable prices throughout Canada is regulation of trade and commerce using those words in an ordinary sense. While the making of contracts for the sale and purchase of commodities is primarily purely a matter of "property and civil rights," and legislation restricting or controlling it must necessarily affect matters ordinarily subject to Provincial legislative jurisdiction, the regulation of prices of necessaries of life—and to that the legislation under consideration is restricted—may under certain circumstances well be a matter of national concern and importance—may well affect the body politic of the entire Dominion. Moreover, "necessaries of life" may be produced in one Province and sold in another. In the case of manufactured goods the raw material may be grown in or obtained from one Province, may be manufactured in a second Province and may be sold in several other Provinces.

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Effective control and regulation of prices so as to meet and overcome in any one Province what is generally recognised to be an evil—"profiteering"—an evil so prevalent and so insiduous that in the opinion of many persons it threatens to-day the moral and social well-being of the Dominion—may thus necessitate investigation, inquiry and control in other Provinces. It may be necessary to deal with the prices and the profits of the growers or other producers of raw material, the manufacturers, the middlemen and the retailers. No one Provincial Legislature could legislate so as to cope effectively with such a matter and concurrent legislation of all the Provinces interested is fraught with so many difficulties in its enactment, and its administration and enforcement that to deal with the situation at all adequately by that means is in my opinion quite impracticable.

Viewed in this light it would seem that the impugned statutory provisions may be supported, without bringing them under any of the enumerative heads of sec. 91, as laws made for the peace, order and good government of Canada in relation to matters not coming within any of the classes of subjects assigned exclusively to the Legislatures of the Provinces, since, in so far as they deal with property and civil rights, they do so in an aspect which is not "from a provincial point of view local or private" and therefore not exclusively under provincial control.

"It must be borne in mind," says Lord Haldane in the recent case of *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. at 359,

> in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or of the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality.

The legislation now under consideration must fall under the one set of powers or under the other, since as in *Attorney-General for Ontario* v. *Attorney-General for Canada*, 3 D.L.R. 509, [1912] A.C. 571, *per* Loreburn, L.C., at 511,

> the powers distributed between the Dominion on the one hand and the Provinces on the other hand covered the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.

As put by Sir Montague Smith in *Russell* v. *The Queen* (1882), 7 App.Cas. 829 at 838-39:

> What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful.

After giving illustrations of laws designed for the promotion of public order, safety or morals which, nevertheless, prohibit certain uses of, and certain acts in relation to, property, his Lordship proceeds at 839-40:

> Few, if any, laws could be made by Parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs.

Lord Fitzgerald in delivering the judgment of the Privy Council in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, quoted extensively and with approval from the *Russell* judgment and referring to it and also to *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, said, at 130, "that the principle which [these cases] illustrate is, that subjects which in one aspect and for one purpose fall within sec. 92 may, in another aspect and for another purpose, fall within sec. 91," and this is said, as the passages cited shew, in relation to the general Dominion power to make laws for the peace, order and good government of Canada as well as in relation to matters falling clearly within some one of the enumerative heads of sec. 91. Reference may also be made to *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, at 587, and to the oft-quoted language of Lord Watson in the *Local Prohibition* case, [1896] A.C. 348, at 361.

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion.

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I ventured in the *Insurance Act Reference*, 15 D.L.R. 251, 48 Can. S.C.R. 260, at 310, to state what I conceive to be the result of the authorities on this particular point in these words:

> When a matter primarily of civil rights has attained such dimensions that it "affects the body politic of the Dominion" and has become "of national concern" it has in that aspect of it, not only ceased to be "local and provincial" but has also lost its character as a matter of "civil rights *in the province*" and has thus so far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the "peace, order and good government" provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount.

In the judgment of the Privy Council on the same *Insurance Act Reference*, 26 D.L.R. 288, [1916] 1 A.C. 588, Lord Haldane said, at 291:

> There is only one case, outside the heads enumerated in sec. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all the subject-matters enumeratively entrusted to the province under sec. 92. *Russell* v. *The Queen* is an instance of such a case.

It may be said that if the subject matter of the Dominion legislation here in question, when its true aspect and real purpose are considered, relates to public order, safety or morals, affects the body politic of the Dominion and is a matter of national concern, so that it can be supported under the general peace, order and good government provision of sec. 91 without recourse to any of the enumerative heads, it is unnecessary and inadvisable to attempt to bring it under Head No. 2. But, while, as Lord Haldane said in *The Insurance* case (26 D.L.R. at 291), great caution must always be exercised in applying the well established principle that "subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures, may in another aspect and for another purpose fall within Dominion legislative jurisdiction," having regard to the warning of Lord Watson in the *Local Prohibition* case, [1896] A.C. 348, at 360-1, that

> the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in sec. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in sec. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by sec. 91, would, in their Lordship's opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the

Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in sec. 92 upon which it might not legislate to the exclusion of the provincial legislatures.

I think it is better that legislation such as that with which we are now dealing, which undoubtedly affects what would ordinarily be subject matters of Provincial jurisdiction, should, if possible, be ascribed to one of the enumerative heads of sec. 91. I prefer, therefore, to rest my opinion upholding its constitutional validity on the power of the Dominion Parliament to legislate for "the regulation of Trade and Commerce" as well as on its power "to make laws for the peace, order and good government of Canada," in regard to matters which, though not referable to any of the enumerative heads of sec. 91, should, having regard to the aspect in which and the purpose for which they are dealt with, properly be held not to fall within any of the enumerative heads of sec. 92—to "lie outside all the subject matters" thereby "entrusted to the Provinces."

The carrying out of the Act now in question, as I have endeavoured to point out, will, in some of its phases, affect the inter-provincial trade and the foreign trade of Canada. It has to do with the general regulation of trade in necessaries of life throughout the Dominion. It would therefore seem to fall within the jurisdiction conferred by Head No. 2 as indicated in *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, at 112-113.

No objection can successfully be founded upon the fact that the Board must exercise its powers from time to time in a particular Province. *Colonial Building Ass'n* v. *Att'y-Gen'l of Quebec* (1883), 9 App. Cas. 157. The necessity of such local action and regulation is perhaps the chief justification for the delegation to a Board or Commission of the power to define what shall be unfair profits and unreasonable and unjust prices. The unfairness of profits and the unreasonableness and injustice of prices, depends so largely on local conditions which vary from day to day and from place to place that Parliament could not itself deal with them by general legislation. Effective regulation of such matters can be accomplished only by some body such as the Board of Commerce endowed with the powers bestowed upon it and ready from time

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to time to deal promptly with the problems involved as they arise. Yet the power of Parliament to delegate its functions to the limited extent for which the Combines and Fair Prices Act provides has been challenged. We had occasion comparatively recently to consider and overrule a similar objection in *Re Gray* (1918), 42 D.L.R. 1, 57 Can. S.C.R. 150. Dealing with the power of a Provincial Legislature to confer on bodies of its own creation authority to make by-laws and regulations upon specific subjects and with the object of carrying an enactment of the Legislature into effect, their Lordships of the Privy Council said in *Hodge* v. *The Queen*, 9 App. Cas. 117, at 132:

> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of law, to decide.

The Acts now under consideration involve no such abdication of legislative jurisdiction—no such abrogation of the power of one of the integral constituents of the Legislature as was attempted in recent Manitoba legislation held *ultra vires* by the Judicial Committee in *Re the Initiative and Referendum Act*, 48 D.L.R. 18, [1919] A.C. 935, where such a limited delegation of legislative functions as was sanctioned in the *Hodge* case, *supra*, again received their Lordships' approval.

However formidable may be the obstacles to the creation of a Dominion Court of criminal jurisdiction presented by clause 27 of sec. 91 and clause 14 of sec. 92 of the B.N.A. Act, I see no valid objection to the constitution by our Parliament under sec. 101 of a Court to carry out the provisions of the Acts now before us designed for the regulation of trade and commerce; and the power to make an order such as that now under consideration, eliminating from it clauses (a) and (b) of the paragraph numbered 1, which are not supported, seems a reasonable and necessary jurisdiction to vest in such a body, in order that its administration may be

effective. At all events, if Parliament is endowed with legislative jurisdiction to deal with the subject of profiteering under the head of "the regulation of trade and commerce" as a matter not substantially of local or provincial interest but affecting the well being, social, moral, and economic, of the Dominion at large, there appears to be no tenable objection to its jurisdiction to confer on a Court of its own creation power to restrain and prohibit contraventions of such regulations and restrictions, general or particular, within the purview of the statute, as it may be found necessary or proper to impose.

Again, it is objected that the proposed order is rather a local regulation than a restraining order. I think not. It will impose a behest *nominatim* on a number of individuals, firms and corporations who were first cited to appear before the Board and whose dealings with the subject-matter of such behest were investigated by the Board. It is just as much an order within the contemplation of sec. 18 of the Combines and Fair Prices Act as it would be if it were one of several similar documents dealing separately with each of the parties to be enjoined.

No valid objection to the provision for making such an order a rule, order or decree of a Provincial Superior Court has, in my opinion, been presented. The machinery of the Provincial Court is to be utilised for a Dominion purpose. The power of Parliament to require this to be done is distinctly affirmed in *Valin* v. *Langlois* (1879), 5 App. Cas. 115, and the express approval by this Court of the following passage from the work of the late Mr. Lefroy on Legislative Powers in Canada, at 510, in *In re Vancini* (1904), 34 Can. S.C.R. 621, at 626, puts it beyond question here:

> The Dominion Parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion whether they be officials of Provincial Courts, other officials, or private citizens; and there is nothing in the B.N.A. Act to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers as to matters which do not come within the subjects assigned exclusively to the Legislatures of the Provinces, [or to deprive them of jurisdiction over such matters].

The authorities on this feature of the case are collected and discussed in Clement's Canadian Constitution, at 531.

We are for these reasons of the opinion that the power of Parliament to confer the authority, to the existence of which

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the questions in the stated case are directed, has not been successfully impugned and that the right of the Board of Commerce to make the proposed order, eliminating from it clauses (a) and (b) of the operative paragraph numbered 1, may be upheld as an exercise of authority validly bestowed under the jurisdiction of Parliament to make laws for "the regulation of trade and commerce" and for "the peace, order and good government of Canada," and in so far as the findings in its recitals are concerned, possibly also under Dominion legislative jurisdiction over "The Criminal Law," although the investigation and the findings made thereon for the purpose of determining what are reasonable and just prices and of affording a foundation for an order prohibiting the making or taking of unfair profits and practices calculated to unfairly enhance costs or prices may not form part of a criminal cause or matter. *Manchester Profiteering Committee* v. *Samuel*, (1920), 36 T.L.R. 254.

We would therefore answer both the questions of the stated case in the affirmative.

Idington, J.

IDINGTON, J.:—This is claimed to be a stated case pursuant to sec. 32 of the Board of Commerce Act, which reads as follows:—

> 32. (1) The Board may, of its own motion, or upon the application of any party, and upon such security being given as it directs, or at the request of the Governor-in-Council, state a case, in writing, for the opinion of the Supreme Court of Canada upon any question which, in the opinion of the Board, is a question of law or of jurisdiction.
>
> (2) The Supreme Court of Canada shall hear and determine such question or questions of law arising thereon, and remit the matter to the Board with the opinion of the Court thereon.

This section is in substance the same as that appearing in the Railway Act, R.S.C. 1906, ch. 37, as sec. 55 thereof and is evidently taken therefrom.

The Board of Railway Commissioners in practice formulate a statement of facts which of course is binding upon us, and then submit the questions of law which they desire answered.

The party then appealing has charge of the conduct of the appeal, and same is argued out in a due and orderly manner, first by counsel for appellant and then by the counsel for respondent, as all appeals on a stated or special case submitted to this or any other appellate Court have been heretofore treated.

The origin of such a mode of appeal need not be traced for many illustrations are to be found in various branches of both civil and criminal, and quasi-criminal, law.

The necessity for the statement of a concrete case seems to me to be almost self-evident, and at all events all relevant precedents I can find, establish that.

It so happened that the Board of Commerce got seized of the idea that all it had to do was to submit questions to this Court for its opinion relative to mere abstract points raised upon the construction of some sections of the Combines and Fair Prices Act, 9-10 Geo. V. 1919 (Can.), ch. 45, without stating any concrete case. And half a dozen such were presented.

I was applied to as Judge in Chambers and refused to recognise such right by making any formal order but suggested to the Registrar that he had better set the matter down to be brought under the notice of the full Court at its then approaching sittings, and he did so.

Upon its coming up there, it developed that there had been a number of questions raised by parties who had been before the Board.

I insisted, for my part, that unless and until a stated concrete case was made in accord with the settled practice of the Railway Board, there should not be a hearing granted.

There appeared counsel for the Board of Commerce, which surprised me somewhat, and for the Attorney-General for Canada and for a number of the parties concerned.

A long discussion ensued resulting in the matter being left to all those so concerned to try and agree upon the selection of a case upon which argument could properly take place.

The case of the Ottawa clothiers had been mentioned in the course of said discussion, as one in which all the questions desired to be raised had been therein raised before the Board, and another was suggested as equally important.

Previously to said sitting of this Court, I had given leave to appeal in a concrete case from Winnipeg, which I suggested might bring up much that it was desired to have this Court pass upon.

The net result of the foregoing attempt to frame a suitable case, consisted of the so-called stated case submitted by the

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Board in the first place, with a brief typewritten memo, which was inserted therein, and after elaborate argument of counsel for all parties appearing before us, and due consideration of the non-observance of our demand, for a concrete case, it was determined by us to insist thereon. The decision in *Re County Council of Cardigan* (1890), 54 J.P. 792, was pointed to as a guide.

The result is now before us in an alleged stated case in which instead of half a dozen questions as previously of a purely abstract character, we have presented to us to be answered, two questions relative to the jurisdiction to make a proposed order based upon what is alleged to be the finding of facts.

The latter are referred to as follows:—

All evidence elicited was given subject to the jurisdiction of the Board to make any order consequent upon the inquiry and to the power of the Parliament of Canada to enact the legislation under which the inquiry was proceeding, counsel for the clothiers having formally protested such jurisdiction. At the conclusion of the sittings argument was heard on behalf of the clothiers and as well on behalf of the public, whereafter the Board took into consideration all matters, including the protest as to jurisdiction. The Board, upon the evidence before it, found as matters of fact the matters set forth in the recitals to the draft order which is Schedule "B."

The recital thus referred to is as follows:—

It appearing that heretofore and since the 7th day of July, 1919, sales by retail of the commodities Men's Ready-Made and Partly Ready-Made Suits and Overcoats (hereinafter referred to as "commodities") purchased by the retailer thereof at a cost of thirty dollars or under have, as a practice, been made within the city of Ottawa by the respective persons, firms and corporations hereinafter named (all being retailers of clothing within said city) at the same percentage of gross profit or margin to the retailer as the commodities purchased by him or them at a greater cost than thirty dollars, and that said persons, firms and corporations respectively have, since said 7th day of July, 1919, made and taken unfair profits upon sales of such commodities so purchased at a cost of thirty dollars or under and have not offered their respective stocks-in-trade of such immediately hereinbefore mentioned commodities (the same being necessaries of life as defined by sec. 16 of the Combines and Fair Prices Act, 1919), at prices not higher than were reasonable and just, the said unfair profits being profits greater than those hereinafter indicated as fair profits; and it further appearing that the conditions mentioned are not such as to call for prosecution, because the making or taking of such unfair profits was not in deliberate breach of or non-compliance with sec. 17 of the Combines and Fair Prices Act, 1919, but was the result of the existence of a long standing practice of marking selling prices upon the basis of addition of arbitrary percentages for gross profit or margin to cost, which practice has been almost universal throughout Canada, was fair at the time of instituting it, but has become unfair and ought to have been varied by reduction of such percentages in consequence of continued substantial increases in basic costs

causing an increased yield of profit, in terms of money, net as well as gross or margin; wherefrom the herebefore indicated offences against said sec. 17 of the Combines and Fair Prices Act, 1919, resulted.

Then follows the opinion of the Board thereon.

I do not consider this which deals with or is made to represent the result of an inquiry by the Board into the respective courses of business pursued by 36 different persons or firms or corporate companies carrying on business in Ottawa and are grouped together in one order, is either such a concrete case as was demanded or presented by way of an appeal as such a case should be.

The Board frames and presents the order.

By sec. 3 of the Combines and Fair Prices Act, 9-10 Geo. V. 1919, ch. 45, it is declared that the Board "shall have the general administration of this Act which shall be read and construed as one with the Board of Commerce Act." Section 18 of the same Act, which is the immediate authority upon which the proposed order must rest, if at all valid, by sub-sec. (1) thereof provides as follows:—

18. (1) The Board is empowered and directed to inquire into and to restrain and prohibit,—(*a*) any breach or non-observance of any provision of this Act; (*b*) the making or taking of unfair profits for or upon the holding or disposition of necessaries of life; (*c*) all such practices with respect to the holding or disposition of necessaries of life, as, in the opinion of the Board, are designed or calculated to unfairly enhance the cost or price of such necessaries of life.

The only concrete facts presented to us are those above recited, presumably the result of the exercise of the powers and discharge of duties above set forth.

There is no appellant named or indicated unless from the fact that a member of the Board appeared as counsel for the Attorney-General for the Dominion, and opened the argument before us supporting the action of the Board.

On the application I have referred to first coming before us, the Board was specifically represented by counsel for it; but none appeared on the last argument herein though the Board of Commerce Act, 9-10 Geo. V. 1919, ch. 37, by sub-sec. 7 specially provides for the Board being heard by counsel or otherwise on appeals such as this. Presumably this provision was made to overcome the possible effect of the case of *Smith* v. *Butler* (1885), 16 Q.B.D. 349, where the Court held that the justices could not be heard in support of an appeal stated by them.

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Such a case so presented without an appellant I respectfully submit, should be dismissed.

The majority of the Court hold that notwithstanding all the foregoing peculiar features of this case, as an appeal on a stated case, we must answer the questions submitted.

Therefore, bowing to their opinion, I will proceed to deal therewith.

On the first argument the leading counsel who presented the case in its then condition seemed to rest the exercise of power in question as based upon the power of the Dominion Parliament over criminal law, and his junior, as if based upon its power over trade and commerce.

Counsel respectively for the firms or parties then concerned in the exercise of the power and for the Province of Alberta, each denying its existence, argued ably that we must look at the general purview of the whole Act to determine its character and by doing so urged that it could not be called legislation within the powers assigned Parliament relative to criminal law and hence must be held as an Act dealing with property and civil rights.

The elimination from the case, as first stated, of four of the questions thereby submitted has rendered much of the argument then considered necessary, inapplicable to the case as it now stands before us.

The proposed order rests upon sub-secs. (1) and (2) of sec. 18, 9-10 Geo. V. 1919, ch. 45, of which sub-sec. (1) is above quoted, and the said sub-sec. (2) is as follows:—

> (2) For the purposes of this Part of this Act, an unfair profit shall be deemed to have been made when, pursuant to and after the exercise of its powers by this Act conferred, the Board shall declare an unfair profit to have been made, and an unfair enhancement of cost or price shall be such enhancement as has resulted from the making of an unfair profit.

Indeed, this sub-sec. (2) in the last analysis is that upon which it must rest.

Assuming the ancient laws against forestalling, regrating and engrossing, which had long been treated as obsolete, and, being considered unsuited to a free people, were finally repealed in England by 7-8 Vict. (1844) ch. 24, yet may be existent in older parts of Canada or re-enacted as part of our criminal law, how can that help to maintain said section as being within the power of the

Dominion Parliament which for its legislative authority must act within the power conferred by the B.N.A. Act?

It seems to me that the enactment of sec. 22 of the Combines and Fair Prices Act, 9-10 Geo. V. 1919, ch. 45, coupled with much else therein, must have been passed by reason of an oversight of the limitations in the B.N.A. Act, otherwise we would not be confronted with so much therein as seems, to say the least, of very questionable authority.

I cannot imagine that Parliament really intended to invade the rights secured to the Provinces to the extent that some of these enactments (of which section 18 is one) clearly do.

Section 91 of the B.N.A. Act provided as follows:—

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

Item 27 of the enumeration reads as follows:—

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

By section 92, it is enacted as follows:—

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

Item 14 of this enumeration, reads as follows:—

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

The Board is constituted a Court of Record. Its acts must be taken to be those of a Court.

How can such a Court, declared by the above quoted sec. 3 of the Combines and Fair Prices Act to have the general administration of that Act which is now in question be held not to offend against these items, 27 of sec. 91, and 14 of sec. 92?

"The constitution of Courts of Criminal Jurisdiction" is expressly excluded by said item 27, and "the administration of justice in the Province" is, by the enacting part of sec. 92 and said item 14 thereof handed over exclusively to the Legislature thereof.

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How can the Board claim in face thereof any right to administer what it urges is criminal law?

The administration of procedure in criminal law is not by a single line or letter assigned to the Dominion.

All the power that is conferred on Parliament relative to procedure is to define the mode of procedure to be followed by the Provincial Courts in the administration of criminal law.

Included in procedure, as heretofore interpreted, is the law of evidence which Parliament may declare.

It has never occurred to any one hitherto, that the conception of what would constitute relevant evidence should be something evolved by a Court, constituted by Parliament first to inquire and declare what was a reasonable course of conduct on the part of any one of the classes of business men falling within the provisions of the Combines and Fair Prices Act, and then to warn, by virtue of sec. 18 thereof, those concerned where and how the line to regulate such course of conduct should be drawn in future; and then to inquire, after such warning had been given, whether any of those so warned had transgressed; and then, if any one found by the inquisition of the Board or its appointed examiners under sec. 19, by means of examining the accused, his employees and books, to have transgressed, the offender so found guilty may be handed over to the consideration of the Attorney-General for the Province who, as well as the offenders, would be bound in duty duly to observe, under sec. 33 of the Board of Commerce Act, 9-10 Geo. V. 1919, ch. 37, such findings of fact.

That section by sub-sec. 3 thereof provides as follows: "The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive."

Such is a fair outline of this new method of defining what may become evidence, and hence legislation within the meaning of item 27 of sec. 91 of the B.N.A. Act relative to what is covered by the phrase therein, "but including the procedure in criminal matters."

There is no other ground upon which, in a strictly legal sense, such provision can be upheld, than as falling within this reservation relative to matters of procedure.

I submit respectfully that the closest examination, or most liberal interpretation, of these two items, 27 in sec. 91, and its

counterpart in item 14 in sec. 92, of the B.N.A. Act, preclude the possibility of making out of them anything which can maintain such a mixture of substantive "criminal law," and law including the procedure in criminal matters, consistent with a due observance of the exclusion of power over "the constitution of Courts of Criminal Jurisdiction" given by item 14 of sec. 92 to the Provincial Legislatures, or in any way to support or justify such legislation as in said sec. 18 of the Combines and Fair Prices Act, on which ultimately the proposed order must rest.

To do it justice the Board, or counsel for the Attorney-General, failed to attempt to put forward such a direct method of dealing with the matter, though the section on which its proposed order must rest, for a basis, necessarily involves all I have set forth in light of the whole of the legislation in question.

The method of meeting so obvious a difficulty was to suggest that as relative to criminal law it was maintainable as ancillary thereto.

The B.N.A. Act leaves no room for any such distinction. And the same sort of argument was put forward in the case of *Montreal Street Ry. Co.* v. *Montreal* (1910), 43 Can. S.C.R. 197, but rejected by a majority of this Court, and we were upheld by the Court above in the appeal taken therefrom by the decision in *City of Montreal* v. *Montreal Street Ry. Co.*, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541.

That decision, of course, stands as a declaration of principle for much more than is merely relative to what was directly involved therein. I, therefore, rely upon its adoption of a principle applicable in other regards, as well as upon its apt disposition of the ancillary argument for which there was much more reason for its application therein than there is herein.

In default of that argument maintaining the jurisdiction of the Board, counsel falls back upon the provision in sec. 101 of the B.N.A. Act, which reads as follows:—

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada.

By virtue of that section this Court was constituted; and, by virtue of the last part thereof, the Court of Exchequer and the Board of Railway Commissioners were created.

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Each of these lastly mentioned Courts was constituted as an additional Court for the better administration of the laws of Canada, and in no way, in actual practice, did they interfere with provincial rights save when straining the power given, as in the *Montreal* case just cited.

It is conceivable that within the powers thus assigned the Dominion Parliament, it might, "for the better administration of the laws of Canada," *i.e.*, laws enacted by that Parliament, create many such Courts.

It is inconceivable to me, how, when the relative powers of Parliament and Provincial Legislatures are so tersely dealt with and definitely expressed, as they are by the items of secs. 91 and 92, which I have already quoted, Parliament can properly constitute any additional Courts for the purpose in question herein.

In relation to many of the subjects enumerated in sec. 91 over which the Dominion Parliament is given plenary powers, the constitution by it of additional Courts is quite conceivable, as within the scope of sec. 101, and is also clearly necessarily so, in relation to the government of territories not given a Provincial Legislature or the status of a Province, and all implied therein.

But whilst the administration of justice thereunder may rest with the Dominion Parliament, how can the constitution of Courts of criminal jurisdiction or any part of the administration of justice relative thereto be assigned by Parliament in anything relative to the criminal law when so expressly excluded on the one hand regarding the constitution of Courts and all that which is relative to the administration of justice so far as regards the constitution of Courts of criminal jurisdiction is on the other hand so expressly assigned to the respective Provincial Legislatures?

Yet these enactments now in question presume to hand over the greater part of the administration of what is claimed to be criminal law to the Board of Commerce. Not only that but do it in such a manner as is quite repugnant to the ideals of British law and justice, as is well exemplified in the recent case of *Law* v. *Chartered Institute*, [1919] 2 Ch. 276.

This enactment which we have under consideration constitutes the Board of Commerce the sole investigator, the sole prosecutor, and the judge to determine the facts it has discovered, or imagines it has discovered, and only when the Board deems proper accused is to be handed over to have the formal part of rendering judgment

duly executed. And, as if to let nothing escape its grasp, the Board has delegated to it the power to make further regulations as set forth below.

I suspect that the clear separation of the legislative power from the administration of its products in relation to criminal law was not born of accident but design, on the part of the astute men who framed the B.N.A. Act. Many obvious reasons existed for doing so. The substantial racial differences between Upper and Lower Canada (now respectively Ontario and Quebec) must never be forgotten if justice is to be done in operating the B.N.A. Act.

Then failing to find that source of jurisdiction available, the argument in support of the proposed order fell back upon the old forlorn hope, so many times tried, unsuccessfully, upon this Court and the Court above, of item 2 of sec. 91 of the B.N.A. Act, which empowers Parliament to deal with "the regulation of Trade and Commerce."

The scope and purpose of this power has so often been referred to in numerous cases, that I hardly think it necessary to repeat what has so often been said in that regard.

I doubt if it has ever been heretofore relied upon in support of such an extravagant claim as this put forward herein.

To regulate the prices charged in the tailor shop, or the corner grocery, needs a power which has not only the limited powers of Parliament but also all that is comprehended in the item 13 of sec. 92 of the B.N.A. Act, which gives exclusively to Provincial Legislatures the power to make laws in relation to "property and civil rights in the Province."

What is this power so assigned to each of the Provincial Legislatures worth, if it can be effectually wiped out by the Dominion Parliament enacting a so-called criminal law and supplementing it by such legislation as before us, including the large delegation of legislative power given by sec. 39 of the Board of Commerce Act (1919 Stats., ch. 37), which reads as follows:—

> 39. Any rule, regulation, order or decison of the Board shall, when published by the Board, or by the leave of the Board, for 3 weeks in the *Canada Gazette*, and while the same remains in force, have the like effect as if enacted in this Act, and all Courts shall take judicial notice thereof.

Is there any sumptuary law or socialistic conception of organised society which could not be made to fall within the power of

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Parliament, by the same process of reasoning as must be resorted to, in order to maintain the right of the Board to make the proposed order?

Our Confederation Act was not intended to be a mere sham, but an instrument of government intended to assign to the Provincial Legislatures some absolute rights, and of these none were supposed to be more precious than those over property and civil rights.

The case of *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96, at an early date in our system of Federal Government decided in effect, by the principle expressly and impliedly adopted therein, much more than appears on the superficial aspects thereof relative to the contractual powers falling within civil rights. Its implications have been maintained in many well known ways by numerous decisions needless to cite.

The case of *In re Vancini* (1904), 34 Can. S.C.R. 621, so much relied on, not only binds us but in the result reached I fully agree; yet I fail to see how that or any of the decisions in the cases cited on behalf of the Board's power, at all help to support its pretension in question herein; unless that in the case of *Geller* v. *Loughrin* (1911), 24 O.L.R. 18, which does not bind us. If there was much resemblance between the legislation in question in that case and this, I might find it necessary to say something, but I fail to find any close resemblance.

Indeed there is, I venture to say, no judicial authority maintaining such legislation.

The counsel for the Attorney-General of the Dominion in his opening on the first argument, referred to certain remarks made by me in the case of *Weidman* v. *Shragge* (1912), 2 D.L.R. 734, 46 Can. S.C.R. 1, 20 Can. Cr. Cas. 117, and repeats the reference in his supplemental factum as if supporting his contention. I was therein attempting to properly appreciate the scope of sec. 498 of the Cr. Code as then in force. I still adhere to all I therein expressed, not only in its immediate bearing upon the issue presented for consideration therein, but, if I may be permitted to say so, in a much wider sense lying within the power of Parliament to deal effectively with, not only by way of the criminal law but also that bearing upon its power over patents and of incorporating companies and the limitations it can impose relative to their operative results.

I fail to see, however, that what I had there in mind (and beyond, relative to which I did not give expression of judicial opinion) can in any way help to maintain such legislation as before us.

Parliament has, in its residual power for the "peace, order and good government of Canada," both legislatively and administratively, a plenary power over territory not yet given the status of a Province.

Yet in default of satisfactory authority for the maintenance of the remarkable legislation, now in question in relation to those dwelling in one of the Provinces, the residual power of Parliament was invoked.

Whatever may be said and must be admitted, relative to the proper exercise of any of the enumerated powers conferred on Parliament being likely to touch incidentally and necessarily upon property and civil rights within a Province, there the power to do so ends.

I deny its existence in the residual power of Parliament, save in the extreme necessity begotten of war conditions, or in manifold ways that do not touch provincial rights.

The war had ended when the legislation now in question was enacted.

It is one of the many curious things relative to these Acts that there seems so much difficulty on the part of those who ought to know in assigning them, or parts of them, to the exact power that is sought to be exercised thereby.

It generally happens that amendments to the criminal law are presented as such and the clear purposes and powers had in view are, therefore, thereby well understood.

In this instance, if so designed, those sections which form Part 2 of the Combines and Fair Prices Act, save sec. 20 expressly excluded, I respectfully submit should have found a place in the chapter of important amendments to the Cr. Code passed in the same session, assented to same day, and forming the very next chapter of the statutes. And, not having done so, coupled with the curious blending of that which is *intra vires* with what is *ultra vires* of Parliament, gives rise to many questions we have not to answer, yet renders any consideration of these we are asked to answer rather confusing.

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Counsel for Alberta submits a recent decision in *Manchester Profiteering Committee* v. *Samuel* (1920), 36 T.L.R. 254, upon an analogous statute in England, where it was held that the legislation there in question, though dealing with the fixing of prices and affixing penalties for breaches of the order determining same, was not criminal law, is a very important one when we apply it to what may be possible for Provincial Legislatures to enact within their powers over property and civil rights.

In that connection it tends to demonstrate that all that is proposed by the form of order presented herein is quite within the powers of the Provincial Legislatures to enact and hence not within any of the powers assigned to the Dominion.

However that may be, we are confronted with sec. 22 of the Combines and Fair Prices Act, 1919 Stats., ch. 45, which enacts as follows:—

22. (1) Any person who contravenes or fails to observe any of the provisions of this Part of this Act other than sec. 20 shall be guilty of an indictable offence and liable upon indictment or upon summary conviction under Part XV. of the Cr. Code to a penalty not exceeding $5,000, or to imprisonment for any term not exceeding 2 years or to both fine and imprisonment as specified, and any director or officer of any company or corporation who assents to or acquiesces in the contravention or non-observance by such company or corporation of any of the said provisions shall be guilty of such offence personally and cumulatively with his company or corporation and with his co-directors or associate officers.

(2) For the purposes of the trial of any indictment for any offence against this Part of this Act, sec. 581 of the Cr. Code, authorising speedy trials without juries, shall apply.

There cannot be a doubt surely of the intention that this enactment should be held part of the criminal law however absurd some of the consequences may be.

For example, under sec. 18, if the Board failed to observe any of its provisions, it must be held liable to be indicted and punished according to the terms of the enactment.

Such like complications may arise in applying sec. 22 to other sections, save sec. 20, in same Part 2 of the Act.

This sort of legislation is characteristic of much more in these two Acts to be administered by the Board of Commerce.

Fortunately we have only to pass upon sec. 18 and answer one question, if concluding, as I do, for the reasons assigned above, that it is *ultra vires* the Dominion Parliament and infringes upon the exclusive jurisdiction of Provincial Legislatures, over

property and civil rights, and over the administration of justice in the Province including "the Constitution, Maintenance and Organization of Provincial Courts both of Civil and of Criminal jurisdiction" as above set forth.

Hence I say "No" in answer to the first question: Has the Board lawful authority to make the order?

And, as an obvious consequence of that answer, the second needs no answer.

As I am unable to find an appellant who has prosecuted this so-called appeal, I cannot suggest imperatively who should pay the costs.

The Attorney-General for the Dominion had the same right, as of course, to intervene and be heard in argument on so grave a constitutional question, as has always been accorded by this Court, in the like cases, to him and Provincial Attorneys-General.

But I cannot in the case before us hold him to have been the appellant.

This is another illustration of how futile this whole proceeding has been, and how far it has fallen short of what is required in a stated case.

To illustrate further what I have advanced I imagine the order proposed might be held quite valid if dealing with traders in Dawson City in the Yukon, over which Parliament has plenary power, but not when dealing with traders in Ottawa, which is part of the Province of Ontario.

DUFF, J.:—The scope of the authority arising under sec. 91 (2) of the B.N.A. Act has been much discussed. No precise definition of that authority has of course been given or even attempted; nevertheless, it has for 40 years been a settled doctrine that the words "regulation of Trade and Commerce" as they appear in that item cannot be read in the sense which would be ordinarily ascribed to them if they appeared alone and unaffected by a qualifying context. To adopt the language of Lord Hobhouse in the case of *The Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, at 586 "it has been found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures," and some definite limiting rules are deducible from the decided cases.

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In the *Parsons* case, 7 App. Cas. 96, it was held that "this authority does not comprehend the power to regulate by legislation the contracts of a particular business or trade in a single province" the particular business or trade there under consideration being the business of fire insurance.

In *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, the authority given to the Provinces by item 9 of sec. 92 to make laws with respect to licenses for raising a revenue for Provincial purposes was considered sufficient to enable a Province to regulate within its own boundaries the manner in which a particular trade is to be carried on and in the judgment delivered upon the reference touching the validity of the Liquor License Act of 1883, commonly known as the McCarthy Act, it was held that the authority of the Dominion in relation to trade and commerce did not include authority to regulate a particular trade by a licensing system applicable to the whole Dominion. And again on the reference upon the subject of the Dominion Insurance Act in 1916, *Att'y-Gen'l for Canada* v. *Att'y-Gen'l of Alberta*, 26 D.L.R. 288, [1916] 1 A.C. 588, this decision was affirmed, and it was decided that the Dominion Insurance Act professing to regulate the business of insurance by a single system of licensing governing the whole of Canada could not be supported as an exercise of the Dominion legislative power in relation to trade and commerce.

The decisions of the Judicial Committee in the two last-mentioned cases appear to have been the logical result of the decision in *Hodge's* case, 9 App. Cas. 117, for although it is quite true that after all proper modifications of the natural meaning of the words used in the respective enumerations in secs. 91 and 92 have been made (by a comparison of the enumerations with each other in accordance with the well known doctrine in *Parsons'* case, 7 App. Cas. 96, at pp. 108-9), there must still be considerable overlapping of the domains ascribed to the Dominion and the Provinces respectively by these enumerations; this is not because the Provinces are authorised by sec. 92 to trench upon the subject matters strictly comprised within the enumerated items of sec. 91 (to pass laws for example which could be described as "railway legislation strictly so called," *C. P. R. Co.* v. *Bonsecours*, [1899] A.C. 367, or legislation dealing with the subject matter of fisheries or a bankruptcy law or a copyright law, *Att'y-Gen'l for Canada* v.

Att'y-Gen'l for Ontario, [1898] A.C. 700 at 715), but because the Dominion for the purpose of giving effect to a legislative scheme properly falling within the authority of one or more of the enumerated heads of sec. 91 may in order to prevent the defeat of the scheme enact proper ancillary provisions upon matters falling under some of the heads of sec. 92, *Att'y-Gen'l for Canada* v. *Att'y-Gen'l of Ontario, supra*.

It is, of course, an important principle that legislation which for one aspect and for one purpose falls within the authority conferred by sec. 92, may in another aspect and for another purpose fall within the authority conferred by sec. 91, but where the question concerns the scope of the enumerated heads of sec. 91 it is in the sense just indicated that this principle must be understood. It cannot be applied in such a way, as Lord Herschell said in the decision in the *Fisheries* case just referred to, as to enable a Provincial Legislature to legislate in respect of the matters which fall strictly within one of the specified classes enumerated in sec. 91. Therefore the decision in *Hodge's* case, *supra*, appears to have involved the conclusion that the kind of regulation which the Judicial Committee there held to be competent to a Provincial Legislature, was not the kind of regulation which is exclusively committed to the Dominion Parliament by the 2nd enumerated head of sec. 91; and it would only be a corrollary of this to hold that the Dominion could not by enacting a law professing to put into effect the same kind of regulation in each Province, legitimately appropriate a field belonging to one of the enumerated specific classes of sec. 92; and this is what was decided upon the reference touching the validity of the McCarthy Act. In *Att'y-Gen'l for Canada* v. *Att'y-Gen'l of Alberta*, 26 D.L.R. 288, [1916] 1 A.C. 588, Lord Haldane speaking for the Judicial Committee said at 292-3:—

> But in *Hodge* v. *The Queen*, the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board, though without giving reasons, that the Dominion licensing statute known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by sec. 91.

By parity of reasoning it seems to follow as a result of *Parsons'* case, that legislation regulating the contracts of a particular

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business or trade is not the kind of regulation which is exclusively committed to Parliament by that provision of sec. 91 now under discussion and consequently that it is not competent to the Dominion to regulate such contracts in each Province by legislation applicable to all of the Provinces.

Again, in the *Montreal St. Ry.* case, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541, a Dominion enactment purporting to regulate local railways in respect of through traffic, that is to say, traffic passing from a Dominion to a local line and *vice versâ*, was held to be *ultra vires* and it was decided that the authority conferred by item No. 2 of sec. 91 could not be legitimately exercised in regulating the management of "local works or undertakings" of the kind committed to the exclusive jurisdiction of the Province by item No. 10 of sec. 92.

In *Parsons'* case, 7 App. Cas. 96, at 112, 113, appears the well known elucidation of the language of No. 2 of sec. 91 by Sir Montague Smith. In the *Montreal St. Ry.* case, *supra*, the substance of this passage is adopted by the Judicial Committee; and again in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, Lord Haldane speaking for the Judicial Committee said (18 D.L.R. at 357-8):—

> Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, at 112, 113, on head 2 of sec. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade.

Turning then to the exposition in *Parsons'* case, thus adopted in 1912 and 1915, we find (in addition to the negative proposition that the authority in question does not comprehend the power to enact minute regulations in respect of a particular trade), 1st, that the context affords an indication that "regulations relating to general trade and commerce" were in the mind of the Legislature, and, 2nd, that matters embraced by these words would include "political arrangements in regard to trade requiring the sanction of Parliament; regulation of trade in matters of interprovincial concern" and possibly "general regulation of trade affecting the whole Dominion."

It is not easy to ascribe a precise meaning to the words "general trade and commerce" but the passage seems to imply that the words "trade and commerce" are to be read conjunctively or at

all events that the word "trade" takes on a special colour and significance from its association with the word "commerce"; and whatever be the precise significance of the word "general" we are at least able to affirm in consequence of the decisions already mentioned that it excludes regulations such as those which were in question in *Hodge's* case, in the McCarthy Act reference, in *Parsons'* case, *supra*, and in the *Montreal St. Ry.* case. To borrow a phrase used *arguendo* on the Liquor License appeal, *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for Canada*, [1896] A.C. 348, "general" in this passage means "general not as including all particulars but general as distinguished from some particulars."

In the *Montreal St. Ry.* case, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541, it was laid down in effect that the authority to deal with trade and commerce ought not to be so construed and applied as to enable the Parliament of Canada to make laws applicable to the whole Dominion in relation to matters which in each Province are substantially of local or private interest and in particular in relation to matters which in each Province are comprehended within the subject matters assigned to the Province by No. 10 of sec. 92, viz., "local works and undertakings."

In addition to these negative and limiting rules a recent decision, *Wharton's* case, *supra*, affords an illuminating example of the application of the considerations mentioned in *Parsons'* case, *supra*. It was there held that companies incorporated under the residuary power arising under sec. 91, having the status of corporations throughout the Dominion generally might properly be subjects of regulation under No. 2 of sec. 91 in the sense that Parliament in the exercise of the authority thereby conferred might prescribe the extent to which such companies should be entitled to trade in any of the Provinces. That is entirely consistent with the proposition laid down in *Parsons'* case, that the authority of Parliament under the heading mentioned is an authority to pass regulations in relation to "general" trade and commerce. For the regulation in question in *Wharton's* case, 18 D.L.R. 353, [1915] A.C. 330, was not a regulation relating to any particular kind of trade or business, but a regulation touching the trading powers of all Dominion companies engaged in any kind of business and applying to all such companies alike and thus at least potentially affecting Dominion trade and commerce in general through one of its most important instrumentalities.

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Coming to the consideration of the Combines and Fair Prices Act, and particularly sec. 18 of that Act, under which the order in dispute has been made. The jurisdiction of the Board under this section falls broadly into two sub-divisions, first, the jurisdiction to make orders prohibiting the accumulation of articles to which the statute applies or the withholding from sale at reasonable prices of any such articles in excess of the amount reasonably required for domestic purposes, or for the ordinary purposes of business, and secondly, the jurisdiction to regulate profits; that is to say, to declare what constitutes an unfair profit upon the holding or disposition of such articles, to prohibit the making or taking of such profits and to prohibit any practice which in the opinion of the Board has a tendency to enhance the cost of such articles, or the profits rising from the holding or the disposition of them, or the price of them.

As regards the first head of jurisdiction, the authority of the Board extends to traders and non-traders alike, to persons accumulating by means of purchase or by means of production, to articles accumulated whether by means of production or otherwise, for domestic use or for use for the ordinary purposes of business. For example it applies to accumulations by the house holder of articles of food produced by the householder himself, the small farmer's pork and butter, as well as to his cordwood. It applies to the stock of coal accumulated by a railway or shipping company, or of coal or coke by a gas company or a smelting company, as well as to the coal accumulated by a coal mining company or the gas produced by a gas company; to the dairyman's as well as to the rancher's herd.

In so far as the Act authorises the Board of Commerce to compel persons who are not engaged in trade to dispose of their property subject to conditions fixed by the Board and persons who are traders to dispose of property in respect of which they are not engaged in trade (the coal of the railway company or of the gas company, the dairyman's herd for example), I have not a little difficulty in classifying it as an enactment relating to the matters comprised within sec. 91, sub-sec. 2, upon any fair construction of the words "regulation of Trade and Commerce." It is legislation effecting trade and commerce no doubt, but I am unable to distinguish such an enactment from an enactment

authorising a Board established by Parliament to take over such property on terms to be fixed by the Board and to dispose of it itself. Such compulsory enactments seem to be enactments on the subject of the rights of property, sec. 92, sub-sec. 13, and "local . . . undertakings," sec. 92, sub-sec. 10, rather than enactments in regulation of trade and commerce.

Turning now to the authority vested in the Board by 9-10 Geo. V., 1919, ch. 45, sec. 18 in relation to profits and prices. The provisions of sec. 18 on this subject appear to be obnoxious to the principles laid down in the passages referred to in *Parsons'* case, 7 App. Cas. 96, the *Montreal St. Ry.* case, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541, and the *Wharton* case, 18 D.L.R. 353, [1915] A.C. 330. The authority given to the Board is an authority to prohibit the making or taking of unfair profits upon the holding or disposition of any articles to which the statute applies, and the section provides, "that an unfair profit shall be deemed to have been made, when . . . the Board shall declare an unfair profit to have been made." It is thus left to the Board to make orders affecting individual holders or traders, to fix the terms upon which they are required to dispose of articles withheld from disposition or held for disposition, and such terms the Board is not required to fix by any general regulation, but may, and in the normal course would, fix them with reference to the circumstances of a particular case. The fixing of the terms of disposition by reference to the prohibition against unfair profits might well result in great disparity between the prices charged for the same article by different traders. The creation of an authority endowed with such powers of fixing the terms of contracts in relation to specific articles appears to involve an interpretation of the words, "regulation of trade and commerce," much more comprehensive than anything contemplated by the decisions and judgments referred to above. I have indicated the principle which in my opinion is deducible from *Parsons'* case, *supra*, namely, that sec. 91, sub-sec. 2, does not authorise an enactment by the Dominion Parliament regulating in each of the Provinces the terms of the contracts of a particular business or trade, for the reason (put very broadly) that such legislation involves an interposition in the transactions of individuals in the Provinces, within the sphere of "Property and Civil Rights and local under-

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takings" not contemplated by section 91 (2). Legislation, for example, imposing upon the trade in ready-made clothing throughout Canada, the prohibitions put into force by the order out of which this reference arises would if my view of the effect of *Parsons'* case, *supra*, be the right view, pass beyond the scope of the authority given in sec. 91, sub-sec. 2; an enactment that is to say, by the Dominion Parliament in the precise words of the order now in question could not be supported under that head. I cannot discover any principle consistent with these conclusions, upon which an enactment delegating to a commission the authority to regulate the terms of particular contracts of individual traders in a specified commodity according to the views of the Board as to what may be fair between the individual trader and the public in each transaction, can be sustained as an exercise of that power; and if such legislation could not be supported when the subject dealt with is a single commodity, or the trade is a single commodity, or a single group of commodities, how can jurisdiction be acquired so to legislate by extending the scope of the legislation and bringing a large number of specified trades or commodities within its sweep? Every consideration which can be evoked in support of the view that the authority to regulate by general regulations of uniform application the contracts of a trade in one commodity, does not fall within sec. 91, sub-sec. 2, can properly be brought to bear with I think increased force in impeaching legislation of the character now in question.

The point may be illustrated by reference to the Provincial jurisdiction concerning Local Works and Undertakings. The power given to the Board by sec. 18 is a power to interfere with the management of local undertakings in respect of all the matters mentioned, accumulation, withholding from sale, making and taking profits, from holding or selling, prices, cost, and practices affecting prices and cost. The authority extends to such undertakings, for example, as coal mines and gas works. Electricity does not fall within the definition of sec. 16, but could I think be brought within the jurisdiction of the Board by a regulation passed under that section. Section 19 shews that such undertakings are within the contemplation of sec. 18, and in *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, at 585, it was laid down that coal mines are local undertakings within sec. 92, sub-sec. 10.

It is necessary to observe that we are not dealing with a statute clearly within one of the enumerated heads of sec. 91, and only incidentally affecting local undertakings, or other matters committed to the Province. The normal operation of sec. 18, being such as I have pointed out, namely through the instrumentality of orders made by the Board directly against individuals and particular undertakings, and based upon conclusions derived from a consideration of the circumstances of each particular case, it becomes plain that what is contemplated is a direct interference by the Board, in respect of the matters committed to its jurisdiction in the management of such undertakings, the property held in connection with them and the contracts made by their proprietors. Let us take as instances, coal mines and gas works. The authority given to the Board to fix the rate of profit, to prohibit accumulation beyond the amount which in the opinion of the Board may reasonably be required for the purposes of the business, to prohibit practices which in the opinion of the Board enhance costs or profits, is essentially an authority to interfere with the management of undertaking A, undertaking B, and undertaking C, notwithstanding that the authority is given in general terms, and therefore the legislation creating that authority is not legislation merely affecting such undertakings, but legislation in relation to such undertakings: *C.P.R. Co.* v. *Bonsecours*, [1899] A.C. 367, at 372; *Montreal* v. *Montreal St. Ry. Co.*, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541.

It may be conceded that while sec. 18 could in its very terms be validly enacted by a Provincial Legislature, the authority reposed in a Commission created by such a Legislature would not of course extend beyond the ambit of authority committed to the Legislature itself and consequently such a Commission would not acquire power to deal with matters belonging to the subjects of foreign trade, inter-provincial trade, and the regulating of the management of Dominion undertakings and beyond the legitimate scope of the legislative activities of the Province; but it does not follow because the Dominion could alone deal with these last mentioned matters it is itself authorised to enter upon fields exclusively reserved for the Provinces, in order to carry out a legislative design necessarily incomplete without legislation on matters so exclusively reserved, co-operation between the

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Dominion and the Provinces may be necessary to attain the ends desired by the legislator and such co-operation is of course not unknown and has indeed in some cases been expressly provided for in Dominion legislation, see for example 9-10 Geo. V. 1919, ch. 68, sec. 373, sub-sec. 6.

Having regard then to the scope of sec. 18, the authority conferred upon the Board to interfere with the proprietary rights of producers, holders and consumers of any of the articles to which the Act applies, and the authority to interfere with the management of local works and undertakings, and to prescribe the conditions of contracts relating to such articles and to the manner in which the Act takes effect, I conclude that it is not an enactment in relation to trade and commerce within sec. 91, sub-sec. 2.

The second question is whether sec. 18 can be sustained as an exercise of the power of the Dominion under the introductory clause of sec. 91 to "make laws for the peace, order and good government of Canada." Two conditions govern the legitimate exercise of this power. First—it is essential that the matter dealt with shall be one of unquestioned Canadian interest and importance as distinguished from matters merely local in one of the Provinces, and, secondly, that the legislation shall not trench upon the authority of the Province in respect of the matters enumerated in sec. 92. *Att'y-Gen'l of Ontario* v. *Att'y-Gen'l for Canada*, [1896] A.C. 348, *Montreal* v. *Montreal St. Ry. Co.*, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541, *Wharton's* case, 18 D.L.R. 353, [1915] A.C. 330. I have already pointed out that section 18 does profess to deal with matters which in each Province are, from the provincial standpoint, rights of property and civil rights there and matters which, in each Province, are comprehended within the subject matter "local undertakings."

It is true that in *Russell* v. *The Queen* (1882), 7 App. Cas. 829, the Canada Temperance Act was held to be validly enacted under this general power and that in *Local Option Reference*, [1896] A.C. 348, and in the *Manitoba License Holders'* case, [1902] A.C. 73, the enactment of similar legislation was held to be competent to a local Legislature, the legislation being, of course, limited in its operation to the Province; but it is I think impossible to draw from these authorities on the "drink" legislation any general principle which can serve as a guide in passing upon the validity of the statute before us.

Russell's case, 7 App. Cas. 829, was accepted by the Judicial Committee in 1896, as decisively determining the validity of the Canada Temperance Act and to that extent it was treated as a binding authority.

But it must be remembered that *Russell's* case was in great part an unargued case. Mr. Benjamin who appeared for the appellant—the Provinces were not represented upon the argument—conceded the authority of Parliament to enact legislation containing the provisions of the Canada Temperance Act to come into force at the same time throughout the whole of Canada and this Lord Herschell said, in a subsequent case, was a "very large admission." The Judicial Committee proceeded upon the view that legislation containing the provisions of the Canada Temperance Act was not, from a provincial point of view, legislation relating to "property and civil rights" within the Province; it was, they said, legislation dealing rather with public wrongs, having a close relation to criminal law and on this ground they held that the subject matter of it did not fall within the exceptions to the introductory clause.

The subsequent judgments of the Judicial Committee in the *Local Option Reference* of 1896, [1896] A.C. 348, and in the *Manitoba License Holders'* case, [1902] A.C. 73, shew that consistently with the validity of the Canada Temperance Act similar legislation by the Provinces, limited in its operation to the Province, can be supported as being from a provincial point of view legislation dealing with matters merely local. In the last mentioned case Lord Macnaghten said it might be doubtful whether if such legislation were from the provincial point of view properly classified as legislation upon the subjects denoted by "property and civil rights," general legislation by the Dominion such as the Canada Temperance Act could be sustained.

There is no case of which I am aware in which a Dominion statute not referable to one of the classes of legislation included in the enumerated heads of sec. 91 and being of such a character that from a provincial point of view, it should be considered legislation dealing with "property and civil rights," has been held competent to the Dominion under the introductory clause; and the effect of decisions in the *Montreal St. Ry.* case, or the *McCarthy*

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Act Reference and in the *Insurance Act Reference, Att'y-Gen'l for Canada* v. *Att'y-Gen'l of Alberta*, 26 D.L.R. 288, [1916] 1 A.C. 588, is that legislation by the Dominion applying to the whole of Canada, dealing with matters which from a provincial point of view fall within No. 9 or No. 10 of sec. 92, is not a competent exercise of this general power.

"Property and civil rights," of course, taken in the most comprehensive sense, is a phrase of very wide application and like the words "Trade and Commerce," it must be restricted by reference to the context and the other provisions of secs. 91 and 92. But my view is that where a subject matter is from a provincial point of view comprehended within the class of subjects falling under "property and civil rights," properly construed (*ex hypothesi* such matter could not fall strictly within any of the classes of subjects enumerated in sec. 91) it is incompetent to the Dominion in exercise of the authority given by the introductory clause to legislate upon that matter either alone or together with subjects over which the Dominion has undoubted jurisdiction as falling neither within sec. 92 nor within the enumerated heads of sec. 91; and legislation which in effect has this operation cannot be legitimised by framing it in comprehensive terms embracing matters over which the Dominion has jurisdiction as well as matters in which the jurisdiction is committed exclusively to the Provinces.

Nor do I think it matters in the least that the legislation is enacted with the view of providing a remedy uniformly applicable to the whole of Canada in relation to a situation of general importance to the Dominion. The ultimate social, economic or political aims of the legislator cannot I think determine the category into which the matters dealt with fall in order to determine the question whether the jurisdiction to enact it is given by sec. 91 or sec. 92. The immediate operation and effect of the legislation, or the effect the legislation is calculated immediately to produce must alone, I think, be considered. I repeat that if, tested by reference to such operation and effect, the legislation does deal with matters which from a provincial point of view are within any of the first fifteen heads of sec. 92, it is incompetent to the Dominion unless it can be supported as ancillary to legislation under one of the enumerated heads of sec. 91.

This view may be supported by contrasting the decision of the Judicial Committee in *Russell's* case, *supra*, with its decision on the *McCarthy Act Reference*. The Canada Temperance Act was an attempt on the part of the Parliament of Canada to cope with the evils arising from the sale of intoxicating liquor, and that Act as already mentioned was held to be within the power of Parliament as dealing not with civil rights and property but with public wrongs, and being legislation analogous in character to the statute restricting the sale of explosives and poisons and having a close relation to the criminal law. The McCarthy Act which was passed shortly after the decision in *Russell's* case, recited that it was expedient to regulate the traffic in intoxicating liquors by a system uniform throughout Canada for the purpose of preserving public order, and then proceeded to regulate the liquor trade by a system of licensing. This decision, as already mentioned, was a logical consequence of the preceding decision of the Board in *Hodge's* case, 9 App. Cas. 117, to the effect that from a provincial point of view such a system of licensing fell within No. 9 of sec. 92. The combined effect of these decisions seems clearly to be that while for the purpose of dealing with a matter of interest to the whole Dominion in the sense of being a matter affecting and pertaining to the public order and good government of the whole Dominion (the evils of the liquor trade), Parliament may legislate so long as its enactments are of such a character that they do not deal with matters from a provincial point of view within the specific classes of subjects enumerated in sec. 92 (*i.e.*, the first fifteen heads), it is not within its power under the residuary clause to enact legislation which from the provincial point of view falls within any one of such classes. It is quite true that the *McCarthy Act Reference* principally involved a consideration of only one of the enumerated heads, No. 9, but it is difficult to find any satisfactory relevant distinction between No. 9 and No. 10 (as regards matters falling under this head, the *Montreal St. Ry.* case, *supra*, seems to be conclusive), or between No. 9 and No. 13, although as regards the last-mentioned head, caution must be used in observing the limits necessarily imposed by the context in the two sections upon the scope of their application.

The argument based upon the residuary clause rests upon the principles supposed to be deducible from the decisions upon the

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liquor legislation. The result of the decisions of the Judicial Committee in *Russell's* case, *supra*, on the *Local Option Reference* in 1896, and the *Manitoba License Holders'* case, *supra*, in 1902, is that while the restriction or prohibition of the liquor traffic in the manner effected by the Canada Temperance Act within a single Province, may from a provincial point of view fall within No. 16, it may also fall within the ambit of the residuary clause as subject matter of legislation; but there is in my judgment no justification for applying the reasoning of their Lordships in their judgments in the *Local Option Reference* in support of the proposition that matters falling within any of the other heads of sec. 92 as subject matter of legislation can be dealt with by the Dominion under a general law passed under the authority of the residuary clause, and the doubt expressed by Lord Macnaghten in the *Manitoba License Holders'* case, [1902] A.C. 73, affords very weighty argument against such an interpretation of Lord Watson's judgment on the *Local Option Reference*.

The consequences of this proposed view of the residuary clause, can be illustrated by the present legislation. The scarcity of necessaries of life, the high cost of them, the evils of excessive profit taking, are matters affecting nearly every individual in the community and affecting the inhabitants of every locality and every Province collectively as well as the Dominion as a whole. The legislative remedy attempted by sec. 18 is one of many remedies which might be suggested. One could conceive, for example, a proposal that there should be a general restriction of credits, and that the business of money-lending should be regulated by a commission appointed by the Dominion Government with powers conferred by Parliament. Measures to increase production might conceivably be proposed and to that end nationalisation of certain industries and even compulsory allotment of labour. In truth, if this legislation can be sustained under the residuary clause, it is not easy to put a limit to the extent to which Parliament through the instrumentality of commissions (having a large discretion in assigning the limits of their own jurisdiction, see sec. 16), may from time to time in the vicissitudes of national trade, times of high prices, times of stagnation and low prices and so on, supersede the authority of the Provincial Legislatures. I am not convinced that it is a proper application of the reasoning

to be found in the judgments on the subject of the drink legislation, to draw from it conclusions which would justify Parliament in any conceivable circumstance forcing upon a Province a system of nationalisation of industry.

Mr. O'Connor's chief contention was that the enactments of sec. 17 are enactments upon the subject of criminal law, within the meaning of that phrase as used in sec. 91 and that the provisions of sec. 18 can be supported as provisions ancillary to these enactments. I think it is open to doubt whether the enactments in sec. 17 can be supported as enactments upon the subject of "the criminal law." Section 22 it is true makes infractions of sec. 17 punishable as therein provided, but the penal sanctions provided by sec. 22 apply clearly to any contravention of any provisions of Part 2 of the Combines and Fair Prices Act, and it is not easy to believe that every such infraction (for example, sub-sec. 3, sec. 19), was intended by the Legislature to be classed as a crime in the strict sense. Moreover, having regard to the jurisdiction conferred upon the Board (by sec. 16) to enlarge the application of the statute, it seems very doubtful indeed if such could have been the object of the Legislature. But assuming this view of sec. 17 to be the right view, I cannot agree that the enactments of sec. 18 are in any proper sense ancillary to the enactments of sec. 17. Sections 17 and 22 are quite complete in themselves, and while I think the Legislature might very well have provided as ancillary to these enactments special administrative machinery for the investigation of questions of fact pertaining to the matters dealt with in these two sections, and have reformed the criminal procedure for the purpose of meeting the difficulties of enforcing sec. 17, the authority conferred upon the Board by sec. 18 is not in my opinion in any way necessary in order to give complete effect to secs. 17 and 22.

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BRODEUR, J.:—The Board of Commerce had, on January 9, 1920, under sec. 32 of the Board of Commerce Act, 9-10 Geo. V. 1919, ch. 37, stated a case for the opinion of this Court upon several questions which, in the opinion of the Board, were questions of law.

The specific facts which had arisen and the decision arrived at on these facts had not been mentioned in the stated case and it could hardly be considered that the questions were properly

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submitted. In *Re County Council of Cardigan*, 54 J.P. 792. It was found advisable, at the suggestion of the Court, that a new case should be submitted. The Board then stated a new case with regard to the retail clothiers of the City of Ottawa, in which it is alleged that the Board had made of its own motion an inquiry under the provisions of sec. 18 of the Combines and Fair Prices Act, ch. 45, 9-10 Geo. V. 1919, and that it was found that those merchants had made unfair profits on the sales of men's clothing and that after a certain date an order would issue restraining them from selling these goods, except at a certain margin of profit. We are asked to determine whether or not the Board has the authority to make such an order and to require the Registrar or other proper authority of the Supreme Court of Ontario to cause the order to be made a rule of said Court.

This new stated case supersedes the question formerly submitted. It is made with the evident intention of testing the validity of sec. 18 of the Combines and Fair Prices Act. There was at first some uncertainty as to whether the proposed order was issued under secs. 17 and 18; but at the argument it was stated as a common ground that the only section of the Act applicable to the facts of the case is sec. 18. This sec. 18 declares that the Board is empowered to inquire into and to prohibit any breach of any provision of the Act, the making of unfair profits upon necessaries of life and all practices calculated to unfairly enhance their cost.

The Attorney-General of Alberta, who had appeared by counsel on the first stated case which covered the validity of the whole Act, has also appeared on this amended issue to contest the validity of the order. He does not desire to question the wisdom of any proper legislative attempts to regulate prices in the interest of the consumers, but he claims that such a legislation is within the exclusive jurisdiction of the Provincial Legislature.

The retail clothiers specifically named in the proposed order are being defended by the association of which they are members, the Retail Merchants Association of Canada, and this association, as well as some other associations and organisations which are interested in the proceedings instituted before the Board of

Commerce, have also appeared and have asked us to declare *ultra vires* the legislation on which the order is based.

The Attorney-General of Canada upholds the constitutionality of the said order, his main ground being that sec. 18 is legislation ancillary to criminal legislation, viz., to sec. 17 of the Combines and Fair Prices Act. The first question then is as to whether or not sec. 17 is criminal legislation.

Section 17 prohibits undue accumulation of necessaries of life and forces the accumulators to dispose of these necessaries at fair prices.

In other words, it is an enactment relating to the quantity of goods which a person may possess and determines the conditions at which they should be sold. *Primâ facie* it is legislation affecting property and civil rights and would fall within provincial and not federal jurisdiction. Sec. 92, sub-sec. 13.

It is true that penalties are imposed on those who contravene or fail to observe any provisions of the Act and even these contraventions are indictable offences (sec. 22). But the imposition of penalties would not by itself give the Federal Parliament power to legislate. As it was declared by the Privy Council in *The Insurance Reference*, 26 D.L.R. 288, [1916] 1 A.C. 588, such penalty is an ancillary enactment. We must ascertain the class to which the operative enactment really belongs, the primary matter dealt with, the true nature and character of the legislation, its leading features, its pith and substance. *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580.

What is the object of the legislation at issue in this case? It is to investigate and restrain the withholding and enhancement of the price of commodities. A Board is created for that purpose with very extensive powers. If the intention of Parliament was to enact criminal legislation, it would likely have been embodied in an amendment to the Cr. Code, as they have done by the following chapter, ch. 46 of the statutes passed in the same year.

Similar provisions had to be construed in the *Insurance Reference* case (secs. 4 and 70 of the Insurance Act). Penalties and imprisonment were enacted for the contravention; but it was mildly contended it could be considered as criminal legislation before this Court (15 D.L.R. 251, 48 Can. S.C.R. at 313); it was

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not mentioned before the Privy Council, 26 D.L.R. 288, [1916] 1 A.C. 588.

Legislation similar to the one we have to construe in this case was passed last year in England and was called the Profiteering Act, 9-10 Geo. V. 1919 (Imp.), ch. 66. Under that Act the Board of Trade has power to investigate prices, profits, etc., and for that purpose to require any person to appear before them and on any such investigation they may by order fix maximum prices and declare the price which would give a reasonable profit.

By sub-sec. 2 of sec. 1 of the Act it was declared:

If, as the result of any investigation undertaken on their own initiative or on complaint made to them, it appears to the Board of Trade that the circumstances so require, the Board shall take proceedings against the seller before a Court of summary jurisdiction, and if in such proceedings it is found that the price charged or sought about which the complaint was made, or the price discovered at the investigation to have been charged or sought, was such as to yield a profit which is, in view of all the circumstances, unreasonable, the seller shall be liable on summary conviction to a fine not exceeding £200 or to imprisonment for a term not exceeding 3 months or to both such imprisonment and fine.

By sec. 2 of the same Act, the Board of Trade has power to establish local committees to whom the Board may delegate any of their powers.

The Lancashire and Yorkshire Railway were charged before the Manchester Profiteering Committee for charging at their restaurant exorbitant prices. The railway company applied for a writ of prohibition and the Court, on March 15, decided that a prosecution under sec. 1, sub-sec. 2, of the Act is a separate and independent proceeding from the investigation with a view to declaring a price and ordering repayment of any amount in excess of that price under sec. 1, sub-sec. 1, and that the investigation was not a criminal cause or matter.

Even if sec. 17 were criminal legislation, it could not be claimed that the order is valid because it is ancillary to criminal legislation.

The power to pass criminal laws belongs to the Federal Parliament (B.N.A. Act, sec. 91, sub-sec. 27). In its ordinary sense, the words *criminal law* would cover not only the definition and punishment of crime, but also the procedure and the Courts for the trial of persons accused of crime. But sec. 92, sub-sec. 4, gives to the Provincial Legislatures the legislative control over the constitution of the Courts of criminal jurisdiction, and, besides, sub-sec. 27 of sec. 91, in giving legislative power to the

Federal Parliament on the criminal law, excepts formally the constitution of the Courts of criminal jurisdiction.

It is such a formal enactment that I cannot accept the proposition that the creation of a Court like the Board of Commerce could be validly constituted as a Court of criminal jurisdiction. Section 101, which is invoked also in that respect, could not alter the formal provisions of sec. 91 which should stand "*notwithstanding anything in this Act*," as it is declared therein.

I admit that *intra vires* federal legislation will override inconsistent provincial legislation and that the widest discretion must be allowed to the Federal Parliament in the moulding of its legislation, but at the same time no usurpation should be made under the guise of so-called ancillary legislation. *Montreal* v. *Montreal St. R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, 13 Can. Ry. Cas. 541.

It could not be considered as essential to the exercise of the Dominion legislative authority that sec. 18 of the Fair Prices Act should have been passed, and I understand this as the test which should be adopted to determine the validity of any ancillary legislation.

The Board in exercising its powers under sec. 18 exercises independent civil powers and the order we have to examine is made for the purpose of forcing the merchants to sell their goods at a certain price.

It is contended also that this can be dealt with by Federal Parliament as a regulation of Trade and Commerce.

The words "regulation of Trade and Commerce" may cover a very large field of possible legislation and there has been much discussion as to their limits.

They were first considered in the *Parsons*' case, in 1881, and there it was stated that these words in their unlimited sense would include every regulation of trade ranging from commercial treaties with foreign governments down to minute rules for regulating particular trades, but a consideration of the context and of other parts shews that these words should not be used in this unlimited sense. The collocation of the regulation of Trade and Commerce with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the minds of the Fathers of Confederation when they gave the Federal Parliament the power to deal with it.

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Views to the same effect have been expressed by the Privy Council in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, and in *Montreal* v. *Montreal Street R. Co.*, *supra*.

The last case where this power of regulating trade and commerce has been considered by the Privy Council is the *Insurance Reference*, 26 D.L.R. 288, [1916] 1 A.C. 588, and it was held there that "the regulation of trade and commerce does not extend to the regulation of a particular trade."

In the Combines and Fair Prices Act, there is an attempt to regulate the trade of those who are engaged in the trade of necessaries of life, as there was an attempt in the Insurance Legislation to regulate the trade of those engaged in the insurance business.

Then the contention is made that this legislation is valid in the exercise by the Federal Parliament of its power to make laws, for the peace, order and good government of Canada.

According to the principle of construction adopted in the *Parsons'* case, 7 App. Cas. 96, the first question to be determined with regard to the distribution of legislative powers is whether sec. 18 of the Combines and Fair Prices Act falls within any of the classes of subjects enumerated in sec. 92 and assigned exclusively to the Legislatures of the Provinces. If it does, then the further question would arise whether the subject of the Act does not also fall within one of the enumerated classes of sec. 91 and so does not still belong to the Dominion Parliament.

Primâ facie sec. 18 of the Combines and Fair Prices Act is legislation affecting property and and civil rights and would fall within provincial control and not federal control (sec. 92, sub-sec. 13) and, as I have shewn above also, the subject of the Act does not fall within the regulation of trade and commerce or criminal law.

There may be matters not included in the enumeration of sec. 91 upon which the Parliament of Canada has power to legislate, because they concern the peace, order and good government of the Dominion, but if they are enumerated in sec. 92, then the Dominion Parliament has no authority to encroach upon these subjects. It is not claimed that the order in question is of Canadian interest or importance, because this order has reference to merchants of a certain city and the provincial authorities could certainly pass the necessary legislation to carry out such an

order. *Att'y-Gen'l of Ontario* v. *Att'y-Gen'l of Canada*, [1896] A.C. 348.

I do not then hesitate to say that sec. 18 of the Combines and Fair Prices Act could not be considered as valid under the exercise by the Federal Parliament of its power to legislate concerning peace, order and good government. The legislation in question is then *ultra vires* and should be declared unconstitutional.

For these reasons the answer to the first question submitted should be in the negative. As to the second question, it is not then necessary for me to deal with it.

SCOTT FRUIT Co., Ltd. v. WILKINS AND REECE.

Alberta Supreme Court, Hyndman, J. July 27, 1920.

FIXTURES (§ II—7)—BUILDING—RESTING ON GROUND BY ITS OWN WEIGHT—INTENTION OF PARTIES.

To make an article a fixture, mere juxtaposition with the soil is not sufficient unless an intention be shewn to that effect, nor does it matter that a building, resting on the ground, sinks into the ground by its own weight, the question whether it becomes a fixture or not being one of fact depending on the intention of the parties.

[See *Travis-Barker etc.* v. *Reed* (1920), *post* p. 405.]

Statement.

ACTION to enforce payment of a certain mortgage made by defendant Wilkins. Wilkins did not defend but defendant Reece claimed that a building on the premises was his chattel property and was added as a party defendant. Judgment for defendant Reece.

Alan D. Harvie, for plaintiff; *H. R. Milner* and *H. M. Dawson*, for defendant Reece.

Hyndman, J.

HYNDMAN, J.:—This is an action originally brought by the plaintiffs against the defendant Wilkins to enforce payment of a certain mortgage bearing date August 29, 1913, made by the said Wilkins in favour of the plaintiffs, for the sum of $3,000, on the security of Lots 1 and 2 in Block 23, Cromdale Subdivision, according to Plan 585OR of the City of Edmonton. The said Wilkins did not defend but Reece was later added as a party defendant due to the fact that the building situate on Lot 1 is claimed by him as his chattel property, he, prior to the date of the said mortgage, having leased the said Lot 1 for the period of 3 years from June 24, 1913, from the said Wilkins, it being provided that the said Reece should have the right at any time "provided he

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does not make default in performance of the covenants and payment of the rent" to move the house off the said Lot 1 and that under the terms of the said arrangement the house belonged to Reece.

It is admitted that whilst the agreement bears date June 24, 1913, it was not as a matter of fact actually signed until September which would be subsequent to the date of the mortgage in question; but the defendant Reece testified that a verbal agreement in the terms contained in the written lease was entered into between him and Wilkins about May 24 and that he proceeded to erect the house in question in July and it was partially built prior to the date of the said mortgage; and I find such to be the case. The question for determination therefore is whether or not the building in question is a chattel only or a tenant's fixture. If a chattel then the mortgage never at any time bound; but if a tenant's fixture, whilst the tenant would have the right to remove it before the expiration of his term, or within a reasonable period thereafter, and did not do so the mortgage would attach and comprise it as well as the land.

I am satisfied on the evidence that the intention of the parties at the time of entering into the agreement for the lease and as expressed in the written document was that the house or building should be erected by the defendant Reece at his own expense and that it should belong to him. It is true that the lease provides that he may remove it "provided he does not make default in performance of the covenants or payment of the rent." The defendant did not pay the rent in accordance with the terms of the lease and it would appear that he is and has been since about the beginning of the year 1914 in default; but it seems to me that the only person who would have the right to take advantage of the breach of this proviso and object to the removal of the building would be the landlord Wilkins and there is no evidence that he did so object and it is possible has waived his rights in that respect.

As to whether or not this building was attached to the land so that it became part of the freehold the evidence would appear to me to be in favour of the contention that it is, and always has been, a chattel only. The plaintiff's witnesses were not what might be called "experts" on the subject in question. McIntosh, who is a very capable valuator of real estate, admitted that he

did not notice whether the front of the house was higher than the back or what the sills rested on, whether brick or what. Harvey Traub, who is a carpenter and contractor examined the exterior of the house and says that it was built as any ordinary frame house except that there was no concrete foundation but that it rests on wooden blocks. He says that the sills were about 6 inches below the surface; the blocks below the sills, that excavations had been made for the sills and blocks but that one sill was flush with the top of the ground. He also says that it is usual to throw up an embankment around a house of this kind, but not to the extent as in this case; that the foundations were built as those of any house would be if it were intended to move it later, although the sills are lower than they should have been if that was the intention.

The defendant produced the witness Hudson, who I think ought to be considered the most reliable witness on the point. He has been in the moving trade for 3 years and has moved a large number of buildings. He says he inspected the house and that it can easily be moved; that it is erected on 6" x 6" sills set up on 6" x 6" blocks; that the sills run the same way as the lot, the house is low in front and a little high behind; it is not built on the ground but sits on the blocks and the blocks are quite visible; the sills are off the ground and it would be on the sills that the house would be moved; the house is banked up on the north side but not on the other sides.

The defendant Reece states that he put up the building during his spare time in evenings after ordinary working hours; that the house is built on 6" x 6" sills and 6" x 6" blocks; the front is 18 or 20 inches off the ground; that he merely levelled the ground so that the blocks should lie level, that the sills are attached only by their own weight to the blocks; and that he built it so that it could be moved; the permit for the construction of the house was taken out in his own name; and that he banked the house with clay in the fall.

To make an article a fixture mere juxtaposition with the soil is not sufficient unless an intention be shewn to that effect as where a statue resting on the ground by its mere weight forms part of one architectural design with the building of which it is an ornament; the burden of shewing such an intention resting on those who assert the article to have become a fixture. Thus articles like a wooden windmill, a granary, a cistern, a wooden barn or stable, a vat,

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resting by their own weight on the ground or (what comes to the same thing) on a foundation or supports fixed in the ground are not fixtures; and this even if they be placed in a receptacle or on a foundation connected with and attached to the soil and specially prepared for the purpose. Nor does it necessarily make any difference that an article so resting on the ground subsequently sinks into the ground either by its own weight or by a weight placed upon it; the question whether it becomes a fixture or not being one of fact depending on the intention of the parties. (See Foa's Landlord and Tenant, 4th ed., at 692, and the cases there cited.)

It would seem to me that the above citation applies to the facts and circumstances of this case. As stated above the intention of the parties clearly was that the building should be the property of and belong to the defendant Reece. It was built, not in the way in which a permanent structure is usually put up, that is, either on a concrete or brick foundation; but the sills of the house rest on 4 small blocks which cannot be considered as being in the nature of a permanent foundation. In my opinion the evidence is very much in favour of the contention that the building or house was never intended to be and is not any more than a chattel. If I am correct in this conclusion then the mortgage of the plaintiff company never at any time took effect to bind the house in question.

I am bound to say that the conduct of the defendant Reece especially his apparent carelessness with regard to his property in the house in question is peculiar and under certain circumstances might amount to an estoppel as against a mortgagee but when the general conditions in regard to real estate and rents during the greater period of the war are considered there is perhaps a sufficient explanation. The plaintiff here was not a mortgagee in the ordinary way, that is, it did not advance the amount of the mortgage as a loan as loan companies do but obtained the mortgage merely as security for past indebtedness and I think would have taken the mortgage whether there was a building upon it or not, consequently I am of opinion that the defendant's attitude should not be held to estop him in connection with his claim to the building.

There will therefore be judgment in favour of the defendant Reece with costs. *Judgment accordingly.*

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Alberta Supreme Court, Hyndman, J. October 9, 1920.

MORTGAGE (§ II B—40)—DWELLING ATTACHED TO FREEHOLD—FRAUDULENT REMOVAL—ATTACHED PERMANENTLY TO SOIL TO WHICH REMOVED—NO WARNING TO PUBLIC OF REMOVAL—MORTGAGE PLACED ON IT IN GOOD FAITH—PRIORITIES.

Where a dwelling house, attached to the soil so as to become part of the freehold, has been fraudulently removed to other land and permanently attached to the soil and no notice has been given to the public warning it against either purchasing or loaning on the property, a mortgagee who in good faith loans money on the building and property will have priority over the owner of the building who has neglected to give such warning.

[*Scott Fruit Co.* v. *Wilkins* (1920), *ante*, p. 401, referred to and distinguished.]

Statement.

Action to recover damages in the sum of two thousand dollars; or, in the alternative, a declaration that the plaintiffs are entitled to remove a certain building from Lot 13, Block 11, Brackman-Ker Subdivision, Plan 4575S, Edmonton, to Lot 11, Block 3, Richmond Heights, Plan 7961 A.M., at the expense of the defendants; or, in the further alternative, a charge upon said Lot 13 to the amount of their damages in priority to the present mortgage thereon for $900 in favour of the defendant Nettleton.

F. C. Jamieson, K.C., and *C. H. Grant*, for plaintiff.

L. T. Barclay, for defendants C. R. Reed and Elizabeth Reed.

P. G. Thompson, for defendant Punt.

G. W. Archibald, for defendant Nettleton.

Hyndman J.

HYNDMAN, J.:—The plaintiff, Travis-Barker, being the registered owner in fee simple of a portion of a subdivision known as Richmond Heights, on May 28, 1912, by a contract in writing, agreed to sell to one William Sutherland the said lands for the sum of $25,500, payable $5,000 in cash at the time of sale and the balance by instalments.

On January 30, 1913, Sutherland, by instrument in writing, agreed to sell that portion of the said property described as Lot 11 in Block 3, Richmond Heights, at the price of $475 on the following terms: $120 cash upon the signing of the agreement; $120 on January 30, 1914; $120 on January 30, 1915; and $115 on January 30, 1916, with interest at 8% per annum payable at the time of each instalment of principal money. The plaintiff Travis-Barker was not in any way privy to this latter agreement.

Subsequently to the last mentioned date foreclosure proceedings were instituted by the plaintiff Travis-Barker against the said

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Sutherland, and on Tuesday, September 18, 1917, a final order of foreclosure was granted and duly entered which cancelled and determined the agreement between the said Travis-Barker and Sutherland and all interest of Sutherland was foreclosed and put to an end and the registered title then stood in the name of said Travis-Barker free and clear of any interest of Sutherland.

On May 27, 1912, said Travis-Barker executed a mortgage in the sum of $15,000 in favour of one James Eamer on the security of the lands in question subsequently sold by Travis-Barker to Sutherland, which mortgage has remained in full force and effect ever since, no substantial part at least of it having been paid. The said mortgage now stands in the name of the plaintiffs, the Imperial Trust Co., Ltd., as administrator *de bonis non*, of the estate of Sarah Eamer, deceased.

After the purchase by H. W. Punt of Lot 11 he erected a building thereon and occupied it as his home until enlisting for overseas service about the year 1916. During his absence overseas the house was locked up, his furniture and other effects remaining therein.

Punt paid on account of his agreement the sum of $120 at the time of purchase, and on June 17, 1914, $120 and $29.20 for interest, making a total payment aside from interest of $240 and thus leaving a balance unpaid for principal of $235 with interest thereon at 8% *per annum* from January 30, 1914.

On his return from overseas Punt discovered that the title of Sutherland had been foreclosed and that consequently any interest which he had in the land came to an end also.

Some negotiations took place between C. R. Reed (father-in-law of Punt) acting as the latter's agent and the plaintiffs with regard to obtaining title.

The evidence is conflicting as to the amount which was required, but apparently $400 would have been satisfactory to both plaintiffs on payment of which they were willing to transfer clear title of the lot. This amount was not agreeable to Punt and at any rate was not paid.

It was then decided by defendant C. R. Reed and his son-in-law that, without any notice to the plaintiffs, they would move the house from off the property and place it on the other lot in question (13) at that time in the name of the defendant Elizabeth Reed, wife of C. R. Reed, and this was in due course carried out.

After being placed in the new location the structure was enlarged by the addition of about 12 ft. at the rear, put on a firm brick foundation and otherwise improved.

The title of the lot was later transferred by Mrs. Reed to her daughter, the defendant Lotta May Punt.

On September 1, 1919, Lotta M. Punt executed a mortgage to the defendant Nettleton for the sum of $900 which mortgage was registered on September 8, 1919.

The defendant Nettleton as mortgagee was entirely ignorant of any of the facts surrounding the title of the building, and was a *bonâ fide* investor, acting in absolutely good faith throughout, believing the house to be part of the property.

The chief point for consideration and determination in connection with this somewhat complicated situation is whether or not the house whilst on Lot 11, before it was moved, was a fixture and therefore part of the freehold or a chattel only. If merely a chattel then the plaintiffs' claim must fail; but if a fixture, then it will have to be considered whether the plaintiffs are entitled to damages only, or to an order for the removal of the house to its former site, at the expense of the defendant, and the rights of the mortgagee Nettleton, being an innocent third party, must also be disposed of.

The evidence as to the manner in which the house was built was somewhat lengthy and conflicting. I was requested by both parties to view the "*locus*," which I did. After the most careful consideration I have come to the conclusion that although the house was not what one might call a thoroughly modern substantial structure, nevertheless it was built for the purpose of a home for H. W. Punt. There never was any intention on his part that it should be used merely as a temporary abode but rather for a permanent residence. All the facts, circumstances, and probabilities, in my opinion, point in that direction. If he had merely rented the land and placed the building thereon intending to move it off during the term of his tenancy there might be room for argument that it was a mere temporary structure and not a fixture; but in the case at bar he purchased the land, made two payments on account of the price, and I gathered from his own evidence intended it for his "home," although he did have in view various improvements and changes.

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But even apart from the question of intention it would seem to me that the house, in any event, was built in such a way as to endow it with the characteristics of a fixture, rather than a chattel. It is true that at first a frame-work was set up upon which the house was later moved; that there were merely wooden blocks under this frame-work, but these wooden blocks were later replaced by concrete blocks let into the ground some 8 or 10 inches which made a fairly firm foundation. But the subject that gave rise to the greater part of the evidence was the nature of the construction of the chimney. This chimney rested upon a block of concrete which was let into the ground to a depth of about 10 inches below the natural surface level. There was a keen dispute raised as to whether or not the bricks upon this concrete block were attached by cement or merely laid loosely without any binding material. From the examination which I made of the block and the bricks which were clearly at one time attached to it, and their appearance and the evidence offered, I feel bound to find that the bricks were not laid loosely but were attached to one another with cement and became part of a solid column of brick and cement or mortar. The chimney, after entering the floor, went through to the roof and was plastered around in uniformity with the rest of the room. These being the facts, it would seem to me that through the medium of this chimney, if in no other way, the building was made part of the land and became a fixture and therefore part of the freehold.

Hence the building became the property of the registered owner of the land and subject to the mortgage to the plaintiff company. No right consequently existed which would justify the defendants in removing it from the land without permission of the owners, and in doing so the parties concerned became trespassers, and liable in damages.

The case is clearly distinguishable from the decision in *Scott Fruit Co.* v. *Wilkins*, *ante*, at p. 401, given by me on July 27, 1920. There the defendant who claimed the right to the building as against the owner of the land was a tenant under a written agreement of lease in which it was expressly stipulated that the building should belong to the tenant. Neither was it built as substantially, or nearly so, as the one in question here. The case, in my opinion, does not apply to the facts in issue here.

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As against the defendants Reed and Punt the plaintiffs would therefore be entitled to an order for the removal of the house to its original location, or if that were impracticable, then to damages. But the intervention of the mortgagee Nettleton raises a new situation so that it may not be proper to grant an order for the removal of the house. It is clear that the defendant Nettleton and her agent acted in the utmost good faith in making the loan of $900 which would never have been made had the house not been on the property. After the discovery by the plaintiffs that the building had been removed to its present site they commenced action against C. R. Reed later adding the other defendants, but took no steps to obtain an injunction for registration in the Land Titles Office or to otherwise warn the public against either purchasing or lending on mortgage except that on the examination for discovery of the defendant C. R. Reed on July 14, 1919, several months after the house was moved, counsel for plaintiffs obtained a verbal undertaking from the solicitor for C. R. Reed that no change would be made in the position of the building or title pending the trial of the action. This, of course, was no notice to the public, and it seems to me that the situation being as it was at the time, the building to all appearances being a part of the freehold, the plaintiffs ought now to be estopped as against the defendant Nettleton from saying that the house is their property. In my opinion they owed a duty to the investing public to do some act which would reasonably be expected to warn third innocent parties from either purchasing or lending on the property, honestly believing that the building was part of the freehold. This could have been done by the simple filing of an injunction within a reasonable time after the discovery of its removal which would undoubtedly have been granted at any time on a proper presentation of the facts. Their failure to do so, in my opinion, must have the effect of placing their claim secondary to that of the defendant Nettleton.

This being the position then, it remains for me to assess the damages or loss caused to the plaintiffs by the removal of the house from their property.

Various valuations were put upon the building, and it is almost impossible to arrive at what might be considered an absolutely accurate estimate. In its present condition it is a very

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great improvement over what it was formerly. The estimates given by the various witnesses as to its previous value run all the way from $475 up to $2,500. I think neither of these extremes is nearly correct. The fact that a party refused to pay $475 for it does not necessarily fix its value. All things considered I think the sum of $800 would be a very fair value to place upon it.

There will, therefore, be judgment against the defendant C. R. Reed in the sum of $800 damages and costs.

As against the defendant Elizabeth Reed the action is dismissed, without costs.

As against the defendant Lotta May Punt, there being no direct evidence that she had any knowledge of wrongdoing, there will be a declaration only that the property is charged with the sum of $800 and the amount of the costs against the defendant C. R. Reed, which charge shall be secondary only to the mortgage in favour of the defendant Nettleton.

As against the defendant Nettleton the action will be dismissed with costs. *Judgment accordingly.*

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J. H. TREMBLAY Co. Ltd. v. GREATER WINNIPEG WATER DISTRICT.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 8, 1920.

CONTRACTS (§ V A—376)—CONSTRUCTION OF AQUEDUCT—VARIATION BY CHIEF ENGINEER—ADDITIONAL COST TO BUILDER—PAYMENT ON QUANTUM MERUIT—VARIATIONS WITHIN TERMS OF CONTRACT.

The plaintiffs entered into a written contract with the defendant by which they undertook the construction of a section of the aqueduct which the defendants were constructing between Shoal Lake and the city of Winnipeg. They were to furnish steel for re-inforcing the concrete wherever required by the chief engineer, and attached to the contract and forming part of it was a schedule, shewing the quantities of different materials the engineers estimated would be necessary, including the estimated quantity of steel. The contract gave the chief engineer the fullest power of making alterations in the original plans during the progress of the work. During the progress of the work the engineer changed the specifications and required the plaintiffs to use steel re-inforcements to a much greater extent than required in the original contract. The plaintiffs claimed that the extra work had been done and extra material supplied under a new agreement to be implied from the circumstances, by which they were to be paid on a *quantum meruit* for such extra work and materials. The Court held that the changes in the work were fully provided for in the contract and that the plaintiffs could not recover.

[*Bristol* v. *Aird*, [1913] A.C. 241, followed.]

APPEAL by plaintiff from the decision of the Manitoba Court of Appeal in an action to recover an additional sum for the construction of an aqueduct, caused by variations in the original contract. Affirmed.

The judgment of the Court of Appeal is as follows:—

CAMERON, J.A.:—This is an action brought by the plaintiffs, contractors, for an amount claimed to be due in respect of the construction of a portion of an aqueduct, under a contract with the defendant the Greater Winnipeg Water District. This contract, No. 30, covered the construction of 20.15 miles of the aqueduct between Winnipeg and Shoal Lake and was made October 27, 1914. The contract contained certain information to bidders, drawings and specifications shewing the kind and size of the aqueduct, the materials to be used thereon, the method of construction, and a schedule of approximate quantities required in the construction of the work under said contract 30.

Under this contract there were 3 sections, on one only of which was re-inforced steel to be used, and the amount of steel required was stated by the above schedule to be approximately 3,320,000 lbs. It is alleged in the statement of claim that, in the year 1915, the plaintiffs constructed a part of the sections on which reinforced steel was not to be used. It is further alleged that this work proved inadequate and faulty and the defendant decided to abandon the type of construction used on this part, and for the season of 1916 new drawings and specifications were prepared and the plaintiffs were in the spring of 1916 ordered to proceed with the construction of what was an entirely different type of aqueduct. The inverts throughout under the new plans were re-inforced with steel. The plaintiffs in 1916 proceeded under these new plans and drawings, and tests and experiments were made by the defendant to find out the particular type of aqueduct best fitted to the requirements of the case, and in the winter of 1916-17 certain standard types were adopted by the defendant under whose instructions, and in accordance with such standard types, the plaintiffs continued to carry on the work of construction in 1917. It is further alleged that these standard types were altogether different from the originals, upon which said contract 30 was based; in particular they were re-inforced throughout with steel and required more time, labour and material in construction. It is alleged there were other substantial departures from the original plans and specifications all of which were disadvantageous to the plaintiffs.

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Cameron, J.A.

As a consequence of the changes referred to, it is alleged in the 9th paragraph of the statement of claim that—

> The work undertaken and carried on by plaintiffs for defendant from and after the month of May, 1916, was a work so unexpected and so different from the work upon which the plaintiffs had tendered and from the work covered by contract No. 30 that it was wholly outside the scope of said contract, and said contract No. 30 was rescinded, abrogated and set aside, and a new agreement substituted therefor, which said agreement so substituted was an agreement by plaintiffs to construct said new types of aqueduct, and said changed work, and to be paid therefor by the defendant at a reasonable rate for the work and services performed and materials supplied.

The particular grievance complained of is that, by reason of the larger amount of re-inforced steel made necessary under the plans as changed, the plaintiffs were required by defendant to furnish and put in place 1,517,345 pounds of steel over and above what they had previously contracted to furnish. Owing to the advance in the price of steel which set in after the contract was made, the plaintiffs had to pay more for the steel subsequently purchased, and made a claim for $22,894.34, being the amount paid for steel in excess of the price allowed under the terms of the contract, viz.: 3.4c. per pound.

In the statement of defence, the defendant points out that on the drawings B. 128 and B. 140, intended for use in constructing those portions of the plaintiffs' contract ("B" and "C") where steel was not to be used, the possible need for re-inforcing steel was indicated by a note thereon as follows: "Steel re-inforcement as and when directed by the engineer." The statement of defence denies at length various allegations in the statement of claim, claims that the defendant has paid all the sums for which it is liable under contract 30, denies any liability in respect of the plaintiffs' said claim of $22,894.34; and sets up in defence the terms and conditions of contract 30.

The case came on for trial before Curran, J., who considered the allegation in the 9th paragraph of the statement of claim above set forth fully established: "In my opinion," he says, "there was an implied agreement to pay for the work so done and the materials so supplied upon a basis of *quantum meruit*, and not on the basis of remuneration provided for by the contract. The work was new and not within the contract," He accordingly entered a verdict for the plaintiff for $22,894.34 with interest. In his judgment the trial Judge sets out the various relevant

clauses of the contract and I need not restate them. The work in question was costly, through a country largely unknown and in itself experimental and uncertain. The contract, therefore, designedly and properly gave to the Board the widest latitude in altering or adding to the work, in ordering extra work and to make any changes or alterations that might be deemed expedient and gave to the chief engineer unlimited powers in making new plans and specifications either in substitution for or supplemental to previous plans. It is provided (clause 15) that the quantities of the various kinds of materials set forth in the contract are approximate only, "being supplied only with the object of forming a basis for the uniform comparison of bids" and the district reserves the right to increase or decrease any class or portion of the work as may be directed by the chief engineer and it is expressly stated that—

> Any increase or decrease in the quantity of any or all items shall not be regarded as cause for an increase or decrease in the price, and the contractor shall make no claim . . . for any other losses because of the difference between the quantities of the . . . materials actually supplied and the quantities set forth in said Schedule No. 3

I refer also to section 19.1 of the contract providing that steel for re-inforcing shall be furnished by the contractor wherever ordered by the engineer.

The trial Judge held that these provisions, wide and inclusive though they seemed to him, fell short of giving the chief engineer the power to radically change the design and character of the works or to require the plaintiffs to carry out the works in a manner fundamentally different from that set out in the original plans.

I cannot accede to the view taken by the trial Judge. It does seem to me that the contract was framed with the express purpose of giving the Board and the chief engineer all possible powers to make any changes that might be deemed necessary to secure the construction of an aqueduct suitable for the purposes in view. No plainer or more inclusive language could be used. The contractors entered into this contract after prolonged study of it and on these conditions. It was their business to inform themselves of the nature and requirements of the work. They were more competent to do this than the district. They have made their contract with the fullest knowledge of the facts and of their own responsibilities, and they must abide by it. I can see, on

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their part, neither a legal nor a moral right to have the terms of the contract disregarded. Had the price of steel fallen, does any one believe for a moment that the district would have reaped the advantage? The question answers itself.

Since the decision in *Bristol* v. *Aird*, [1913] A.C. 241, we have been able to take a more reasonable view of clauses such as these in construction and engineering contracts. Lord Moulton there states, p. 257:—

> No one who has had any experience of the contracts under which great engineering works, for instance, have been carried out in the last half-century can doubt that no well advised corporation would have accepted the offer of a contractor to carry out the works which it desired to execute without having an arbitration clause in the contract, and I think I may almost go so far as to say without insisting that the engineer whom it employed for the purpose of superintending the work should be accepted as the arbitrator. Therefore, I always look upon these arbitration clauses as in a business point of view a substantial portion of the contract, and I think the Courts have acted quite rightly in requiring good reason to be shewn why this part of a contract should not be strictly performed.

And certainly clauses openly giving the chief engineer wide powers in making alterations in the original plans and specifications, and in ordering the contractor to execute the work accordingly, are less drastic than such arbitration clauses as are alluded to by Lord Moulton, where an official of a corporation in charge of the work for it is made sole arbitrator in disputes arising thereout between the corporation and the contractor. The one provision, as the other, is part of the consideration for the contract and ought not to be tampered with. I have re-read the strong criticism of the late Howell, C.J., on what he called "arbitrary conditions" in an engineering contract not very different from this in *Boyd* v. *South Winnipeg*, [1917] 2 W.W.R. 489. He there also uses the term "unconscionable clause." But the contractor, with his eyes open, as part of the price or consideration for having his tender accepted, places himself generally and in detail in the hands of the corporation's engineer. It is all perfectly legitimate and proper and perfectly well understood and works out without friction or dispute in multitudes of cases. These contracts are "open covenants openly arrived at": there is no hint of fraud or coercion, and I cannot see how, in law or morals, the contractor can be allowed to repudiate his contract or how such provisions can be justly termed unconscionable or arbitrary, and refused the support of the Courts.

In *Bush* v. *Whitehaven* (1888), 2 Hudson on Building Contracts (3rd ed.), 118, owing to the default of the defendant, the plaintiff could not proceed with the work except at increased expense. This case was much relied upon by the plaintiff's counsel and is cited by the trial Judge as supporting his view. But the facts of this case and those of *Bush* v. *Whitehaven* are widely different. The decision in *Bush* v. *Whitehaven* depended on the finding of a jury which held the plaintiffs had been impeded in their work by the corporation, a finding from which Lord Lindley dissented but by which he felt bound.

The much cited case of *Thorn* v. *Mayor etc. of London* (1876), 1 App. Cas. 120, seems to me much in point in view of the holding of the trial Judge in this case that the claim is for material outside the contract and that there was an implied agreement to pay for the same on the basis of a *quantum meruit*. In the *Thorn* case the contractor was to take down an old bridge and build a new one. Part of the plan consisted in the use of caissons which turned out of no value and the work had to be done in another way. The contractor sued for compensation for loss of time and labour occasioned by the failure of the caissons, alleging a warranty. There was no express warranty that the bridge could be built according to the plans and specifications and it was held none could be implied. I call attention to the judgment at 134 of Lord Hatherley, whose reasoning seems to me irresistible: "If the work was within the contract the contractor must be paid for it and there is no difficulty in obtaining his remedy. If the work was outside the contract, the contractor should have said: This not being within my engagement, I will have nothing to say to this further work. . . . You are calling upon me to do something new: that must be the subject of a wholly new engagement."

I wish to refer to the language used by Lord Cairns in this case, at 127, part of which is incorporated in the statement of claim before us. He states that, in the case of work to be done outside the contract, the contractor can either refuse to go on, or, as an alternative, he suggests as a possibility that the contractor might go on with the work and maintain an action on a *quantum meruit*. But this is merely a shadowy hypothetical suggestion, to which he absolutely refuses to commit himself and which is not even

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mentioned by the other members of the House of Lords sitting on the case.

I must add that the conduct of the plaintiffs did not shew for some considerable time that they appreciated that the original contract had been rescinded and a new one, or several new ones, substituted therefor. In August, 1915, they made a representation as to the increased price of steel and asking the district to pay for it. To this a denial of liability was immediately made by the Board. On October 26, 1915 (Ex. 40), the contractors wrote a letter to the chief engineer acknowledging the receipt of changed plans as coming within sec. 18 of the contract. Subsequently, in that and the following year, new plans calling for re-inforced steel were issued to them and received and adopted in the work by them without question. It was not until February 1, 1917 (Ex. 28) that they made a formal demand for payment. It is plain that not before then did the plaintiffs affect to regard the original contract as superseded in whole or in part.

Upon the argument before us it appeared from statements made by counsel for both parties that the plaintiffs had not at the time this action was brought completed the work under their contract notwithstanding the positive allegation in the statement of claim that "all acts have been performed, times elapsed and things happened, entitling the plaintiffs to recover herein," and that, consequently, this action was premature. "It is a general rule that an action commenced upon a contract before the expiration of the time fixed for the performance is premature and cannot be maintained." 1 Cyc. 742. What then is the situation? It would seem as if, under the form of pretended litigation, the parties were seeking from the Court of King's Bench and this Court not a judgment but an opinion. Neither this Court nor the Court of King's Bench has been constituted for the purpose of answering academic questions, though it is quite competent for the Legislative Assembly so to provide as in R.S.M. 1913, ch. 38, being an Act for Expediting the Decision of Constitutional and other Provincial Questions. A special case can only be stated in an action duly commenced. Now here we have in form an appeal from an opinion of the trial Judge. The judgment entered is, in the circumstances, nugatory. How can there be any appeal to this Court from the opinion of the trial Judge when

there is no cause of action? What is there to prevent the plaintiffs suing again once the work has been completed? What is the status of the opinion of this Court? Is there an appeal from it to the Supreme Court as that opinion is not a final judgment? It does seem to me that the proper course is to dismiss the action when the fact that no cause of action had arisen when it was brought, appears. But the Court allowed the matter to go on and be argued as if this vital objection were non-existent. As a party to the Court's action, I do not feel like insisting on holding the plaintiff to his strict legal position and dismissing the action on this ground.

I have read the judgment of Fullerton, J.A., and agree with him that the appeal should be allowed and the action dismissed with costs here and in the Court below.

Fullerton, J.A.

FULLERTON, J.A.:—The plaintiffs entered into a written contract with the defendant in October, 1914, by which they undertook the construction of a section of the aqueduct which the defendants were constructing between Shoal Lake and the city of Winnipeg.

The whole length of the aqueduct was about 85 miles, and the portion the plaintiffs contracted to construct was about 20 miles.

Before calling for tenders for the construction of the aqueduct, the defendants had plans of the proposed aqueduct prepared, and also had prepared and printed in book form the following documents:—

1. Form of contract;
2. Information for bidders;
3. Specifications;
4. Schedule of prices;
5. Schedule of approximate quantities;
6. Schedule of required rate of progress;
7. Conditions of fair wage schedule;
8. Schedule of rates to be charged by the defendants for materials;
9. Form of tender;
10. List of contract drawings;
11. Contractor's bond.

The work on the aqueduct was divided into five contract sections, numbered respectively 30 to 34, and tenderers were

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invited to tender for any one or more or the whole of such contract sections.

The tender of the plaintiff for contract section No. 30, which is described in the "Information For Bidders" as from station 656+50 to station 1718+00, a distance of 20.15 miles was accepted by the defendant, and a formal written contract was executed, which incorporated the documents 2 to 11 above enumerated.

Three types of construction were specified for the plaintiffs' contract, types A, B & C, and the sections of the aqueduct on which the respective types were placed were called for convenience by the parties, Sections "A," "B" & "C."

Type "A" which is shewn on contract drawing B. 143 was authorised for all work west of station 900. This is a circular tunnel re-inforced with steel. No change of any importance was made in the construction of this portion of the aqueduct, and no question is in issue here respecting it.

Type "B," style of construction was authorised between stations 900.00 and 1234.00. This is what is known as an open flow section of the aqueduct, and is shewn on contract drawing B. 128. This drawing shews a horseshoe form of construction, consisting of concrete, without steel re-inforcements. The minimum thickness of the invert called for is six inches. Written on the drawing, however, are the words: "Steel re-inforcements as and when directed by the engineer."

Type "C" style of construction shewn on drawing B. 140 was authorised between stations 1234.00 and 1718. It is the same type as "B" with a smaller cross sectional area. On drawing B. 140 appears the same memorandum in reference to steel re-inforcement as on drawing B. 128.

The plaintiff commenced work in May, 1915, and during that year constructed about 6,000 feet of type B, and about 7,000 feet of type C.

In the fall of 1915 cracks began to appear in the invert of the aqueduct and near the crown of the arch due, it is said, to settlement.

In order to give greater strength to the invert of the aqueduct the defendants' engineers prepared a new drawing B. 261, of type "B," shewing a re-inforced and thickened invert, and sent a blue

print of same to the plaintiffs with the letter (Ex. 39), dated October 22, 1915. The plaintiffs replied by letter (Ex. 40), dated October 26, 1915, as follows:—

W. G. Chace, Esq.,
Chief Engineer,
Greater Winnipeg Water District,
Winnipeg.

Dear Sir:— Re Re-enforced Section B-30.

We have received your letter of the 22nd inst. enclosing 3 blue prints of drawing B. 261 shewing section B-30 re-enforced for shallow cut.

The instructions contained in your said letter and enclosures apparently come within the provisions of clause 18 of the contract under the heading "Extra work, alterations, deductions, etc.," and apparently constitute a change or alteration within the meaning of the terms of this section. We accept your letter and enclosures as the written notification required by sub-section "A" of said section to be given to us.

Sub-section "C" of the same section provides that the contractor shall notify the Chief Engineer in writing of his intention to begin extra work.

Will you please accept this communication as a notification from us of our intention to begin the extra work ordered in your said letter.

In order that we may become entitled to our proper payment for the extra work involved, as a result of your said instructions we desire, as required by sub-section "H," terms and provisions of our agreement. We note that this last mentioned sub-section requires that your instructions shall state that the matter is to be the subject of an extra or varied charge. The communication sent us, however, does not comply with the provisions of sub-section "H" in this respect. Will you kindly supplement your letter in this regard.

According to sub-section "K" of the above mentioned section, the difference in cost occasioned by alterations may be ascertained in one of two ways. We would like to discuss with you at your convenience the basis upon which the extra cost of the alterations for which you have given instructions is to be ascertained.

Referring to sub-section "B" of section 61 of the contract we note that a statement in writing of alterations shall be furnished each month. We shall endeavour to comply with this requirement.

Awaiting your letter fixing the alterations as an extra, and awaiting also an appointment for the purpose of discussing the cost, we are,

Yours truly,
TREMBLAY MCDIARMID COMPANY,
(Sgd.) J. P. Tremblay, Secretary.

J.P.T.-A.B.

The defendant replied by letter dated October 30, 1915, which reads as follows:—

File 97-1. 30th October, 1915.

The J. H. Tremblay Company,
Sterling Bank Building, Winnipeg, Man.

Dear Sirs:

Your letter of the 26th October addressed to the Chief Engineer has been noted and am advised by him that the modifications of the design originally laid out for the construction of the aqueduct, section B-30, are such that all

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items therein will be covered by the Schedule of Prices forming a part of your contract. Under such circumstances there is no need for the formal extra work order being issued, and I do not anticipate that you will have any claims other than such as may be settled in accordance with that Schedule of prices. Please confirm this understanding.

In such event it will not of course be necessary for you to furnish details of the costs to yourselves . . .

Plaintiffs confirmed the understanding referred to in the last quoted letter by letter dated November 1, 1915, reading as follows:—

November 1st, 1915.

Greater Winnipeg Water District,
901 Boyd Building, City.

Re Modification of the Design of Invert.

Gentlemen,—

Your letter of the 30th October to hand stating "That all items therein will be covered by the schedule of prices forming a part of your contract."

We are therefore confirming this understanding.

Yours very truly,
TREMBLAY McDIARMID COMPANY,
(Sgd.) J. P. Tremblay,
Secretary.

JPT–AB

Only 45 feet of the aqueduct was however built according to drawing B. 261.

The defendants' engineers were making experiments with a view to discovering the most economical means of lessening the settlement and reducing the liability of the aqueduct to split and "deform" and B. 261 was one of three experiments, made with this end in view.

By letter dated December 18, 1915, defendants notified plaintiffs that "the thickness of the invert of the aqueduct will be modified for all sections and detailed drawings of these revised shapes will be furnished you during the ensuing week."

On January 3, 1916, copies of drawings B. 268 and B. 275 were sent to plaintiffs with the following letter:—

File 97-1. Winnipeg, 3rd January, 1916.

The J. H. Tremblay Company,
Sterling Bank Building, Manitoba.

Dear Sirs:— Re Design of Invert.

Enclosed please find copies of the following drawings, approved for construction:

B. 268—Aqueduct Section "B" with revised invert.

B. 275—Aqueduct Section "C" with revised invert.

You will note that these drawings are complete in dimension for the invert only, as this is the only portion which has been changed.

With regard to Section "B," Drawing B. 268, you will please furnish immediately for the alteration of your forms a supply of sufficient re-inforcing steel for the work of next season. Revised invert will be used henceforward on this section.

With reference to Section "C," Drawing B. 275, you will please provide enough of steel for at least one mile of work involving revised invert. I am not sure as yet that the use of this revised section will be required throughout the length of the slope on which Section "C" is to be built. . . .

Drawings B. 268 and B. 275 shew a thickening of the wall of the invert and reinforcement of same by 5/8 square twisted bars.

No actual work was ever done under these drawings. They were furnished apparently to enable the plaintiffs to order the steel for the re-inforcement which was of a dimension different from that required for the type "A" aqueduct.

On the recommendation of their special Board of consulting engineers the defendants adopted drawing D. 334 for use in the invert on sections B. & C. during the season of 1916.

The blue print of the drawing was sent to plaintiffs who acknowledged the same by letter dated May 12, 1916.

The portion of the drawing that deals with section B. provides for an invert of 10¾ inches in thickness re-inforced by ½ inch and ⅝ inch steel bars. The foot of the invert is also 16 inches wider than shewn on the original contract drawing.

The drawing also shews a modification of type "C." The invert is thickened to 8½ inches, with ½ and ⅝ steel re-inforcement, and the foot of the invert is widened. The plaintiffs proceeded with the work during the season of 1916 and constructed about 14,000 feet of the aqueduct, according to drawing D. 334.

Some time prior to August 24, 1916—the exact date is not shewn by the evidence—the plaintiffs asked the defendants for additional payment on account of the price of steel having advanced.

In answer to this request defendants on August 24, 1916, wrote the plaintiffs the following letter:—

Winnipeg, 24th August, 1916.

The J. H. Tremblay Company,
Sterling Bank Building,
Winnipeg, Man.
Dear Sirs,—

The Commissioners of the Greater Winnipeg Water District have considered your application for additional payment on account of the price of re-inforcing steel and I have to inform you that the District Solicitor advises

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that the District is not liable under their contract with you to pay more than the prices set forth in the schedule of prices forming part of the Contract, except for extras.

Again in the spring of 1917 slight modifications were made in the invert and the work was proceeded with according to drawing B. 304, shewing such modifications.

On February 1, 1917, the plaintiffs wrote the defendants the following letter:—

February 1st, 1917.

Chairman, Administration Board,
Greater Winnipeg Water District,
City.

Dear Sir:— RE CONTRACT No. 30.

The schedule of approximate quantities upon which tenders were based shews 3,320,000 lbs. of re-inforcing steel required. The Information for Bidders stated that the intention was to estimate all quantities liberally.

The price quoted by us was low, much lower than that submitted by any other contractor to whom a contract was awarded. As a matter of fact the contractors on Contract No. 31 receive 32 per cent. more and the contractors on Contract No. 32 receive 47 per cent. more than we do per lb. of steel. The margin of profit is small. An order was placed with the Rolling Mills for only the quantity of re-inforcing steel named in the specifications.

Had the original plans and specifications, those upon which the tender was based, been carried out, the quantity named in the specifications would have sufficed to complete the work. These plans and specifications did not contemplate the use of re-inforcing steel in any portion of the Type "B" section of the aqueduct except at culverts and crossings, and throughout the whole of 1915 none was used.

Early in 1916 the engineers in charge of the work evidently concluded that the plans and specifications which had been used were unsuited to the work, because a radical change was made; a totally different invert was specified and very considerable quantities of re-inforcing steel were ordered to be placed where previously none had been contemplated.

As a consequence, during the season of 1916 a very large portion of the steel which had been intended for other parts of the aqueduct, was used on the Type "B" portion. Of the total quantity estimated, about 598 tons or 1,196,000 lbs., or 1-3 of the total steel remain unused. Recent estimates received from the Chief Engineer for 1917 shew that 2,662,000 lbs. will be required. This means that approximately 1,500,000 or about 50 per cent. of the original estimated requirements have been rendered necessary by the new plans and specifications resulting from the changes above mentioned.

Since the contract was let, steel has advanced approximately 1.6 cents per lb. To furnish the additional steel required will mean an increased cost of about $24,000.00. If no allowance is made by the District to cover the cost of the extra steel over and above the price tendered upon the original estimates, a loss of $24,000.00 will ensue, a loss against which there is no protection and against which no protection could have been obtained. Surely in the circumstances, the District cannot reasonably expect the contractor to stand this loss.

Recently the Commissioners, acting upon the advice of the District Solicitor, declined to pay any extra cost of steel. With all due deference to Mr. Harvey's opinion and of the Commissioners, we do not consider that the District should be guided solely or even largely by a consideration of its legal rights in this matter. The opinion of our solicitors is not in accord with that of Mr. Harvey. We are of the opinion that we have very strong legal rights to be paid any and all extra cost to which we may be put in procuring the extra steel and, in submitting this communication, we desire it clearly understood that we do not waive but reserve all legal rights to which we may be entitled. However, we feel very strongly that our moral rights in the matter are beyond question, so strong in fact as to hardly admit of argument. We are sure that when the members of the Board clearly understand the facts they will view the matter in the light in which we do.

We respectfully request, therefore, that the Administration Board issue the necessary instructions to provide for payment to us of the increased cost of all re-inforcing steel required in excess of the amounts stated in the Schedule of approximate quantities.

Yours truly,
TREMBLAY MCDIARMID COMPANY,
(Sgd.) E. Cass, Chairman.

In their statement of claim plaintiffs set out the several changes made from time to time in connection with the work and allege that:—

The work undertaken and carried on by the plaintiffs for defendants from and after the month of May, 1916, was a work so unexpected and so different from the work upon which the plaintiffs had tendered and from the work covered by Contract No. 30, that it was wholly outside the scope of said contract, and said Contract No. 30 was rescinded and set aside and a new agreement substituted therefor, which said agreement so substituted was an agreement by plaintiff to construct said new types of aqueduct and said changed work and to be paid therefor at a reasonable rate for the work and services performed and materials supplied. The plaintiffs claim $22,894.34, which represents the increased cost of steel and labour supplied.

The action is evidently based on *Bush* v. *Whitehaven*, 2 Hudson on Building Contracts (3rd ed.) 118. There the plaintiff contracted to construct for the defendant a water main for a sum certain. In order to do the work it was necessary that plaintiff should be given possession of the site through which the water main was to run. The contract was made on July 12 and the work was to be completed by November 12. A very important part of the site was not given until some time in October and in consequence the contract was changed from a summer contract to a winter contract, where as pointed out by Lord Coleridge, L.C.J., in his judgment at p. 124:—

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> Days were short instead of long; when weather was bad instead of good; when rivers which had to be dealt with and had to be crossed by the pipes, were full or empty; and when . . . a great many most important circumstances under which the contract was to be executed had wholly changed from those which, it is reasonable to suppose, were in the contemplation of both the parties when the contract was entered into.

The plaintiff went on and completed the work under the altered conditions and sued to recover not only the contract price, but a considerable sum of money beyond the contract price, on the ground that the circumstances under which he completed the contract were wholly different from those under which he entered into it, and that therefore he is set free from the terms of it and has a right to recover by way of *quantum meruit*.

The contract provided that the plaintiff should not commence work until authorised by the engineer and that, with the engineer's order to commence work, the defendant would give plaintiff so much of the site as might be necessary for the works. It also provided that the non-delivery of the site should not vitiate or affect the contract or entitle the plaintiff to any increased allowance in respect of money, time or otherwise, unless the engineer might grant an extension of time, which under the terms of the contract would only enable the plaintiff to escape the payment of a penalty for failure to complete on the day fixed for completion.

The contract also contained a stipulation that, if plaintiff failed to complete within the required period by reason, among other things, of the non-possession of the site and by reason thereof the plaintiff was, in the opinion of the engineer, unduly delayed, the engineer might extend the time "without thereby prejudicing or in any way affecting the validity of the contract or the sufficiency of the tender, or the adequacy of the sums or prices therein mentioned." The case was tried before a jury. The following question was answered by them in the affirmative: "Were the conditions of the contract so completely changed, in consequence of the defendant's inability to hand over the site of the work as required, as to make the special provisions of the contract inapplicable?"

A verdict was entered for the plaintiff and an appeal to a Divisional Court was dismissed.

Lord Coleridge places his judgment on two grounds. See *Bush* v. *Whitehaven*, 2 Hudson on Building Contracts, pp. 124-125:—

(1) Upon the true construction of this contract . . . the giving of these sites within a time that shall be reasonable for the completion of the work . . . must be taken to have been the true view of the parties, and, that view being consistent with the words, it must be taken to be the true construction of the words which the parties have used. (2) Upon the finding of the jury coupled with the principle laid down in *Jackson* v. *Union Marine Ins. Co.* (1874), L.R. 10 C.P. 125, that, "if circumstances arise which alter the whole . . . work . . . or entirely change the conditions of the contract, then the contract cannot be held applicable to those changed conditions, because those conditions could not have been in the contemplation of the party at the time when the contract was signed."

Lord Coleridge, L.C.J., pointed out in his judgment that counsel for the defendant were driven to contend that under no circumstances could any change in the conditions of the contract created by delay emancipate the plaintiff from the fulfilment of the contract, and if they admit that such circumstances might arise then the question whether they did in fact arise was for the jury.

After a careful study of the case I fail to see how it can be made applicable to the case in hand.

The whole point in the *Bush* v. *Whitehaven* case was the delay which went to the root of the contract and changed entirely the conditions under which it was to be carried out.

Here the question of steel re-inforcement was only one out of some seventeen classes of work involved in the construction, and was specifically provided for by the contract.

Counsel for the plaintiffs contend that it was never within the contemplation of the parties when the contract was signed that sections B and C should be re-inforced. In support of his contention he refers to Schedule No. 3, being the "Schedule of approximate quantities" item 19, "Re-inforcing steel, furnished and in place—3,320,000 pounds," and states that this quantity of steel was only sufficient to supply re-inforcement for "A" section, and certain other items which called for re-inforcement. Section 6, however, of the "Information for Bidders" provides as follows:—

Each tenderer must form his own opinions of the character of the materials to be excavated, or to serve as foundations for the structures, from an inspection of the ground; put his own interpretation upon the soundings and borings made by the District and make such other investigation as he may deem fit. 6. For the purpose of comparing tenders on a uniform basis, Schedule No. 3 attached hereto has been prepared for each Contract Section upon which tenders are invited; but it must be distinctly understood that the quantities

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given in the Schedules are approximate only, and that the District does not expressly or by implication agree that the actual amount of work will even approximately correspond therewith, but reserves the right to increase or decrease the quantity of any portion of the work and at any time, as may be deemed necessary, without alteration of the prices given in the Schedule of Prices. 7. The excavation, masonry and other parts of the work have been divided into classes and items in order to enable the bidder to bid for the different parts of the work in accordance with the estimate of their costs, so that in the event of an increase or decrease in quantities of any particular class of work the actual quantities of work executed may be paid for at the price bid for that particular class of work. 8. Attention is called to the uncertainty in the quantities in many kinds of the work involved in construction; the quantities of excavation and of steel re-inforcing are especially subject to such uncertainty. Generally the intention has been to estimate all quantities liberally. 9. An increase or decrease in the quantity for any item will not be regarded as ground for an increase or decrease in the prices, nor in the time allowed for the completion of the work, excepting as provided in the Form of Contract.

Also see sec. 15 of the contract.

One would have thought that the memorandum endorsed on the original drawings B. 128, B. 140, "Steel re-inforcement as and where directed by the engineer" was a sufficient indication to the plaintiffs that steel re-inforcement might be required in these types.

Plaintiffs' contention however is that these words are intended only to refer to a memorandum which appears below the above memorandum: "Under such road-crossings as directed this section will be strengthened by increasing the thickness and by the addition of re-inforcing steel."

On both B. 128 and B. 140 white dotted lines are drawn through the centre of the concrete in the invert which defendants contend were intended to convey the idea to the contractor that the aqueduct may possibly be re-inforced as indicated by those lines.

Chace, the chief engineer of defendants, says that is what the white dotted lines indicate. Plaintiffs however contend that these lines indicate the manner in which the aqueduct is to be re-inforced under road-crossings only, and in support of this position point to the fact that the special drawing for road-crossings on B. 210 shews steel re-inforcement of a similar design.

Whether the plaintiff understood the dotted lines to indicate steel re-inforcement under road-crossings only or not, they could not misunderstand the meaning of the memo. "Steel re-inforce-

ment as and where directed by Engineer," which has no connection whatever with the memo. relating to steel re-inforcement under road-crossings.

It may be and probably is the fact that when the contract was made the engineers of the defendants did not anticipate that it would be necessary to re-inforce sections B and C. They nevertheless made provision for such a contingency in the clearest terms which could be employed.

I quote the portions of the contract which appear to bear on the point:

Section 6 of the Specifications: "The masonry aqueduct, in general, will be built in open cut and of Portland Cement Concrete, either plain or re-inforced."

Under the heading: "Open Cut Excavation," sec. 2-6:—

Whenever in the judgment of the Engineer, field or other tests are necessary to determine the supporting power of the soil upon which the aqueduct and its appurtenances are to be built, in order to determine the type of structure to construct . . . , the expense of all such tests . . . shall be borne by the contractor.

Under the heading: "Concrete Masonry," sec. 17-39:—

Re-inforcing steel will be required in the circular section of the Aqueduct on Contract No. 30, and in the depressed sections at the Brokenhead, Whitemouth and Birch River crossings, and in the Venturi meter at the Falcon River crossing, and at the west end of Contract No. 30; it may also be ordered to be used for re-inforcing the bottom of the Aqueduct where, in the judgment of the Engineer, it may be necessary on account of the nature of the excavation, and the Contractor shall furnish and place such steel, of the sizes and lengths ordered by the Engineer, from time to time, and will be paid therefor under Item No. 19 . . .

Under the heading: "Re-inforcing Steel," sec. 19-1:—

Steel for re-inforcing concrete shall be furnished and put in place by the Contractor in accordance with these specifications wherever, and in the manner, ordered by the Engineer, or called for by the Drawings. Steel will be required in all depressed sections of the Aqueduct, and in some portions of the invert where the bottom of the excavation may be unsatisfactory and at other places which will be determined upon by the Engineer during the construction of the work.

Contract sec. 141:—

The Contractor covenants and agrees with the District that he will, at his own expense, furnish all and every kind of labour, tools, machinery, implements, materials, matters, things, plant and appliances (except as herein otherwise specified) whatsoever necessary or suitable for the due execution and completion of, and shall fully perform, construct, execute, complete and deliver in the most thorough workmanlike and substantial manner in every respect to the satisfaction and approval of the Chief Engineer in the manner

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and upon the terms and conditions and within the times herein specified and in accordance with the maps, plans, drawings, profiles and specifications herein or in the schedules hereto attached, referred to and to any further maps, plans, profiles, drawings or specifications in substitution therefor (which the Chief Engineer may provide from time to time for the full and complete performance of the works). All the works hereby contracted for and shewn or to be shewn on the maps, plans, drawings, profiles and specifications above referred to or any of them, or which may be ordered by the Chief Engineer from time to time or at any time during the progress of the work . . .

Contract sec. 15:—

The quantities of the various kinds of materials and work as set forth in Schedule No. 3 hereto attached, are approximate only, being supplied with the object of forming a basis for the uniform comparison of bids, and the District does not expressly or by implication, agree that the actual amount of work or quantities of material will correspond therewith, but reserves the right to increase or decrease the quantity of any class or portion of the work as may be directed by the Chief Engineer. Any increase or decrease in the quantity of any or all items shall not be regarded as cause for an increase or decrease in the price, nor in the time allowed for the completion of the work, except as herein elsewhere provided, and the contractor shall make no claim for anticipated profits or for loss of profits or for any other losses because of the difference between the quantities of the respective works or materials actually done or supplied and the quantities set forth in said Schedule No. 3.

By sec. 10 (f) of the contract:—

The Chief Engineer shall have the right to issue at any time, and from time to time, additional drawings and specifications further detailing, explaining or modifying the work. Such drawings and specifications shall either supplement or supersede those signed at the time the Agreement is entered into, issued herewith or set forth or referred to in Schedule No. 1 attached hereto; provided that if the carrying out of the work in accordance with such additional drawings and specifications should increase or reduce the cost to the Contractor an adjustment of the cost shall be made as provided for in paragraph (e) of this section.

Section 10 (e) provides that, if the cost is increased, there shall be paid to the contractor such additional money as shall be ascertained as provided in sec. 18.

Section 18 (k) provides that the difference of the cost shall be ascertained in accordance with the rates and prices specified in Schedule 2, so far as the same shall be applicable, otherwise the actual cost of material and labour plus 5% on material and 15% on labour.

Section 18 (a) gives the defendants the right at any time to make any change or alteration which they may deem expedient in the

Alignments, grades, levels, location, dimensions, nature, position, plans or specifications of the work or any part or parts thereof, or in any other thing

connected with the work, whether or not such changes diminish or increase the amount of the work to be done or the cost of doing the same, and all without in any way affecting or vitiating this agreement.

Section 18 (g):—

All the sections of this agreement shall apply to any changes, alterations, additions, deductions, omissions, deviations or extra work in like manner and to the same extent as to the works contracted for and no changes, alterations, additions, deductions, omissions, deviations or extra work shall annul or invalidate this agreement.

How in the face of these provisions of the contract plaintiffs can say that the re-inforcement of sections B and C was a work "so unexpected and so different from the work upon which plaintiffs had tendered or from the work covered by contract No. 30, that it was wholly outside the scope of said contract," I am at a loss to understand.

On the contrary, the above quotations from the contract shew in the clearest possible manner that such a change was contemplated and provided for.

The plaintiffs clearly understood this. When in October, 1915, they received Plan B. 261 with instructions to re-inforce the invert in section "B" they wrote the letter (Ex. 40) above quoted, in which they distinctly point out that the alteration came within sec. 18 of the contract, and later on by letter confirmed the statement of the engineer that the cost would be covered by the schedule of prices in the contract.

When the two drawings B. 268 and B. 275 were sent to plaintiffs in January, 1916, they immediately ordered the $\frac{5}{8}$ inch steel for re-inforcing, which was a different size from any required in section "A," and no such contention as is here raised was ever made until the action was brought.

Plaintiffs worked according to Drawing D. 334 during the season of 1916, without any protest until August, 1916, when they asked defendant for additional payment for steel, which had gone up in price.

The trial Judge expressed the view that the legal principles laid down in *Bush* v. *Whitehaven*, *supra;* and *Boyd* v. *South Winnipeg*, [1917] 2 W.W.R. 489, applied to this case. I have already dealt at length with the case of *Bush* v. *Whitehaven*.

In *Boyd* v. *South Winnipeg* the contract was for the construction of a sewer. After the contract was signed the defendant

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changed the location of the sewer. The trial Judge found that the tender was prepared and the contract entered into upon the first set of plans, and that the plaintiff and his foremen in charge of the work knew nothing of any change in location until after the work was actually commenced. It was also found that the plaintiff never tendered or estimated upon building the sewer in the new location. The change in location added very materially to the cost of construction. In this case Howell, C.J., was of the opinion that *Bush* v. *Whitehaven* did not apply.

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Perdue, J.A., based his judgment on the change in the location of the sewer. He says:—

> I do not think that in any view of the case the essential change in location from the point where the course of the sewer was diverted to where it entered the river was either an extra or an alteration such as would be ordinarily or reasonably contemplated by persons signing a contract such as the one in question in this case. It should rather be regarded as an independent agreement outside the contract.

Haggart, J.A., thought the case came within the principle of *Bush* v. *Whitehaven*, while Cameron, J.A., who dissented, was of opinion that it did not apply.

With deference, I fail to see how this case is of any assistance whatever to the plaintiffs. Here the very thing contracted to be built was built on the location fixed—the only change being a variation in the thickness of the walls of the invert and the strengthening of it by steel bars. These changes, as already stated, were contemplated and provided for by the contract.

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

Perdue, C.J.M. Haggart, J.A.

PERDUE, C.J.M., and HAGGART, J.A., concurred.

Appeal dismissed with costs.

This judgment was affirmed by the Supreme Court of Canada, by the following decisions:—

Harvey, K.C., and *W.L. Scott*, for respondent.

Idington, J.

IDINGTON, J.:—If it is borne in mind that the contract here in question was one for work and material for which the respective quantities were to be paid upon the basis of a fixed schedule of prices, and that such respective quantities were, by the express terms of the contract, liable to be either increased or diminished at the will of one or other or both of several authorities named as endowed with such power of requiring variation therein, then it seems to me impossible to hold that in law the necessary requisi-

tions made by such respective authorities can be said to have exceeded what was within the reasonable contemplation of the parties to the contract.

There is no charge of incompetence or bad faith on the part of those authorities so assigned by the contracting parties such extensive powers as respectively exercised by them.

The magnitude of the work, the obvious impossibility of determining beforehand, exactly, or even with accuracy approximately the actual conditions which the progress of the work might disclose, rendering changes necessary, rendered it necessary to resort to the expedients adopted of providing for a basis of compensation according to schedule of prices, and trusting to some authority to determine relative to such future changes in design or quantity of material, or labour, as the necessities of producing a first-class aqueduct might require.

All that being thus brought within the reasonable contemplation of the parties and the requisition made being necessary and well within the limits of the express provisions of the contract, I fail to find any reason in law for the contention set up by the appellants.

The sole ground in the last analysis of what the appellants complain of is the increase in prices of steel and wages of men.

It is to be observed that in a contract of this kind in which the compensation is based upon a schedule of prices there must be assumed that he contracting to do the work, as a prudent man, will estimate a profit upon each of these things he has undertaken to supply. Hence the greater the quantity of material or labour called for, the greater the profit he is likely to earn.

The chapter of accidents may increase or diminish the expense of men or material beyond what either party may have anticipated. That, however, furnishes no ground for asserting that the work done has been beyond that which was in law within the reasonable contemplation of the parties to the contract.

Any such event does not in law relieve either from his obligation.

That the amount of the claim herein did not exceed 2% of the total compensation of nearly $1,000,000, is suggestive that there was not in fact much to complain of.

Governed, as I hold I must be, by the foregoing reasons I need not dwell upon or repeat the various provisions of the contract,

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which are set forth in the judgments of the trial Judge (Curran, J.) and of Fullerton, J.A., in the Court of Appeal, ante p. 417, which furnish, together with the admitted fact of a schedule of prices being the basis of compensation, the basic facts upon which my reasons rest.

The appeal in my opinion should, therefore, be dismissed with costs throughout.

Duff, J.

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

It is unnecessary to add anything to the judgments delivered in the Court below. (See *ante* p. 410). Section 18 of the contract affords a conclusive answer to the appellant's claim.

Anglin, J.

ANGLIN, J.:—In my opinion the change in the construction of sections B. and C. of the works for which the appellant contracted, whereby the use of the inverts of reinforced concrete instead of concrete was extended to the greater part of those sections, was a "change or alteration in the . . . nature . . . plans or specification of the work" within clause 18 (a) of the contract. As such it was within the rights thereby conferred on the Administration Board to order it and when it did so, on the advice of its consulting engineers, the altered or changed work thus directed became part of the work contracted for. I have not the slightest doubt that the defendant's appeal was rightly allowed by the Court of Appeal of Manitoba and that the judgment of that Court dismissing this action (*ante* p. 410), must be maintained.

Brodeur J.

BRODEUR, J.:—The appellant relies mostly on the case of *Bush* v. *Whitehaven*, 2 Hudson on Building Contracts (3rd ed.) 118, to justify his appeal. It has been held in this case of *Bush* that where the circumstances contemplated by a building contract for works are so changed as to make the special conditions of the contract inapplicable, the contractor may treat the contract as at an end and may recover upon a *quantum meruit*.

The facts in that case and in the present one are very different. In the *Bush* case, *supra*, the contract was for a lump sum, whereas in the present case it is based on fixed prices for uncertain quantities of labour and material. In the *Bush* case there was undue delay on the part of the owner to give the sites on which the work was to be done and the anticipated circumstances under which it was to be executed became wholly inapplicable. In the present cause neither fault nor negligence can be attributed to the respond-

ents. They have acted in an entirely good faith and the changes and alterations made by them as to the use of steel were contemplated in the contract which they have signed.

It is true that in the estimated quantities of steel which they supplied to the contractor before he had put in his tender they stated that about 3,320,000 pounds would be required. But in the specifications it was formally stated that outside of some specific places the steel might "also be ordered to be used for re-inforcing the bottom of the aqueduct where in the judgment of the engineers it may be necessary on account of the nature of the excavation, and the contractor shall furnish and place such steel . . . and will be paid therefor under" the price tendered for.

In the contract itself it was also stated in clause 15 that the various kinds of materials as described in the schedule of quantities were approximate only "being supplied with the object of forming a basis for the uniform comparison of bids" and that these quantities should not be considered as constituting the quantities of materials that will be required, but the respondent reserved for itself the right to increase the quantity of steel required.

We find also that in the drawings that were submitted to the appellant company there was specifically mentioned the fact that steel re-inforcement of the invert of the aqueduct could perhaps be introduced if so ordered by the engineer.

In the first year in which the work was begun no steel was used to re-inforce the invert but it was found that the work was defective and could not stand the pressure. Then it was decided by the respondent to re-inforce the invert with steel in the shallow cuts. At first objection was made by the appellant company and they asked for an additional price since the steel had increased in cost. But the respondents refused to agree to their request and then the appellant company on October 25, 1915, agreed that the steel should be supplied at the contract price.

Later on some new modification was made by the respondents on the advice of consulting engineers of great repute, and this modification called for reinforced concrete not only on shallow cuts, but on all the parts of the contract. A new protest was made by the appellant company but the respondents having stated that the price was determined by the contract, the work was carried out by the contractor and the steel was put in.

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He now asks for an additional price above the contract price. The respondents are willing to pay the contract price but refuse to pay any additional price.

By the provisions of the contract and particularly by sec. 18 (a) it was agreed that the respondents were at liberty at any time to make any change which they may deem expedient in the plans or specifications of the work. The work in question was of great magnitude and was being carried out under circumstances and conditions which required changes. At first it was thought that the concrete without steel re-inforcement would be sufficient in certain parts of the work, but it was soon found that the aqueduct was cracking, and then it was decided to provide for re-inforcement all through. These alterations were contemplated in the contract and besides it was within the power of the respondents to make the necessary changes.

It is a pity, however, that the respondents had not found it advisable to settle this claim by some amiable process, because there is no doubt that the plaintiffs have incurred some losses in their purchase of steel.

However we have, as far as we are concerned, to take the contracts as they are, and I feel bound to say that the plaintiffs could not under their contract claim the sum for which they have instituted this action.

In cases where the quantities are inaccurate in a contract of "bills of quantities" the employer is not under any liability to a contractor who has tendered, though the inaccuracy in the quantities may have induced the contractor to tender at an inadequate price (*Sherren* v. *Harrison* (1860), 2 Hudson on Building Contracts (3rd. ed.), 6).

The appeal of the plaintiffs fails and should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—The judgments of the Court below (*ante* p. 410), are so complete that it is not necessary to repeat here what has been so fully stated by the Judges. The question, moreover, is a simple one and is whether the re-inforcing steel furnished by the appellants for sections "B" and "C" of their contract is to be paid according to the prices mentioned in Schedule 2 of the specifications annexed to and a part of their contract, or whether the supplying of re-inforcing steel for these

sections is something so entirely outside the contract that it should be paid on the basis of a *quantum meruit* and according to the market price of the steel when the appellants were called on to furnish it for these sections. There is no pretence of not paying for the re-inforcing steel so supplied, the only question being whether the contract prices apply.

My opinion is that the contract prices do apply to this quantity of 1,500,000 pounds of re-inforcing steel furnished by the appellants. It is true that Schedule 3 of the specifications estimated the quantity of re-inforcing steel to be furnished at 3,320,000 pounds, but this estimate was merely approximate, and, in the information for bidders, also a part of the contract, the appellants were warned that the quantities given in the schedule were approximate only, and that the district did not expressly or by implication agree that the actual amount of work would even approximately correspond therewith, but reserved the right to increase or decrease the quantity of any portion of the work and at any time, as might be deemed necessary, without alteration of the prices given in the schedule of prices.

That being the case it is immaterial that it was first thought that re-inforcing steel would be required in sections B and C only at certain places, and at the road crossings, and not generally throughout these sections; for the contingency which has happened was certainly provided for, and the drawings of sections B and C expressly stated that steel re-inforcement would be required as and when directed by the engineer. I am therefore of opinion that what was done by the contractor comes entirely within the contract.

I need now merely refer to sec. 18 of the contract with respect to extra work, alteration, deduction, etc. The respondent reserved the widest power of making alterations, changes and additions in the work to be done by the contractors, and it was stipulated that the amount of the difference in cost, if any, occasioned by any alterations, amendments, additions, omissions, deductions, deviations, changes, variations or extra work, should be ascertained in accordance with the rates and prices specified in Schedule 2, so far as the same should be applicable. (Sub-sec. k of sec. 18.)

It is true that sub-sec. k added that otherwise (that is to say, where the rates and prices specified in Schedule 2 should not be

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applicable), the basis of ascertainment of the difference in cases where the cost of the work is increased should be the actual cost of material and labour entering into the extra work, plus 5% of the cost of the said material, and 15% of the cost of the said labour. But here the rates and prices specified in Schedule 2 are, in my opinion, clearly applicable to the extra amount of re-inforcing steel furnished by the appellants. It could not be contended for a moment that because the cost of steel advanced, the appellants are entitled to an indemnity for the added cost if the work done comes within the contract, any more than the respondents could have claimed the benefit of a decrease in the market price of steel. The whole matter was one of the contingencies fairly contemplated at the time of the contract, for the country to be crossed by the aqueduct was not well known, and the contractors were warned to form their own opinion of the nature of the ground. Furthermore, the attention of bidders was called to the uncertainty in the quantities in many kinds of the work involved in construction, the quantities of excavation and of steel re-inforcing being stated to be especially subject to such uncertainty. And it was expressly added that an increase or decrease in the quantity for any item would not be regarded as ground for an increase or decrease in the prices excepting as provided in the form of contract.

In my opinion the appeal fails and should be dismissed with costs. *Appeal dismissed.*

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REX v. MORRIS.

Stipendiary Magistrate's Court for Halifax, Nova Scotia, O'Hearn, K.C., Deputy Stipendiary Magistrate. February 3, 1920.

JUSTICES (§ III—12)—QUESTION OF JURISDICTION OF MAGISTRATE TO HOLD SUMMARY TRIAL—CHARGE TRIABLE WITHOUT CONSENT UNDER CR. CODE SECS. 773, 774—NO POWER TO RESERVE A CASE TO COURT OF APPEAL.

A magistrate holding a summary trial under Cr. Code secs. 773, 774 without consent on a charge of keeping a disorderly house has no jurisdiction to reserve a case for the consideration of the Court of Appeal even on the question of his own jurisdiction. The power to reserve a case on summary trial applies only to trials under Cr. Code sec. 777.

Statement.

MOTION before the magistrate to reserve a case for the Court of Appeal. The grounds of the motion were as follows:—

1. That the trial and conviction are null and void and without jurisdiction because the deputy stipendiary magistrate who tried

the said Massel Morris and made the said conviction against her, had power to act only in the temporary absence from the city of Halifax of the stipendiary magistrate of the city of Halifax, whereas the latter was neither in fact nor in law temporarily absent from the city of Halifax at the time the said deputy stipendiary magistrate assumed jurisdiction over the said Massel Morris and the charge against her on which she was convicted as aforesaid.

2. That the said deputy stipendiary magistrate has no jurisdiction to proceed under sec. 773 (f) of the Cr. Code for the said offence but should proceed under secs. 228, 582, 583 and 777 of the Cr. Code, and so proceeding or being judicially held to so proceed he had no jurisdiction over the said Morris as she did not consent to be tried before him for the said offence or waive a trial by a jury therefor.

3. There was no information or record or charge made against the said Morris for the said offence as contemplated in Part XVI. of the Cr. Code.

4. There was no jurisdiction to proceed against the said Morris for the said offence in any event, as sec. 641 of the Cr. Code was not complied with.

5. There was no proof on oath before the said deputy stipendiary magistrate of the conditions precedent under which he could act as deputy to the stipendiary magistrate of the city of Halifax as called for by sec. 145 of the Halifax City Charter, 1907, before he assumed jurisdiction over the said offence and made the conviction thereon.

A. Cluney, K.C., for the Crown.

J. Terrell, K.C., for defendant.

O'HEARN, K.C., Deputy Stipendiary Magistrate:—The defendant, Massel Morris, was charged before me, on January 17, 1920, for the offence of keeping a house of ill fame in the city of Halifax on the 16th. After reading the charge to her and asking her the usual questions in respect to her age, occupation, etc., I, at the request of Mr. Terrell, who appeared for her, and with the consent of Mr. Cluney, the Crown prosecutor, continued the trial of the case until Friday, January 23, 1920, at 2.30 p.m. in the afternoon, the defendant going on bail. At about 3.30 p.m. on Friday the 23rd inst., the said defendant again appeared before me on the

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said charge in answer to her recognizance and then for the first time being asked by me to plead to the said charge she pleaded guilty and was convicted by me and sentenced to 6 months imprisonment in the city prison at Halifax. On Saturday January 17, 1920, when the said defendant was charged before me as aforesaid, George H. Fielding, the stipendiary magistrate for the city of Halifax, was not in the city, nor was he in the city during that day at all. On Friday, January 23, Mr. Fielding left his office in the city hall in order to catch the 3.30 p.m. train for Rockingham, where he resides, he having finished his judicial work for the day at about 2.00 p.m. The defendant was not charged before me on a sworn information, but simply on the charge set out in the police charge book, which was copied from the police blotter. The defendant was not asked to consent to a trial on said charge as I proceeded from the first to try the defendant summarily under secs. 773 (f) and 774 of the Code.

I am asked by Mr. Terrell, to reserve a case involving the several questions (set out in the notice of motion) for the consideration of the Supreme Court of Nova Scotia sitting *en banco*. I must refuse his application because I have no jurisdiction to reserve a case when proceeding under sec. 773 of the Cr. Code, as power is only given to a magistrate to reserve, when acting under sec. 777, or under the provisions of the Summary Convictions Act, Part XV. Cr. Code, sec. 761, which does not apply here. See secs. 10, 13, 798, and *Reg* v. *Hawes* (1900), 4 Can. Cr. Cas. 529; *Rex* v. *Davidson* (No. 2) (1917), 35 D.L.R. 94, 28 Can. Cr. Cas. 56, 11 Alta. L.R. 491.

If I had the power to reserve the case I would not do so because I consider that the questions raised do not raise sufficient doubt as to warrant their discussion or consideration, and some of them have been already decided. The questions raised in paras. 1 and 2 have been disposed of by Drysdale, J., in *R.* v. *The Keeper of the City Prison; Ex parte Morris* (the same defendant) (1910), 16 Can. Cr. Cas. 1, and I would also refer to the decision of the Supreme Court of Nova Scotia in *Rex* v. *Smith* (1905), 9 Can. Cr. Cas. 338, and *Rex* v. *Honan* (1912), 6 D.L.R. 276, 26 O.L.R. 484, 20 Can. Cr. Cas. 10. Authority against the contention put forward in para. 3 is to be found in *Rex* v. *McLean* (1901), 5 Can. Cr. Cas. 67, and *Rex* v. *Crawford* (1912), 6 D.L.R. 380, 5 Alta.

L.R. 204, 20 Can. Cr. Cas. 49, and, even if an information were required, the fact that the accused was before a magistrate having jurisdiction over the subject matter and also territorial jurisdiction disposes of the matter, and the irregularity and illegality of defendant's arrest do not affect the magistrate's jurisdiction over the defendant. See *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614 at 622; *Rex* v. *Walton* (1905), 10 Can. Cr. Cas. 269; *Re Le Chu* (1909), 14 Can. Cr. Cas. 322, 323 and 327, and *Ker* v. *Illinois* (1886), 119 U.S.R. 436.

Sec. 641 of the Code only deals with the issue of a search warrant, which is obviously only for the purpose of permitting the police to get evidence, and even if the officer has unlawfully entered into the premises of the defendant, as I have said before, that fact while giving the defendant a right of action will not affect the jurisdiction of the magistrate. Respecting the question in para. 5 of the notice of motion, it was held in *Brunet* v. *The King* (1918), 42 D.L.R. 405, 30 Can. Cr. Cas. 16, 57 Can. S.C.R. 83, that the deputy magistrate is not to make a preliminary enquiry in respect to the whereabouts of his principal before proceeding to try the case. The law presumes that he is doing his duty promptly, faithfully, and such presumption can only be disturbed by evidence to the contrary.

Motion refused.

STRAND THEATRE Co. v. CAHILL.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. June 21, 1920.

INJUNCTION (§ I E—53)—THEATRE COMPANY—PATRONS OBSTRUCTING STREET WHILE WAITING TO BUY TICKETS—INCONVENIENCE TO PROPRIETORS OF NEARBY STORES—NUISANCE.

An injunction will be granted restraining a theatre company from inconveniencing and annoying the proprietors of nearby stores by allowing its patrons to obstruct the entrance to their premises while waiting to purchase tickets of admission to the theatre.

[*Cahill & Co.* v. *Strand Theatre Co.* (1920), 51 D.L.R. 234, affirmed.]

Statement.

APPEAL from a decision of the Supreme Court of Nova Scotia (1920), 51 D.L.R. 234, reversing the judgment at the trial in an action for an order restraining defendants from obstructing access to plaintiffs' premises. Affirmed.

F. H. Bell, K.C., for the appellant.

A. W. Jones, for the respondent.

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Idington, J.

IDINGTON, J.:—The respondent complaining of a nuisance created by the appellants inducing such an assemblage of persons on the sidewalk in front of its theatre and extending to the entrance of the respondent's adjoining grocery, applied for an injunction, and that application was by consent conducted without formal pleadings.

After a trial lasting 2 days Drysdale, J., dismissed the application, and, on appeal, the Supreme Court of Nova Scotia (1920), 51 D.L.R. 234, reversed said judgment of dismissal and made instead thereof the following order:—

> And it is further ordered that the defendant, Strand Theatre Company, Limited, its managers, servants and agents be and they are hereby restrained from unlawfully obstructing the free access to and egress from the premises of the plaintiff, Cahill & Company, at the southeast corner of the intersection of Sackville and Argyle streets in the city of Halifax by the collection of crowds of people or otherwise.

From that, by leave of said Court, the said defendant appeals to this Court.

There appears herein some evidence which, within the doctrine relied upon in the case of *Lyons, Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631, might have justified a judgment for damages, if that form of relief had been sought or an injunction restraining the repetition of the offences disclosed in the evidence I refer to.

The above quoted order being confined to the restraining feature "unlawfully obstructing the free access to and egress from the premises of the plaintiff," etc., can result in nothing more than the trial of a specific complaint founded upon facts, disclosing such an unlawful obstruction hereafter, and the payment of the costs as awarded.

In other words, there seems to me nothing in fact or law involved in this appeal but a mere question of costs.

The uniform jurisprudence of this Court has rightly been to refuse to interfere with a mere question of costs.

What then is left for us to consider? If there occur any future like offences they must be decided upon the facts according to the relevant law applicable thereto.

I am sorry to hear counsel suggest that the proof in such cases must depend solely upon that furnished by affidavits in support or denial of the allegations of any such offence, and that there can be no cross-examination.

Such a feature in the administration of justice I suspect must, if so, be confined to Nova Scotia, for elsewhere rules of practice generally provide for cross-examination of parties making affidavits.

That, of course, is not always so satisfactory as the cross-examination in an open trial, but if its operation does not exist in Nova Scotia, I imagine some means can be devised by the Courts there for overcoming such an unsatisfactory condition of affairs.

I think that must be entrusted to the local Court...

If there had been pleadings, or the Court had seen fit to permit of amendment to substitute them for the procedure adopted so as to allow a judgment for damages by way of remedying the undoubted wrong that has occasionally been suffered, coupled with costs of suit, it would, to my mind, have more appropriately met the necessities of the case than such an injunction as framed.

On the other hand, I cannot say that there was no evidence of a cause of action and, as a result, hold the appellant at liberty to pursue a like course of conduct as it undoubtedly did.

Lawlessness is not to be encouraged by giving a license to repeat such offences as were committed.

A little vigourous effort on the part of the local authorities, if invoked by appellant, should produce the result desired.

I think the appeal should be dismissed with costs.

DUFF, J.:—The form of the order may be open to objection, *Parker* v. *First Ave. Hotel Co.* (1883), 24 Ch.D. 282 at 286, but the point was not clearly taken and the Court has full control on its own order. I think the appellant has not made out a case for interference. Duff, J.

ANGLIN, J.:—After considering all the evidence I find myself unable to say that the careful appreciation of it in Mellish, J.'s, judgment, 51 D.L.R. 234, is not correct. It discloses, in my opinion, an unjustifiable interference (for which the defendants are clearly responsible) with the plaintiffs' undoubted right to the full enjoyment of their property. The defendants must find some means of putting a stop to the obstruction complained of, even if to do so should necessitate the incurring of additional expense or some curtailment of the profitable use to which they are now putting their own property. *Lyons, etc.* v. *Gulliver*, [1914] 1 Ch. 631. *Sic utere tuo ut alienum* Anglin, J.

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non laedas is an elementary principle in point. The evidence shews that the unlawful obstruction continued between the date of the writ and that of the trial.

Had objection been clearly taken to the form of the order of injunction I am not entirely satisfied that it should not have been modified. An injunction against "unlawfully obstructing free access to and egress from the plaintiffs' premises by the collection of crowds of people or otherwise," is open to the objection that it merely expresses, and in terms no more precise, a general obligation which the law imposes. It leaves undecided and open for discussion, on a motion to punish for breach of it, what is prohibited. *Cother* v. *Midland Ry. Co.* (1848), 2 Ph. 469, at pp. 471-2, 41 E.R. 1025; *Att'y-Gen'l* v. *Staffordshire County Council*, [1905] 1 Ch. 336, at 342; *Parker* v. *First Ave. Hotel Co.*, 24 Ch.D. 282, at 286.

On the other hand, however, it may be that the view of the Supreme Court of Nova Scotia was that adequate protection could not be afforded to the plaintiffs by an order couched in less comprehensive terms. *Elliott* v. *North Eastern Ry. Co.* (1863), 10 H.L. Cas. 334, at 358-9, 11 E.R. 1055, *Vere* v. *Minter* (1914), 49 L.J. (Notes of Cases) 129. Moreover, the defendants' contention has been that no injunction whatever should have been granted rather than that an order more definite and precise should have been made.

On the whole the appellants have, in my opinion, failed to make out a case for interference with the order against which they appeal.

Brodeur J.

BRODEUR, J.:—It has been suggested that the control of crowds in a highway was a matter for police regulation and that the owner of a theatre was not responsible because persons collected before the hour at which they were invited, forming a queue on the sidewalk and causing an obstruction to access to the adjacent premises. But the Court of Appeal in England decided this question adversely to that suggestion and declared that if the natural and probable result of what a person is doing will be the collection of a crowd which will obstruct the highway, then the obstruction is an actionable nuisance and this person could be restrained. *Lyons, etc.* v. *Gulliver*, [1914] 1 Ch. 631.

It does not seem that a theatre queue under all circumstances and in all conditions is an actionable nuisance. There must be some unreasonable use or obstruction of the highway so as to prevent the access to and egress from the neighbouring premises and that obstruction must be calculated to deter customers, to some extent, from resorting to those adjacent premises.

Each case, however, should be governed by its own facts and an injunction should be issued only in circumstances which would amount to a nuisance.

The owner of the theatre in the present case was alive to these exigencies of the law and claims that he had been doing everything in his power to minimise inconvenience to the plaintiff, his neighbour, and had been willing to incur all necessary expenses arising out of a larger police force to control the crowd.

The evidence, however, shews that the plaintiffs' premises have been unduly obstructed and customers desiring to enter his premises unduly interfered with. The evidence given by the police authorities is generally favourable to the owner of the theatre; but there were facts and circumstances established by evidence, which was not contradicted, which shewed undue interference. I am inclined to think that the police protection was not sufficient; and as the appellant has assumed the onus of seeking and even paying for that police protection, he has then incurred liability. On the whole, I agree with the judgment *a quo*.

The appeal should be dismissed with costs.

Mignault J.

MIGNAULT, J.:—The law governing a case of this description has been authoritatively stated by the English Court of Appeal in *Lyons, Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631, also the case of queues formed by the patrons of a theatre waiting for admission, and obstructing the entrance to a neighbouring business establishment. The English case, however, differs from the present one in that, in the former, damages only, and not an injunction, were granted, in view of the undertaking given by the defendants to open their doors an hour before the performance, and it further differs in that the trial Judge there found on the facts in favour of the plaintiffs, whereas here Drysdale, J., the trial Judge said:—

I find these queues have been formed and kept, that is reasonably kept, on the outer side of the sidewalk with ample space for people to pass up and

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down the sidewalk between the queues and the buildings, for a long period before action. I find that plaintiff's shop has not been obstructed or customers desiring to enter interfered with; in short, so far as the entrance to plaintiff's shop is concerned, the plaintiff company has no reasonable cause of complaint. Plaintiff Cahill in describing conditions is somewhat in conflict with the testimony of the police. His statements are, however, I think, exaggerated and this perhaps owing more to his state of feelings than an intention to exaggerate, as conditions that now exist and for a long time previous have existed. I accept the testimony of the police. These men are truthful and I believe them and I do not think the defendant company had been so using its property as to interfere with plaintiff's business but reasonably and in a way as of right they might.

This finding is my only difficulty, for my reading of the evidence would lead me to agree with Mellish, J., 51 D.L.R. 234, and were the conditions described in the evidence to continue, I cannot doubt that the respondents would be greatly prejudiced thereby. I think, however, that the way the appellant carries on its business inevitably leads to the gathering of crowds in front of the theatre and of the neighbouring properties. It gives one performance in the afternoon and two in the evening. The greater crowds gather for the second evening performance, and the doors of the theatre are closed about 8.20 p.m., when the lobby is usually filled, and the practice being not to let the second audience in before the first has left the theatre by the side exits, the doors are opened only about 8.40 or 8.50 p.m., so that during from 20 to 30 minutes at least, a crowd naturally gathers. At first this crowd obstructed the street, but the city police formed them into queues on the sidewalk, on one side those who already had tickets, and on the other those who had not secured them. That the queue thus formed in front of the respondent's premises obstructed the entrance thereto cannot be doubted on any reading of the evidence. It is true that the appellant carries on a legitimate business, but that is no excuse for the annoyance caused to the respondents and the interference with the free and unobstructed access to their place of business. The appellant, if it chooses to give two performances each evening, and to let one audience out before it admits the other, must not so use its right as to interfere with the equal rights of the respondents to carry on their business without any interference; *sic utere tuo ut alienum non laedas.*

The form of injunction granted by the Court below is not free from objection, for it states that the appellant must not

unlawfully obstruct the free access to and egress from the premises of the respondents, and thus in effect orders the appellant not to violate the law, but the appellant's case is really that no injunction at all should have been granted. It is indeed very questionable whether such an injunction is in any way prejudicial to the appellant, for the latter certainly cannot claim the right to unlawfully obstruct the respondents' premises and if any one has an interest in having the injunction made more precise it is rather the respondents, for in any case where it is claimed that the injunction has been disobeyed the issue will be, as it was in this case, whether the appellant has unlawfully obstructed the free access to and egress from the respondents' premises.

On the whole, I do not feel disposed to interfere with the judgment of the Supreme Court *en banc*, 51 D.L.R. 234, and the appeal should be dismissed with costs.

Appeal dismissed.

CITY OF WINNIPEG v. WINNIPEG ELECTRIC RAILWAY Co.

Manitoba King's Bench, Curran, J. June 25, 1920.

STATUTES (§ I A—5)—PUBLIC UTILITIES ACT, R.S.M. 1913, CH. 166—POWER OF PROVINCIAL LEGISLATURE TO PASS—COMMISSION A COURT—NOT A SUPERIOR COURT—JURISDICTION OF COURT OF KING'S BENCH TO QUESTION ORDER OF.

The Public Utilities Act, R.S.M. 1913, ch. 166, is constitutional and wholly within the legislative authority of the Provincial Legislature including secs. 5 and 6. Sec. 5 of the Act, whilst constituting the Commission a Court which shall be a Court of Record, does not constitute it a Superior Court within the meaning of sec. 96 of the B.N.A. Act, and this being so sec. 6 is *intra vires*.

The Court of King's Bench has no jurisdiction to question the validity of an order made by the Public Utilities Commissioner because of the provisions of secs. 69 and 70, even if it be of opinion that the order is invalid as being made in excess of or without jurisdiction conferred by the Act.

The constitutionality or otherwise of the Act as a whole or in part cannot be questioned in a collateral proceeding.

[*Winnipeg Electric R. Co.* v. *Winnipeg* (1916), 30 D.L.R. 159, 26 Man. L.R. 584; *Re Toronto R. Co. and City of Toronto* (1918), 46 D.L.R. 547, 44 O.L.R. 381, 24 Can. Ry. Cas. 278; *Northern Alberta Natural Gas Co.* v. *Edmonton* (1919), 50 D.L.R. 506; *McCauley* v. *The King*, [1920] A. C. 691, discussed and applied. See also *Ottawa Electric R. Co.* v. *Township of Nepean* (1920), *post* p. 468.]

Statement.

ACTION to set aside an order made by the Public Utilities Commissioner, granting an increase in the fares allowed to be charged by the Winnipeg Electric R. Co. Action dismissed.

John Allen, K.C., Deputy Attorney-General, for the Crown.

Edward Anderson, K.C., and *D. H. Laird*, K.C., for defendants.

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CITY OF WINNIPEG v. WINNIPEG ELECTRIC RAILWAY CO.

Curran, J.

CURRAN, J.:—The facts sufficiently appear from the pleadings and documentary evidence and need not be recapitulated at any length.

By-law No. 543 of the City of Winnipeg entitled "A By-law of the City of Winnipeg respecting Electric Street Railways" was passed by the council of the City of Winnipeg (without reference to the ratepayers) on February 1, 1892. By this by-law certain rights and privileges for constructing, equipping, maintaining and operating street railway lines in the city of Winnipeg were granted to James Ross and William Mackenzie, called the applicants, subject to the terms, conditions and provisos specified in this by-law and the due fulfilment of such terms, conditions and provisos are expressly declared in the by-law to be taken as conditions precedent to the enjoyment of the rights and privileges thereby granted. Amongst other rights and privileges was the exclusive right to construct, complete, maintain and operate double and single track railways upon the streets or highways of the city of Winnipeg.

The by-law provided what maximum fares might be charged for transportation of passengers, as follows:—

Single cash fare not to be more than five cents each.

Fares on night cars (that is after 11 p.m.) are not to be more than double the ordinary maximum single fare rate.

A class of tickets must be sold at not less than twenty-five for a dollar, and still another class at not less than six for twenty-five cents. Cheap tickets for workmen must also be sold at the rate of eight for twenty-five cents the same only to be used by passengers entering the cars between the time day cars commence running and eight o'clock a.m. and between 5.30 p.m. and 6.30 p.m. School children are to have the right to buy tickets at the rate of ten for twenty-five cents and to be used only on school days and between 8 a.m. and 5 p.m.

A ticket shall be deemed a fare. All classes of tickets above named shall be kept for sale on the cars of the applicants. The company failing to supply such tickets the passengers shall be carried free until tickets are provided.

By 55 Vict. 1892 (Man.), ch. 56 (a private Act), entitled an Act to incorporate "The Winnipeg Electric Street Railway Company" and to confirm by-Law No. 543 of the City of Winnipeg, the Winnipeg Electric Street Railway Co. was incorporated and authorised subject to the provisions of the Act to construct, maintain, complete and operate a double or single track railway upon or along any of the streets or highways in the city of Winnipeg (and other places named) and to take, transport and carry

passengers upon the same, and in addition to the powers by this Act given, to exercise all the powers set forth in by-law No. 543 of the City of Winnipeg and the contract thereunder.

Sec. 34 of the foregoing Act (55 Vict. 1892, ch. 56) confirmed said by-law No. 543 in these words:

By-law No. 543 of the City of Winnipeg, entitled "A By-law of the City of Winnipeg respecting Electric Street Railways," a copy of which by-law is Schedule "A" hereto, is hereby validated and confirmed in all respects as if the said by-law had been enacted by the Legislature of this Province and the said company shall be entitled to all the franchises, powers, rights and privileges thereunder.

Sec. 35 of the by-law provided that

A contract embodying the provisions hereof and a covenant on the part of the applicants to conform to and fulfil all the matters and provisions hereby required of them shall be drawn and shall be executed by the city and the applicants within twelve weeks of the passing of this by-law.

Sec. 34 of the incorporating Act contains the only reference to the by-law to be found in the Act.

The applicants Ross and Mackenzie assigned to the Winnipeg Electric Street Railway Co. all their rights and privileges under said by-law and thereupon the said Winnipeg Electric Street Railway Co., pursuant to said by-law, entered into an agreement with the City of Winnipeg dated June 4, 1892, relative to the construction and operation of the said street railway. This agreement was duly executed by both the company and the City of Winnipeg and contains the identical terms as to fares provided for in the by-law, clauses 5 and 6.

By 58-59 Vict. 1895 (Man.), ch. 54, the Legislature confirmed the purchase by the Winnipeg Electric Street Railway Co., from James Ross and William Mackenzie of their rights under by-law No. 543 and the transfer of such rights to said company; and the agreement of June 4, 1892, aforesaid between the City of Winnipeg and the said company a copy of which is set forth as Schedule "B" to the Act last named, was confirmed and validated to all intents and purposes as therein expressed. This Act is also a private Act.

The Winnipeg Electric Street Railway Co. thereupon proceeded to build and operate a street railway system in the city of Winnipeg pursuant to the said by-law and agreement.

It is admitted that the above company and the Winnipeg Power Co. were amalgamated to form the defendant company

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in the year 1914 and that the defendant is now and has been since the date of said amalgamation operating the said street railway system and subsequent extensions thereto in pursuance of and under and subject to the terms, conditions and provisos of said by-law No. 543 and the agreement of June 4, 1892.

In the year 1912 the Legislature enacted a statute, 2 Geo. V. (Man.), ch. 66, called "An Act respecting Public Utilities to create a Public Utility Commission and to prescribe its Powers and Duties." This statute now appears in the Revised Statutes (1913) of the Province as ch. 166 in slightly different form due to amendments.

Ch. 166, R.S.M., 1913, was amended in 4 Geo. V. 1914, ch. 87, by the Provincial Legislature to further extend its application.

The plaintiff municipality by its by-law No. 7288, dated May 20, 1912, requested that pursuant to sec. 3 of the Public Utilities Act an order of the Lieutenant-Governor-in-Council might be passed making the provisions of the said Act applicable to all public utilities then owned or being operated by an existing company within the limits and extent of the city of Winnipeg and an order of the Lieutenant-Governor-in-Council was passed accordingly on May 28, 1912, in part as follows:

> That pursuant to the provisions of the said the Public Utilities Act all public utilities at present owned or being operated by any existing company or that may be hereafter continued in the name of another company or by the Municipal Council of the City of Winnipeg as a corporation within the limits and extent of the said city of Winnipeg insofar as such operation is within said limits be brought under the said Act; and that the same and every part thereof be applicable thereto and be in full force and effect from the day of the date hereof.

All further reference to the Public Utilities Act in this judgment will be to said ch. 166, R.S.M. 1913.

Sec. 5 of that Act provides that:

> The Lieutenant-Governor-in-Council may appoint a commissioner to be called "The Public Utility Commissioner." The commissioner shall constitute a Court which shall be a Court of Record and shall have a seal of his office, bearing the words "Public Utility Commissioner."

A Commissioner was appointed under this authority in the person of the Honourable Hugh Amos Robson who, having resigned his office, was succeeded in that office by Patrick Anderson Macdonald. The authority for this is contained in an order of the Lieutenant-Governor-in-Council No. 25429, dated December

31, 1915, a certified copy of which has been put in evidence as Ex. 5. The substantive portion of the Order in Council is as follows:

On the recommendation of the Attorney-General, Committee advise, "That the resignation of the Honourable Hugh Amos Robson as the Public Utilities Commissioner for Manitoba be accepted and that Patrick Anderson Macdonald, of the City of Winnipeg, be appointed in his place at a salary of six thousand dollars per annum, such resignation and appointment to take effect this day."

It is clear, therefore, that the Public Utilities Commissioner under this Act was appointed by the Lieutenant-Governor-in-Council, his salary fixed by the same authority and paid, as is admitted by counsel for the defendant, by the Province out of provincial funds.

Resort was had from time to time prior to the making of the Commissioner's order complained of herein to the Public Utilities Commissioner by both litigants for orders, rulings and directions respecting various matters in controversy between them, as will appear from exhibits filed at the trial.

Upon the application of the defendant company to the Public Utilities Commissioner that official, on October 3, 1919, made the order to which the plaintiff objects and which is the cause of this action. A copy of this order has been admitted as evidence, (Ex. 10). It is somewhat lengthy and I will not set it out in full. It shews on its face that the application in response to which it has been made is

a special one made during the pendency of a major application by the company for a permanent increase in fares to meet conditions which it is claimed have so changed since the date of the contract between the city and the company that the company is not now able to secure a fair return on its investment.

It further recites that

Counsel for the city strongly opposes the application; that the usual objection was taken that the appointment of the Public Utilities Commission was *ultra vires* of the Provincial Legislature and that the Commission had no power under the Act to vary a contract,

and proceeds: "These questions are not new and on this application the Commission will follow the course hitherto adopted of overruling the objections."

The order then went on to deal with the question of increase in fares asked for in the following terms:

The commissioner is of the opinion that the company's present financial position justifies them in the application and that the relief is necessary to protect the investment from serious loss. It remains to determine what the

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amount of the increase shall be. The amount to be provided for is as has been shewn in the neighbourhood of $290,000. No exactness can be looked for in calculating what any specific increase will produce but my best judgment is that the fares should be as follows:—

Cash fares, six cents.
Five tickets, thirty cents.
Nine tickets, fifty cents.
Workmen's tickets, five for twenty-five cents (conditions as at present).
School children's tickets to remain as at present.
These rates to prevail until the order is made upon the major application. This order effective immediately.

It is obvious that this order did override and render nugatory the provisions of the contract and the by-law as to fares although the agreement contained contractual obligations absolutely binding upon the defendant company.

The plaintiff then commenced this action and some days later applied under the provisions of sec. 70 of the Public Utilities Act for permission to appeal to the Court of Appeal against the Commissioner's order.

The statement of claim commencing this action was issued on October 4, 1919, and the application for leave to appeal was made on the 17th of the same month to the Chief Justice of the Court of Appeal (Perdue, C.J.M.) in Chambers (1919), 51 D.L.R. 697, 30 Man. L.R. 155. The defendant company opposed the application and leave to appeal was refused upon the ground amongst other grounds that the order in question was not a final order. The same objection is taken here by the defendant and for that reason I feel justified in expressing an opinion upon it.

There are two distinct rulings contained in this order, one undoubtedly final, as to the Commissioner's jurisdiction, the other merely interlocutory and temporary relating to the amount of the increase in fares then authorised. It does seem to me that the decision of the Commissioner as to his jurisdiction was appealable under sec. 70. It was as final an order upon that question as any tribunal could make and not only that but it distinctly reaffirms the Commissioner's previous decisions upon the same question, for he says:

> The usual objection was taken that the appointment of the Public Utilities Commissioner was *ultra vires* of the Provincial Legislature and that the commissioner had no power under the Act to vary a contract. These questions are not new and on this application the commissioner will follow the course hitherto adopted of overruling the objections.

It is apparent then that the objection to jurisdiction had been taken before and ruled upon by the Commissioner adversely to the plaintiff who raised it. The only question which he did not finally decide was the amount of the increase in fares to be permanently allowed. Not only did he decide finally the question of his jurisdiction to vary the contract in question but that it should be varied in this instance for he says in his order:

> The Commissioner is of the opinion that the company's present financial position justifies them in the application and that relief is necessary to protect the investment from serious loss. It remains to determine what the amount of the increase shall be.

Sec. 70 of the Public Utilities Act, R.S.M. 1913, ch. 166, provides that

> An appeal shall lie to the Court of Appeal . . . from any final decision of the commission upon any question involving the jurisdiction of the commission, but such appeal can be taken only by permission of a Judge of the Court of Appeal given upon a petition, etc.

Doubtless there may have been other reasons which influenced Perdue, C.J.M., in refusing leave to appeal, notably the judgment of the Court of Appeal in the what is known as the *Electrolysis* case (*Re Public Utilities Act, Winnipeg Electric R. Co.* v. *Winnipeg*) (1916), 30 D.L.R. 159, 26 Man. L.R. 584, and also the judgment of the Appellate Division of the Supreme Court of Ontario in *Re Toronto R. Co. and City of Toronto* (1918), 46 D.L.R. 547, 44 O.L.R. 381, 24 Can. Ry. Cas. 278, and I do not wish to be understood as in any way criticising this decision, but the fact remains that such refusal precluded the plaintiff from obtaining a judicial decision upon the question of the Commissioner's jurisdiction to make the order objected to in the only way permitted by the Act itself, see secs. 69 and 70.

Do these sections deprive this Court of jurisdiction to review the order made by the Commissioner upon the ground either of want of jurisdiction in him to make such order whilst admitting the validity of his appointment and the constitutionality of the Act, or upon the ground that the Act itself is *ultra vires* of the Manitoba Legislature in respect of the clauses creating the Commissioner's office, providing for his appointment by Provincial authority and conferring upon him the powers given by that statute?

Section 69 expressly states that

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The decision of the commission upon any question of fact or law within its jurisdiction . . . shall be binding and conclusive upon all companies and persons and municipal corporations and in all Courts; (2) The commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act . . . and, save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any Court even when the question of jurisdiction is raised.

The expression "save as herein otherwise provided" refers undoubtedly to sec. 70, previously quoted, which restricts the right of appeal to one Court named and to one subject of appeal, viz., a final decision upon any question involving the jurisdiction of the Commission.

Again, sec. 64 provides that "the decision of the commission upon any question of fact or law within its jurisdiction shall be final and be *res judicata*."

The plaintiff directly challenges the Commissioner's jurisdiction to make the order in question and denies that he had power under the Public Utilities Act to interfere with or change the provisions of the by-law and agreement with respect to fares.

If I have jurisdiction to determine this question I would say that the Commissioner had not, under the Public Utilities Act, the right or power to override the by-law and contract. In my opinion the Act does not confer any such power. I fully agree with the decision of the Appellate Division of the Alberta Supreme Court: *In re Public Utilities Act; Northern Alberta Natural Gas Development Co.* v. *Edmonton* (1919), 50 D.L.R. 506, where the identical question was considered under the Alberta Public Utilities Act and decided against the Commission.

The Alberta statute (5 Geo. V. 1915, ch. 6) is identical in its provisions with the Manitoba statute, in fact, it seems to have been copied from it almost verbatim down to and including sec. 85 of the latter Act. No question as to the right of the Alberta Court to deal with the case arose because the appeal from the Public Utilities Commissioner's order was taken in the manner provided for by the Act under its sec. 70. In this respect it differs from the case at bar but upon the question of the jurisdiction of the Commissioner to increase charges beyond the maximum agreed on between the owner of the utility and the municipality granting the franchise I think the decision is on all fours with the case at bar.

Sec. 20 of the Manitoba Public Utilities Act defines the jurisdiction of the Commission, or to quote the language of Harvey, C.J., in the *Alberta* case, 50 D.L.R. 506, at p. 510:

> Section 20, however, being the one section specifying the circumstances under which the Board [Commissioner] exercises jurisdiction as distinguished from its authority or the extent of its jurisdiction we naturally look for some provision of that section under which this jurisdiction is impliedly conferred and it appears to be found in para. (g), sec. 20.

And again at pp. 511-512:

> It would seem very strange indeed, if the Legislature had intended to give the Board the right to set aside the terms of contracts, that it would not have said so in plain words. There is no such suggestion of any such intention beyond the limited right given by 20 (b), while 20 (g) shews a general intention to the contrary.

There can be no doubt but that the Provincial Legislature had full power and authority by the legislative enactment to override or set aside the contract between the City of Winnipeg and the company as a matter respecting property and civil rights in the Province under sec. 92 of the B.N.A. Act, which defines the exclusive powers of Provincial Legislatures.

In *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, it was contended that the power conferred by the Imperial Parliament on the local Legislature should be exercised in full by that body and by that body alone. The maxim *delegatus non potest delegare* was relied on but it was held that the objection thus raised was founded on an entire misconception of the true character and position of the Provincial Legislatures. I quote from the judgment, 9 App. Cas. at p. 132:

> They [Provincial Legislatures] are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the B.N.A. Act enacted that there should be a Legislature for Ontario and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.
>
> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail. . . . It was argued at the

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bar that a Legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for such Legislature and not for Court of law to decide.

From the foregoing authority it seems clear that the Legislature could delegate such of its powers as it saw fit to an agency created by itself, in this case the Public Utilities Commission, and consequently as the Legislature itself had the power to vary or set aside altogether the contract existing between the city and the company, so also could the Commission do likewise if such power was conferred upon it.

Here there is no express delegation of such authority to be found in the Act nor can I find in any of its clauses language from which such power ought to be implied or necessarily intended for the carrying out of the objects and purposes of the statute. I think there can be no question either that the sections of the Act relating to the finality of the Commissioner's decisions and limiting the right and manner of appeal therefrom are also *intra vires* and must be respected by all Courts of law. It follows then that the plaintiff cannot come to this Court for relief against the order made by the Commissioner but is confined to the only method of appeal and the only subject of appeal given by the Act.

I have no doubt whatever that this Court has no jurisdiction upon the facts of this case to interfere with the Commissioner's order however satisfied I may be that it is invalid for want of jurisdiction. No appeal from that order lies to this Court nor can it be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in this Court even when the question of jurisdiction is raised (see sec. 69), so that the injunction asked for restraining the defendant from carrying into effect the Commissioner's order must be refused.

The next question is can the constitutionality of the Public Utilities Act as a whole or in part be considered and adjudicated upon by this Court in a proceeding such as we have here, *i.e.*, by ordinary statement of claim issued according to the King's Bench practice? This question presents greater difficulty than the former. The plaintiff asks, 2 (a) for a declaration that the Public

Utilities Act and amending Acts are *ultra vires* of the Legislature of the Province of Manitoba and are unconstitutional and invalid; (b) A declaration that the appointment of the said Public Utilities Commissioner is invalid.

The constitutionality of the Public Utilities Act and the jurisdiction of the Commission to make orders under it was before the Court of Appeal for this Province in what is known as the *Electrolysis* case, 30 D.L.R. 159, 26 Man. L.R. 584. The case came before the Court of Appeal under sec. 70 of the Public Utilities Act from an order of the Public Utilities Commissioner compelling the Winnipeg Electric Railway Co. (defendants in this case) to take proper measures of prevention against damage to underground cables and mains by electrolysis. Curiously enough the roles of the contesting parties here were in that case reversed, the defendant company assailing the Public Utilities Act as unconstitutional and the plaintiff upholding it. The Court of Appeal was evenly divided upon the questions raised for decision and consequently the Commissioner's order stood. Two of the Judges held that the question of *ultra vires* could not be determined by the Court of Appeal under sec. 70 but only the question whether supposing the Act to be constitutional the Commissioner had jurisdiction under it to make the order he did make. The same two Judges held that the Public Utilities Act conferred jurisdiction on the Commissioner to make the orders appealed from and also took away all power from any Court of reviewing his decisions upon the questions of law and fact.

The other two Judges (there being a Bench of four Judges sitting) held that the question of the power of the Provincial Legislature to create the tribunal and appoint the Commissioner was properly before the Court by virtue of sec. 70 and that those portions of the Act which provide for the appointment of the Commissioner and payment of his salary by the Provincial Government were *ultra vires* of the Legislature being in direct conflict with secs. 96 and 100 of the B.N.A. Act.

I am bound by this decision and it seems to decide that the plaintiff could not under sec. 70 have had determined the question of constitutionality of the Act and validity of the appointment of the Commissioner.

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If this is so how then can the plaintiff proceed to have these questions judicially determined? If not by action in this Court in the manner adopted, how must the plaintiff proceed?

It is obvious that there must be some way of bringing these questions before some competent tribunal for judicial determination. The Act has been in force for many years. It has never been disallowed by the Federal authorities but on the contrary has been expressly recognised in Dominion legislation.

The Public Utilities Commissioner is at all events a *de facto* officer and it has been decided that it is not open to attack in a collateral proceeding the status of a *de facto* Judge having at least a colourable title to the office and that the proper proceeding to question his right to the office is by *quo warranto* information: *Re Toronto R. Co. and City of Toronto*, 46 D.L.R. 547, at pp. 551-2, 44 O.L.R. 381, 24 Can. Ry. Cas. 278.

This practice was followed in a very late case before the Privy Council, *McCawley* v. *The King*, [1920] A.C. 691, and seems not to have been questioned. It is true that the judgment in the case of *Re Toronto R. Co. and City of Toronto, supra*, was reversed on appeal to the Privy Council, 51 D.L.R. 69, [1920] A.C. 446, but upon grounds which do not touch the point now under consideration. The constitutional questions raised on the appeal were not considered or dealt with, so I am at liberty to regard the Ontario decision still as good law in this respect and I ought to follow it.

The Public Utilities Commissioner is not a party to this action. The validity of his office is directly called in question and if the plaintiffs' contention in this action is given effect to it will have the logical effect of depriving this official of his office and its emoluments without an opportunity being afforded him of being heard in defence of his right and title thereto. There seems to be no doubt therefore that it was open to the plaintiff to proceed by way of information of *quo warranto* against the Public Utilities Commissioner and to have raised in this way the question whether secs. 5 and 6 of the Public Utilities Act which provide for his appointment and tenure of office were *ultra vires* and unconstitutional.

Another method of procedure for securing decisions upon constitutional questions is provided by R.S.M. 1913, ch. 38, by

which the Lieutenant-Governor-in-Council may refer to the Court of King's Bench or a Judge thereof for hearing or consideration any matter which he thinks fit to refer and the Court or Judge thereof shall thereupon hear and consider the same. This Act is entitled "An Act for Expediting the Decision of Constitutional and other Provincial Questions."

I do not say that it was open to the plaintiff to have resorted to this Act as the initiative seems to be vested solely in the Lieutenant-Governor-in-Council. I merely refer to it in discussing the available remedies apparently open to the plaintiff and because the Duputy Attorney-General himself cited this Act upon his argument as providing one means of testing the constitutionality of the statute.

I will not consider under reserve as to my jurisdiction the chief objection against the constitutionality of the Act or of those clauses directly attacked.

The plaintiff says that the Public Utilities Commissioner is a Superior Court and being such that the Lieutenant-Governor-in-Council cannot appoint the Commissioner. Having assumed to do so it is claimed that the appointment so made is invalid because of sec. 96 of the B.N.A. Act.

Sec. 5 of the Public Utilities Act, R.S.M. 1913, ch. 166, reads as follows (see *ante* p. 448):

Sec. 6 reads:

> The commissioner shall hold office during good behaviour, but may be removed at any time by the Lieutenant-Governor-in-Council for cause, etc.

The plaintiff contends that the Public Utilities Commissioner is exercising the jurisdiction of a Superior Court and argues that the various orders made by him filed shew this, as also do the various sections of the Act relating to his jurisdiction and powers. Much stress is laid upon a decision of this Court in a case of *Kowhanko* v. *Tremblay* [(1920), 50 D.L.R. 578, 30 Man. L.R. 198, at 200], not yet reported, but the text of the judgment in which has been handed to me. This was a case under the Workmen's Compensation Act, 6 Geo. V. 1916 (Man.), ch. 125, and Mathers, C.J.K.B., held that the Board appointed under that Act was a Superior Court. His judgment, however, has been reversed by the Court of Appeal (1920), 51 D.L.R. 174, 30 Man. L.R. 198, at 213, in a judgment rendered since the argument in

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the case at bar and I am, of course, bound by this judgment insofar as its conclusions of law are applicable here.

The Workmen's Compensation Act is ch. 125 of 6 Geo. V. 1916 (Man.). Sections 46 to 52, both inclusive, relate to the appointment of what is called the Workmen's Compensation Board. The Board consisted of a Commissioner and two directors who were to be appointed by the Lieutenant-Governor-in-Council and the Board was declared to be a body corporate. Provision was made for an acting Commissioner in certain contingencies. The Commissioner holds office during good behaviour but may be removed at any time for cause. His salary was to be paid out of the administration fund created under the Act and, lastly, the Board was declared to have the like powers as the Court of King's Bench in Manitoba or a Judge thereof for compelling the attendance of witnesses, etc.

Among its provisions, however, was the following (sec. 57 (1)):

> 57 (1). The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Board and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any Court or be removable by *certiorari* or otherwise into any Court.

This section was under consideration in our Court of Appeal in *C.N.R. Co.* v. *Wilson* (1918), 43 D.L.R. 412, 29 Man. L.R. 193. The Board made an order against the company for payment of compensation to the widow of the deceased who had been an employee of the company in respect of his death, under the provisions of the Act but no notice of the proceedings leading up to the making of such order was given the company. The company (plaintiff) moved for an injunction in the King's Bench to restrain the defendant (widow) from filing this order in the King's Bench under sec. 60, upon which it would become a judgment of the Court and enforceable accordingly.

Galt, J., granted an injunction order and from that order the defendant appealed to the Court of Appeal, which dismissed the appeal, 43 D.L.R. 412, 29 Man. L.R. 193, three out of four Judges concurring in the judgment of Perdue, C.J.M., who delivered the

majority finding. I quote the following significant statement of the law from his judgment in 43 D.L.R., at p. 425.

> It is the duty of the Court to interpret the Act and declare its meaning where it is properly brought before the Court for that purpose. The Court can only interfere where the powers given by the Act have been exceeded or where a fundamental principle inherent in the Act has been disregarded, so that a want of jurisdiction in its officers supervenes.

Section 57 (1) is very similar in terms to sec. 69 (2) but there is no section corresponding to sec. 70 of the Public Utilities Act giving an appeal on questions of jurisdiction. I take the simple meaning of the judgment to be that the Board had acted without jurisdiction because it had assumed to deal with a claim properly before it without giving notice to the company and decided a question involving the company's liability in its absence and without having given it an opportunity to be heard in its own defence.

Is the position there analogous to the case at Bar where the right to appeal has been refused under the only section giving that right? Is the position virtually the same as if the Public Utilities Act contained no appeal clause at all?

Here there is a contention that the Commission had exceeded its jurisdiction and acted beyond the powers given by the Public Utilities Act.

In *Kowhanko* v. *Tremblay* (51 D.L.R. 173, at p. 180), Perdue, C.J.M., referred to this case (*C.N.R.* v. *Wilson*) and said: "If the Board exceeds its jurisdiction or acts without jurisdiction it may be restrained." The Court of King's Bench has therefore interfered by injunction notwithstanding the provisions of sec. 57 (1), in a case where it had found that an order was made without jurisdiction. What then is to prevent this Court from interfering by injunction in this case notwithstanding sec. 69 (2), whilst not questioning the validity of the appointment of the Public Utilities Commissioner, if it is found that the Commissioner has exceeded his jurisdiction or acted without jurisdiction? Clearly the provisions of sec. 70.

I take it that the decision in *C.N.R. Co.* v. *Wilson*, 43 D.L.R. 412, 29 Man. L.R. 193, but for this sec. 70, would be a clear authority for the right of interference in such a case. In so doing the Court would not be questioning either the constitutionality of the Act or the legality of the appointment of its Commissioner. Section

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70 seems to me to be the obstacle to apply this decision to the case at Bar. Had the Workmen's Compensation Act contained a section similar to sec. 70 and the appeal had not been taken under such section I think the decision in that case would have been different.

Upon the question of constitutionality I have no doubt at all that the Public Utilities Act is constitutional and wholly within the legislative powers of the Provincial Legislature to enact and that the Public Utilities Commissioner was and is legally appointed and can function in all of the powers delegated to him by that Act. Further, that in no case where he acts within his jurisdiction can his orders or acts be called in question in this Court. What the Legislature could lawfully do by enactment it could lawfully delegate to a tribunal created and set up by it for that purpose. Beyond that authority expressly or by plain inference or intentment conferred, such tribunal cannot legally act. If it does the only redress is that given by sec. 70.

I quote from the judgment of the late Chief Justice of the Court of Appeal, Howell, C.J.M., in the *Electrolysis* case, 30 D.L.R. 159, at p. 169, 26 Man. L.R. 584:

> Again I take up for consideration sec. 70; but it seems to me it must be read as explained by sec. 69. In that section there is a declaration that the commissioner's finding of fact and law within his jurisdiction is binding "in all Courts."

And at p. 170:

> The only matter then open to appeal in my view of the law is whether the company, its structures and operations, are subject to the Act, and if so whether the order made by the commissioner is within the powers given to him by the Act. . . . Secs. 21 and 52 I think, give the commissioner power to make the order which he has made.

What would have been the result in this case had the Court found that the Act did not give the Commissioner power to make the order? The answer is obvious. Can it be said that the Commissioner is the sole judge of his own jurisdiction and that his decision upon that cannot be questioned, even under sec. 70? I do not think so. Then, if he errs in making an order which he had no jurisdiction to make, is there no remedy? Yes, clearly there is under sec. 70, which says an appeal shall lie to the Court of Appeal from any final decision of the Commission upon any question involving the jurisdiction of the Commission. What do the words "involving the jurisdiction of the Commission"

mean? I think they mean this and only this: Has the Act conferred jurisdiction on the Commission in any given case to make any given order? I think the Court of Appeal is clothed with full authority by sec. 70 to adjudicate in such a case if properly before it and could set aside any final order of the Commission if found to go beyond the authority conferred by the Act.

The plaintiff here sought to appeal against the Commissioner's order under sec. 70 but permission to appeal was refused. Was there any course still open to the plaintiff or was it concluded by the refusal of leave to appeal? Could the order be reviewed by any other Court or in a different proceeding? It would seem not because such right appears to be taken away by sec. 69.

Upon this point the decision of Middleton, J., in the case of *Re City of Toronto and Toronto R. Co.* (1918), 43 D.L.R. 739, 42 O.L.R. 82, is instructive. The railway company moved the Court to stay a writ of *fi. fa.* issued by the city corporation against the railway company upon an order of the Dominion Board of Railway Commissioners made a rule of the Supreme Court of Ontario pending the determination of the right of the corporation to receive payment of the money for the levying of which the writ was issued and for an order directing the trial of an issue to determine such right. There were three grounds assigned for the Court to act upon. I need only refer to one (see p. 740), "that the order of the Board under which the execution was issued is without jurisdiction." By the order of the Board the railway company was directed to pay a large sum of money. The only appeal allowed from such an order under the Dominion Railway Act, R.S.C. 1906, ch. 37, is provided for by sec. 56 of that Act, which is as follows:

56 (2). An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction, but such appeal shall not lie unless the same is allowed by a Judge of the said Court upon application, etc.

(3) An appeal shall lie from the Board to such Court upon any question which in the opinion of the Board is a question of law upon leave therefor having been first obtained from the Board and the granting of such leave shall be in the discretion of the Board.

(9) Save as provided in this section, (a) Every decision or order of the Board shall be final, and (b) No order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any Court.

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An application was made to the Board for leave to appeal to the Supreme Court under sec. 56 (3) above, which leave was refused. Next an application was made under sec. 56 (2) above, to a Judge of the Supreme Court to permit an appeal which was dismissed (43 D.L.R. 739, at p. 741), and

so the decision of the Board became by virtue of sec. 56 (9) final and incapable of being "questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari*, or any other process or proceeding in any Court." The intention of the statute is to give finality to the decision of the Board unless there is an effective appeal in the way pointed out by the statute. Unless there is an appeal upon the question of jurisdiction, the decision of the Board as to its own jurisdiction is thus given finality.

The Judge then proceeds, 43 D.L.R. at p. 742:

The liability of the company being thus determined by the Board and the statute giving finality to this decision I should not attempt to delay its enforcement by directing the trial of an issue already concluded.

This case seems squarely in point with the case at Bar and I feel that I should follow it, the more so as I am fully in agreement with its reasoning and the grounds of decision. The provisions of sec. 56 of the Dominion Railway Act, R.S.C. 1906, ch. 37, sub-secs. 2, 3 and 9, are closely analogous to secs. 69 and 70 of the Public Utilities Act, R.S.M. 1913, ch. 166, with respect to the subject of appeal and finality of the Commissioner's orders. The words "upon a question of jurisdiction" in sub-sec. 2 of said sec. 56 are equivalent to the words "upon any question involving the jurisdiction of the commission" in sec. 70 of the Public Utilities Act. They give the only appeal upon a question of jurisdiction from the Commissioner's orders. Apart from this the decision of the Commission upon any question of fact or law within its jurisdiction shall be final. See sec. 64, and see also sec. 69 (2).

69 (2). The commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act . . . and, save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed, by prohibition, injunction, *certiorari* or any other process or proceeding in any Court even when the question of its jurisdiction is raised.

It is clear to me that the Legislature has provided only one method of appeal from orders of the Public Utilities Commissioner and has also restricted the ground of appeal to one question only, viz., one involving the jurisdiction of the Commission; in all other respects the statute makes the Commissioner's orders final . . . unappealable and incapable of being questioned

or reviewed, restrained or removed by prohibition, injunction *certiorari* or any other process or proceeding in any Court even when the question of jurisdiction is raised.

I think the same result follows here as was held to follow in the case I have just referred to, *Re City of Toronto and Toronto R. Co.*, 43 D.L.R. 739, 42 O.L.R. 82, viz., there being no appeal before the Court, in the only manner provided by the Act, perforce, the order of the Commissioner stands final and conclusive and binding upon all parties affected by its terms.

I have yet to deal with the contention that the Public Utilities Commission is a Superior Court. In my view this cannot be given effect to. The great weight of authority cited upon the argument is against it. Apart from such authority, on looking closely into the Act and its various provisions there is apparently a wide difference between the tribunal set up by this statute and the Courts mentioned in sec. 96 of the B.N.A. Act. I will mention a few of these.

Section 5. The seal is not the seal of the Court but of the Commissioner. Judges of Superior Courts of law have no official seals, the only seal authorised and used is the seal of the Court itself.

Section 6. The Commissioner is removable by the Lieutenant-Governor-in-Council for cause whereas Superior Court Judges are removable only by the Governor-in-Council on address of the Senate and House of Commons. See sec. 99 of the B.N.A. Act.

Section 7. Appointment by the Lieutenant-Governor-in-Council of an acting Commissioner in certain cases. This is wholly inconsistent with the position of Judges of a Superior Court appointed under sec. 96 of the B.N.A. Act.

Section 12. Appointment of experts to assist the Commission in an advisory capacity. This is not reconcilable with the independent position and jurisdiction of a Superior Court Judge.

Section 17. Remuneration of the Commissioner fixed by the Lieutenant-Governor-in-Council, and (Section 19), paid out of provincial funds. Both of these provisions are contrary to those governing Superior Court and the Judges thereof.

Section 23. Giving the Commissioner power to act on his own initiative. This power is wholly incompatible with that of

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a Superior Court Judge who can only act in cases brought before him in the Courts.

Many of the other powers given the Commissioner are of a character wholly at variance with and in some cases greatly in excess of any powers vested in a Superior Court or its Judges, such for example as those found in secs. 27, 29, 32, 36, 37 and 38. Under the head of "Enforcement of the Act and Procedure," power is given by sec. 45 to the Commission to accept as evidence the report of any officer or engineer appointed by it and by sec. 46 the Commission is not bound by the technical rules of legal evidence. No Superior Court of Justice is given by law any such latitude in these matters.

Section 50, amongst other things, gives the Commissioner power to enter upon and inspect any place, building, or works of a public utility and to inspect rolling stock of a public utility, etc., Judges of a Superior Court are not invested with any such power for the purposes specified.

By sec. 55 the Commissioner may take possession of and manage the business of a public utility under certain circumstances. No Superior Court Judge has any such authority conferred upon him.

It must, however, be admitted that many of the powers conferred upon the Commission are similar to those conferred upon Superior Courts and closely parallel them. In some cases, as pointed out, they are greatly in excess of the powers given to a Superior Court. However, some of the principal incidents that distinguish a Superior Court from an inferior Court are totally lacking in the powers conferred upon the Commission by this Act, notably the right or power to interfere with Courts of inferior jurisdiction by means of prohibition or *certiorari*.

The circumstance that the Act constitutes the Commission a Court of Record does not of necessity make it a Superior Court. It appears to me that taking the Act as a whole and considering its pith and substance and the scope of the powers and authority actually vested thereby in the tribunal created by it, no other conclusion can be reached than that the Legislature did not intend to create and had not by this Act created a Superior Court within the meaning of that term as used in sec. 96 of the B.N.A. Act. See *Fielding* v. *Thomas*, [1896] A.C. 600, at p. 612.

Stroud's Judicial Dictionary defines a *Superior Court*, vol. 3, at pp. 1986-87, as follows:—

It is submitted that "Superior Court" is to be construed historically and that, in its primary meaning, it connotes a Court having an inherent jurisdiction, in England, to administer justice according to law, as and being a part of or descended from, and as exercising part of the power of the *Aula Regia*, established by William I., which had universal jurisdiction in all matters of right and wrong throughout the Kingdom and over which, in its early days, the King presided in person. An inferior Court is one limited as to its area and also limited, as to its jurisdiction and powers, to those matters and things which are expressly deputed to it by its document of foundation or by a legal *Custom*.

Before the Judicature Acts the more principal Superior Courts were "the Lords House in Parliament, the Chancery, King's Bench, Common Pleas, and Exchequer."

The same authority, vol. 1, at p. 424, defines *Court* as "a place where justice is *judicially* ministered."

In 15 Corp. Jur., p. 721, para. 7, a *Superior Court* is defined as follows:

A Superior Court is a Court with controlling authority over some other Court or Courts and with certain original jurisdiction of its own.

In *Re Toronto Railway Co. and City of Toronto*, 46 D.L.R. 547, 44 O.L.R. 381, 24 Can. Ry. Cas. 278, Ferguson, J.A., said at p. 561 (46 D.L.R.):

The question whether a Court or other tribunal is or is not a *Superior* Court within the meaning of the B.N.A. Act cannot, I think, be answered by reference only to the powers the Court or tribunal possesses to hear and determine or enforce the rights of litigants, but also by reference to the power of the Court or judicial body to adjudicate upon the rights and powers of other Courts and to control their acts and proceedings. For, as I read the B.N.A. Act, the designation *Superior*, as applied to a Court, means a Court other than County and District Courts in which is vested the right and power to control, regulate, restrain or review the acts and proceedings of some other Court.

The Quebec Public Utilities Act, R.S.Q. 1909, is contained in arts. 718 to 768, both inclusive. By it the Lieutenant-Governor-in-Council is empowered to appoint a Commission called the Quebec Public Utilities Commission, consisting of three members. The Commission is constituted a Court of Record, *vide* art. 719. Its scope and purpose is very similar to our own Act though perhaps not so extended. Art. 763 provides for appeal from final decisions of the Commission upon any question as to its jurisdiction or upon any question of law and is therefore nearly identical with sec. 70 of our Act.

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The Supreme Court in the case of *Canada & Gulf Terminal R. Co.* v. *The King* (1918), 43 D.L.R. 291, 57 Can. S.C.R. 140, had the above appeal clause under consideration under these circumstances. The Commission made an order which was appealed to the King's Bench (appeal side) pursuant to art. 763 above, which Court affirmed the jurisdiction of the Commission (1918), 50 D.L.R. 635. An appeal was then sought to be taken to the Supreme Court from this decision and the question was whether such decision was appealable under sec. 37 of the Supreme Court Act, R.S.C. 1906, ch. 139, and it was held that it was: 43 D.L.R. 291, 57 Can. S.C.R. 140. Fitzpatrick, C.J., and Idington and Anglin, JJ., all expressed the opinion that the Quebec Public Utilities Commissioner was not a Court. Fitzpatrick, C.J., said, 43 D.L.R. at p. 294:

> The Public Utilities Commission is not a Court (*vide* sec. 740, R.S.Q. 1909), and the statute which creates the commission provides for an appeal to the Court of King's Bench subject to limitations which shew that it was the intention of the Legislature to limit appeals to certain specified questions and to the Court of King's Bench in an advisory rather than a judicial capacity.

Idington, J., at p. 294, said:

> The constitution of a Public Utilities Commission in Quebec does not create a Court in the sense of that word in the Supreme Court Act and hence there does not seem to be any place in that Act for appeals from the Court of King's Bench (appeal side) rendering a judgment pursuant to the provisions of art. 763 R.S.Q. 1909. It is manifest that such a proceeding as in question herein did not originate in any Superior Court and hence the jurisdiction given by sec. 36 of the Supreme Court Act cannot be invoked to support an appeal here.

Anglin, J., seemingly concurred in this view, at p. 295, where he said the appeal was "admittedly not within sec. 36 of the Supreme Court Act because the proceedings did not originate in a Superior Court."

These expressions of opinion added to what I have already said in my brief review of the clauses of the Act seem to justify my holding that the Public Utilities Commission is not a Superior Court and that the Act does not conflict with sec. 96 of the B.N.A. Act in the power of appointment of the Commissioner given by the provincial Act.

Having reached the conclusion that the question of the constitutionality of the Act, including as it does the power of appointment by the Lieutenant-Governor-in-Council of the Public Utilities Commission, is not a question that this Court has juris-

diction to deal with in an action framed and instituted as this one is, I ought not perhaps to have ventured an opinion upon it.

My only excuse for doing so is that the main argument of plaintiff's counsel was directed to that question and I felt that I ought not to ignore it though doubtless such opinions as I have expressed may not have any other than academic weight.

Upon the question, therefore—Is the Public Utilities Commission a Superior Court?—I think that although it has for some purposes judicial functions to perform it is not a Superior Court within the meaning of sec. 96 of the B.N.A. Act.

My conclusions upon the whole case are briefly as follows: The Act is in my opinion constitutional and wholly within the legislative authority of the Provincial Legislature, including secs. 5 and 6. See *Hodge* v. *The Queen*, 9 App. Cas. 117.

Section 5, whilst constituting the Commission a Court which shall be a Court of Record did not thereby constitute it a Superior Court within the meaning of sec. 96 of the B.N.A. Act. This being so, sec. 6 is *intra vires*.

This Court has no jurisdiction to question the validity of the order made by the Public Utilities Commissioner because of the provisions of secs. 69 and 70, even if it should be of the opinion that this order is invalid as being made in excess of or without jurisdiction conferred by the Act.

The constitutionality or otherwise of the Act as a whole or in part cannot be questioned in a collateral proceeding such as this. *Re Toronto Railway Co. and City of Toronto*, 46 D.L.R. 547, 44 O.L.R. 381, 24 Can. Ry. Cas. 278, and *Kowhanko* v. *Tremblay*, 50 D.L.R. 578, 30 Man. L.R. 198, at 200; 51 D.L.R. 174, 30 Man. L.R. 198, at 213. It could not be questioned under sec. 70 even if this had been a proceeding in appeal under that section: *Re Public Utilities Act*; *City of Winnipeg* v. *Winnipeg Electric Railway Co.*, 30 D.L.R. 159, 26 Man. L.R. 584.

The net result is that the plaintiff cannot succeed and the statement of claim must be dismissed with costs. As the action is one of more than ordinary difficulty and importance I will direct that costs be taxed without regard to the statutory limitation.

As it was agreed that the defendant's counterclaim should not be dealt with until the legal questions involved had been disposed of, I do not now dispose of it but leave it for future dis-

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position as the defendant may be advised. In dismissing the plaintiff's action I do so without prejudice in any way to this counterclaim or the right of the defendant to have it tried and disposed of in the usual manner.

I wish to express my appreciation of the able and helpful arguments addressed to the Court by all counsel engaged and by which I have been materially assisted in reaching a conclusion.

Action dismissed.

OTTAWA ELECTRIC RAILWAY Co. v. TOWNSHIP OF NEPEAN.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur, and Mignault, JJ. March 8, 1920.

RAILWAY BOARD (§ II—10)—OTTAWA ELECTRIC R. CO.—AGREEMENT ESTABLISHING FIVE CENT FARES—CONTROL OF BOARD PRIOR TO PASSING OF RAILWAY ACT 1919—METHOD OF ESTABLISHING RATES.

Under its agreement with the City of Ottawa made in 1893 establishing five cent fares as the maximum within the city limits, the right of the Ottawa Electric R. Co. to charge any rate up to that maximum was not subject to the control of the Board of Railway Commissioners prior to the enactment of sec. 325 (5) of the Railway Act of 1919.

In establishing a tariff of rates on the Ottawa Electric cars the Board should consider the portion of the line from Holland avenue to Britannia separately from the rest, and fix the rates without regard to conditions on the remainder of the line.

Statement.

APPEAL from a decision of the Board of Railway Commissioners for Canada by leave of the Board on questions of law.

The following questions were submitted by the Board for the opinion of the Court:

(1) Whether upon the proper construction of the agreements with the City of Ottawa and the Village of Hintonburgh the statutes relating to the Ottawa Electric Railway Co. and the relevant provisions of the Railway Acts, the Board was right in disallowing the tariff of the company filed providing for payment of additional fare for carriage upon the extension from Holland Ave. notwithstanding that the Board has found as a fact that the company did not require additional revenue?

(2) Also whether upon the proper construction of the said agreements and statutes for the purpose of computing the toll to to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Ave. or at the former westerly limit of the village of Hintonburgh now the city of Ottawa.

(3) Has the Board the right to treat the company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by municipal agreements.

By virtue of an agreement with the City of Ottawa the company could not exact a higher rate than 5 cents for carrying passengers within the city limits but they asked the Board to sanction a higher rate for the part of the line running to Britannia. This the Board refused to do on the ground that as the system as a whole was profitable additional revenue was not required.

The Court heard counsel on these questions and ordered a re-argument on three others, namely:—

(1) Has the Board of Railway Commissioners authority to reduce the company's charge for passenger services within the city of Ottawa below the fare of 5 cents now charged for any such service?

(2) If the first question is answered in the negative, has the Board power to require the company to provide a service partly within and partly beyond the limits of the city of Ottawa for a charge not exceeding 5 cents?

(3) In passing upon the questions raised upon this appeal, is the Court in any respect governed by sec. 325 of the Railway Act of 1919?

F. H. Chrysler, K.C., for appellants.

S. Denison, K.C., and *Wentworth Greene*, for Township of Nepean.

J. E. Caldwell, for Village of Westboro.

F. B. Proctor, for City of Ottawa.

Davies, C.J.

DAVIES, C.J. (dissenting):—This is an appeal from the order or judgment of the Board of Railway Commissioners rejecting an application of the appellant company for leave to charge a higher rate than the existing one upon that portion of their railway known as the Britannia section or extension.

All the facts necessary for our decision on the questions of law referred to us are stated very fully in the reasons of the Chief Commissioner, Sir Henry Drayton, with which the rest of the Board concurred. Three questions are asked by them for us to answer. They are as follows: (See statement *ante* 468).

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It appears clear to me that when exercising its statutory powers in fixing the rates which a company may charge, the decision of the Board is final and we have no right to interfere or express any opinion upon it unless it clearly appears either (1) that the Board in exercising its judgment has refused to consider facts which it ought to have considered or (2) has considered facts which it should not have considered, or (3) has admittedly proceeded on a view of facts rightly taken into consideration which is erroneous at law.

In the case before us the Board determined that it should not consider the Britannia extension as a separate entity but should consider it as an extension of the main city line and form its conclusions on the rate question with reference to the operations of the whole line.

If the Railway Commissioners were obliged, as was contended by Mr. Chrysler, to consider this extension as a separate entity, they found that the present rates which the company sought permission to raise were not fair and reasonable, and would, therefore, in such case presumably have permitted some raise to be made.

If, on the other hand, they had to consider the application to raise the rates in the Britannia section with reference to the operations of the entire line and as a mere extension of it as they determined it was, then their decision is one with which we have no right to interfere or express any opinion upon.

I am of opinion that in so deciding they acted within their legal rights and that this Court has no jurisdiction to interfere.

The question, therefore, to determine is whether or not the Britannia extension was to be considered as part of the company's main line or as a separate entity. That I take it is a legal question and one which the Board rightly determined. The application to Parliament for the power and privilege of constructing this extension was made by the company on the express ground that it was an extension merely of their city lines, and in the statutes passed it was so recited and enacted. I cannot in the face of the express words of the statute, construe it as a separate entity. It is true that the main charter of the company limits the fares which they charge on their city lines to the *then existing city limits* and that such limitation does not embrace the Britannia section which

was outside of those limits. But that by no means disposes of the question whether the Board had the right to disallow the application to be allowed to charge on the Britannia extension higher rates than those now existing; that is a question which, the Board having taken into its consideration all the facts it was obliged to consider and not having considered any facts which it had no right to consider, was in its absolute discretion and judgment. Mr. Chrysler pressed upon us the admitted fact that the Britannia extension was, in part, constructed upon the company's own private property and not upon the streets or roads. It does not appear to me that this fact makes any difference in determining the question of an increase of the rates whether the extensions was to be treated and considered as a separate entity or not. The Board determined not to consider it such and, I think, was right in so doing. But when it has so decided after considering everything it was bound to consider, this Court has no right to interfere with its conclusions.

In reaching the conclusions I have stated and disallowing this appeal I do not wish to be understood as affirming or agreeing with the statement of the Chief Commissioner of the Railway Board in delivering the reasons of the Board for making the order disallowing the proposed new tariff, to the effect that the Board had no authority to reduce the company's charge for passenger services within the city of Ottawa below the 5 cents now charged for such service. As I understand the language of the Chief Commissioner, he holds that even if the rate of 5 cents was held by the Board to be an unfair and unreasonable one the Board was powerless to reduce it because the Dominion Parliament has confirmed the agreement between the company and the Corporation of the City of Ottawa which provided that rate as a maximum one. The question is simply as to the meaning of the agreement so confirmed. That agreement, it seems to me, merely establishes 5 cents as a maximum rate which the company in no case or under no circumstances can exceed. The Board itself with all its statutory powers could not in the face of this express prohibition agreement, allow a higher tariff rate than 5 cents. But I respectfully submit in exercising its statutory powers and determining whether the rate of 5 cents, or even a lower rate than that, was or was not a "fair

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and reasonable rate," the action of the Board is unfettered by the prohibition against charging more.

The question is not, of course, directly before us on this reference, but I am anxious not to be considered as agreeing with the conclusions of the Chief Commissioner on the point, concurred in as they were by the other members of the Board, and as such a conclusion was necessarily an important factor in deciding whether in disallowing the proposed new tariff the operations of the railway as a whole had a right to be considered by them.

At the second argument of this reference before us the question whether this Court was in any respect governed by sec. 325 of the Railway Act of 1919, 9-10 Geo. V. ch. 68, was debated.

In the view I take of the jurisdiction and powers of the Railway Board over the Ottawa Electric Railway Co., being ample to justify their order, and also to fix the fares it may or may not charge, I do not deem it necessary to invoke the aid of the legislation of 1919. The previous legislation was quite sufficient, in my opinion, to give the Board jurisdiction and to justify its order now under appeal. If that legislation of 1919 was applicable I do not see how any question as to the validity of the Board's action could arise.

In the year 1894, the then two independent street railways in Ottawa were united, and the agreement made between them was ratified by Parliament as also the agreement between the united companies and the City of Ottawa by 57-58 Vict. 1894 (Can.), ch. 86.

Section 7 of that Act is as follows:—

> The lines of street railway constructed by the said companies, or either of them, are hearby declared to be works for the general advantage of Canada, and the said "The Ottawa Electric Railway Company" is hereby declared to be a body corporate subject to the legislative authority of the Parliament of Canada.

From and after the passage of that legislation the now appellant the Ottawa Electric Railway Co., became, in the words of the statute, a body corporate subject to the legislative authority of the Parliament of Canada and its works were declared to be for the general advantage of Canada. The company, therefore, had all the benefit of the general railway legislation of the Dominion then or thereafter passed and became subject in all respects to the same.

In 1906, such a general Act was passed, R.S.C. 1906, ch. 37, sec. 314 of which is as follows:—

314. The company or the directors of the company, by by-law, or any officer of the company thereunto authorised by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

2. Such tolls may be either for the whole or for any particular portions of the railway.

3. All such by-laws shall be submitted to and approved by the Board.

4. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein.

5. No tolls shall be charged by the company until a by-law authorising the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any service as common carrier, except under the provisions of this Act.

Then, sec. 323 enacts as follows in its first part:—

323. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

Under this legislation the Board, in my opinion, has full and ample powers to control the rates of the company on its main lines and its extensions, and, finding that the company had a revenue of at least 15% from its works as a whole, was acting within its rights when it rejected the company's application for leave to charge a higher rate than the existing one upon the Britannia section or extension of their lines of railway.

I am unable to appreciate the argument that the powers granted to the companies by the Provincial Legislature to make by-laws regulating the rates which might be charged for the carriage of passengers became vested in the united companies under the name of the Ottawa Electric Railway by the Act of the Parliament of Canada which declared the work to be for the general advantage of Canada, and that the General Railway Act did not take away or impair those rights or powers. It seems to me that the contention is fully met by sec. 6 of the Railway Act of R.S.C. 1906, ch. 37, which reads as follows:—

6. Where any railway, the construction or operation of which is authorised by a Special Act passed by the Legislature of any province, is declared, by any Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway, and to the company constructing

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or operating the same, to the exclusion of such of the provisions of the said Special Act, as are inconsistent with this Act, and in lieu of any general railway Act of the province.

Under any construction of these various Acts the power to control and disallow any proposed tariff of rates as being "unjust and unreasonable" remained in the Railway Board under sec. 323 of the Railway Act and applied to the tariff of rates now under review.

The power of the common law Courts over rates charged by a common carrier were practically transferred by sec. 323 of the Railway Act above quoted to the Board of Railway Commissioners.

I would, therefore, answer the first question, under the circumstances I have stated above, in the affirmative construing the phrase "right in disallowing the tariff" in question as meaning "within its right." Whether the decision was right or wrong is not for me to pass on; I merely say the Board was within its right in deciding as it did.

My answer to the first part of the third question is in the affirmative, and, to the latter part, in the negative.

The appeal, therefore, should be dismissed with costs.

Idington, J.

IDINGTON, J. (dissenting):—There existed in Ottawa in the early part of 1894, two street railways, respectively owned by separate corporate companies whose early history and relations with the City of Ottawa concern, or at all events should concern, us very little for the purpose of determining the questions raised by this appeal.

Suffice it to say that in said year there were agreements entered into between the said companies whereby the assets of the one were to be sold to the other and between both and the City of Ottawa, presented to the Parliament of the Dominion with a petition to confirm same and vest the properties which had been theretofore and were then held by either in the appellant.

Parliament, by 57-58 Vict. 1894, ch. 86, sec. 1, ratified the said agreement between the said companies, and by sec. 2, the said agreement between them and the City of Ottawa.

Then by sec. 3 of said Act, it enacted as follows: –

3. The franchises, powers and privileges heretofore or hereby granted to or conferred upon the said companies, or either of them, and which are hereby authorised to be transferred to the said united company, shall be exercised

and enjoyed by the said united company, subject to the terms, provisos and conditions contained in the said agreement with the Corporation of the City of Ottawa.

Section 6 provided as follows:—

6. The name of the Ottawa City Passenger Railway Company is hereby changed from "The Ottawa City Passenger Railway Company" to "The Ottawa Electric Railway Company," but such change in name shall not in any way impair, alter or affect the rights or liabilities of the company, nor in any wise affect any suit or proceeding now pending or judgment existing either by or in favour of, or against the said company, which, notwithstanding such change in the name of the company, may be prosecuted or continued, completed and enforced as if this Act had not been passed.

And sec. 7 of the same Act declared as follows:—

7. The lines of street railway constructed by the said companies, or either of them, are hereby declared to be works for the general advantage of Canada, and the said "The Ottawa Electric Railway Company" is hereby declared to be a body corporate subject to the legislative authority of the Parliament of Canada.

That legislation beyond doubt constituted the appellant and the said lines of railway, in the language just quoted, "works for the general advantage of Canada" and subjected the appellant as the new corporate owner of same and said works to the future railway legislation of the Dominion, unless when expressly exempted therefrom.

The Dominion Parliament by the Railway Act, R.S.C. 1906, ch. 37, sec. 5, provided as follows:—

5. This Act shall, subject as herein provided, apply to all persons, companies and railways, other than Government railways, within the legislative authority of the Parliament of Canada.

The said Railway Act, 1906, provides, by sec. 314, as follows: (See judgment of Davies, C.J., *ante* p. 473.)

Section 323 of said Act reads in first part as follows: (See judgment of Davies, C.J., *ante* p. 473.)

The foregoing outlines of so much of the legal history of appellant as can be made relevant to any of the questions herein submitted, when taken in connection with said sec. 323 of said Act, contains all the law to which we should have regard in answering same.

Indeed, I hold that the lastly quoted part of sec. 323 contains all that is relevant in this particular case, for the Board finds that the appellant has a revenue of at least 15% from its works, as a whole. That renders it impossible to say, as matter of law, that

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the ruling is "unjust and unreasonable" and hence in any way such a violation of said sec. 323 as to furnish any ground of complaint on the appellant's behalf.

If it is not possible to hold that in law there has been something unjust or unreasonable done by the Board in reaching its judgment, or in the application of any of the statutes to which I have referred, then it hardly seems possible that there can be any question of law proper for this Court to be called upon to decide.

I may briefly state some other facts which it is said give rise to the doubt of the correctness in law of the conclusion reached by the Board.

It seems that the appellant's railway extends from a point some short distance east of Ottawa to Britannia-on-the-Bay to the west of said city, with numerous divergent parts and branches running over many of the city streets.

As inevitably happens in every large business enterprise, there are some parts of this railway which do not pay as well as others; and indeed are a burden, according to the absurd view that the feeders to serve the system are entirely useless and that all the persons passing over same would in any event pass over the other central part and pay a fare.

The part of the said railway extending from Ottawa to Britannia-on-the-Bay was authorised by Parliament, by the statute of 1899, ch. 82, expressly enacting that the company might as an extension to its then existent railway, construct and operate, etc., such a branch.

An agreement referred to in the questions I am about to quote had been entered into between the appellant and the Village of Hintonburgh specially providing for its franchise in that part of its line.

That agreement has expired, and can hardly be said as matter of law to have anything to do with the questions raised, especially when the maximum limit of basis fixed thereby is adhered to by appellant.

The Board, however, for some reason not very apparent in so plain a case, has submitted the following alleged questions of law on which appellant bases this appeal, and asks to find that what has been done by the Board is in law unwarranted: (See statement, *ante* 468.).

I am unable to understand the argument that in law there is such an imperative legal distinction, between the part of the company's line beyond Holland Ave., and those other parts of same, which must of necessity become effective and so operate as an imperative mandate in relation to the defining or fixing of rates that there must be different rates east of that line from those west thereof, which conflicts with conclusions reached by the Board. The mathematical distinction I can grasp but that we have to deal with must be one so founded in law as to affect this case.

To urge that a separate and distinct line of treatment thereof in regard to the question of fares for passage over it because it was authorised and built at a different time from some other part, seems to me, with great respect, a very idle argument. And it does not seem to me to be improved by a reference to the question of whether the power of expropriation existed before or was first enforced by a particular clause in the legislative history of the appellant.

The same sort of argument would lead to holding as matter of law that the Hintonburgh part of the line must be treated as a thing separate from the rest of the lines in fixing fares, and so on throughout the system.

I can understand the question of the delimitation of rates as evidenced by agreements between appellant and municipal bodies being a matter of fact which probably the Board of Railway Commissioners should examine in reaching a determination as to any tariff of tolls. When the Board has done so and examined all else in the way of facts bearing upon the questions raised by the proposed imposition of a tariff, I fail to see how any question of law arises. It is not for us to pass upon the question of whether or not the proper construction of the agreements and the relevant provisions of the Railway Acts, as a matter of law, lead to the allowance or disallowance of the proposed tariff when we find that the Board, even assuming as well founded appellant's contention relative to the construction of said agreements and statements, has found as fact that the company did not require additional revenue and hence it was neither just nor reasonable to impose further rates.

I could understand the question of law being put as to whether or not the rates of fares named in such agreements and legislative

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validation thereof must be held to have been thereby in law imperatively and definitely determined for all time. But when we find the Board and counsel for appellant have assumed that to be law (which I much doubt but pass no opinion upon) and acted upon such assumption, there seems nothing but mere questions of fact involved in what remains for consideration.

There is much to be said for the true legal aspect of the whole matter involved having been reduced, by the Parliamentary legislation above recited, to a mere question of what would be, in the opinion of the Board, a just and reasonable tariff, regardless of the agreements in question, and especially so when we find they seem in this regard to have merely arrived at a maximum tariff.

Evidently this part of the agreement, though for even that and many other purposes validated by the preceding legislation, may be held to have been overridden by the later legislation constituting the Board and assigning it such powers as it has, constituting it absolute master of the whole question of rates or tolls, provided always as a test of the due discharge of such duties as entailed thereby that it has duly considered all that is involved as fact in such like agreements.

Let us assume that there had, instead of a highly profitable investment such as appellant's has turned out, resulted an enterprise that could not be made productive of a fair profit without discarding the limitation in these agreements; could it be said that the Board under the legislation conferring such an absolute power long after the agreements had come into existence, would be powerless to grant any relief?

The questions as presented and the argument thereon do not permit me to feel at liberty to answer definitely this question.

I, therefore, merely submit it as an illustration of what might have been a possible solution of much that is involved in what has been considered, and suggesting a reason why the questions submitted cannot be answered in a more helpful way than I am compelled to.

Holding the view I have expressed as to the first question, it seems self-evident that the answer to the second question is not involved in the disposition of the question before the Board and hence needs no answer.

As to the third question I cannot conceive of any rule of law that would prevent the Board from considering the company's operations as a whole, and if it saw fit to disallow the proposed tariff, or any portion thereof which it considered to be unjust, or unreasonable, or contrary to the provisions of the Railway Act, it was entirely within its province. So far as the doing so can be said to raise any question of law, I have no hesitation in answering affirmatively.

As to the second branch of the third question, raising the point of whether or not the Board must permit the fixing of tariffs on a mileage basis, I may point out that the appellant's factum distinctly disavows desiring to raise such a question and insists that "there was no question before the Board as to whether the tolls should be based upon mileage, or upon a flat rate."

That seems to eliminate so far as this appellant is concerned in this appeal, the only other possible question of law raised by the third question for our decision.

It is only as a basis of appeal by way of which an appellant may seek to get relief that we can consider any such question. However willing we should be to aid the Board we cannot properly so interfere unless incidentally to the determination of something in respect of which an appellant seeks relief.

With great respect I submit the questions submitted (save the first part of the third question) do not raise or distinctly state any definite question of law actually relevant to the matters in issue between those concerned, upon which a ruling is desired, and can be properly made.

The first part of the third question should be answered in the affirmative.

I think, therefore, following our view expressed in the case of *C.P.R. Co.* v. *Regina Board of Trade* (1911), 45 Can. S.C.R. 321, the appeal should be dismissed with costs.

After I had written the foregoing the majority of the Court decided to direct a re-argument (which has been had) upon certain stated questions. (See statement, *ante* p. 468). In deference, however, to suggestions made in that argument, which was not directed on the grounds upon which I proceeded and hence has not changed my opinion, I may be permitted to point out that the declaration, contained in the above quoted sec. 7, of the Dominion Act, 57-58

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Vict. ch. 86, that, so long ago as 1894, the works of the appellant were thereby declared to be for the general advantage of Canada; and hence by such declaration withdrawn, by virtue of Item No. 10 of sec. 92 of the B.N.A. Act, from any control of, or incidental to, their operation either by virtue of any legislation of Old Canada or the legislation of the Province of Ontario.

Such, I think, must be held to be the result of the decision of the Judicial Committee of the Privy Council in the case of *Toronto* v. *The Bell Telephone Co.*, [1905] A.C. 52. Unfortunately that case was not referred to in either argument herein.

By the express language of the above quoted sec. 7, as well as the necessities of the situation created by the other provisions of the said Act a new corporate entity, composed of two such previously existent, is created and that is declared to be subject to the legislative authority of the Parliament of Canada.

The result of the said legislation, viewed in light of said decision, seems to have been to give predeterminate effect to the Act of Parliament wherever conflict arises between the respective enactments.

We are not left to depend alone upon such reasoning for this conclusion was adopted by the enactment of sec. 6 in the Railway Act of R.S.C. 1906, ch. 37, which reads as follows: (See judgment of Davies, C.J., *ante* p. 473).

Hence beyond peradventure all the subsequent undertakings of the new creation such as the new branch, declared by the later Act authorising it, to be an extension, and that extension which is now in question, must be governed in every respect by the Dominion Railway Act, and not by any legislation of the Ontario Legislature either as to fares or otherwise.

This evidently was the view held by the appellant itself otherwise it never should have troubled the Board of Railway Commissioners by filing with it a proposed new tariff of fares.

The point made by Mr. Denison of counsel for one of the respondents, that at common law the common carrier was as between him and any one of the public, not entitled to charge any fare beyond what was just and reasonable, was well taken.

Besides those cases he referred to I find the case of *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.* (1892), 145 U.S.R. 263, which proceeds upon a distinct holding of such a view

as the basis upon which the legislation there in question proceeded. See also *Harris* v. *Packwood* (1810), 3 Taunt. 264, 128 E.R. 105.

Our Railway Act in making a statutory provision for the determination of what rates are chargeable, also proceeds upon the same basis of what is just and reasonable.

I therefore repeat that I can see nothing else to test the jurisdiction of the Board so long as it has not gone beyond its statutory authority and has not failed to consider all relevant facts.

DUFF, J.:—The questions submitted should, in my opinion, be disposed of as follows:—

The first question: This question is not answered since it involves questions of fact within the exclusive competence of the Board of Railway Commissioners. So far as it involves a question of law it is covered by the answer given to the first part of the third question.

The second question: At Holland avenue.

The third question: First member. No. Second member: Yes; though not necessarily on a mileage basis.

My reasons for these conclusions can be stated briefly. They are based upon two propositions which appear to me clearly established.

First. I concur fully with the opinion of the chairman of the Board as to the effect of the statute of 1894. By force of that statute and the scheduled agreements the rights and obligations of the Ottawa Electric Railway Co. in relation to the fares chargeable in respect of the services provided for or contemplated by the agreement between the Street Railway Cos. and the city—services which may with sufficient accuracy be referred to as city services—were to be governed by the agreement itself; and consequently the Ottawa Electric Co. did not on the passing of the Railway Act of 1903 (see sec. 3) become in respect of such fares subject to the jurisdiction of the Board of Railway Commissioners touching the matter of the regulation of rates.

Second. As regards the Britannia extension on the other hand, authorised by the Act of 1899, I can find nothing in that statute excluding this line from this jurisdiction of the Board and I think that on the passing of the Railway Act of 1903 the provisions of that enactment on the subject of the regulation of rates became applicable to it.

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The first of these propositions seems to involve this consequence: The fares exigible under the statute and agreement of 1894 must be taken to be a just remuneration, neither too much nor too little, for the city services; and it seems to follow that in determining what is a just and reasonable remuneration for the services performed on the Britannia lines the proceeds derived from the city services must be left out of account. That is to say that in determining what is just and reasonable in respect of the Britannia lines, you must start with the hypothesis that everything paid in respect of city services has been fully earned by the performance of those services.

The point may be illustrated by a reference to one example of the manner in which the existing tariff operates. Under that tariff the company is entitled to charge a maximum fare of 5 cents for transport from the corner of Laurier Ave. and Charlotte St. to Britannia, a charge which the company, by the Act and Agreement of 1894, is nevertheless entitled to make for that part of the service which is performed within the city. In other words, under existing conditions, so long as the Britannia line is kept in operation and this service is maintained, the company is obliged to give, for a fare of 5 cents, the city service (for which by-law it is entitled to receive a fare of 5 cents) plus the service from Holland Ave. to Britannia; and that appears to be the necessary consequence of treating the operations of the company as a whole and maintaining the existing tariff.

I think it is not permissible to do this because thereby full effect is denied to the legal rights of the company under the statute and agreements of 1894.

I must mention that in answering these questions we are governed by the law as it stood before the enactment of the Railway Act of 1919 (9-10 Geo. V. ch. 68).

Anglin, J.

ANGLIN, J.:—This case comes before us by leave of the Board of Railway Commissioners granted under sub-sec. 3 of sec. 56 of the Railway Act, R.S.C. 1906, ch. 37, as enacted by 9-10 Edw. VII. 1910, ch. 50, sec. 1. The Board is thereby empowered to grant a right of appeal "upon any question which *in the opinion of the Board* is a question of law." It may therefore be that this Court should not decline to pass upon any question leave for the submission of which as a question of law has been given by the

Board, however difficult or even impossible it may be to find in it such a question. On the other hand, if a question formulated by the Board is susceptible of more than one interpretation, inasmuch as it must be assumed that the Board did not intend to ask the opinion of the Court on anything other than a question of law, the Court should put upon it any construction at all admissible that presents such a question. If on no possible interpretation can a question of law be found, it would seem reasonable to assume that there had been some mistake in the drafting of the question in respect of which leave has been given, and on that assumption the Board might be asked to reconsider it and, if possible, to state it in a form which would present an issue of law. I should have been disposed to adopt this course in regard to the first question in the present case were it not for the fact that I incline to the view that it was probably intended by it to cover substantially the same ground as is covered by the first member of the third question, and in the latter may be found a question of law. It would not seem to be practicable to answer the first question submitted on this appeal without reviewing the discretion of the Board exercised upon considerations which are in no sense matters of law. It is beyond the function which sec. 56 (3) of the Railway Act contemplated should be exercised by this Court to determine "whether . . . the Board was (or was not) right in disallowing the tariff of the company filed providing for payment of additional fare for carriage upon the extension from Holland Ave." Should there be no legal obstacle to the adoption of the course decided upon by the Board, there may be error in the determination of some matter of fact or in the exercise of the wide discretion entrusted to it by the statute, neither of which can be made the subject of an appeal to this Court. I find it difficult to conceive of any case in which the Court may properly be asked whether any action taken by the Board is or is not "right," unless where the law peremptorily requires that some particular course should be taken in regard to the subject matter of the question.

The facts out of which the questions submitted arise appear in the order of the Board granting leave to appeal. Mr. Chrysler contends that the finding of the Chief Commissioner, that the company has a statutory right, not subject to the control of the Board, created by the confirmation of its agreement of 1893 with

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the City of Ottawa by the Dominion Act of 1894, 57-58 Vict. ch. 86, to charge any rate of fare fixed by it, not exceeding 5 cents, for the carriage of each adult passenger within the then limits of the city of Ottawa, constitutes such a legal requirement and compels the allowance by the Board of some additional rate for carriage on the Britannia extension, admittedly beyond those limits, and precludes that tribunal from taking into account in fixing such rate the company's profits on the operation of so much of its system as is covered by the agreement. If the Chief Commissioner's finding is right, or must be assumed to be so on this appeal, I am, with respect, of the opinion that the counsel's conclusions would seem necessarily to follow. Otherwise the company would be obliged to expend in the operation of an extension found to be unprofitable (para. "r") income derived from other portions of its system to which, *ex hypothesi*, it has an absolute statutory right: To put it otherwise—having by statute a right to be paid 5 cents for carrying a passenger, who embarks in Ottawa, to the former city limits, it would be compelled to carry him gratis beyond those limits—and for an additional 3 miles should he desire to travel to the Britannia terminus. The same result would ensue in the case of a passenger boarding one of the company's cars at some point on the extension to be carried to a place within the city of Ottawa as it stood in 1893. The only traffic on the Britannia extension for which the company would receive any remuneration would be that having both its point of origin and its point of destination on the extension itself. If it is beyond the jurisdiction of the Board directly to control the company's tolls within the limits of the Ottawa of 1893, it cannot, in my opinion, do so indirectly by refusing to the company reasonable remuneration for the traffic on the Britannia extension, considered by itself.

Mr. Chrysler argued that the Board has not submitted to the Court the question whether the company has or has not the statutory right which the Chief Commissioner has found it enjoys with regard to the rates of fare within the city of Ottawa as it stood in 1893-4, and that that matter is therefore not subject to review here. It is quite true that the question is not formulated in explicit terms. But the first member of the third question submitted "has the Board the right to treat the company's operations as a whole and continue the existing tariff?" treating the word

"right" used in it as meaning power or jurisdiction—necessarily involves it. I find nothing else in the statutes and agreements referred to in the first question, and recited in the statement of facts embodied in the order of the Board, that could possibly exclude that right. They include the statute and agreement on which the Chief Commissioner bases his finding that a statutory right to a 5 cent fare for each adult passenger carried within the limits of the Ottawa of 1893, over which the Board has no power of regulation or control, is vested in the company. We cannot in answering the first member of the third question propounded ignore this feature of the case before us which appears to me to be so vital that it is virtually the turning point in its determination and presents, if not the sole, at least the most obvious and most important question of law to be found in the entire submission. Somewhat paradoxically upon this question the appellant company upholds the finding of the Chief Commissioner while the respondents maintain that it is wrong.

Although, for reasons presently to be stated, of the opinion that the company has a right not subject to the control of the Board to fix a rate of fare not exceeding 5 cents for each adult passenger, except as provided by clause 49 of the agreement of 1893, carried by it within the then limits of Ottawa, with respect, I fail to find in the confirmation by the statute of 1894 of clause 46 of the agreement of 1893 sufficient ground for that conclusion. On the contrary, if the company's right rested on that contract and statute alone, while it could not claim any fare exceeding 5 cents (except for the traffic specifically provided for by clause 47) for the carriage of a passenger within the limits of the Ottawa of 1893, its right to demand fares up to that figure would, in my opinion, be subject to the control of the Board. Clause 46 is purely restrictive in its terms. Had the company intended to stipulate for a right to charge any fare fixed by it not exceeding 5 cents, it is scarcely conceivable that that right would not have been expressed in positive terms such as are found in clause 47 dealing with the special rates of fare between 12 o'clock midnight and 5.30 a.m. Moreover, the fact that its right to collect and fix fares within the Ottawa of 1893 existed independently of and antecedently to the contract of that year and the statute of 1894, as I shall now endeavour to demonstrate, renders it wholly un-

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necessary to import by implication into clause 46 of that contract the positive provision which the contracting parties would seem to have deliberately omitted from it.

The Ottawa City Passenger Railway Co. was incorporated by the Parliament of the late Province of Canada in 1866 and by sec. 8 of that statute (ch. 106) its directors were empowered to make by-laws touching (*inter alia*) "the fares to be received for passengers and freight transported over the railway or any part thereof." The franchise conferred was to construct and to operate by animal power a street railway on certain specified streets and others to be agreed upon in the city of Ottawa and adjoining municipalities. The work being purely local and provincial passed, at Confederation, under the control of the Legislature of Ontario. That body in 1868 amended the company's charter (31 Vict. ch. 45) by declaring applicable to it certain sections of the Consolidated Railway Act of 1859 (Con. Stats. (Can.) ch. 66), *inter alia* those with respect to "Powers," and expressly excluding the application of other clauses of the same Act, *inter alia* secs. 118 and 151 relating one to the reduction of tolls by the Legislature and the other to the approval of tariffs by the Governor-in-Council. Under the heading "Powers" it was by sec. 9 of the Consolidated Railway Act (ch. 66) provided that "the company shall have power and authority . . . *Tenthly* . . . to regulate . . . the tolls and compensation to be paid and to receive such tolls and compensation." Sub-sec. 1 of sec. 31 of ch. 171 of R.S.O. 1887 (the Ontario Railway Act) applied to the Ottawa City Passenger Railway Co., but sub-secs. 9, 10, 11 and 12 of the same section did not. R.S.O. 1887, ch. 2, sec. 10.

No other change in the statutes affecting the company was made prior to 1892. It would therefore appear that at that time under the provincial statutes governing it one of the "powers" of the company was to regulate its tolls—a power which it would probably exercise through directors' by-laws passed under sec. 8 of the Act of 1866—without control by the Legislature or by the Governor-in-Council under secs. 118 or 151 of the Consolidated Railway Act of 1859, or the corresponding sections of ch. 171 of the R.S.O. 1887. The Ontario Street Railway Act of 1883, 46 Vict. ch. 16, R.S.O. 1887, ch. 171, by sec. 24 provided that "nothing in this Act contained shall apply to or affect any street railway company existing or incorporated before the 1st of February, 1883."

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In 1892 the company desiring to extend its line across the Union Bridge and into the city of Hull sought and obtained from the Dominion Parliament an Act, 55-56 Vict. (Can.), ch. 53, empowering it to do so, (sec. 1) declaring it to be a work for the general advantage of Canada, (sec. 6) conferring on it the additional right to use motive power other than animal power, except steam, (sec. 3) making applicable to the new lines of which the construction was thereby authorised the Acts of 1866 and 1868 and "the powers thereby conferred," and providing that the "operation" of the railway "by any new or additional powers conferred by this Act," should be subject to the provincial law in relation to street railways (sec. 6).

"Operation" in this statute in my opinion does not include the fixing or regulation of fares. It refers to the working of the railway—how the cars should be run—control of the tracks, motive power and equipment. *Bedford-Bowling Green Stone Co.* v. *Oman* (1904), 134 Fed. R. 441, 450; *Minneapolis St. R. Co.* v. *City of Minneapolis* (1907), 155 Fed. R. 989, 1000. A reference to the clauses of the Dominion Railway Act (R.S.C. 1906, ch. 37) included in the fasciculus headed "Operation" will serve to indicate the purview of that term as understood by the Parliament of Canada.

By sec. 13 of the Act of 55-56 Vict. 1892, ch. 53, it was provided that "nothing in this Act shall in any respect impair any of the powers which the company has at the passing of this Act." Ordinarily I should incline to think that the word "powers" in such a section would not include the right to fix rates. But that right was conferred by the Act of 1868 as a "power and authority;" and by the Act of 1868 it was confirmed as one of the "powers" under sec. 9 of the consolidated statute of 1859 incorporated with the Act of 1868. Furthermore, in the Dominion Act of 1892, 55-56 Vict. (Can.), ch. 53, while secs. 92 and 93-98 of the general Railway Act, 51 Vict. 1888 (Can.), ch. 29, are expressly made applicable to the company, there is no reference either to sec. 223 empowering the company to fix tolls or to secs. 11 (k) and 227 and 228 providing for the control of tolls by the Railway Committee of the Privy Council and the Governor-in-Council respectively. The proper conclusion from these circumstances appears to me to be that the "power" of fixing and regulating its rates of fare free

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from the control of the Lieutenant-Governor-in-Council, which the company possessed under the provincial legislation affecting it, was continued unimpaired by the operation of secs. 6 and 13 of the statute of 1892, notwithstanding the declaration thereby made that the company's undertaking was a work for the general advantage of Canada, and that that right thus became the subject of a "Special Act" excluding the application of inconsistent provisions of the general Railway Act (51 Vict. 1888, ch. 29, secs. 3 and 6), if they would otherwise have been applicable to it as a street railway.

Such was the position of the Ottawa City Passenger Railway Co. in regard to the imposition and control of tolls at the time of the agreement of 1893 and the statute of 1894 confirming it, so much canvassed at Bar. The Ottawa Electric Street Railway Co., then absorbed by and amalgamated with the Ottawa City Passenger Railway Co., had been incorporated in 1890 and was subject to the Ontario Street Railway Act (R.S.O. 1887, ch. 171). But the only statutory provision affecting its tolls was that contained in sec. 9 of that Act, limiting the maximum fare to be charged by it to 5 cents for any distance not exceeding 3 miles and one cent for each additional mile. It seems very clear to me, therefore, that the sole office of the first member of clause 46 of the agreement of 1893—"no higher fare than 5 cents shall be charged for the conveyance of one passenger from one point to another on the said line and branches thereof within the present city limits"—was so to limit the company's right to fix its rates of fare conferred by the provincial Acts of 1866 and 1868, and confirmed by the Dominion Act of 1892, and not otherwise subjected to statutory control or restriction, that thereafter the ordinary fare for the carriage of an adult passenger within the then city limits should not exceed 5 cents—a concession which the company no doubt made in consideration of countervailing benefits and advantages obtained by it under the agreement. That, in my opinion, is the entire scope and purpose of the part of clause 46 now under consideration and it therefore becomes quite unnecessary to consider the effect of its confirmation by the statute as creating a statutory right in favour of the company.

The Act of 57-58 Vict. 1894, ch. 86, continues the existence of the "Ottawa City Passenger Railway Company" under the name

of the "Ottawa Electric Railway Company" (sec. 6) and sanctions its absorption of the Ottawa Electric Street Railway Co. (sec. 1), declaring that the lines of street railway of both companies are works for the general advantage of Canada and that the Ottawa Electric Railway Co. is subject to the authority of the Parliament of Canada (sec. 7). But any effect which these latter provisions might otherwise have had under sec. 6 of the Railway Act of 1903, ch. 58; (R.S.C. 1906, ch. 37, sec. 6) is excluded by secs. 3 and 11, to which, as well as to sec. 13 of the Act of 1892, the provisions of sec. 3 of the Railway Act of 1903 would seem to apply. Secs. 3 and 11 of the Act of 57-58 Vict. 1894, ch. 86, are as follows:—

(3) The franchises, powers and privileges heretofore or hereby granted to or conferred upon the said companies, or either of them, and which are hereby authorised to be transferred to the said united company, shall be exercised and enjoyed by the said united company, subject to the terms, provisos and conditions contained in the said agreement with the Corporation of the City of Ottawa.

(11) Nothing in this Act shall in any respect impair any of the powers which the said Ottawa City Passenger Railway Company shall have immediately prior to the date appointed for this Act to take effect.

Under these provisions the power or privilege of the Ottawa City Passenger Railway Co. to fix and regulate its rates of fare conferred by the legislation 1866 and 1868 and confirmed by the statute of 1892 are again preserved for the benefit of the continuing corporation, the Ottawa Electric Railway Co. As provisions made by the Parliament of Canada inconsistent with the jurisdiction over tariffs and tolls then possessed by the Governor-in-Council and the Railway Committee of the Privy Council and now vested in the Board of Railway Commissioners by the Railway Act, they override the latter (sec. 3 of ch. 37, R.S.C. 1906). There is no reference to the general Railway Act in the statute of 1894.

The construction of the Britannia branch by the Ottawa Electric Railway Co. was authorised by a Dominion statute of 1899, 62-63 Vict. ch. 82 "as an extension of its present railway." Neither the agreement of 1893 between the City of Ottawa and the appellant company, nor the (now expired) agreement of the company with the Village of Hintonburgh applies *proprio vigore* to this extension. The former is explicitly confined in its operation to the city of Ottawa of 1893; the latter to lines of railway constructed on streets of the village. No part of the Britannia extension is within the Ottawa of 1893 and the short portion of it

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within the former village of Hintonburgh is constructed not on streets but on a private right of way. The fact that the company was authorised by the statute of 1899 to construct the line from Holland Ave. west to Britannia-on-the-Bay "as an extension of its present railway" does not bring that extension within the terms of agreements explicitly confined in their operation the one to territory within which no part of it is constructed and the other to property over which it does not pass; nor does it, in my opinion, as a matter of law preclude the sanction by the Board of a tariff of fares for that extension distinct from that in force for the rest of the company's system.

Section 3 of the Act of 62-63 Vict. 1899, ch. 82, reads as follows: "Secs. 90-172, both inclusive, of The Railway Act and such of the other sections of the said Act as are applicable, shall apply to the company with respect to the said extension."

It is common ground that as to the Britannia branch the jurisdiction of the Board of Railway Commissioners over tariffs and tolls conferred by the general Railway Act is unfettered. But I cannot find in the mere description of this branch as an "extension" anything entitling the Board in the exercise of that jurisdiction to disregard the effect of any rights which the company may have to fix and regulate tolls on its lines within the limits of the city of Ottawa of 1893 independently of the Board's supervision and control. If, in order "to treat the company's operations as a whole and continue the existing tariff," the Board must disregard such a right of the company, either directly or indirectly, in my opinion it may not do so. It follows that the Board should "permit the filing of tariffs . . . covering service on the Britannia line without reference to the larger part of the system covered by the municipal agreements . . ." though not necessarily on a mileage basis.

On the proper construction of the relevant agreements and statutes I am of the opinion that the Britannia extension commences at Holland Ave., since from that point westerly the company's tracks are laid on a private right of way and not on public streets and it is "from some point on its present railway" (of which the terminus was then at Holland Ave.) that the company was by the Act of 1899 authorised to construct and operate its line to Britannia-on-the-Bay.

While it would seem to follow from what I have said that it is not possible to hold as a matter of law that the order of the Board disallowing the tariff in question was not "right" and the respondents may therefore be entitled to ask the Court to decline to answer the first question in the affirmative, in view of the facts and finding in paragraph "r" of the order allowing the appeal the company is entitled to such fares and on such basis as the Board may deem reasonable and just in respect of traffic on its Britannia branch irrespective and independently of the rates of fare prevailing on the rest of its system. As the Chief Commissioner said in delivering the opinion of the Board in this case:

> Under the Railway Act the same company may have different rates on different parts of its system where traffic and operating conditions and construction costs are dissimilar, for example, railway tolls are justifiably higher in a mountainous district where cuttings and grades are heavy and as a result the cost of construction and operation is greater than in other districts. Again the tolls may be greater where traffic density and diversity differ.
>
> Rates on a branch or lateral line may be justified, although higher than those of a main line, with greater traffic and although owned by the same company.

The fact that a flat rate of fare prevails throughout the rest of the company's system does not as a matter of law in my opinion preclude the authorisation of an additional fare, either on a mileage or "measured" basis or as a flat rate, on the Britannia extension.

I would, for the foregoing reasons, without answering the first question, answer the second question: "At Holland Ave.:" and to the first member of the third question my answer would be: "No;" and to the second member thereof: "Yes, though not necessarily on a mileage basis."

In reaching these conclusions I have entirely put out of consideration sub-sec. 5 of sec. 325 of the Railway Act of 1919. That provision is not retroactive. The statute was passed on July 7, 1919; the decision of the Board was pronounced on February 25, 1919; and leave for this appeal was granted on April 14, 1919. The answers to the questions before us, therefore, in nowise depend on sub-sec. 5 of sec. 325 and I refrain from expressing any opinion whatever either upon its construction or upon the scope of its application.

On the whole the appeal succeeds and the appellants should have their costs.

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BRODEUR, J.:—The appellant company operates within the city limits of Ottawa a street railway proper, and beyond city limits it runs a suburban railway called the Britannia line.

This suburban railway is constructed upon a private right of way and passes through the territories of the respondents, the township of Nepean and the village of Westboro.

The rates within the city of Ottawa are fixed by a contract which was confirmed by Parliament.

The railway company has filed before the Railway Board a tariff asking for larger fares than those charged heretofore on the Britannia line and the municipalities interested including the City of Ottawa have applied for the disallowance of the proposed tariff and it was disallowed on February 25, 1919. The Ottawa Electric Co., dissatisfied with the order of the Board, obtained on April 14, 1919, leave from the Board to appeal to this Court upon the following questions: (See statement, *ante* p. 468).

These questions arise out of certain facts which the Board stated in their order granting leave.

The Board has found as a fact that the operation of the Britannia line, considered by itself, is not remunerative, but that the operation of the lines of the railway as a whole, including those within the city of Ottawa, are returning to the company adequate profits. The Board has found also that within the city limits on the street railway proper it could not reduce nor increase the rates because they have been the subject of an agreement with the city which has been approved and confirmed by Parliament (1894 Stats., ch. 86, sec. 2) and that the Board's jurisdiction is bound by this special Act.

Though the Railway Commissioners thought they could not change, alter or reduce the city rates, they decided, however, that the profits made by the company under its contract should be utilised to cover the deficit incurred in the operation of the Britannia extension and they ordered the company to operate at a loss its suburban line. This decision does not seem to me satisfactory. If the contract with the city has the effect asserted by the Board it is then binding to all intents and purposes and this part of the system should have been left alone and the profits or losses made in connection with it should not have been considered in the determination of the rates to be paid on some other part of

the system. In other words, the company's operations should not have been treated as a whole.

When the company was incorporated in 1866 by the Legislature of the Province of Canada, 29-30 Vict. ch. 106, it was declared by sec. 8 that the directors would have the power to make by-laws touching "the fares to be received for passengers and freight transported over the railway or any part thereof."

We find also another provision in this statute of 1866 giving the right to the company to lay their tracks on certain streets.

These two provisions give more extensive powers than those which would be granted to-day, for Parliament would not give the power to a railway company to lay tracks on a particular street without the consent of the municipality, and as far as the rates are concerned Parliament would not to-day give a railway company the right to fix its rates without the control of the Railway Board. But in 1866 the street railways were new ventures which were treated most liberally by our legislators.

The appellant company had then the power under its charter to fix its rates without being bound to submit them to the Government and it could lay its tracks upon certain streets within the city of Ottawa.

The line of railway being a provincial line fell after Confederation under the legislative control of the Province of Ontario. But in 1892 the company being desirous to connect its railway with a line situate in another Province, its undertaking was declared by the Federal Parliament under the provisions of subsec. 10 of sec. 92 of the B.N.A. Act, to be a work for the general advantage of Canada ((1892), ch. 53).

In 1893 the railway company made a contract with the City of Ottawa in which it was stipulated that it could run its cars upon some other streets than those mentioned in the Act of incorporation of 1866 and the railway company agreed by clause 46 that "no higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said lines and branches thereof within the present city limits . . . " and that it could amalgamate with an electric street railway company then in existence under its present name.

This contract was ratified and confirmed by the Canadian Parliament in 1894 and by the special Act then passed, 57-58

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Vict. ch. 86, it was declared that, "the franchises, powers and privileges heretofore or hereby granted to or conferred upon the . . . company shall be exercised and enjoyed" under its new company name, 57-58 Vict. 1894, ch. 86, sec. 3, and by sec. 11 of the Act it was also declared that "nothing in this Act shall in any respect impair any of the powers which the said . . . company shall have immediately prior to the date appointed for this Act to take effect."

This Act came into effect on June 1, 1894.

What is the effect of this legislation of 1894?

First, it ratifies and confirms the agreement with the City of Ottawa by which a flat rate not exceeding 5 cents should be charged for the conveyance of a passenger in the day time. It becomes a binding contract for the city, for the company and also for the public by which this fare of 5 cents would be considered a reasonable rate. This provision forms part of the special Act of the railway company.

At the same time Parliament in declaring that the powers possessed by the railway company would not be impaired, but on the contrary these powers would continue to be exercised and enjoyed by the company, confirms and ratifies the power that the company possessed by its Act of incorporation of 1866 to fix its rates subject, of course, to the new rates fixed in its agreement with the city.

It seems to me that as a result of this legislation of 1894, the company was the only authority that could deal with the rates within the city of Ottawa provided it should not charge more than 5 cents.

The general provisions of the Railway Act giving the Board the power to deal with the rates would certainly not affect the lines of the appellant company within the city limits since sec. 3 of ch. 37 of the R.S.C. 1906, declares that the Railway Act should be construed as incorporated with the special Act and where the provisions of the Railway Act and of the special Act relate to the same subject matter, the provisions of the special Act will override those of the general Act.

The Parliament of Canada having by the special Act of the appellant company dealt specifically with the tolls within the city

of Ottawa, the subject matter of these tolls could not be considered by the Board of Railway Commissioners, whether they are profitable or not.

In 1899 the Parliament of Canada authorised the appellant company to build a suburban line outside of the city limits on private rights of way as an extension of its street railway. It was provided by this new Act that certain sections of the Railway Act were applicable "and such of the other sections as are applicable, shall apply to the company with respect to the said extension."

It may be claimed that under the provisions of the Act of 1894 the tolls to be charged on the suburban or extension line shall be under the control of the railway company itself but the question of jurisdiction of the Board in that regard has not been raised, and both parties agree that the Board has jurisdiction to fix the rates on the suburban railway. But it is claimed on the part of the appellant that these rates on the extension line should be determined without regard to the profits or losses made on the city lines because the latter are not under the control of the Board.

I fully concur with this view of the appellant. The special Act of 1894 fixed the rates for the city limits and these rates cannot be disturbed by the Board since they form part of an Act which overrides the general powers of the Board under the Railway Act. The Board having come to the conclusion that the rate on the Britannia line was not remunerative it was its duty to grant to the appellant company a remunerative rate on this part of the line and it should not have taken into consideration the profits made on some other part of the line which did not come under its jurisdiction.

The first question which is submitted to us involves questions of fact, which, of course, have to be dealt with exclusively by the Board. We have no authority to decide whether the rates asked for by the company are fair and just. So far, however, as this question No. 1 involves a question of law, it is covered by the answer I give below to the first part of the third question.

We are asked by the second question submitted to us to state whether the tolls to be charged on the extension line should be computed from Holland Ave. where the extension begins.

If the extension line was built on the streets with the consent of the city, special tolls could be charged only from the city limits,

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but the extension line is not built on the streets but on a private right of way. Then I would declare in answer to the second question that the point of commencement of the extension line should be considered for toll purposes to be at Holland Ave.

I would answer in the negative the first part of the third question and in the affirmative the second part of it. As a result of these answers the appellant's contentions are generally sustained.

The appeal should be allowed with costs.

MIGNAULT, J.:—This is an appeal by leave on three questions of law from the decision of the Board of Railway Commissioners for Canada disallowing a tariff of tolls filed by the appellant. The only point involved is as to the extension of the appellant's line from Holland Ave. in the former village of Hintonburgh, now a part of the city of Ottawa, to Britannia-on-the-Bay in the township of Nepean, but to answer the questions submitted it is necessary to consider the statutes and contracts under which the appellant carries on its operations.

All the facts found by the Board are stated in the order granting leave to appeal, as well as in the opinions given by the Chief Commissioner, and it will be sufficient to give briefly my reasons for the answers which I make to the questions submitted.

The appellant now stands in the place of two Ottawa street railway companies, the Ottawa City Passenger Railway Co., incorporated in 1866, by an Act of the Province of Canada (29-30 Vict., ch. 106), and the Ottawa Electric Street Railway Co., incorporated in 1891 by letters patent of the Province of Ontario. These two companies amalgamated in 1894, forming what was termed the united company under the name of the Ottawa Electric Railway Co. Previous to the amalgamation, in 1892, an Act was passed by the Dominion Parliament (55-56 Vict. ch. 53) declaring the undertaking of the Ottawa City Passenger Co. to be a work for the general advantage of Canada, conserving its charter powers, and authorising it to extend its lines to the city of Hull, in the Province of Quebec. After the amalgamation an Act was passed by the Dominion Parliament, in 1894 (57-58 Vict., ch. 86), ratifying the amalgamation, and confirming the contract entered into between the City of Ottawa and the Ottawa City Passenger Railway Co. and the Ottawa Electric Street Railway Co. and the appellant was declared a body corporate subject to

the legislative authority of the Parliament of Canada. It is under this contract and this statute that the appellant carries on its operations in so far as the city of Ottawa, as it then was, is concerned.

It may be added that, in 1895, the appellant entered into a contract with the then Village of Hintonburgh, adjoining Ottawa on the west, for the extension of its lines, under which the appellant extended its railway as far as Holland Ave. in the said village. This contract has now expired.

In 1899, by the Dominion statute, 62-63 Vict. ch. 82, sec. 1, it was enacted that the appellant

may, as an extension of its present railway, construct and operate by means of electricity or other motive power, except steam, a double or single track, iron or steel railway, with the necessary side tracks, switches and turn-outs for the passage of cars, carriages and other vehicles adapted to the same, from some point on its present railway in the municipalities of Hintonburgh or Nepean in the county of Carleton, to some point at or near Bell's Corners in the township of Nepean.

The railway referred to in this enactment as the *present* railway of the appellant did not extend further west than Holland Ave. in the village of Hintonburgh and the extension from that point to Britannia-on-the-Bay, which I understand is to the east of Bell's Corners, was constructed, not on a street or road, but on a private right of way acquired by the appellant.

The statute of 1899 declared that secs. 90 to 172, both inclusive, of the Railway Act (then that of 1888) and such of the other sections of the said Act as are applicable shall apply to the appellant with respect to the said extension.

The appeal having been argued on November 17, 1919, this Court, on December 22, 1919, ordered a re-argument on the following questions:—

(1) Has the Board of Railway Commissioners authority to reduce the company's charge for passenger services within the city of Ottawa below the fare of 5 cents now charged for any such service?

(2) If the first question is answered in the negative, has the Board power to require the company to provide a service partly within and partly beyond the limits of the city of Ottawa for a charge not exceeding 5 cents?

(3) In passing upon the questions raised upon this appeal, is the Court in any respect governed by sec. 325 of the Railway Act of 1919?

The re-argument took place on February 3 and 4, 1920, and was of a very exhaustive character.

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The principal question discussed was as to the effect of clause 46 of the contract with the City of Ottawa which reads as follows:—

No higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said line and branches thereof within the present city limits, and for children under ten years of age no higher fare than three cents shall be charged, except between the hours of twelve o'clock midnight and five-thirty a.m.

The question was also discussed whether the Board of Railway Commissioners could reduce the maximum rate of 5 cents for passengers provided for the city of Ottawa.

It is argued that clause 46 is purely negative, that it in no way determines any toll or fare which the company may charge, that its object was not to empower the company to exact tolls, the power to do so being conferred on the directors by the statute of 1866, but merely to restrict the exercise of this power, so that in any event the company could not demand more in the daytime than 5 cents per adult passenger, and that in so far as the fixing of tolls and the control of the Board is concerned, the whole matter was left where it was before the contract, so that the directors can by by-law regulate the tolls to be charged, subject to the control of the Board, these tolls however not to exceed the maximum stipulated in clause 46 of the contract.

I cannot so construe the contract. It is true that clause 46 is negative in form, such negative form being usual in agreements of this kind, and it is also true that the directors derive their power to regulate tolls from the charter the company obtained from the Legislature. But the whole object, or at least the main object, of the contract was to oblige the company to operate a street railway in the city of Ottawa, the city receiving from the company an annual payment based on the mileage of the latter's lines, and for this service the company was to be remunerated by tolls charged for the carriage of passengers. So the fixing of a maximum fare by the contract necessarily implies that the company may charge any fare, provided it does not exceed the maximum, and within these limits, and during the life of the contract, the city cannot contend that the fare charged is not just and reasonable. This contract was ratified and confirmed by Parliament, the latter thus recognising that the fixing of fares had been treated as a matter of agreement between the city and the company, and unquestionably the contract binds both the city as representing the

public interested in the railway service and the company for the term of its duration, with the consequence that the power of interference of the Railway Board—which can be exercised only on the ground that the tolls charged are unfair and unreasonable—is excluded by the recognition by the city and by Parliament that up to the maximum stipulated by clauses 46 and following of the contract, any tolls charged by the company while the contract is in force are fair and reasonable.

I am, therefore, of opinion that, properly construed, clause 46 of the contract authorises the appellant to charge 5 cents per passenger during the hours mentioned, or any lower rate; and also, inasmuch as the contract was ratified and confirmed by Parliament and the ratification and confirmation was accompanied by the declaration (sec. 3) that the franchises, powers and privileges conferred on the original companies should be exercised and enjoyed by the appellant, subject to the terms, provisos and conditions contained in the agreement with Ottawa, my opinion is that the Board of Railway Commissioners cannot for the services contemplated in this agreement, reduce, no more than it can increase, the maximum rate provided by the contract. In coming to this conclusion, I also rely on sec. 3 of the Railway Act (R.S.C. 1906, ch. 37), the statute of 1894 being a special Act overriding the provisions of the Railway Act in so far as is necessary to give effect to such special Act.

This disposes of question 1, submitted by the Court for re-argument, which question should be answered in the negative. I may add that this is also the opinion expressed by the Chief Commissioner.

Mr. Denison argued however that the statute of 1894 is a private Act, which cannot prevail over a public Act like the Railway Act. This argument is answered by sec. 13 of the Interpretation Act (R.S.C. 1906, ch. 1) as well as by sec. 3 of the Railway Act, for surely the statute of 1894 is a special Act within the meaning of that section.

Question 1 being answered in the negative, question 2 requires a reply, and I am of opinion that this reply must also be in the negative. In so far as service outside Ottawa is concerned, it cannot be considered as covered by the charge made for the city of Ottawa under the contract and statute of 1894. By the city of Ottawa I mean the territory described in the contract.

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OTTAWA ELECTRIC RAILWAY CO. v. TOWNSHIP OF NEPEAN.

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Question 3, in so far as this appeal is concerned, should be answered in the negative. This section was enacted subsequently to the order of the Board, but the power it confers on the Board, should the question now come before it, possibly renders the discussion of this appeal of somewhat an academic interest. I may add that I do not wish to be understood as placing a construction on sec. 325 of the Railway Act of 1919.

I now come to the questions submitted by the Board which are the subject of this appeal. And here I must note the following findings of fact of the Board in paragraphs (r) and (s) of the order allowing the appeal:—

(r) The Board has found, as a fact, that the operation of the Britannia extension considered by itself is not remunerative, and that if the operation of this line can be so considered it is clear that the company is entitled to an increased remuneration for the service it performs thereon.

(s) The Board has also found that the operation of the lines of this railway as a whole including those within the city of Ottawa have returned or are returning to the company adequate profits. The company contends that inasmuch as the receipts from the lines within the city of Ottawa are the result of the operations of the company under a schedule of rates limited by the agreement with the city and confirmed by the Act of Parliament such favourable result is not a valid reason under the Railway Act for disallowing a tariff which will give the company power to collect additional fares upon the Britannia extension.

I may add that the contracts with Ottawa and Hintonburgh in nowise apply to the Britannia extension, which is governed by the statute of 1899. The respondents, however, contend that the contract with Hintonburgh applied to the extension from Holland Ave. up to the western limits of the former village, a distance of some 1900 feet. I think this contention cannot be sustained, because the contract with Hintonburgh refers to a railway to be built on the streets of the village, and this extension was built, not on any street, but on the private right of way of the appellant from Holland Ave. to the west, and because the statute of 1899, which governs the extension, gives authority to the appellant to construct the said extension, from some point on the then present railway of the appellant in the village of Hintonburgh and the most westerly point of the said railway was at Holland Ave. The extension was constructed under the authority given by this statute.

I cannot doubt, moreover, in special reference to paragraph (r) of the order granting leave to appeal, that the Board can consider

by itself the operation of the Britannia extension from Holland Ave. to Britannia-on-the-Bay.

The answers I would give to the questions submitted, are contained in the formal judgment of the Court, and in my opinion the appeal should be allowed with costs.

Appeal allowed.

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MINISTER OF INLAND REVENUE v. JASSBY.

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Quebec King's Bench, Lamothe, C.J., Lavergne, Carroll, Pelletier, and Martin, JJ. April 30, 1919.

APPEAL (§ II C—25)—STATED CASE FROM SUMMARY CONVICTION—JURISDICTION—BREACH OF THE REVENUE LAW—STAMPS—CR. CODE PART XV., SECS. 705, 749, 761, 1012, 1013.

Part XV. of the Criminal Code grants the right of appeal by stated case to the Court of King's Bench, Crown side (*juridiction criminelle*) and not to the Court of King's Bench, appeal side. Accordingly, in a summary conviction proceeding before the Judge of Sessions, under Part XV. of the Criminal Code, in which the Court decided that, under the Dominion Revenue Act, 5 Geo. V. 1915 (2nd sess., Can., ch. 8), the employer is not liable for failure to place stamps upon articles sold if the sale is made by a salesman without the personal knowledge of the employer, the Court of King's Bench, appeal side, has not jurisdiction to decide a question submitted to it and upon which the Judge of first instance made a reserved case. It is the Court of King's Bench, Crown side, which has jurisdiction to hear a case stated under Part XV.

CASE reserved for the decision of the Court of King's Bench, civil side. Statement.

The respondent is charged, by summary proceeding (Cr. Code, Part XV.), with not having put stamps on goods sold, contrary to the Dominion Revenue Act, 5 Geo. V. 1915, Can., ch. 8. The defence was that the act complained of was not committed by the accused, but by his clerk, in his absence, and in disobedience of his order.

Police Magistrate Leet discharged the accused but, on the application of the complainant, reserved a question of law to be submitted to the Court of King's Bench, and filed a statement of the case.

The accused made a motion asking for the rejection of the appeal for want of jurisdiction, in that summary proceedings were taken, and that the Court which has jurisdiction to hear and decide the question is the Court of King's Bench sitting as a Criminal Court and presided over by one Judge, and not the Court of King's Bench, appeal side, presided over by five Judges.

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Carroll, J.

The Court granted the motion and rejected the appeal.

J. H. Rainville and *Gagnon*, for appellant; *Nathan Gordon*, for respondent.

CARROLL, J.:—The attorney for the respondents made a motion to quash, alleging that the Court of Appeal has not jurisdiction in the matter. The reserved case was based on sec. 761 of the Criminal Code, where it is stated that any person aggrieved who desires to question any decision or other proceeding of a Justice of the Peace, under Part XV. of the Code on the ground that it is erroneous in point of law, or that the Justice exceeded his jurisdiction, may apply to such Justice to prepare a statement of the facts of the case and the reasons for his decision, and if the Justice refuses, such person "may apply to the Court" for an order requiring the case to be stated.

The question for decision is whether the two words "the Court" mean the Court of King's Bench, appeal side, or the Court of King's Bench, Crown side, presided over by a single Judge.

The answer to this question appears to me to be given by sec. 749 Cr. Code, where it is laid down in para. (b) that, in the Province of Quebec, the appeal from decisions given by a Justice of the Peace or magistrate, under Part XV., is taken to the Court of King's Bench, Crown side.

Since appeals, under Part XV. of the Code, are brought before the Court of King's Bench, Crown side, presided over by a single Judge, and that such appeals comprise both the law and the facts, what reason would the law-maker have for submitting the question of law only to the Court of King's Bench, appeal side? Besides, sec. 705 Criminal Code gives the rule of interpretation for offences proceeded against under that part of the Code, and states that the word "Court . . . means and includes any Superior Court of criminial jurisdiction."

The Court of King's Bench, appeal side, in not a Superior Court of criminal jurisdiction. When the law maker wished to give jurisdiction to the Court of King's Bench, appeal side, he expressly so stated, for example, in secs. 1012, 1013, and these sections specify that there is an appeal upon all questions of law and fact to the Court of Appeal in the Province where such conviction is made, that is to say that the law maker made a distinction between the Court of King's Bench sitting as a Criminal

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Court, and the Court of King's Bench sitting as an Appellate Court. The cases where an appeal is given to the Court of King's Bench with appellate jurisdiction are made exceptions.

For these reasons I think that the motion should be granted.

Lamothe, C.J.

LAMOTHE, C.J.:—The Minister of Inland Revenue comes before us with a stated case, granted by a Police Magistrate at Montreal. A motion is made by the accused to reject this appeal for want of jurisdiction. The reason for the motion is that, the offence not being indictable, the appeal can only be brought before a Judge of the Court of King's Bench sitting as a Criminal Court or sitting in Chambers. Pelletier, J., in his notes, puts in a very plain light the question of the separate jurisdictions of the Court of King's Bench, a civil appellate jurisdiction, and the Crown side presided over by a single Judge. The Court of Appeal, civil side, not having jurisdiction in the matter, the motion to quash should be granted.

Pelletier, J.

PELLETIER, J.:—The accused, Jassby, was brought before the Police Magistrate under Part XV. of the Cr. Code for not having put the required stamp upon a bottle or package which he sold. The magistrate set the accused at liberty, and the Minister of Inland Revenue comes before us with a stated case, under secs. 761 *et seq.* Criminal Code. He claims that the magistrate was wrong in setting the accused at liberty and that the latter ought to be found guilty in spite of the fact that the evidence shews that the act complained of was done by his clerk, in his absence and in disobedience to his orders. This is the first point submitted to us. On his side, the accused makes a motion before us to quash, because, in his opinion, it is not before this Court but before the Court of Appeal sitting as a Criminal Court that the question should be submitted. Since I come to the conclusion that the latter claim is well founded, I am excused from examining the other question submitted.

It seems to me certain that the remedy asked for exists in law, but that it must be exercised by a Criminal Court presided over by a single Judge. Under art. 3059, R.S.Q. 1909, the Court of King's Bench has an appellate jurisdiction over all causes, matters and things, in which an appeal lies, from all Courts wherefrom an appeal lies by law, "unless such appeal is expressly directed

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(*affecté à la competence*) to be to some other Court," and then, under art. 3062, the quorum of the Court, for such appeals, is four Judges. This is what is called in English the Court of King's Bench, appeal side.

Under art. 3225 of the same statutes, R.S.Q. 1909, the Court of King's Bench has also an appellate jurisdiction in criminal matters in accordance with the rules made by competent authority; but here, under art. 3227, the Court may be presided over by a single Judge. This is the Court of King's Bench, Crown side.

By Part XIX. of the Cr. Code which deals with offences which may be proceeded against by way of indictment, there is no special appeal possible under sec. 1012 except for an offence mentioned in sec. 498 (trade conspiracies), but sec. 1013 prevents any other appeal in the case of the verdict of a jury or of a sentence by a magistrate sitting as Judge and jury, except such as are mentioned in secs. 1014 *et seq.* Now, under these sections, 1014 *et seq.*, there can only be a reserved case with the consent of the Judge presiding at the trial or by an order of the Court of Appeal directing a stated case to be prepared; the Court of Appeal may also, however, order a new trial, etc.: Every other appeal or writ of error is abolished.

What is the "Court of Appeal" mentioned in these secs. 1014 *et seq?* Sub-para. (b) of para. (7) of sec. 2 Criminal Code tells us that the Court of Appeal is the Court of King's Bench, appeal side. These rules are well known, and it is to the Court of Appeal that application is always made in the cases mentioned in secs. 1014 *et seq.* I recall all that only for the purpose of emphasising and making clearly understood the great difference that there is between the *reserved case* mentioned in Part XIX. Criminal Code and the *stated case* which is now before us under Part XV. which deals with summary matters.

Contrary to what takes place under Part XIX., where appeals are prohibited, all judgments given under Part XV. are appealable both on the facts and on the law, but they are appealable before a Criminal Court presided over by a single Judge. In short, it is secs. 749 *et seq.* of the Criminal Code which allow this appeal, and here, instead of saying, as do secs. 1014 *et seq.*, that the proceedings shall be had before "the Court of Appeal," it contents itself with saying before "the Court."

What is this Court? To answer this question it is only necessary to refer: (1) to para. (b) of sec. 705 which tells us that this Court is one of criminal jurisdiction; (2) to para. (b) of sub-sec. 1 of sec. 749 which says positively that it is the Court of King's Bench, Crown side, that must be applied to.

There has been suggested to us, here, a distinction which does not appear to me to be possible. They admit this rule for an appeal upon a question of law and of fact, but they refuse to apply it to an appeal upon the law alone. In other words, if they proceed, under secs. 749 to 760 to review the judgment upon a question of law and a question of fact, they would go before the Judge of a Criminal Court, but if they only complain of a judgment because it is bad in law, or that the Justice of the Peace exceeded his jurisdiction, they must go before the Court of Appeal *in banc*. This claim is not founded on any wording and cannot stand. Let the accused appeal upon the law and the facts, or upon the facts alone, he is, in every case, an appellant. Secs. 762, 764, etc., continue to call him an appellant, as do secs. 749 to 760.

Moreover, the question is settled in a way to remove every doubt by sub-sec. 2 of sec. 766, which states that the jurisdiction to appeal in a stated case, like the one which we have before us, under secs. 761 *et seq.*, belongs to a single Judge, who may hear such appeal as well in Chambers and during vacation as in the regular criminal term. This wording confirms what para. (b) of sec. 705 and sec. 749 tell us, and make clear the fact that the stated case in the present case is within the competence of a single Judge sitting as a Criminal Court.

It is clear that the law maker did not wish to give to an appeal in summary matters the same importance as in indictable offences, since he went to the point of permitting them to be heard and decided by a single Judge in Chambers. The stated case which we have here before us ought, therefore, to be submitted to the Criminal Court or to a Judge in Chambers. Consequently I would grant the motion to quash.

MARTIN, J.:—I concur in the view expressed by Pelletier, J., that the Court of Appeal is without jurisdiction in this matter. Martin, J.

Sections 761, 762, 762A, 764, 765 and 766 all speak of "the Court," which is defined by sec. 705 (b), Criminal Code, as "any Superior Court of criminal jurisdiction for the Province in which

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the proceedings in respect of which the case is sought to be stated are carried on," meaning, in the Province of Quebec, the Court of King's Bench (Cr. Code sec. 2, para. 35 (b). See also sec. 749 (b)).

Sections 1014 to 1023 inclusive all mention the "Court of Appeal," which, by sec. 2 para. (7) (b), means and includes, in the Province of Quebec, the "Court of King's Bench, appeal side." This distinction is further shewn by reference to sec. 766, sub-sec. 2, by which the authority and jurisdiction of the Court for the opinion of which a case is stated under sec. 761 *et seq.* may be exercised by a Judge of such Court sitting in Chambers, as well in vacation as in term.

The objection as to jurisdiction is well founded and the motion to quash is granted.

JUDGMENT:—Whereas the Minister of Inland Revenue has lodged an appeal before the Court of King's Bench, civil side, from certain judgments given by the Judge of Sessions, District of Montreal, stating that the employer is not liable for failure to put the stamps required by law upon an article sold, when the sale was made by a clerk, and without the personal knowledge of the employer;

Whereas, at the hearing, the respondents made a motion asking for the rejection of the appeal because the Court of King's Bench, appeal side (*juridiction civile*), is not competent to hear an appeal in a criminal matter;

Considering that, by Part XV. of the Criminal Code, the right to hear an appeal is conferred upon the Court of King's Bench, Crown side, and not on the Court of King's Bench, appeal side (*juridiction civile*);

Maintains the said motion, rejects the appeals and recommends the Minister of Inland Revenue to pay the costs incurred by the respondents. *Appeals quashed.*

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DOERING v. TSCHRITTER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. October 14, 1920.

CONTRACTS (§II A—128)—SALE OF GRAIN IN BIN—1,600 BUSH. MORE OR LESS—AMOUNT TO BE ASCERTAINED—NO CHECK OF AMOUNT KEPT BY EITHER PARTY—AMOUNT IN CONTRACT TO GOVERN—BURDEN OF PROOF.

The plaintiff agreed to sell the defendant a certain fixed and definite bin or granary of wheat described in the memorandum as amounting

to "sixteen hundred (1,600) bush. more or less." The exact quantity was unascertained but the wheat was to be taken to the market and weighed and if there was more than 1,600 bushels the excess was to remain the property of the plaintiff. When it came to hauling away the grain neither party took any precaution to prevent disputes as to the quantity, or to be in a position to check the matter with certainty. The Court held that the estimate made by the parties when drawing up their agreement should govern, and that the defendant should pay for 1,600 bushels but no more.

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APPEAL by plaintiff from a District Court judgment in an action to recover a balance claimed to be due on a quantity of wheat sold. Reversed.

Statement.

C. J. Wilson, for appellant.

Fred Long, for respondent.

HARVEY, C.J.:—In the early part of the year 1917 the plaintiff who had sold the defendant his farm sold him also certain wheat in the granary on the farm. The exact quantity was unascertained but the wheat was to be taken to the market and weighed and if there was more than 1,600 bushels the excess was to remain the property of the plaintiff. On June 12, 1917, in the presence of the grain dealer there was what was apparently intended to be a settlement and payment. Some time later by reason of some statement by defendant's son the plaintiff was led to believe that he had not received payment for all the wheat and this action is brought to recover a balance claimed to be unpaid.

Harvey, C.J.

The trial was held before Greene, Dist. Ct. J., and the plaintiff's claim was dismissed because he was not satisfied from the evidence that there was a considerably larger quantity of grain than was accounted for. There is not much conflict of testimony and the trial Judge in his reasons gives no suggestion of preferring the evidence of one witness to that of another. He says:

> I fail to see how I can come to the conclusion in the matter, how as a matter of fact (I may be mistaken), there was a larger quantity by a considerable amount of grain in that granary than has been accounted for. I do not know how I can come to any conclusion to shew and establish beyond a reasonable doubt if it were necessary, the indebtedness of the defendant to the plaintiff in this respect. I do not see how I could. It may be for all I know, that there was a far greater amount in that granary than has been accounted for by the defence. The evidence does not establish that.

It is apparent from this that the trial Judge was by no means satisfied that the defendant had paid for all the wheat for which he was accountable but that on the other hand the evidence did not establish as he seemed to think it should, and his remark leaves

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doubt whether he did not think it should beyond a reasonable doubt, any definite amount for which payment had not been made.

There is no doubt that the rule of absence of reasonable doubt has no application to such a case as this and all that is required at the most in favour of the plaintiff would be a preponderance of evidence, but while the general rule is that the burden is on the plaintiff of establishing his case there may be qualifications as to the nature of the case he has to make out.

In the present case there was first an oral contract which was rescinded and subsequently two written ones. The last written one which is the one admittedly binding provides for the sale up to 1,600 bushels at $1.56 a bushel and provides that the defendant shall haul the 1,600 bushels to the nearest shipping point before July 1, 1917, and on the said July 1 shall pay the plaintiff $2,495, with a proviso that if there is less than 1,600 bushels the defendant shall only be required to pay for the actual amount. The $2,495 is apparently taken as the price of 1,600 bushels at $1.56 per bushel, though it is in fact $1 less.

The fact was that at the time the contract became effective, which was a few days before the date of the present written contract, the defendant was on the farm and then in possession of all the grain, while the plaintiff was not. It was apparently not contemplated that the plaintiff should in any way check the quantity of grain but that it was to be entirely left to the defendant to ascertain through his sales the exact amount. At an earlier date both together had measured the cubical contents of the bin containing the grain and taken the figures to two grain dealers to find the quantity in bushels. One gave the amount as 1,750 bushels and the other as 1,950. The former who was called as a witness said that his rule for ascertaining the number of bushels was to take 8/10 of the cubical contents in feet. This is approximately correct having a variation of between 2 and 3%, assuming that a bushel in measure will weigh exactly 60 pounds. It is shewn that this wheat was all No. 1 so that it would almost certainly overrun in weight much more than 2 or 3% and therefore the quantity would probably be more rather than less than the figures arrived at. It is also shewn that 3 loads had been taken out of the bin after the calculation amounting to about 135 bushels. There

was no one on the farm for 2 or 3 days after the plaintiff left it and it is quite possible as argued that some one might have broken into the bin, for it was boarded up, and taken some of the grain, but there is no suggestion in the evidence of any probability or indication of such a thing and both parties saw the grain when the transaction between them was closed. There is thus evidence from which a reasonable inference could be drawn that there was in the bin between 1,600 and 1,700 bushels and the terms of the contract shew that the parties contemplated that there was 1,600 bushels or more.

It is reasonably clear however that the quantity was not to be ascertained in this way but by the scales at the market.

At the same time that the defendant was marketing this wheat he was marketing wheat purchased from another person selling all to the same dealer who gave him a memorandum receipt for each load and at the defendant's request wrote on the receipt the name of the plaintiff or other vendor according to whose wheat it was. The other vendor was a witness and he swore that he checked every load of his wheat and that the defendant produced to him a receipt for every load with his name on it with the exception of two which however were not delivered until after June. The defendant at that time was handling no other wheat. On June 12 the defendant requested the plaintiff to come over to the dealer's and receive payment. The dealer did some checking up from his books or from the slips and gave the defendant a cheque for $2,200 which the defendant gave to the plaintiff. There is some difference between the parties as to this settlement. The plaintiff says that the figures of the dealer shewed 900 bushels and that the defendant admitted that he had kept for seed 363 bushels. This would make the amount owing $1,970.28 but the plaintiff says that defendant said he had done pretty well out of the resale and he would call it $2,000 and that the cheque was for this and $200 to be credited on what was owing on the farm.

This explanation of the plaintiff is to some extent supported by the fact of a receipt from the dealer in favour of the defendant in that date for 900 bushels at $2.50 a bushel. The defendant's account however is that the dealer figured up the amount and that it came to a little over $2,200 and that he paid the difference amounting to $10 or $11 in cash.

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At some later date the defendant obtained from the dealer a statement of the particulars of the grain though for what reason does not appear and this shews 1,105 bushels and 50 pounds. He admits keeping for seed and selling to a neighbour 308 bushels and this makes 1,413 & 5/6 bushels, which at $1.56 a bushel would amount to $2,209.58. Though there is no evidence that these figures were the ones used by the dealer in his calculation the result is quite in harmony with the defendant's account.

Nearly a year after the settlement and apparently after the plaintiff's suspicions had been aroused he obtained from the grain dealer a statement of particulars. Both statements are produced and they only agree in part. It is clear that the one furnished to the plaintiff though it shews 1,180¾ bushels is not complete because it omits all grain delivered in March and the defendant swears that he delivered some in that month, and the statement furnished him shews 85 5/60 bushels in that month. The only other difference is 2 loads in May shewn by the second but not the first statement. Both of these statements end on June 12 the date of settlement but there are produced the memorandum receipts for two more loads of wheat from defendant, one on June 16 for 71 2/3 bushels and the other on June 19 for 73¾ bushels. The latter has the plaintiff's name on it but the former has no name. As to these receipts all the defendant has to say in explanation is that there must be some mistake and that they must be for the other man's grain as he did not deliver any of plaintiff's grain after June 12. The other man, however, as stated, says that his receipts all had his name on them and defendant's counsel argues that a mistake might have been made by the dealer and that in the duplicate delivered to the other man the defendant may have himself written the other man's name but the defendant himself makes no suggestion of this. The dealer himself was a witness but all he could say was that he wrote on the receipts what he was told to write and that the statements were in accordance with his books—to the best of his belief—and that subsequently he had been ill and some of his papers and books had been mislaid or lost.

The quantity shewn by these statements and the two receipts and what the defendant admits he kept or otherwise sold is 1,719¼ bushels. By the terms of the contract 1 pound per bushel is to be

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deducted for dockage. The defendant admits that he deducted this from the grain he kept but nothing was said about it in respect to the other. This amounts to 23½ bushels on the 1,411¼ bushels sold and reduces the total to 1,695¾ bushels. This quantity is nearer the lower calculation than the higher and the excess might easily be accounted for by the overweight on a high grade of grain.

The general rule is that the burden of proof is on the one who has the particular means of knowledge. In the present case it was left to the defendant to ascertain the quantity of grain and he had or should have had the knowledge which in the circumstances the plaintiff could not have. If this had occurred to the trial Judge I think he would not have dismissed the action because the plaintiff could not satisfy him of the exact amount of any shortage. Having regard to this situation and to the evidence of the quantity of grain at the time of the sale I think the documentary evidence should be accepted as establishing 1,695¾ bushels as the quantity of grain for which the defendant must account. As he was not entitled to the excess over 1,600 bushels under the contract in strictness he should perhaps be chargeable at the market price for the excess rather than at the contract price but the evidence is not such as to enable us to fix that with exactness and no argument was adduced to that feature so I take it that the plaintiff will be satisfied to treat it all as included in the contract.

Accepting the defendant's evidence as establishing the quantity paid for as 1,105 5/6 and 308 bushels he is still accountable for 281 11/12 bushels which at $1.56 per bushel amounts to $439.79.

I would therefore allow the appeal with costs and direct judgment for the plaintiff for $439.79 with costs.

Stuart, J.

STUART, J.:—The exhaustive analysis of the evidence in this case by Harvey, C.J., clearly reveals how much to blame both parties to this action were for their loose methods of dealing with each other. The agreement of April 10 is clear and definite enough but when it came to the execution of it the parties seem to have left open every possible door that might lead to uncertainty and dispute.

The plaintiff agreed to sell to the defendant a certain fixed and definite bin or granary of wheat described in the memorandum as "all the wheat being the property of Otto Doering and now

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lying upon the N.W. ¼ of Sect. 9, Tp. 13, Rge. 3 west 4th meridian, amounting to sixteen hundred (1,600) bush. more or less at and for the price of $1.56 net at the place." Tschritter was to haul the wheat before July to the nearest shipping point and was to be allowed 1 lb. per bush. dockage and Tschritter "shall (so it reads) on the said first day of July pay to the said Otto Doering the sum of $2,495."

Then it says: "It is expressly understood that the said sum shall be due and payable whether the wheat has been sold or hauled prior to the first day of July or not."

Then followed the two clauses as to variation in quantity which to me seem to be very subsidiary. The parties had evidently fixed on 1,600 bush. as almost certainly the quantity of wheat in the bin within a narrow margin of variation. Unless this is so how else can we explain the agreement that the price should at all events be paid on July 1 whether the grain was hauled or not?

When it came to the process of hauling away neither plaintiff nor defendant thought it worth while to take any precaution to prevent disputes. The defendant was left at liberty to tell the elevator man Schaller what he pleased as to the source from which any particular load of wheat came. He was left at liberty to haul any particular load of the wheat to Schaller or not as he pleased. I am not suggesting fraud or theft on his part. But it was to the interest of both that they should each be in a position to check the matter definitely with no chance even of uncertainty leaving the question of possible fraud on one side altogether. Yet neither of them paid any attention to this matter. In these circumstances it is my opinion that when a dispute did arise the obligation lay upon the defendant to prove that there was less than the 1,600 bushels originally fixed and upon the plaintiff to prove that there was more.

It may be said that the plaintiff was himself to blame in trusting so completely to the defendant's word and honesty and to the accuracy of Schaller's apparently slipshod records. No doubt he was. But the defendant was equally to blame in allowing so much to depend upon himself. Indeed, I can only explain their course of action on the assumption that they were confident that the amount named in the memorandum was approximately correct and that the variation would be slight.

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As to the supposed settlement the plaintiff says he was dissatisfied with the result and that he did express some doubt of its correctness. Naturally, having by his own neglect allowed himself to be entirely at other people's mercy and being conscious that he was and that he had no evidence or proof to contradict them it was at the moment useless for him to protest or dispute. But I do not think there was anything to estop him from raising the question afterwards if he found he had secured any evidence. No doubt the defendant was tacitly left by the plaintiff in a position of trust which position he tacitly assumed. He was in a position to know the exact facts and as Harvey, C.J., points out this of itself is a good reason for throwing the burden of proof upon him instead of upon the plaintiff as the trial Judge assumed that it was. But if the defendant failed, as I think he quite evidently did, to prove that he had paid for all the grain he had got it does not I think quite follow that the Court ought to endeavor to make out from extremely meagre and doubtful evidence just exactly how much grain there was and to give the plaintiff the benefit to the full extent of the best conclusion that can be drawn from it when the result is to go considerably above 1,600 bushels. The defendant should not be treated as a defaulting trustee and charged with the most conceivably possible. The plaintiff was nearly if not quite as much to blame as the defendant for the uncertainty. Nothing that the defendant could have done short of insisting that the plaintiff keep control of the wheat and accompany him in his deliveries could have removed completely the possibility of dispute or suspicion. And the plaintiff himself could have insisted on this if he wished. For anything over 1,600 bushels I think the burden of proof was upon the plaintiff. I would therefore let the estimate made by the parties when drawing up their agreement stand and make the defendant pay for 1,600 bushels but no more. This amounted to $2,496 at the price fixed. The defendant paid $2,200 and I would therefore give judgment for the plaintiff for $296 and costs, allowing the appeal also with costs. Rule 27 should not be interfered with.

Beck, J.

Ives, J.

BECK and IVES, JJ., concur with Stuart, J.

Appeal allowed.

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CRAIG & Co. v. GILLESPIE.

Ontario Supreme Court, Middleton, J. May 28, 1920.

CHATTEL MORTGAGE (§ II A — 7) — VALIDITY — SECRETARY-TREASURER — AFFIDAVIT OF BONA FIDES—IRREGULARITY—BILLS OF SALE AND CHATTEL MORTGAGE ACT, R.S.O. 1914, CH. 135, SEC. 12, SUB-SEC. 3.

A chattel mortgage is void as against creditors, where the affidavit of *bona fides*, made by the secretary-treasurer of the mortgagee company does not comply with the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, sec. 12, sub-sec. 3, by stating that the deponent is aware of all the circumstances connected with the mortgage or conveyance and has personal knowledge of the facts deposed to; sub-sec. 3 is general in its terms and refers to all officers or agents of a corporation.

[*Bank of Toronto* v. *McDougall* (1865), 15 U.C.C.P. 475; *Freehold Loan and Savings Co.* v. *Bank of Commerce* (1879), 44 U.C.R. 284; *Universal Skirt Mfg. Co.* v. *Gormley* (1908), 17 O.L.R. 114, considered.]

Statement

THE plaintiff, an incorporated company, a creditor of Tripp & Steenburgh, a trading partnership, obtained from that firm a chattel mortgage upon their stock of goods and an assignment of book-debts.

More than 60 days after this, the firm made an assignment to the defendant for the general benefit of their creditors.

The plaintiff company brought this action to establish its right to priority over the assignment to the defendant.

F. King, for plaintiff; *A. B. Cunningham*, for defendant.

Middleton, J.

MIDDLETON, J.:—Action by a chattel mortgagee and assignee of book-debts to establish its right to priority over the assignment for the benefit of creditors under which the defendant claims. The goods and debts were sold by arrangement, and the proceeds await the determination of this action.

There was no assignment and no attack within the 60 days: so there is no statutory presumption of invalidity.*

On the facts, I find there was insolvency to the knowledge of both debtors and creditor, and there was an intention to give and to obtain an unjust preference.

There was pressure—and there was no agreement to give credit or supply future goods save for cash.

The debtors, two young men without capital, bought the business in 1917. In 1919 they had paid the vendor, but owed, according to a statement made at the time of the transaction in question, nearly $5,000: Craig, $2,138; Power, $1,100; the milling firm, $400; and the balance among small creditors. They had as

*See the Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 5, sub-secs. 3 and 4.

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assets: stock, $855; book-accounts, $1,600; fixtures, $2,600. The stock was small but good—as the business consisted in peddling groceries and flour among the farmers, who paid in cash or kind, butter and eggs. Under fixtures came two horses and waggons, as well as general equipment. Taken at face, this left a surplus of a few dollars, but the fixtures were sold for $1,300, a good price; and the book-debts, under the careful handling of the debtors and energetic treatment of Mr. E. M. Young, a solicitor in whose hands they were placed for collection, yielded $300 only in four months, and the balance remaining and all new debts in these four months were sold for $600. No sane or experienced merchant would have thought a condition of solvency existed at that time. The past due debts were too large. A business might have been built up, and solvency might in time have been created, had the debtors possessed business capacity and had the creditors as a whole co-operated—but insolvency clearly existed at the time.

Before the mortgage was registered, Power came upon the scene and found out what was being done. He threatened an immediate attack, but the plaintiff company's representative promised to divide with him. The company's claim was twice Power's, and Power was to receive $1 out of every $3 which the company collected.

Martin, the agent of the milling firm, also turned up, and he was got rid of by the statement that the unusual activity in the office was the installation of a system for looking after the accounts, and not an indication of trouble.

When the assignment took place, it was found that the debts were $1,000 greater than stated by the debtors, who had not proper books and depended on memory as to the amount owed.

There was also a mortgage made by Tripp, on his share of the business, for $800—the proceeds of which went to pay off the original owner—which was ignored or overlooked in the estimate of solvency.

As I understand the cases, the doctrine of pressure covers all this and defeats the right of the assignee and attacking creditors. Apart from cases, I should have taken the view that the parties intended the natural consequences of their acts. The creditor goes to a weak debtor and demands security, and this Micawber signs what is put before him, and, with a sigh of relief, thinks he has

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escaped his "temporary embarrassment of a pecuniary nature," and hopes "something will turn up," but he knows he has given the preference asked; and, if he is versed in commercial law and morals, he knows that, as soon as the 60 days mentioned in the statute have gone by, he has little to hope for; for, if he read the document signed, he must have realised the utter impossibility of making the payments falling due on his mortgage and keeping his other creditors at bay. But pressure is said to remove all idea of an attempt to obtain an unjust preference. An index to the situation is found in the fact that the plaintiff company supplied the debtors with $150 worth of goods only when $100 had been placed in Mr. Young's hands to pay for them.

But the attack upon the security is also based upon another ground. The mortgage is said to be void for failure to comply with the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, as the affidavit of *bona fides* is made by Mr. Craig, the secretary-treasurer of the plaintiff company, and he has not made the statement required by sec. 12, sub-sec. 3, "that the deponent is aware of all the circumstances connected with the mortgage or conveyance and has personal knowledge of the facts deposed to."

Reading the statute apart from cases, no one could doubt that this statement is essential.

Sub-section 1 enables the affidavit to be made by an agent of the mortgagee "if aware of all the circumstances and properly authorised in writing."

Sub-section 2 provides that, where the mortgage is to a corporation, the affidavit may be made "by the president, vice-president, manager, assistant-manager, secretary or treasurer, or by any other officer or agent thereof authorised to do so by resolution of the directors."

Sub-section 3 provides that, where the affidavit is made by the agent of the mortgagee, "or by an officer or agent of a corporation," it shall state that he is aware of the circumstances and has personal knowledge of the facts deposed to.

In other words, when the mortgage is to an individual it is presumed that he knows the facts and can swear to the intention, but when some one other than the mortgagee undertakes to swear to the intention he must also state that he has personal knowledge of the circumstances and the facts deposed to.

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In *Bank of Toronto* v. *McDougall* (1865), 15 U.C.C.P. 475, the mortgage was made to a corporation, and the affidavit was made by its president. There was then no such section as that quoted. The mortgage was required to be accompanied by an affidavit of the mortgagee or his agent authorised in writing shewing *bona fides*, but no provision was made dealing with the case of a corporation. The holding was that the president was not acting as an agent and so did not need written authority: "He is exercising the corporate powers of the institution in the only way in which they can be exercised at all: he acts directly and in chief, and not by delegation. The metaphysical body never can in fact act; but as it does act in contemplation of law, its function must be performed through the instrumentality of others; but such others are no more agents in the proper acceptation of the term, than the amanuensis who writes the name of another in his presence and at his request" (pp. 482, 483). The affidavit was therefore "considered as the affidavit of the mortgagee, made in the only way the mortgagee could make the affidavit, namely, through its administrative officer" (p. 483).

When, some 15 years later, the Court was asked to apply the doctrine to the case of an affidavit made by a manager of a loan company, in *Freehold Loan and Savings Co.* v. *Bank of Commerce* (1879), 44 U.C.R. 284, the Court was obviously shocked at the audacity of the earlier decision, and declined to extend the doctrine, and distinguished the case upon the ground that a manager stands "in a very different position from its president. The latter is one of the corporation, the chief partner, and in a sense its organ and representative. The manager is an executive officer, not a corporator—a mere agent, with certain specified executive functions."

In *Universal Skirt Manufacturing Co.* v. *Gormley* (1908), 17 O.L.R. 114, the question again arose. The affidavit had been made by the president of the company. The statute had been changed, and the amendment is found in the Statute Law Amendment Act, 1903, 3 Edw. VII. ch. 7, sec. 30. The section reads: "* * * if a mortgage be made to a company the said affidavits may be made by the president, vice-president, manager, assistant manager, secretary, or treasurer of such company, or by any other officer or agent of such company duly authorised by resolution of the directors in that behalf. Any such affidavit made by an officer or agent shall state," etc.

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Mabee, J., the trial Judge, held that the words "made by an officer or agent" indicated that the requirement of the latter part of the section was not intended to apply to all affidavits made by those authorised to depose for a corporation—for them the clause would have read "any such affidavit shall state," etc.

On appeal it was held by the majority of the Court that the law stood as declared by *Bank of Toronto* v. *McDougall*, and the president was not an officer but a principal swearing as and for the corporation, in the only way in which it could make oath by its mouthpiece, and that the statute had not declared "that the president is an officer within the meaning of the section."

The majority also agreed that the trial Judge had correctly construed the section, and that "only such officer or agent as is authorised by resolution of the directors in that behalf requires to make the affidavit with the words that he is aware," etc. (17 O.L.R. at p. 123).

Mr. Justice Riddell dissents and gives very full reasons for his views.

I do not intend to discuss the question of the exact relation between the company and its president. The reasoning is applicable to all directors, and the foundation of the decision in 15 U.C.C.P. is the fac that the president is chosen by the directors from their own number, and the ownership of so much stock is the qualification for directorship. Since 1864, much has been written on the subject of the position of directors and their true relation to the company. *Ferguson* v. *Wilson* (1866), 2 Ch. App. 77, at 89, where Lord Cairns says, "What is the position of directors of a public company? They are merely agents of the company," is the beginning of what Palmer calls "a long series of decisions" establishing this proposition. If the matter is investigated in a Court where the decisions that bind me do not control, the statement made in our decisions may have to be reconsidered.

Nor do I intend to refer to the cases in which it was held that where a party was entitled to certain relief upon filing his affidavit a corporation could not obtain that relief because an affidavit by its president was not a compliance with the requirement.

Nor shall I refer to the long series of cases discussing who is and who is not an officer of a corporation for the purposes of discovery.

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I merely draw attention to the fact that the statute in force in 1864 spoke only of an "agent." The statute of 1903 and the present statute, after enumerating the president, vice-president, manager and assistant manager, secretary and treasurer, speaks of "any other officer or agent." The earlier decisions had found that the president was not an agent and that the manager was an agent. Nowhere is there a holding that the president is not an officer, but in *Universal Skirt Manufacturing Co.* v. *Gormley* the law is discussed as though the introduction of the words "officer or" had not changed the situation. The statute, as recast in 1910 and now found in R.S.O. 1914, ch. 135, sec. 12, cannot be distinguished from the Act of 1903 so far as the case depends upon the theory that the president is not an "agent" or "an officer or agent" of the company.

But, bearing in mind that a manager is an agent according to the cases, sub-sec. 3 cannot now be read as referring only to the "other officer or agent" of the company specially authorised. It required much ingenuity so to construe the Act of 1903, but the words upon which this feat was accomplished are completely changed.

"The affidavit" refers to sub-sec. 1, and means "every affidavit of *bona fides* required by this Act." To attempt to read these words in the present Act as meaning "the affidavit of an agent authorised by the directors," as was done in the *Gormley* case, would make sub-sec. 3 a meaningless jumble.

In the light of the cases, the "manager, assistant manager, secretary, or treasurer" are agents, and the authorised officer or agent is rightly spoken of in sub-sec. 3 as an "other officer or agent."

Sub-section 3 is general in its terms, and, in my view, refers to all officers or agents of the corporation.

In my view, this mortgage is bad for this reason.

In the result, the claim to the proceeds of the book-debts is established. The claim to the proceeds of the goods fails.

I give no costs, as success is divided. I should have given no costs had the plaintiff succeeded, to mark my disapproval of the transaction.

The assignee may have his costs out of the proceeds of the goods.

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MONTREAL v. LA CORPORATION DU COLLEGE STE-MARIE.

P. C. *Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Atkinson and Duff, J. August 5, 1920.*

MUNICIPAL CORPORATIONS (§ II H—270)—RELIGIOUS CORPORATION—AGREEMENT TO PAY FIXED SUM YEARLY FOR TAXES—AGREEMENT EMBODIED IN RESOLUTION.

An arrangement whereby a religious corporation agrees, for a certain period, to pay a fixed sum yearly for taxes, when embodied in a valid resolution of the council, cannot be affected by a subsequent revocation of the resolution without the consent of the corporation and when the agreement has been strictly established it will be enforced.

The Legislature has the right to authorise the municipal corporation to agree to such an arrangement by resolution of the municipal council.

Statement. APPEAL by the City of Montreal from a decision of the Court of King's Bench for the Province of Quebec, appeal side, (1915), 24 Que. K.B. 563, in an action to recover alleged arrears of taxes. Affirmed.

The judgment of the Board was delivered by

Duff, J. DUFF, J.:—The questions in controversy on this appeal concern the legality and effect of a resolution of the municipal council of the Town of Maisonneuve of January 26, 1898, by which the council professed to fix the amount payable annually as taxes for 30 years by the respondents, in respect of certain lands within the municipality, at the sum of $100. The Town of Maisonneuve by its action prayed a declaration that the resolution was void, and claimed the sum of $7,628 alleged to be due as arrears of taxes upon this property. The respondents having confessed judgment for $2,825, admitted to be due in part under the terms of the resolution of 1898, and in part for arrears of school taxes in respect of which they preferred no claim for exemption, the trial Judge, in respect of the residue of the claim, dismissed the plaintiffs' action, and this judgment was unanimously affirmed by the Court of King's Bench (1915), 24 Que. K.B. 563 (*sub-nom. Maisonneuve* v. *La Corporation du Collège Ste-Marie*). Maisonneuve has since the commencement of the action been incorporated in the city of Montreal, and the last-mentioned corporation appeals.

The property in question was acquired by the respondents in 1872 as a country resort for the pupils and professors of the college, which was situated in the heart of Montreal; and although since that time the locality in which the property is situated has lost its rural character, the property has always been used by the

respondents as a place of recreation for its pupils and professors. In 1898, at the time the resolution was passed, the property was in charge of a person described by the respondents as caretaker, who had a lease of it, at an annual rent of $100, under which he was entitled to use for himself and his family part of the residence, the greater part of which was reserved for the accommodation of the teachers and pupils, the lessee being obliged to perform for them the duties of house-keeper and cook. The lessee was entitled to, and did, cultivate the land and retain the produce, but a considerable part of it was reserved as a play-ground for the pupils, who were accustomed to visit it once or twice a week during the college term.

The respondents having disputed their liability to taxation, on the ground that the property was exempt under the provisions of art. 25 of 61 Vict. 1898 (Que.), ch. 57 (the charter of the Town of Maisonneuve), an arrangement was arrived at, and the resolution now impeached was the result of that arrangement.

The validity of the resolution is maintained upon the ground that it embodies an agreement between the corporation and the respondents falling within the operation of 61 Vict. 1898, ch. 57, sec. 26, which is in the following words:—

> The council may, by resolution, when it deems expedient in the interest of the town, enter into any agreement whatsoever with one or more proprietors, either to regulate the manner of valuing his or their real estate, or establish the amount at which the same shall be estimated, or to regulate the mode of taxing real estate, for ordinary or special taxes, or determining the amount at which it shall be taxed for a specified period. It may also, by resolution, determine the delay and manner of collecting all special taxes. The same right is granted to the school commissioners and to the trustees of the dissentient schools for the town of Maisonneuve.

On behalf of the appellants it is contended, first, that this resolution is merely a unilateral declaration, and that the evidence fails to disclose the existence of any agreement obliging the respondents to observe the conditions of it; and, second, that the lands in question being manifestly taxable, the resolution must be regarded as an attempt to grant an exemption in the interests of the respondents exclusively, and not as an exercise of the power vested in the council by the statute, which is a power to do certain things only when such things are deemed by the council to be in the interests of the municipality.

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Their Lordships are not disposed to differ from the view pressed upon them that an agreement in order to receive effect under the statute must be very clearly made out; such an agreement, if effective, establishes a privilege in respect of taxation, and the principle is not only well settled, but rests upon obvious considerations, that those who advance a claim to special treatment in such matters must shew that the privilege invoked has unquestionably been created.

But their Lordships think that in this case the agreement alleged by the respondents has been proved beyond controversy. Evidence was given in cross-examination by the notary, Ecrement, a witness called by the appellants, who was secretary of the town in 1898, when the resolution was passed, in these words:—

THE JUDGE:—Q. For what purpose were these discussions between the parties—to find out if the defendant corporation should pay the taxes? A. Yes. Q. Defendant claimed that it should not pay? A. Yes. Q. And the council claimed that it should pay? A. Yes. Q. There was an agreement which is the resolution? A. Yes.

Mr. St. Jacques, K.C., for defendant:—Q. This difference of opinion has been one of several years standing? A. Yes. Q. From 1896 to 1906, defendant has paid annually, the sum of $100, in conformity with the resolution of January, 1898? A. Yes. Q. And in 1906, after the passing of the resolution annulling that of the year 1898, defendant continued to offer, every year, the sum of $100? A. I do not know if that has been done every year, but some years.

THE JUDGE:—Q. And you refused this offer? A. We have always refused it. Q. Did you refuse the first year defendant offered it to you? A. Yes.

This evidence, which was not contradicted or questioned, seems to establish that the resolution was intended to embody, and did embody, an agreement between the appellants and the respondents, and that it was accepted and acted upon by both parties as evidencing such an agreement for a period of 8 years. In these circumstances there seems to be little ground for dispute that the agreement alleged has been strictly and conclusively established.

It is perhaps unnecessary to add that the respondents' rights under this agreement could not be affected by the subsequent revocation of the resolution in 1906 without their consent.

Coming to the other contention upon which the appellants rely, their Lordships have no doubt that there were solid reasons which might properly satisfy the council that the claim of the

respondents was one which had not a little chance of success in the Courts. The relevant statutory provision, sec. 25 of the charter, 61 Vict. 1898, ch. 57, is in these words:—

> The following property is not liable to taxation:—
>
> . . . . . .
>
> (3) That belonging to *Fabriques* or to religious, charitable or educational institutions or corporations or occupied by such *Fabriques* or corporations, and not owned by them solely for the purpose of deriving a revenue therefrom.

The facts bearing upon the nature of the occupation of the property have already been mentioned. One of the Judges of the Court of King's Bench, Pelletier, J., 24 Que. K.B. 563, drew from those facts the conclusion that the property was exempt from taxation by force of sec. 25, because it was not held "*solely* for the purpose of deriving a revenue therefrom." Their Lordships do not wish to be understood as disagreeing with this view; but they consider it unnecessary to express any opinion upon the point. The fact, nevertheless, that Pelletier, J., has arrived at this conclusion, in itself presents, of course, a formidable objection to maintaining the appeal on the ground that such a view is manifestly untenable; and their Lordships agree with the unanimous opinion of the Judges in Quebec that the liability of the respondents to taxation was at least very doubtful, and that there is nothing in the character of the arrangement made or in the evidence adduced to support a suggestion that the council in entering upon it was not really acting in the interests of the municipality, but abusing its powers by exercising them for an ulterior purpose.

The decision of this Board in *The Seminary of Quebec* v. *Corporation of Limoilu*, [1899] A.C. 288, proceeded upon an entirely different state of facts, the claim for exemption under examination in that case being in respect of property which was in the exclusive occupation of a tenant and was used by the owners for no other purpose than that of extracting a pecuniary profit from it by way of rent, and that decision has consequently no application here.

The appellants also argue that the Legislature cannot be supposed to have intended when enacting sec. 26 of 61 Vict. ch. 57, to endow the council with unlimited discretion as to the duration of any privilege granted under that enactment; and the limitation of 20 years to which exemptions granted in respect of "industrial" enterprises under art. 4559 R.S.Q., 1888, are subject, is

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referred to as something through which it is contended the Courts ought to discover an intention on the part of the Legislature to restrict in like manner the duration of privileges acquired under sec. 26. Art. 4559 is strictly limited in its application to the class of cases thereby designated, which does not include privileges arising under sec. 26; and in truth their Lordships are invited, by this argument, to amend or supplement these enactments rather than to construe them.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs.

Appeal dismissed.

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SHERLOCK v. GRAND TRUNK R. Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Riddell, Sutherland and Masten, JJ. September 23, 1920.

CARRIERS (§ II O—365)—BOARD OF RAILWAY COMMISSIONERS—GENERAL ORDER NO. 151—VALIDITY—EFFECT—LIMITATION OF LIABILITY.

General Order No. 151 of the Board of Railway Commissioners, dated November 8, 1915, declaring *inter alia* that the carrier shall not be liable in respect of or consequent upon loss of or damage or delay to any personal baggage however caused for an amount in excess of $100 . . . . , is *intra vires*, and by sec. 31 of the Railway Act, R.S.C. 1906, ch. 37, has the effect of an Act of Parliament, and the language is wide enough to limit the railway company's liability.

[*Spencer* v. *Canadian Pacific R. Co.* (1913), 13 D.L.R. 836, 29 O.L.R. 122, 16 Can. Ry. Cas. 207, distinguished]

Statement.

APPEAL by plaintiff from the judgment of Rose, J., (1920), 47 O.L.R. 473 in an action to recover the value of the contents of a trunk checked as personal baggage, and lost by the defendant company, the carrier. Affirmed.

The judgment appealed from was as follows

The question is whether the liability of the company is limited to $100 by General Order No. 151 of the Board of Railway Commissioners, dated the 8th November, 1915.

The Order was duly published in the Canada Gazette on the 28th January and the 5th and 12th February, 1916. Therefore, by sec. 31 of the Railway Act, R. S. C. 1906, ch. 37, if there was power to make it, it has, while it remains in force, the like effect as if enacted in the Act itself.

The Order is intituled "In the matter of Interim Order No. 195, dated October 17, 1904, authorising the use of forms of bills of lading and other traffic forms until the Board should otherwise

order and determine; and the consideration of the matter of the proposed regulation governing baggage car traffic in Canada." It prescribes certain regulations for the observance of every railway company within the legislative authority of the Parliament of Canada, other than Government Railways. Of those regulations, the only ones that need here be referred to are Rule 1(*a*), which defines "personal baggage," and Rule 3(*b*), which declares that the carrier shall not be liable in respect of or consequent upon loss of or damage or delay to any personal baggage, howsoever caused, for an amount in excess of $100 for any such baggage belonging to and checked for an adult passenger, which amount shall be deemed to be the value of such baggage, whether charged for as excess size or excess weight baggage or carried as free allowance, unless greater values are declared and extra charges paid at the time of checking, in accordance with the carrier's current tariff.

Apparently there was delivered to the passenger a check in form similar to the form which was in question in the case of *Spencer* v. *Canadian Pacific R.W. Co.* (1913), 13 D.L.R. 836, 29 O.L.R. 122, 16 Can. Ry. Cas. 207; but, as in the *Spencer* case, no evidence was tendered to shew that the passenger's attention was drawn to the conditions printed on the back of the check, and no attempt was made to shew that there was really a contract between the plaintiff and the company by which the plaintiff agreed to be bound by the printed conditions.

If, therefore, the case depended upon the condition printed on the check, the holding must be as in the *Spencer* case, that there was no limitation of the company's common law liability; but I do not think that it does depend upon that condition. I think the matter is governed by the order of the Board to which I have referred.

The order is entirely different from the order which was in force at the time when the *Spencer* case was decided. That order was Interim Order No. 195, of the 17th October, 1904, referred to in General Order No. 151. It was an order made upon the application of the Grand Trunk, the Canadian Pacific, and the Canadian Northern Railway Companies, and the Pere Marquette Railroad Company, for approval by the Board of certain forms, in compliance with sec. 275, sub-secs. 1 and 2, of the Railway

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Act of 1903, then in force, which correspond with sec. 340 of the Act of 1906, R.S.C. ch. 37, which was in force at the time of the making of General Order No. 151.

What the Interim Order No. 195 did was: (1) to authorise the applicants to use the forms submitted until the Board should otherwise order; (2) to require the formation of a committee to meet the Board for the discussion of the forms and contracts. It did not profess to limit in any way the liability of the carrier; indeed it contained a recital that the whole subject was of very great importance, and would require much circumspection to be exercised in examining into the contracts which the Board might thereafter have to approve, and also into the question of limitation of liability on the part of carriers. So far as I can learn, this question of the limitation of liability was not dealt with until General Order No. 151 was made in November, 1915.

I take it that the check which was in question in the *Spencer* case was one of the traffic forms authorised by the Interim Order No. 195, that is to say, that the Board had authorised the company to make a contract to the effect stated in the condition printed on the back of the check. One person, however, cannot make a contract; and, the company failing to shew that Mrs. Spencer had agreed to be bound by the conditions, the order of the Board availed them nothing. This case, however, is different. The company, while pleading that the check was delivered, does not base its case upon the condition, but upon the General Order, and that General Order appears to me to be a complete defence.

It was suggested by Mr. Crerar that the Board had no power to limit the liability of the company, or to do more than authorise the company to enter into a contract limiting its liability. That, however, seems to me to be a misconception of the power of the Board. It seems to me that there is ample power, either under sec. 340 (3), which authorises the Board by regulation to prescribe the terms and conditions under which any traffic may be carried by the company, or under sec. 30, which authorises it to make orders and regulations (*h*) with respect to any matter, act or thing which by the Railway Act or the special Act is sanctioned, required to be done, or prohibited, and (*i*) generally for carrying the Act into effect.

Mr. Crerar also suggests that the Order does not profess to limit the liability of the company in the particular case. He says that the limitation is only in respect of personal baggage as defined by Rule 1, and that some or perhaps most of the articles contained in the trunk in question might not fall within the definition, for the reason that they were not articles "necessary and appropriate for the wear, use, comfort and convenience of the passenger for the purpose of the journey."

This argument seems to me to defeat itself. The company must, according to its powers, furnish accommodation for carrying and must carry all traffic offered for carriage upon the railway, and, by sec. 283, must affix a check to every parcel of baggage carried; but, while it must carry all traffic offered, there is no obligation upon it to carry it free, except in the case of personal baggage, and possibly in some other cases which are beside the present discussion. The trunk in question in this case was delivered to the company and was accepted as containing personal baggage, and there was no suggestion of payment for its carriage. If, then, the articles were not personal baggage, no obligation on the part of the company ever arose. See cases collected in Jacobs's Railway Law of Canada, p. 439.

The articles which it was suggested might not be personal baggage were not particularly described at the trial, and it is impossible to say with certainty whether they do or do not fall within the definition contained in General Order 151; but, speaking generally, it seems to me that the definition contained in that Order is quite as wide as any definition which would be framed as a result of an attempt to codify the law as established by the decisions, and I therefore think that the plaintiff is in the dilemma stated: either the articles were personal baggage, as defined by the Order, and the company's liability is limited by the Order, or they were not personal baggage and the company was under no liability at all.

The company admits liability for $100, and there will be judgment accordingly. It is pleaded that the amount was paid into Court, but that fact was not proved in any way, at the trial. I assume, however, that the money was paid into Court. Upon that assumption, the plaintiff will have the costs down to the time

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of payment in, and the defendant will have the costs of all subsequent proceedings; the costs to which the plaintiff is entitled being set off against those to which the defendant is entitled, and the money in Court being applied, first, in payment of any balance which there may be in the defendant's favour, and the remainder being paid out to the plaintiff.

T. H. Crerar, for appellant, argued that the power of the Railway Board to limit the common law liability of the carrier is defined by sec. 340 of the Railway Act, by which the Board can authorise the carrier to limit its liability but only by contract. No contract was made with or notice given to the plaintiff of such limitation. Counsel referred to *Spencer* v. *Canadian Pacific R.W. Co.* (1913), 13 D.L.R. 836, 29 O.L.R. 122, 16 Can. Ry. Cas. 207, and said that the present order of the Board was no stronger than the interim order upon which the *Spencer* case was decided. The word "traffic" in sec. 430 of the Railway Act would include passengers, and surely the railway company could not limit its liability for the death of a passenger to $100.

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

The judgment of the Court was delivered by

Mulock, C.J.Ex.

MULOCK, C.J. Ex.:—From what has been said during the argument, it will not be necessary to give extended reasons for judgment.

The order of the Railway Board is, we think, *intra vires*, and, by sec. 31 of the Railway Act, R.S.C. 1906, ch. 37, has the effect of an Act of Parliament. The language is wide enough to limit the railway company's liability.

Appeal dismissed.

NELSON v. ANGELL.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 11, 1920.

COURTS (§ II A—175)—CRIMINAL LAW—APPEAL—REGULARITY OF PROCEEDINGS ON SUMMARY CONVICTION—JURISDICTION OF COURT APPEALED TO.

The Court to which an appeal is made, in the case of a summary conviction, a question having arisen as to the regularity of the proceedings, is the absolute judge of the law and facts, and the Court *en banc* has no authority to advise in such matters.

[*Mischowsky* v. *Hughes* (1909), 2 S.L.R. 219, followed.]

CASE STATED by a District Court Judge for the opinion of the Saskatchewan Court of Appeal as to whether secondary evidence of the contents of a lost information and complaint may be introduced on an appeal from a summary conviction under the provisions of Part XV. of the Criminal Code. Statement.

Appellant not represented by counsel.

L. McK. Robinson, for respondent.

HAULTAIN, C.J.S.:—This matter came before the District Court Judge of the Judicial District of Humboldt, by way of appeal from an order made by a Justice of the Peace dismissing a complaint of the appellant against the respondent under sec. 3 of the Prairie and Forest Fires Act, 7 Geo. V. 1917 (Sask.) ch. 21. Haultain, C.J.S.

When the appeal came on for hearing, it was found that the original information and complaint was either lost or mislaid in the office of the clerk of the District Court at Humboldt, and the appellant asked to be allowed to give secondary evidence of the document.

The District Court Judge, having doubts on the matter, has stated the following question for the opinion of the Court:—

> Can secondary evidence of the contents of a lost information and complaint be introduced on an appeal from a summary conviction under the provisions of Part XV. of the Criminal Code of Canada?

The proceedings before the magistrate and the appeal were brought under the provisions of Part XV. of the Cr. Code. Section 752 enacts that,

> When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law in respect to such conviction or order.

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In view of these provisions, and in the absence of any provision authorising a case to be stated in appeals from summary convictions and orders, the Court *en banc* in the case of *Mischowsky* v. *Hughes* (1909), 2 S.L.R. 219, decided that there was no authority to warrant a similar reference and no jurisdiction in the Court to entertain it.

For the same reason, and on the authority of that case, we must decline to deal with this matter.

Newlands, J.A.
Lamont, J.A.
Elwood, J.A.

NEWLANDS and LAMONT, JJ.A., concur with ELWOOD, J.A.

ELWOOD, J.A.:—This matter comes before us in the form of a case stated by the Judge of the Judicial District of Humboldt. Briefly, the case stated is as follows: An appeal was taken to the said District Court from an order of a Justice of the Peace dismissing a complaint of the appellant against the respondent. The notice of appeal states that the complaint is:

> For that the said William Angell of Rose Valley, P.O., on the 20th day of May 1919, at or near the N.E. ¼ of Sec. 12-38-14-W2nd in the Province of Saskatchewan did kindle and leave a fire burning without taking effectual means to prevent its spreading on prairie, not his own property, contrary to sub-section b of sec. 3 of the Prairie and Forest Fires Act, 7 Geo. V. 1917, ch. 21, of the Province of Saskatchewan.

The appeal came on for hearing at the sittings of the District Court held at the town of Wadena on June 1, 1920. The records of the clerk of the Court shew that the original information and complaint together with other documents were transmitted to and were received by the clerk of the Court of Humboldt. The original information and complaint was not transmitted by the clerk of the Court to the process issuer at Wadena. Counsel for the appellant, by affidavit, satisfied the District Court Judge that the original information and complaint was either lost or mislaid in the office of the clerk of the Court at Humboldt, and requested leave to give secondary evidence of the contents of the originla information and complaint. The District Court Judge seemed doubtful as to the admissibility of secondary evidence of this information and complaint, and therefore stated the following question for the opinion of the Court:

> Can secondary evidence of the contents of a lost information and Complaint be introduced on an appeal from a summary conviction under the provisions of Part XV. of the Criminal Code of Canada?

In *Mischowsky* v. *Hughes*, 2 S.L.R. 219, it appears that an appeal from a conviction by two Justices of the Peace had been

taken to the District Court, and, a question having arisen as to the regularity of the proceedings, the District Court Judge referred such question to the Court *en banc*. It was held that in such matters the Court appealed to—in that case the District Court—is the absolute judge of facts and law, and the Court *en banc* had no authority to advise in the matters. That case seems to me to be direct authority against the right of the District Court Judge to refer the matter in question herein for the opinion of this Court. In my opinion, therefore, this Court should decline to deal with the matter. *Judgment accordingly.*

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ALTA.
S. C.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. October 12, 1920.

SALE (§ II C—37)—EXCHANGE OF ANIMALS—UNSATISFACTORY TO ONE PARTY —BREACH OF WARRANTY—DAMAGES.

In the case of a breach of warranty, the damage is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

APPEAL from a District Court Judge in favour of the defendant in an action to recover the amount due on an exchange of bulls and counterclaim for damages for breach of warranty. Reversed. Statement.

W. J. Loggie, for appellant; *Frank Ford*, K.C., for respondent.

The judgment of the Court was delivered by:

HARVEY, C.J.:—On June 12, 1919, the plaintiff and defendant made an exchange of bulls on a basis of valuation of $150 for the defendant's bull and $180 for the plaintiff's. This left a balance of $30 due from the defendant. This was not paid and the action was brought to recover it. The defendant counterclaims for damages for breach of warranty claiming as damages $150 the amount paid as the value of the defendant's bull and $132.50 for care and keep of the plaintiff's bull from June 12, to March 3, 1920, when the counterclaim was delivered and $50 for general damages. Harvey, C.J.

The trial was on May 13.

At the close of the evidence the trial Judge asked if, in the event of his giving judgment for the defendant, he should assess the damages up to the date of the trial to avoid another action. This was agreed to and he gave judgment for the $150 and $132.50

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claimed to which he added $35.50 for keep up to the date of judgment. He deducted $30 from this, apparently overlooking the fact that this $30 had not been paid and he had not given the plaintiff judgment for it.

The warranties alleged to have been broken were that the bull was sound in every respect and that he was a sure breeder. The trial Judge had doubts about the first warranty having been given without qualification and he disregarded it but he found that the other had and that there was a breach of it. The evidence shewed that within a week after the sale the defendant discovered a lump on the bull's jaw which he thought indicated "lump jaw" or actinomycosis. He notified the plaintiff and went to a veterinary surgeon and got a prescription. The plaintiff came to see the bull but refused to consider that it had lump jaw. The matter was not pressed then and the defendant continued to use the bull for breeding purposes until about September when he concluded that he was not proving satisfactory and he then got another bull. The plaintiff was pressed for the $30 which the defendant said he should not be asked to pay because the animal was diseased and not a sure breeder. He admits that if the plaintiff had not pressed him for the $30 he would have made no claim for damages. No veterinary surgeon was called to see the bull until March 17. He gave evidence at the trial and stated that the disease existed and had existed probably for more than a year before his visit. The defendant stated that at the time of the trial the bull was in good condition except for some sores on the jaw from which pus was discharging.

I do not see any possibility of interfering with the trial Judge's finding of the warranty and of its breach, and of the consequent right of the defendant to damages. Counsel for plaintiff seemed to have misconceived the ground of the judgment for he argued that there being only a qualified warranty knowledge on the part of the plaintiff must be shewn.

The fact is, however, as I have already stated, that the judgment was rested not on the qualified warranty of soundness, but on the unqualified one of breeding qualities.

The only question to consider, therefore, is the measure of damages.

Although the trial Judge calls the amount damages he seems to assess it as if he were rescinding the contract and he says that the defendant had the right either to return the animal or claim damages. In this I think he is in error. The claim and the evidence do not make out a case entitling the purchaser to rescind and return the thing purchased but only to damages. Certainly that is all that is claimed.

Section 51 of the Sale of Goods Ordinance, C.O.N.W.T. ch. 39, provides that *primâ facie* the damage is "the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty." Inasmuch as the warranty broken was as to breeding qualities the condition of disease as affecting the value might require consideration but for the provisions of another statute which in my opinion renders the case fairly easy of settlement. The disease from which this animal was suffering is an "infectious or contagious disease" within the meaning of the Animal Contagious Diseases Act, R.S.C. 1906, ch. 75. Under that Act (sec. 3), it was the duty of the defendant as soon as he learned of the diseased condition to report to the Minister and to the nearest veterinary inspector. The inspector would inspect the animal with all practicable speed and perform the duties imposed on him by regulations. The Act forbids the selling or turning out with other cattle of any diseased animal and authorises the Minister to order the slaughtering of such animals, and provides for payment of compensation at two-thirds the value of the animal slaughtered.

The loss, therefore, which the defendant would have suffered if he had proceeded in accordance with the law would have been the cost incurred in keeping this bull until it was slaughtered and the difference between the compensation and the amount he had paid less any value received. He states in his evidence that the cost of keep for the first 4 months was 25c. a day. In my opinion 60 days should have been quite ample time to have action taken under the Act, perhaps twice as long as would have been necessary, but it is not very important for in my opinion the value the defendant derived from the use of the bull, for he says he had 3 calves from it, would compensate for its keep.

Though under the Act the value is to be determined by the Minister there is no reason to conclude that it would be less than

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the parties have agreed it was, viz., $180. The compensation therefore would be $120 or $30 less than the amount paid by the defendant which $30 would, in my view, represent his damage.

I would, therefore, allow the appeal with costs and direct that the defendant's judgment for damages be reduced to $30 and costs. *Appeal allowed.*

ONT.
S. C.

HURST v. MURRAY.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, JJ.A., Masten, J., and Ferguson, J.A. June 25, 1920.

NEW TRIAL (§ II—8)—ACTION UNDER FATAL ACCIDENTS ACT, R.S.O. 1914, CH. 51—ERROR ON PART OF TRIAL JUDGE IN INSTRUCTING JURY—SUBSTANTIAL WRONG.

In an action brought under the Fatal Accidents Act, R.S.O. 1914, ch. 51, the trial Judge submitted the following question, *inter alia*, to the jury, "Was the death the natural or ordinary consequence of the injuries he sustained at the accident?" and instructed the jury that they must answer the question "Yes" or "No." The Court held that the trial Judge was in error in so instructing the jury and that on that ground a new trial should be granted; also that the question should not have introduced the words "natural and ordinary" which were not found in the Act.

[*Dunham* v. *Clare*, [1902] 2 K.B. 292; *Reed* v. *Ellis* (1916), 32 D.L.R. 592, 38 O.L.R. 123, referred to.]

Statement.

THE following statement of the facts is taken from the judgment of MACLAREN, J.A.:—

This is an appeal by the plaintiff from a judgment of His Honour Judge Vance, in the County Court of the County of York, on the 23rd March, 1920, upon the answers of the jury to questions submitted to them.

The action was brought under the Fatal Accidents Act, R.S.O. 1914, ch. 151, by the father of a young man who, it was alleged, was injured in Queen street, Toronto, on the 16th February, 1919, by a motor-car negligently and recklessly driven by the defendant; and it was alleged that the injury subsequently caused his death. He was taken to St. Michael's Hospital and there found to have had his leg broken and also internal injuries. Three days later, symptoms of diphtheria appeared, and he was removed to the Isolation Hospital, where he died on the 21st February. The attending physician in his certificate gave as the cause of death "diphtheria and traumatism;" the latter word having reference to the broken leg and other injuries received in the collision.

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The medical witnesses did not agree as to the extent to which each of these causes may have contributed to his death.

The trial Judge submitted the following questions to the jury:—

Q. 1. Was the accident caused by the negligence of the defendant?

Q. 2. If so, in what did such negligence consist?

Q. 3. Was the deceased guilty of any negligence which contributed to the accident?

Q. 4. If so, what did such negligence consist of?

Q. 5. Was the death the natural or ordinary consequence of the injuries he sustained at the accident?

Q. 6. Damages?

After consultation, the jury returned and informed the Judge that they had agreed upon the following answers:—

Q. 1. A. Yes.

Q. 2. A. Excessive speed down grade, and slippery pavement.

Q. 3. A. No.

Q. 4. Not answered.

Q. 5. The foreman: "We could not answer that, your Honour. We could not come to a decision."

Judge Vance: "I must ask you to go back and come to a decision on that."

The foreman: "Do we have to answer it yes or no?"

Judge Vance: "Yes."

After the jury had retired, counsel for the plaintiff contended that his Honour had wrongly instructed the jury, and that it was sufficient to entitle the plaintiff to succeed if the jury found that the death was in part the result of the accident. After some discussion, his Honour decided not to alter his direction to the jury.

The jury returned and informed the Judge that they had agreed to answer "No" to question 5, and had assessed the damages at $800.

The learned Judge thereupon dismissed the plaintiff's action.

A. R. Hassard, for appellant; *W. Zimmerman*, for respondent.

MACLAREN, J.A.:—No authority was cited to us by the counsel for the respondent for the ruling by His Honour that question 5 must be answered either "yes" or "no," and I am not aware of any such authority; and, on that ground, I am of opinion that the appeal should be allowed and a new trial ordered. Maclaren, J.A.

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As to the form of question 5 itself, it may be noted that it has not adopted the language of the Act under which the action is brought, R.S.O. 1914, ch. 151, called "The Fatal Accidents Act," and formerly known as "Lord Campbell's Act."

Section 3 reads as follows:—

"Where the death of a person has been caused by such wrongful act, neglect or default, as, if death had not ensued, would have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages," etc.

Section 4 provides that the action shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused.

The first four of the questions put in this case are similar to those usually put in these fatal accident cases. As to the fifth, it is to be observed that it does not adopt the language of the Act, but introduces the words "natural or ordinary," which are not found in the Act. The form of question usually asked is, "Was the death the result of such negligence as you have found?" or "Was the death caused by such negligence?" The trial Judge can give such directions or explanations as he may find necessary in the particular case.

The judgment in the case of *Dunham* v. *Clare*, [1902] 2 K.B. 292, a unanimous judgment of the English Court of Appeal, is a very high authority on the point. Collins, M.R., says, at p. 296:—

"Did the death or incapacity in fact result from the injury? The County Court Judge, by inquiring whether death was the natural or probable consequence of the injury, has applied the wrong standard to the solution of the question. It is quite consistent to say that death resulted from the injury and yet that it was neither the natural nor the probable consequence of it."

Mathew, L.J., says, at p. 297:—

"The County Court Judge misdirected himself in laying down the wrong test, because death may have been the result of the injury though it was not the natural or probable consequence thereof."

Cozens-Hardy, L.J., says, at p. 297:—

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"The question is, From what in fact has death resulted? The answer to that question does not depend upon what was at first thought to be reasonable and probable. If death has resulted in fact from the injury, the applicant is entitled to succeed."

See also the remarks of Meredith, C.J.C.P., in (1916), *Reed* v. *Ellis*, 32 D.L.R. 592, at p. 599, 38 O.L.R. 123, where he criticises the use of the words "reasonable and probable consequence of any negligence on the part of the defendants" in a question submitted to a jury.

Maclaren, J.A.

In my opinion, there should be a new trial, the costs of the former trial and of this appeal to abide the result.

Magee, J.A.

Ferguson, J.A.

MAGEE and FERGUSON, JJ.A., agreed with MACLAREN, J.A.

Masten, J.

MASTEN, J.:—The majority of the Court being of the opinion that a new trial should be had, I refrain from discussing the question as to whether there was any evidence that the death of George Hurst was occasioned by the impact on his person of the defendant's motor-car. It should, however, I think, be made entirely plain that nothing in the judgment of this Court prejudices or affects the right of the defendant to a nonsuit in case the plaintiff fails to give any evidence from which a jury would be entitled to find that George Hurst's death resulted from the accident complained of.

New trial ordered.

CAN.

S. C.

BAINTON v. JOHN HALLAM Ltd.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. April 6, 1920.

DAMAGES (§ III A—80)—SALE OF GOODS BY SAMPLE—INFERIORITY OF GOODS DELIVERED—BREACH OF WARRANTY—MEASURE OF DAMAGES.

A sale having been made according to sample, and the goods delivered being of an inferior quality to that sample, the measure of damages recoverable by the purchaser is the difference between the market value of the goods of the quality warranted and contracted for and that of the quality actually delivered.

[*Rodocanachi* v. *Milburn* (1886), 18 Q.B.D. 67; *Williams* v. *Agius Ltd.*, [1914] A.C. 510, referred to.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1919), 48 D.L.R. 120, 45 O.L.R. 483, affirming the judgment at the trial in an action to recover damages for the delivery of goods of inferior quality to that sold to them by sample. Affirmed.

McCarthy, K.C., and *Dancey*, for the appellants.

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BAINTON v. JOHN HALLAM LTD.

Davies, C.J.

DAVIES, C.J.:—The appellants contended that the respondents having accepted the goods were not entitled to recover damages, but Middleton, J., and the Appellate Division, 48 D.L.R. 120, 45 O.L.R. 483, both held that while the acceptance of delivery of the wool which was packed in sewn up bags passed the property in the goods delivered to the plaintiffs it did not relieve the defendants from liability for damages for delivery of goods of an inferior quality to that of the sample by which they were sold, and assessed the plaintiff's damages at the sum of $7,500, being the difference between the quality of the goods warranted and sold by the sample and that actually delivered.

These questions of fact of the quality of the wool sold and that actually delivered were found in plaintiff's favour by the trial Judge and these findings were confirmed by the Appellate Division from whose judgment this appeal has been taken. That Court also maintained the assessment of damages of the trial Judge as having been made under the proper rule applicable in such cases as this.

As to the findings of fact made by both Courts, this Court will not interfere except of course in cases of clear error, and certainly this case is not one of that class.

As to the main question, that of the rule or measure of damages which should be applied in cases such as the one before us I think the Courts below have acted correctly. The rule, as I understand it, is that the measure of such damages in cases of the delivery of goods of an inferior quality to that warranted is the difference between the market value of the goods of the quality warranted and contracted to be delivered, and that of the quality actually delivered. Mayne on Damages, 8th ed., at 228; *Rodocanachi* v. *Milburn Bros.* (1886), 18 Q.B.D. 67; *Williams Bros.* v. *Agius, Ltd.*, [1914] A.C. 510.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J. (dissenting):—This appeal from the Appellate Division of the Supreme Court of Ontario, 48 D.L.R. 120, 45 O.L.R. 483, arises out of a sale by the appellants, carrying on business at Blyth, in the Province of Ontario, to respondents carrying on business at Toronto, of a quantity of grey shoddy wool, claimed by the latter to have been bought by sample.

A sample undoubtedly had been submitted by appellants shipping it to the respondent, and communications passed over the telephone, and by letter, in relation to latter buying about 50,000 pounds thereof at 40 cents a pound. The respondent agreed to take about that quantity, at said price, and asked appellant by letter to arrange for three cars on which to load it.

Respondent by letter said, amongst other things, that, upon that being done, "the writer will go up and have the wool weighed."

There was nothing said therein or otherwise relative to inspection.

A letter written by appellants same or next day to the respondent used the expression "you to come as usual to take over stock."

This letter never was received by the respondent and hence is of no consequence other than shewing a different point of view had been taken by each party, as to the question of inspection.

The appellant alleges in argument that by reason of a former misunderstanding and adjustment thereof there had grown up a well understood course of dealing between them by which the respondent was to make such inspection at the point of shipment, as it saw fit, of any goods sold to it by them, and default that, could not be heard to complain.

Certainly the adoption of such a rule and its observance would have been a most satisfactory and businesslike method. But it was not pleaded as a matter of fact in such express terms as now urged.

The pleading alleged that the goods were "sold to the plaintiff by the defendants subject to the examinations inspection and approval of the plaintiff's messenger," etc., at Blyth.

In the particular bargain made herein there was no allusion made to such terms.

And when counsel for appellant at the trial approached the subject he failed to press upon the attention of the trial Judge, who ruled out a question as to reasons, all that is now urged upon us as set forth above, and, I understand, was urged below.

I cannot say that under such a pleading and such circumstances the trial Judge erred in his ruling.

Hence we must rely upon the actual facts proven which disclose that the business as transacted at Blyth consisted only of a weighing and loading of the goods then on the cars.

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BAINTON v. JOHN HALLAM LTD.

Idington, J.

There really was no actual inspection such as any one would have expected to find if the bargain had been made as pleaded or in accord with an alleged established course of dealing.

Then also it became known to appellants that the shipment was to be made to Carleton Place instead of to Toronto.

Why did they not then suggest inspection by way of an adherence to the alleged course of dealing?

On the other hand, it may well be asked, why the manager of respondent was sent to Blyth for the mere minor, menial or clerical purpose of weighing, or checking weight of goods.

I cannot help suspecting that it was the confidence reposed in appellants which induced the manager to have thus appeared to waive inspection.

It became the duty of appellants, or at least the part of prudence, on the alleged basis of dealing, to have seen that it was observed and that no cause of complaint could be possible. Instead of that course being pursued, they passed in silence, an obvious non-observance of the alleged course of dealing.

I am unable to say that as matter of law, under all the foregoing circumstances, that the respondent was not entitled to rely upon the implied warranty the Courts below have proceeded upon.

I am unable, however, to agree, after reading all the evidence adduced in support of the respondent's claim with the assessment of damages adopted by the trial Judge and upheld by the majority of the Appellate Division.

Whether we adopt the rule for assessing damages as laid down in Benjamin on Sales as to the difference in value between the article as delivered and the article as warranted, or that in the English Sale of Goods Act, 56-57 Vict. 1893, ch. 71, which I incline to think is but another way of expressing the common law rule when it provides that (Part V., sec. 50) "the loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract" shall be the measure of damages, the evidence does not justify the said assessment of damages.

We find the utmost profit expected (by respondent conversant with the market price) from a re-sale, based upon the identical samples delivered by appellants, was an advance of 5 cents a pound; for immediately respondent got possession of the samples,

they were submitted to a firm in Carleton Place and a bargain made for a re-sale at 45 cents a pound. It seems to me idle, in face of such a contract made by respondent at the very time when that in question was expected to be, and was being, carried out, to contend that it can properly be held to have suffered any greater damages in the way of loss of profit than this 5 cents per pound of profit which it failed to reap, or indeed any other damages, unless so far as the quality of the goods fell below the sample as to be unsalable at the price agreed upon.

The respondent is not to be treated as a child ignorant of the conditions of the market, but as being possessed of all the information relative to the market, and the possibilities of re-selling such goods as the sample indicated might be reasonably expected to produce.

I think, bearing that in mind, that 45 cents must be conclusively taken herein as the basis for the estimated damages.

A perusal of the evidence adduced on behalf of the respondent produces in my mind a clear conviction that there was not a settled market price such as can often be appealed to as a sure and safe basis upon which to estimate damages.

The market for the class of goods in question seems to have been in an unsettled state and subject to a purely chance sort of speculative condition, furnishing no better basis upon which to proceed than the re-sale at an advance of 5 cents a pound.

A letter of the firm of Cram & Co. to whom the respondent had re-sold, tells that if the goods had been up to the sample, they could have re-sold at a profit of $7,500. Yet we do not find any claim made by that firm for damages of any kind for the breach of contract it has made with respondent. That firm instead seems to have been glad to receive back its cheque without a murmur.

In ordinary cases we might have heard, within the principles laid down in *Wallis* v. *Pratt*, [1911] A.C. 394, of a claim for this $7,500 allowed by the trial Judge, but no such pretension is set up.

If $15,000 damages had been awarded in such a case, arising out of a $20,000 contract, from the result of which respondent had received before trial, and indeed within 6 months, the sum of about $14,000 as proceeds of re-sales, I respectfully submit such

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a result should have so arrested the attention of the Courts below as to the need of a closer examination of the evidential basis for measuring of damages than, in my view, has been given herein.

That possibility which I present is only one of the many possibilities presented by several witnesses in a rather loose sort of way.

Cram is asked the following leading question, and answers as follows:—

Q. You say, comparing the bulk with the sample, that it had a great deal more shoddy, and not only that but some parts were absolutely worthless and useless, that should not be there, that was not in the sample, and you say there was a difference of 25 or 30 cents a lb. in value? A. Yes.

When I find in the letter of his firm to the respondent, rejecting the goods, the following sentence:—"We opened up five (5) sacks of this stock promiscuously, and find it not in any sack, up to the five-pound (5-lb.) sample, on which basis we bought this wool."

I am not much impressed with the basis for this estimate.

Only 5 sacks examined out of a probable 70 in that car, does not seem, when we find all the witnesses testifying to a great variation in the quality of the sacks, a fair basis to found said estimate upon.

Nor is that much improved as a fair test by finding him speak as follows:—"Q. How many of those bales would you examine? A. Possibly I examined a couple of dozen before I notified Mr. Hallam, that is, of the first car."

I submit the formal statement made at the time in the above quotation from the letter to the respondent is more likely to be correct than this chance guess made some months later in the witness box.

The witness apparently had examined a second car and possibly his memory got confused, for he says in another place:—

Q. You say you examined a certain number of the sacks in the first car? A. Yes. Q. How many sacks did you examine? A. Off hand I would say probably a dozen or two. Q. How many would there be in a car? A. If you divide the car by three, there would be about 70. They sometimes vary, according to the size of the car. Q. But of the 70 or 80, you examined probably a dozen bags? A. A dozen or two.

The third car he did not examine at all.

I submit all this as a specimen of the guide we have if we depart from the lines I lay down above to be got from the actual transactions involved in the sale to and re-sale by respondent as the only reliable guiding basis to start from to estimate damages.

Mr. Logan, produced by respondent as an expert, says:—"Q. Did you see the sample of the bulk that is in question here? A. All I saw was the two sacks that Mr. Cram sent up to us to be tested."

This witness applied to these sacks a mechanical test, result of which he gives and then respondent's counsel properly drops him as an expert.

The result of that test, however, might have been followed up by others from which we might have got something reliable, but it was not.

There were two other witnesses called who could speak as experts besides Mr. Hallam, respondent's president.

Of these two, one had bought at 42 cents a considerable quantity of this shoddy wool and both speak of respective examinations made recently before the trial of a sample submitted by respondent taken from the remaining stock on hand after the re-sales made by respondent, of which I am about to speak.

Neither give what I would consider a more satisfactory basis upon which to assess damages than what I am about to submit, as result of the consideration of all the circumstances so far as available in evidence.

The respondent called the appellants' attention to the results reported by Cram, and proposed, very fairly as it appears to me, to the appellants, or one of them, to go down with a representative of respondent and see the parties concerned at Carleton Place and also the goods and try and arrange a settlement. Respondent even offered to pay expenses of doing so, but appellants refused, apparently determined to stand on what they conceived to be their legal rights.

Some weeks were lost in this sort of haggling, and finally this action was brought on March 13, 1918, apparently from the claim made by the indorsment on the writ, for a cancellation of the whole contract, as the claim made indicates it was for the entire price paid. When, better advised, that contention was

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changed in the statement of claim to a claim of $12,621.25 for damages on the much exaggerated basis of 25 cents a pound, though re-sales had then been made of 18 sacks at 43½ to 45c. a pound.

No effort was made by respondent, as should have been done, to re-sell the goods till some time later, and then there were sales made at prices which lead me to the conclusion that if proper energy had been used the whole would have been re-sold at a price of more than the original cost price of 40 cents a pound, and have left the assessable damages at 5 cents a pound.

The increased price got by this mode of proceeding evidently would have re-paid all the attendant expenses upon such a fair and common sense method, which, after all, is but the law upon the subject binding the party claiming damages for breach of a contract to do all that he reasonably can to minimise the loss.

There is no satisfactory reason or explanation given for failure to pursue this course. If chance brought a purchaser he seems to have been dealt with.

Every one knew that unless an effort was made to re-sell before Australian wool came into the market, there was no chance of doing so at prices to minimise the loss. And the only excuse I can find for such an unreasonable course of conduct is that the parties were at war by means of a law-suit.

If that attitude had ceased and a more reasonable course been pursued, I think possibly and indeed probably the respondent would still have been entitled to a judgment for $2,500 or thereabouts—whatever the 5 cents a pound would have produced. Roughly speaking the expenses might have eaten up the excess of price got over 40 cents a pound.

And that is the sum to which I would now reduce the judgment, instead of the $7,500 awarded.

Perhaps the plan of Meredith, C.J.C.P., who suggests a reference to determine the damages, might work out a more accurate result, but I am of opinion that there had better be an end of some things even of a lawsuit.

Here we have presented the curious result of a judgment for $7,500, when a statement of respondent presents, after making every allowance to itself for claims not recognisable in law, only a balance of $6,468.62, yet a judgment stands for $7,500.

Is it by way of penalty as Meredith, C.J.C.P., suggests?

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Of course this statement is headed with an incidental suggestion that the sample standard was worth 55 cents per pound, but I prefer the cool judgment of the merchant selling at 45 cents as a proper test of value of the sample, to that of the litigant and probably exaggerated estimates given by those who probably knew less than he.

Among the indefensible items in this statement, appears a shrinkage of weight due to delay of respondent in re-selling; a charge of 7% for interest, and insurance for a period too prolonged, and $1,398 for commission.

Hallam's evidence which seems given fairly estimates the goods on hand at 30 cents after all the loss of market and possibly deteriorated condition of the goods, suggests to me that a middle line might be drawn between what I have arrived at and that of the trial Judge.

Hence if the respondent prefers the risk and annoyance of a reference in order to demonstrate that by proper efforts there could not have been by due energy a re-sale effected in the early part of 1918 which would have minimised the loss, I would agree thereto, the costs thereof to abide the result. And lest it be necessary for some to have a decision to prove the law as stated relative to the duty to minimise the loss, see latest decision of Court of Appeal in England in *Payzu Ltd.* v. *Saunders*, [1919] 2 K.B. 581, at 587 *et seq.*

Meantime I think this appeal should be allowed either fixing the damages at $2,500, or a reference to reduce that already awarded on the lines I have indicated; the costs of this appeal and in the Courts below to abide the result of such reference.

ANGLIN, J.:—On the evidence in the record it is not possible to disturb the findings that the sale in question was by sample, that there was no acceptance of the wool furnished as equal in quality to the sample and that it was in fact substantially inferior. The weight of the testimony also supports the conclusion that the difference in market value between goods of the quality of the sample and the goods actually supplied was at the date of delivery at least 15c. per pound.

Anglin, J.

The ordinary rule that the measure of the purchaser's damages in such a case is (*Kekule* v. *Loder* (1857), 3 C.B. (N.S.) 128,

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at 139-40, 140 E.R. 687), "the difference between the value of [goods] of the quality contracted for at the time of the delivery and the value of the [goods] actually delivered," adopted by Mayne in his excellent Treatise on Damages, 8th ed., at 228-9, was applied by the trial Judge and in the Appellate Division, 48 D.L.R. 120, 45 O.L.R. 483. I find no circumstances in evidence to justify a departure from it. Except as affording some evidence of market value (*Clare* v. *Maynard* (1837), 6 Ad. & E. 519 at 523, 112 E.R. 198), the prices agreed to on the re-sale by the defendant and on the subsequent re-sale by his purchaser cannot be taken into account. Neither of them conclusively determines the market value of goods of the same quality as the sample. *Rodocanachi* v. *Milburn Bros.*, 18 Q.B.D. 67; *Williams Bros.* v. *Agius, Ltd.*, [1914] A.C. 510.

The appeal should be dismissed with costs.

Brodeur J.

BRODEUR, J.:—One of the issues in this case is whether the sale of the goods in question is a sale by sample. The two Courts below have come to the conclusion that it was a sale by sample. (See 48 D.L.R. 120, 45 O.L.R. 483.) The facts disclosed by the evidence shew to me conclusively that the sale was properly described as such.

A sample of the goods for which a price was quoted was sent to the respondent company by the appellants and the letter sent by the respondent to the appellants confirming a telephone conversation as to the purchase of these goods declared "same to be up to five pound sample expressed us." Nothing could be clearer; and if the vendors were of opinion that the sale was not to be carried out according to the sample they should have called the attention of the purchaser to what they call to-day an erroneous statement.

They claim to have sent a letter which in some respects shews that the sale was not absolutely as alleged by the respondent. But this letter was never received by the respondent. Besides, this letter does not shew that the sample which had been sent previously to the purchaser would not determine the quality of the goods.

It is contended by the appellants that the goods were duly received by the respondent company and that their obligation as to the quality of the goods was duly fulfilled. It is true that an

important officer was sent by the respondent company to attend the loading of the cars but the goods were not inspected by him and the finding of the Courts below was that he went there with the purpose of having the goods properly weighed; and the evidence of this officer, though conflicting with the evidence of one of the appellants, was accepted by the trial Judge. I do not feel disposed to disturb this finding.

There has been raised a question as to the amount of damages which should have been awarded. There is evidence which shews that the 15 cents per pound which was allowed was fair and represented the damages to which the plaintiff was entitled.

For these reasons the appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—In this case I am of opinion that the sale of the wool was a sale by sample and that the wool delivered having been inferior to the sample, there was a breach of warranty entitling the respondent to recover damages from the appellants.

The only question remaining is as to the measure of damages. The trial Judge allowed 15 cents per pound, which is certainly a moderate amount, for the sample was worth from 57 to 60 cents a pound and the contract price was 40 cents.

But the appellants say that inasmuch as the respondent had re-sold the wool to one Cram for 45 cents a pound, the most he would have realised out of the transaction was 5c. per pound, and that at all events his damages could not exceed the latter amount.

This reasoning appears to me to be fallacious. The usual rule, as stated by the trial Judge, is that the measure of damages is the difference in value between the thing contracted for and the thing delivered. Here the respondent contracted for wool which was to equal the sample and for which he was to pay 40 cents per pound. That he had himself contracted to sell the wool for 45 cents is not a matter which the appellants can set up to escape liability to pay, as damages, the difference between the value of the wool contracted for and its actual value as delivered. As stated by Lord Haldane in *Williams Bros.* v. *Agius Ltd.*, [1914] A.C. 510, at 520: "The law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance a contract entered into by the plaintiff with a third party."

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See also *Rodocanachi* v. *Milburn*, 18 Q.B.D. 67, approved by the House of Lords in the case just cited.

In this case Cram who bought the wool on the same sample had re-sold it at a higher price, and the respondent may be called on to pay him damages for not having delivered goods equal to the sample, Cram having refused to accept the wool on that ground. If the respondent received only the profit he was to make on his sale to Cram and was liable to the latter for damages, he would not be compensated by receiving from the appellants only the profit he would have made on the sale to Cram.

It may be added that although the respondent had agreed to pay 40 cents per pound for this wool, it does not follow that the wool delivered was worth 40 cents. As a matter of fact, as found by the trial Judge, it was worth a good deal less.

My opinion, therefore, is that the trial Judge adopted the true measure of damages and that the appeal from the judgment of the Appellate Division, 48 D.L.R. 120, 45 O.L.R. 483, which affirmed the trial Judge, should be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Riddell, Sutherland and Masten, JJ. July 3, 1920.

PRINCIPAL AND AGENT (§ III—31)—SALE OF LAND—AGENT TO BE PAID PROPORTIONATELY AS PURCHASE MONEY PAID—IMPLIED OBLIGATION ON PART OF PRINCIPAL NOT TO PREVENT PAYMENT BEING MADE.

Under an agreement for the sale of land where the agent is to be paid his commission proportionately as the vendors receive the purchase money, there is an implied obligation on the part of the latter not to do anything to prevent the payment of the purchase money by the purchaser, and for breach of this obligation damages will lie although the agreement is not in writing as required by the Statute of Frauds, R.S.O. 1914, ch. 102, sec. 13, as enacted by 6 Geo. V. ch. 24, sec. 19, and amended by 8 Geo. V. ch. 20, sec. 58.

[*Ogdens Limited* v. *Nelson*, [1904] 2 K.B. 410; *Village of Brighton* v. *Auston* (1892), 19 A.R. (Ont.) 305, followed.]

Statement.

APPEAL by the plaintiff from the judgment of MIDDLETON, J., (1920), 47 O.L.R. 37, dismissing the action, upon the determination in favour of the defendants of a question of law raised in the statement of defence. Reversed.

The statement of claim was in part as follows:—

1. The plaintiff is a real estate agent . . .

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2. The defendants at and prior to the 20th September, 1913, were the owners of a large tract of property . . . described in articles of agreement dated the 20th September, 1913, made between the defendants as vendors and the Suydam Realty Company Limited (hereinafter referred to as the Suydam company) as purchaser. . . .

3. Prior to the 20th September, 1913, the defendants, through their Board of Governors, instructed the plaintiff to try to effect a sale of the defendants' said property for the price or sum of $1,100,000, and the defendants agreed to pay to the plaintiff, as a commission for effecting such a sale, the sum of $25,000, payable proportionately by the defendants to the plaintiff as the purchase-money for said property should be paid to the defendants.

4. In pursuance of the said instructions, the plaintiff entered into negotiations with the Suydam company and effected a sale to it of the defendants' said property for the price or sum of $1,125,000, upon the terms and in the manner set forth in the said articles of agreement. . . .

5. The said sale-price of $1,125,000 included not only the price which the defendants were willing to accept for their said property, but also the said sum of $25,000, being the commission agreed to be paid by the defendants to the plaintiff in connection with the sale of the said property as hereinbefore set forth.

6. The said articles of agreement provided that the property therein referred to should be divided into parcels numbered 1, 2, and 3, and should be paid for upon the times and in the manner therein set forth, and also provided that the Suydam company should pay in cash, on signing the sance, the sum of $5,000, and a further sum of $45,000 on the date thereinafter named for completion of the purchase, or sooner upon the acceptance by the Suydam company of the defendants' title to the said lands, the said two sums to be in the hands of the defendants as a permanent deposit as security for the carrying out and performance by the Suydam company of the terms of the said articles of agreement, and to be applied by the defendants as part payment of the price apportioned to parcel number 3 referred to in the said articles of agreement.

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7. The Suydam company paid to the defendants the said sums of $5,000 and $45,000 as a permanent deposit, and also paid a very large sum (amounting to $173,758.60 as the plaintiff is informed and believes) on account of the balance of the said purchase-money, whereupon, without in any way referring to the plaintiff or procuring the plaintiff's concurrence therein, it was agreed between the defendants and the Suydam company that the further carrying out of the terms of the said articles of agreement by the Suydam company should be postponed to a future date.

8. In the year 1917, the plaintiff applied to the defendants for payment of the commission upon so much of the purchase-money as should then have been paid by the Suydam company if the terms of the original articles of agreement had not been varied as set forth in the next preceding paragraph hereof, but the defendants, through their Board of Governors, asserted that the Suydam company had only made payments up to and including the 1st April, 1915, and the defendants also alleged as a fact (which the plaintiff does not admit) that the Suydam company claimed the benefit of the Mortgagors and Purchasers Relief Act, by reason whereof the plaintiff's claim for payment of his said commission was suspended accordingly, and therefore refused to pay the plaintiff at that time any further amount on account of the said commission.

9. The Suydam company completed the purchase of said parcel number 1 and paid the defendants the full consideration payable in respect thereof, and later the Suydam company paid the defendants the full consideration in respect of parcel number 2, and, in addition to having deposited with the defendants the said sum of $50,000 hereinbefore referred to, assigned to the defendants certain securities, the proceeds from which, together with the said sum of $50,000 and the accumulations of interest in respect of the same, were merely sufficient to pay the purchase-price of parcel number 3.

10. The defendants, without the concurrence or assent of the plaintiff, thereupon entered into further negotiations with the Suydam company, whereby the purchase-money paid as aforesaid by the Suydam company to the defendants on account of the purchase of parcels numbers 2 and 3 was repaid by the defendants to the Suydam company, and the said articles of agreement in

respect of parcels numbers 2 and 3 were, as between the defendants and the Suydam company, revoked and cancelled.

11. The defendants paid to the plaintiff on account of the said commission, on the 21st October, 1913, the sum of $5,000, and on the 14th July, 1915, the sum of $1,100, but have made no further payments on account thereof. . . .

The plaintiff therefore claims:—

1. That, by reason of the matters hereinbefore set forth, the defendants should pay to the plaintiff the proportion of the said commission of $25,000, less the aforesaid sums of $5,000 and $1,100, which would have been payable to the plaintiff if the terms of said articles of agreement had been fully carried out by the Suydam company according to the original terms thereof, together with interest computed on the several portions thereof from the date at and which the same would have become payable, at the rate of 5 per cent. per annum.

The plaintiff claimed $15,087.47 as the balance due, together with interest on the sum of $13,344.40 computed from the 1st December, 1919, at the rate of 5 per cent. per annum until judgment.

2. Such other and further relief as the nature of the case may require.

The statement of defence was in part as follows:—

1. The defendants do not admit all or any of the allegations in the statement of claim set forth.

2. The plaintiff's claim for commission for procuring a sale of the lands of the defendants in the statement of claim mentioned is not based on, and in fact there never was, an agreement in writing executed by the defendants, or some person thereto by the defendants lawfully authorised, as required by the 13th section of the Statute of Frauds, R.S.O. 1914, ch. 102, as amended by the Act passed in the 6th year of the Reign of His Majesty King George the Fifth, ch. 24, sec. 19, and the Act of 8 Geo. V. ch. 20, sec. 58. The statement of claim discloses no cause of action, and this action should on this ground be dismissed.

3. At the time when the said alleged verbal agreement was dealt with between the plaintiff and the defendants, it was expressly stipulated by the defendants and agreed by the plaintiff, and if there was any such verbal agreement for commission, it was

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expressly made part of such agreement, that in case from any cause whatever at the instance or at the request of the purchaser or on the defendants' own initiative, in their own interests, the said sale should not be completed, and the contract of sale in respect thereof be rescinded as to any parcel or parcels or portions of the lands embraced in the said contract, all right and claim of the plaintiff . . . should be thereby determined and at an end in respect of those lands as to which the sale should not be carried out and the contract be rescinded as aforesaid.

4. Negotiations at the instance of the Suydam Realty Company, the purchaser, in September, 1919, resulted in an agreement not to carry out the sale of parcels 2 and 3 described in the said contract and in a supplementary agreement defining the said three parcels, and the said contract of sale in regard thereto was then rescinded and determined, while the said contract was completed and carried out as to parcel number 1 as defined in the said contract and supplementary agreement, and $244,000 paid as the price thereof by the Suydam Realty Company to the defendants, which sum is all and the only money received by the defendants arising from the said contract or otherwise in respect of the sale of lands in the statement of claim mentioned.

5. The amount of the plaintiff's commission on the said sum of $244,000, on the basis of the verbal agreement alleged in the statement of claim, is $5,422.22, while the plaintiff admits he has received from the defendants $6,100, which is $677.78 in excess of what the plaintiff would be entitled to on his own shewing.

6. The defendants submit that this action should be dismissed with costs.

The defendants counterclaim against the plaintiff and for the purpose of their counterclaim repeat and rely on all the allegations in paragraphs 1, 2, 3, 4, and 5 of the statement of defence, and claim judgment against the plaintiff for $677.78 received by him over and above what he would be entitled to in respect of his claim for commission at the date of the commencement of this action.

The plaintiff's reply was as follows:—

1. The plaintiff joins issue upon the defendants' statement of defence.

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2. The plaintiff, by way of defence to the defendants' counterclaim, denies the allegations contained in paragraphs 1, 2, 3, 4, and 5 of the defendants' statement of defence relied on by the defendants for the purposes of their counterclaim, and puts the defendants to the proof thereof.

It was upon these pleadings that the action was dismissed.

A. G. F. Lawrence, for appellant.

Frank Arnoldi, K.C., for respondents.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Middleton, under Rule 122. Riddell, J.

The facts as presented and argued before us are accurately stated in the reasons for the judgment complained of.

My learned brother gave effect to the contention of the defendants.

In the view I take of the case, the statutes have no bearing: the case has not been placed on the right basis: the real action is not to recover commission at all. Admittedly, commission cannot be recovered under the contract between the parties and on its terms, for the money has not been received by the defendants, and therefore it is not payable to the plaintiff on the terms of the contract: *Alder* v. *Boyle* (1847), 4 C.B. 635, 136 E.R. 657.

The real cause of action is for damages for breach of the implied agreement on the part of the defendants not to do anything to prevent the payment by the purchaser of the purchase-money—out of which the plaintiff was to receive his commission—I place this duty on a minimum basis when so expressing it—and the statute does not apply to such a contract.

We are relieved of the labour of considering and distinguishing the many cases on implied contract not to alter the existing condition of affairs, by the judgment of Collins, M.R., in the Court of Appeal, in *Ogdens Limited* v. *Nelson*, [1904] 2 K.B. 410, at p. 418:—

"The broad general principle to be extracted from them is that, where the consideration which one of the parties is to receive depends on the other party continuing in the same condition, there is an implied obligation on the part of the latter to keep in existence the conditions out of which his ability to make a return for the benefit received by him arises. A typical case is that of the sale of a business where part of the consideration for the sale

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is to be some part of the future profits of the business; there is clearly in such a case an implied contract by the purchaser to carry on the business, so that the profits may be made out of which the purchase-money is to be found; it is an illustration of the principle that one of the contracting parties cannot get his own profit and then refuse to make the agreed return to the other party."

This decision was affirmed in the House of Lords, *Ogdens Limited* v. *Nelson*, [1905] A.C. 109; see also Mr. Justice Scrutton's fourth rule in *Lazarus* v. *Cairn Line of Steamships Limited* (1912), 28 T.L.R. 244, at p. 246.

This contract the defendants have broken, and the plaintiff is entitled to a verdict; if he can prove no damage, he is entitled to judgment for nominal damages and costs, as settled by our Court of Appeal in *Village of Brighton* v. *Auston* (1892), 19 A.R. (Ont.) 305. In that case Sir Thomas Galt had dismissed the action for breach of contract, on the ground that the plaintiffs had not proved damages: the Court of Appeal reversed this judgment and gave them nominal damages and costs (Mr. Justice Maclennan would have given a substantial judgment).

No doubt the Court on an appeal will not as a general rule grant a new trial to give the plaintiff nominal damages: *Milligan* v. *Jamieson* (1902), 4 O.L.R. 650, at p. 651 *ad fin.*, *per* Meredith, C.J. (now C.J.O.); but the rule is different where no new trial is necessary and the appeal is from a Judge who has been in error: *Village of Brighton* v. *Auston* is an instance. I am not to be understood as saying or suggesting that nominal damages only can be recovered.

While the plaintiff cannot recover his commission as such under the contract with the defendants, for reasons already stated, the amount of money he would have received had the defendants not broken their implied contract with him will give a very satisfactory measure of damages. The defendants may indeed be able to prove that their purchasers would not have paid in any event, or shew some other special circumstances proving that the plaintiff could not have obtained his commission even had they kept faith with him; that is a matter of evidence, and we have no concern with that question here.

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I would allow the appeal, with costs here and below in the cause.

The plaintiff should have leave to amend his pleadings so as to claim as herein stated, either in addition to the claim already made or in substitution therefor.

It may be added that the above view of the rights of the parties was mentioned from the Bench more than once during the argument of the appeal, but neither counsel argued the case on that basis.

Riddell, J.

CLUTE, J., agreed with RIDDELL, J.

Clute, J.

SUTHERLAND, J.:—If this appeal were to be dealt with, and disposed of, solely upon the effect of the statute upon the claim of the plaintiff to be paid the balance due to him as commission under the agreement, I would be of opinion that it should be dismissed, agreeing as I do with the conclusions of Middleton, J., in his judgment. Having regard, however, to the point raised for the first time during the argument, and dealt with in the judgment of my brother Riddell, to the effect that the plaintiff's cause of action is really one for damages for breach of an implied agreement on the part of the defendants to do nothing to prevent payment by the purchaser of the money out of which the plaintiff was to receive his commission, I am disposed to think, with some hesitation, that the appeal should be allowed on that ground. This point was, of course, not taken before Middleton, J.

Sutherland, J.

I think that, under all the circumstances, the costs of the motion and appeal may well be costs in the cause to the successful party.

MASTEN, J. (dissenting):—I have examined with care every one of the cases cited by Mr. Lawrence in his very admirable argument, at the same time bearing in mind his contention that the pith and marrow of the legislation here in question is an interference with vested rights and not mere procedure. I find myself, however, unable to accede to his argument.

Masten, J.

While it is undoubtedly true that the ultimate outcome is an interference with a vested right, yet the statute accomplished that end, not directly, but by prescribing the evidence which must be adduced at the trial, in order that the plaintiff's claim may be maintained, and that which the Legislature thus has seen fit to prescribe must be observed at the trial.

Agreeing completely as I do with the reasoning and conclusion of the judgment appealed from, I have nothing further to add.

ONT.

S. C.

SMITH v. UPPER CANADA COLLEGE.

Masten, J.

Since writing the above, I have had an opportunity of perusing and considering the judgment which has been prepared by my brother Riddell. It is with regret that I find myself unable to reach the conclusion at which he arrives.

The present decision is upon a point of law raised upon the pleadings, practically a substitute for the old demurrer, and our conclusion, particularly in an appellate Court, must, it seems to me, be confined strictly to the question raised on the pleadings and argued before us. We are not, I think, at liberty to substitute a new and different cause of action and to deal with that in lieu of the actual question that was raised and argued.

However, in view of the point now raised by my brother Riddell, the proper course, it seems to me, would be to dismiss the appeal with costs to the defendants in any event of the action, but with leave to the plaintiff within 10 days to amend his claim if so advised; if no amendment made within 10 days, the action to be dismissed.

Mulock, C.J.Ex. MULOCK, C.J. Ex., agreed with MASTEN, J.

Appeal allowed.

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C. C.

HAZLITT & Co. v. TRENWITH.

British Columbia County Court, Swanson, Co. Ct. J. October 13, 1920.

PLEADING (§ VI—355)—RIGHT OF PLAINTIFF IN HIS REPLY TO PLEAD A COUNTERCLAIM TO DEFENDANT'S COUNTERCLAIM.

When a defendant by counterclaim alleges a cause of action against a plaintiff, the existence of which the plaintiff denies, such plaintiff may in his reply alternatively counterclaim against the defendant.

Statement. APPLICATION to strike out pars. 10 and 12 of the reply to defendant's counterclaim. Application dismissed.

E. C. Weddell, for plaintiffs; *W. H. D. Ladner*, for defendant.

Swanson, Co.Ct.J. SWANSON, Co.Ct.J.:—Dealing first with par. 12 of reply—"In further answer to the whole of the defendant's said dispute note and counterclaim delivered herein the plaintiff says that the

NOTE:—It is believed that this is the first time that this point, viz., the right of a plaintiff in his reply to defendant's counterclaim to plead a counterclaim to a counterclaim has ever arisen in the Province of British Columbia. The matter appears to be settled by the Judicature Act which is now written into the B.C. Statutes under the name of the Laws Declaratory Act. The point is of great practical importance not only in the County Courts but also in the Supreme Courts of all the Provinces which with the exception of Quebec have similar statutory provisions copied from the English Judicature Act 1873.

4th section of the Statute of Frauds has not been complied with." Under marginal rule 211 of the Supreme Court Rules this is of course a proper way to plead the Statute of Frauds.

Mr. Ladner contends, however, that the wording of the C. C. Rule is much more specific in its requirements when a party pleads a statutory defence. It reads as follows:

(Order V., R. 12): When in any action the defendant relies on any Statutory defence, or on any defence of which he is required by the Act or any Statute to give notice, he shall in his Dispute Note (except in the case provided for by Rule 11 of this Order) set forth the year, chapter and section of the Statute, or the short title thereof, *and* the *particular matter on which he relies*, or otherwise sufficiently indicate the nature of the defence on which he relies.

On the previous hearing of this matter before me at Kelowna I was inclined to think that the "particular matter relied on" by plaintiff, viz.: that the "contract was not to be performed within a year" should be more specifically set forth in the pleading. I dismissed the application to strike out par. 12 but gave permission to plaintiff to amend by setting forth the specific matter relied on under sec. 4 of the Statute of Frauds. On reconsideration of this matter, I am inclined to think my ruling was rather finical and too finely spun. Dealing with pleadings under Statute of Frauds, White & Stringer's Annual Practice, 1920, at 352 & 353, says:

No particular section need be pleaded; but if a particular section is pleaded, the pleader is bound by it. Thus in *James* v. *Smith*, [1891] 1 Ch. 384, the defendant by mistake pleaded the fourth section instead of the seventh and leave to amend was refused.

Holmstead & Langton, Ontario Judicature Act, 2nd ed., at 459, says:

The facts which make the Statute apply should be stated and the particular provisions relied upon should be pointed to. It is not sufficient to merely make a general statement of reliance on the Statute. *Pullen* v. *Snelus* (1879), 40 L.T. 363. But see *James* v. *Smith*, [1891] 1 Ch. 384, etc.

Odgers on Pleading, 7th ed., gives the following as a sufficient form of pleading. "There is no memorandum in writing of the alleged contract sufficient to satisfy the Statute of Frauds," (page 221). He then adds (page 221): "It is not necessary to plead any particular section and it is wiser not to do so. For if you specify section 4 you will not be allowed to avail yourself of section 7 unless the Judge will give you leave to amend which he refused in *James* v. *Smith*."

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HAZLITT & CO. v. TRENWITH.

Swanson, Co.Ct.J.

I think, therefore, that if the plaintiff has not already amended this paragraph of the reply it will be quite unnecessary for him to do so. This branch of the application is accordingly dismissed.

Dealing with par. 10 of the reply, it was contended that this is setting up a counterclaim to a counterclaim for which no express provision is made in either the County Court Rules of Court, or in the Supreme Court Rules. Fortunately this very interesting point in practice has been dealt with very fully by Field, J., and Huddleston, B., in *Toke* v. *Andrews* (1882), 51 L.J. (Q.B.) 281, and by the Court of Appeal in *Renton Gibbs & Co.* v. *Neville*, [1900] 2 Q.B. 181.

Mr. Ladner relied on *James* v. *Page* (1888), 85 L.T. Journal 157, which is quoted in Odgers on Pleading, 2nd ed., but which I find is not referred to by Odgers in his *5th edition* and is not even mentioned in the Annual Practice, 1920.

The practice adopted by Mr. Weddell in par. 10 is clearly borne out by the two cases first above named.

These two cases turn on the "Wide language of sub-sec. 3, sec. 24, of the Judicature Act, 36-37 Vict., 1873, ch. 66, and sub-sec. 7 of the same section." Collins, L.J., in *Renton Gibbs* v. *Neville*, [1900] 2 Q.B. at 186, and also at p. 185.

It has been argued that a counter-claim cannot be set up by a plaintiff in his reply, and that the rules do not contemplate such a case. In support of that view reference is made to *James* v. *Page*, 85 L.T. 157, a case only noticed in the *Law Times*. An incidental observation on that case is that what was there set up was a counter-claim properly so called—*a counterclaim used not as a shield but as a sword*. It is contended on behalf of the defendants that the plaintiffs must submit to have their counter-claim struck out, and that their proper course is to introduce the subject matter of their counter-claim into the statement of claim as an alternative original cause of action. It is clear that it would be inequitable to allow the defendants to have the benefit of their counter-claim free altogether from the matters raised in the reply. The question is whether the rules are so framed as to necessitate the putting of the parties to the unnecessary expense of beginning the pleadings *de novo*. What would be the result if they had to do this? The plaintiffs do *not* want to rely on the contract upon which the defendants base their counter-claim, and indeed they deny that it is binding on them. If they are bound to deal with the contract in their statement of claim, they would be embarrassed by having to set up a cause of action, whose existence they deny inconsistent with and hamperng their real cause of action. In that state of circumstances it would be an obvious injustice to the plaintiffs to oblige them to introduce this question under the contract into the statement of claim by an amendment. The natural place for it is in the reply in which it is now found. In this way the plaintiffs in dealing with the counter-claim under the contract can deny

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their liability on the ground that the contract is not binding on them, and can add, that, if they are liable, then and *only then* do they claim to *shield themselves* from the result of that liability by claiming unliquidated damages from the defendants arising out of an alleged breach of the contract by them. I do not think that we are prevented from allowing the plaintiffs so to shape their case.

Romer, L.J., at p. 187, says:

If on looking at the nature of the additional claim which the plaintiff wants to set up it appears to be one that cannot be added to the original statement of claim without inflicting hardship and injustice on the plaintiff, and further that it would be an injustice not to allow him to set it up, the Court *has* jurisdiction to allow him to set it up in his reply.

These principles are entirely applicable to the facts of the case before me. The above provisions of the Judicature Act are now found in the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, sec. 2, sub-sec. 3, and sub-sec. 7. Section 2 states that the rules of law enacted by this Act have effect in "*all* Courts whatsoever in the Province," etc. These rules, therefore, expressly bind the County Courts and constitute a set of Rules auxiliary and supplementary to the express Rules of the County Courts. This application will therefore be dismissed.

Application dismissed.

REX v. GOLDBERG.

QUE.

K. B.

Quebec King's Bench, Appeal Side, Lamothe, C.J., Lavergne, Pelletier, Martin, JJ., and Allard, J., ad hoc. March 21, 1919.

1. HABEAS CORPUS (§ I B—7)—CONCURRENT JURISDICTION IN QUEBEC—SUPERIOR COURT AND COURT OF KING'S BENCH.

The Superior Court of the Province of Quebec and the Judges thereof have concurrent jurisdiction with the Judges of the Court of King's Bench in matters of *habeas corpus* in criminal cases where that writ is the appropriate remedy.

[*Harris* v. *Landriault* (1918), 32 Can. Cr. Cas. 384, 55 Que. S.C. 40, explained and modified.]

2. HABEAS CORPUS (§ I C—12)—LIMITATIONS WHERE CUSTODY IS UNDER SENTENCE OF A COURT OF RECORD—SPEEDY TRIALS COURT—JUDGE OF COURT OF SESSIONS IN QUEBEC.

A Judge of the Sessions of the Peace, exercising "speedy trials" jurisdiction under Part XVIII. of the Criminal Code is a Court of Record (Code sec. 824) and having tried an accused person on a charge which was within his power to try, and made an adjudication of guilt and of punishment in which is set forth that an offence triable by the Judge of Sessions has been committed, *habeas corpus* does not lie to enquire into the legality of such adjudication, if the punishment is such as he had power to adjudge.

3. HABEAS CORPUS (§ I D—20)—PROCEDURE—AFFIDAVIT NOT ADMITTED TO CONTRADICT RECORDS OF A COURT OF RECORD.

The Court on *habeas corpus* will not receive or consider an affidavit offered for the purpose of contradicting the records of a Court of Record.

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4. HABEAS CORPUS (§ I D—22)—DISCHARGE IMPROVIDENTLY GRANTED—SENTENCE OF COURT OF RECORD—POWER OF SENTENCING COURT TO RE-COMMIT.

Where a prisoner convicted of felony on a "speedy trial" before a Court of Record has been illegally released on *habeas corpus* granted by a Superior Court Judge on a ground which it was not competent for him to inquire into because by statute the sentence has the same force and effect as if passed on the trial of an indictment (Cr. Code sec. 835) and defendant's recourse was by appeal, the accused can by another commitment be taken to undergo his imprisonment under the existing judgment which has not been annulled by the discharge order. The execution of the sentence has only been interrupted and the convict can be recommitted in execution of the sentence pronounced against him. It is within the competency of the Judge of Sessions to issue another commitment to return the accused to custody under the original sentence.

[See annotation, *Habeas Corpus*, 13 D.L.R. 722.]

Statement.

RESERVED CASE by a Judge of Sessions at Montreal exercising "speedy trials" jurisdiction for the opinion of the Court of Appeal on the question of his authority to re-commit under a sentence passed on a speedy trial under Part XVIII. of the Criminal Code, after the prisoner had been discharged by an order of a Superior Court Judge made on a *habeas corpus* application, it was claimed by the Crown that the latter order had been made improvidently and without lawful authority, because a Judge of Sessions holding a speedy trial is a Court of Record.

The release on *habeas corpus* was based upon the allegation supported by the affidavit of the convict that the Judge of Sessions had altered the sentence from one simply of one year's imprisonment in jail to one of imprisonment at hard labour for the same period.

By the Criminal Code (sec. 835 applicable to speedy trials under Part XVIII.), the Judge shall in any case tried before him have the same power as to acquitting or convicting, or convicting of any other offence than that charged, as a jury would have in case the prisoner were tried by a Court having jurisdiction to try the offence in the ordinary way, and may render any verdict which might be rendered by a jury upon a trial at a sitting of any such Court.

The present reserved case was taken at the instance of the Crown as appellant, the convict being made the respondent.

Lafortune, K.C., and *Walsh*, for appellant.

L. Houle, K.C., for respondent.

Martin, J.

MARTIN, J.:—On April 12 last, Goldberg was tried and found guilty before the Court of Sessions (F. X. Choquet, presiding)

of having received and retained in his possession goods to the amount of several thousand dollars, the property of divers wholesale traders, knowing the same to have been stolen and was sentenced to one year imprisonment in the common jail of this district at hard labour.

On June 6 last, a petition was presented on his behalf to one of the Judges of the Superior Court for this district, praying for his liberation for among other reasons that Choquet, J., had, without the knowledge of the accused and in his absence, altered the conviction from one year to one year at hard labour. The petition was supported by the affidavit of the accused.

On June 18, the writ of *habeas corpus* was maintained and the release of the prisoner ordered by Bruneau, J., the Crown not being represented.

Subsequently, the representative of the Crown applied to the Judge of Sessions for another commitment to return the accused to jail on the original conviction of receiving stolen goods, knowing them to have been stolen. The Judge of Sessions refused this request and granted a reserved case for the consideration of this Court of the question as to whether the Superior Court and the Judges of that Court have jurisdiction to hear such petitions, and whether a judgment rendered by the Court of Sessions, being a Court of Record, can be enquired into and set aside under a writ of *habeas corpus* by the Superior Court, or whether the proper procedure in such cases is to take an appeal to the Court of King's Bench or by way of a reserved case.

The matter was argued before us, at the last term of this Court, and counsel for the accused has submitted for our consideration an able and exhaustive factum.

The first question to be considered is whether or not the Superior Court has jurisdiction in matters of *habeas corpus* respecting criminal cases, Crankshaw, Criminal Code, 4th ed., pp. 1169, 1170 and 1171.

It may be remarked that *Rex* v. *Marquis*, 8 Can. Cr. Cas. 346, decided in May, 1903 (de Lorimier, J.), was reversed by Lavergne, J., in October of the same year, in the case of *Leonard* v. *Pelletier*, 9 Can. Cr. Cas. 19, where it was held:

Considering that the Superior Court and every Judge thereof have jurisdiction to review every decision rendered by Justices of the Peace, even

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in criminal matters, by virtue of the laws of Canada as well as by virtue of the Revised Statutes of Quebec; . . . Maintains the said writ of *certiorari* etc. . . . *Authorities cited by the Court;* Cr. Code 1892, arts. 207, 208, 886, 887, 889, 900, sub-sec. 12; R.S.Q. 1888, art. 2329; Art. 50 C.C.P.; *Denault* v. *Robida* (1894), 10 Que. S.C. 199; *Mercier* v. *Plamondon* (1901), 20 Que. S.C. 288; *Lee* v. *de Montigny and City of Montreal* (1899), 15 Que. S.C. 607; *Trudeau* v. *Durand*, judgment rendered at Sherbrooke, December 17, 1902, White, J.

And by Davidson, J., in *Rex* v. *Janneau* (1907), 12 Can. Cr. Cas. 360; *Rex* v. *Poirier* (1907), 31 Que. S.C. 69; *King et al.* v. *Weir* (1907), 8 Que. P.R. 400.

Wetmore, J., in the Supreme Court of Saskatchewan, in *Rex* v. *Leschinski* (1908), 17 Can. Cr. Cas. 199, said:

Another case cited to me was *The King* v. *Marquis*. That was the judgment of De Lorimier, J., of Quebec, and I consider it a very strong judgment. But at the same time I feel that, strong as it is, I cannot concur in it. I agree with the conclusion reached by the Court of Appeal in Ontario in *The Queen* v. *St. Claire* (1900), 3 Can. Cr. Cas. 551.

Monet, J., in *Miller* v. *Malepart* (1918), 31 Can. Cr. Cas. 203, held that the Superior Court had no jurisdiction respecting *habeas corpus* in criminal matters, because the Act C.S.L.C. 1861, ch. 95, in so far as it gave the Superior Court jurisdiction in such matters, was repealed by the B.N.A. Act of 1867, which gave the Parliament of Canada exclusive jurisdiction in such matters and that the Parliament of Canada had by art. 2, sec. 35*b* (French version, 18*b*) defined Superior Court of criminal jurisdiction in the Province of Quebec as the Court of King's Bench, and Bruneau, J., in *Harris* v. *Landriault* (1918), 32 Can. Cr. Cas. 384, 55 Que. S.C. 40*, decided that the Superior Court

*Bruneau, J., sent to the editors of the "Rapports Judiciaires de Quebec" the following note, with a request that it be published with the report of the case:—"Some advocates have drawn my attention to the judgment of the Court of Appeal in the case of *Rex* v. *Sam Goldberg*, reversing that of this Court upon the ground that this Court has not jurisdiction in a criminal matter by way of a writ of *habeas corpus*, and as I decided the same question, on the merits, on September 30, 1918, in the same way as did the majority of the Court of Appeal in the case of *Harris* v. *Landriault* (32 Can. Cr. Cas. 384, 55 Que. S.C. 40). I am asked how it came that I maintained the writ of *habeas corpus* in the *Goldberg* case. The reason for it is very simple. The latter judgment was given on June 18, 1918, the question of the jurisdiction of that Court was not raised; it was only raised later, and gave rise to the expression of different and contrary opinions by the Judges of this Court. It was only submitted to me directly, and for the first time, in the *Harris* v. *Landriault* case. I think I should give these explanations in reply to questions which have been put to me on this particular point, in order to give a proper conception of the matter, and not to appear, in the eyes of future advocates, to have decided, after due consideration, the same question in an entirely contradictory way, in the interval of a few months, although such a thing might, nevertheless, in certain cases, be perfectly justifiable."

had no jurisdiction in matters of *habeas corpus* respecting criminal cases under the authority of the *Marquis* case above cited.

On the other hand, the late Saint-Pierre, J., in *Rex* v. *Morgan* (1913), 25 Can. Cr. Cas. 192, at 197, 20 Rev. Leg. 277, said: [The Judge here cited all the summary at length, of the following cases affirming the jurisdiction of the Superior Court]:

Mathieu, J., *Reg.* v. *Bougie* (1899), 3 Can. Cr. Cas. 487; Würtele, J., *Ex parte Tremblay* (1902), 6 Can. Cr. Cas. 147; Andrews, J., *Rex* v. *Mercier* (1901), 6 Can. Cr. Cas. 44 at 46; Lavergne, J., *Leonard* v. *Pelletier*, 9 Can. Cr. Cas. 19; Cross, J., *Rex* v. *Therrien* (1915), 28 D.L.R. 57 at 61-62, 25 Can. Cr. Cas. 275; Martineau, J., *Re Miller*, No. 2, No. 677, C.S. Montreal (not reported) "considering that a Judge of this Court is competent to hear generally applications by writ of *habeas corpus* in criminal matters, both under the authority of the Revised Statutes of Lower Canada, ch. 95, and by the common law of England." Maréchal, J., *Re Feldman*, No. 655, C. S. Montreal (not reported):

Whereas, upon the hearing of this application, the representative of the Crown, Mr. D. A. Lafortune, K.C., took exception, while the Court was sitting, to the jurisdiction of this Court; Whereas the facts alleged in the said application are established by the affidavit of the applicant and by the documents produced in the record and not contradicted; Considering that the Superior Court of the Province, or one of the Judges of the said Court has full jurisdiction to act and decide the matter which forms the object of the present writ, C.S.L.C. 1861, ch. 95, art 1; *Reg.* v. *Bougie*, 3 Can. Cr. Cas. 487; *Ex parte Fortier* (1902), 6 Can. Cr. Cas. 191; *Ex parte Tremblay* (1902), 6 Can. Cr. Cas. 147.

Duclos, J., *Re Flore Harris*, No. 695, C.S. Montreal (not reported).

The late Chief Justice Archambeault, in the case of *Duperron* v. *Jacques* (1917), 26 Que. K.B. 258 at 261, said:—

It is well to remark that the provision of sec. 1125, C.C.P. (Que.) does not apply only to writs of *habeas corpus* asked for in a civil matter; it applies every time that any one is imprisoned or deprived of his liberty in a criminal matter, or supposed criminal matter, as well as in a civil matter; art. 1114 so states in those very words.

I am unable to concur with Archambeault, C.J., in this remark, as it appears to me that arts. 1114 and 1125 C.C.P. deal only with *habeas corpus* in civil matters, and the authority for this chapter in the C.C.P. is the second part of the Habeas Corpus Act, C.S.L.C. 1861, ch. 95, arts. 20-28, which deal with *habeas corpus* in civil matters, articles 1-19 dealing with *habeas corpus* in criminal matters.

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Article 3228, R.S.Q. 1909, says:—"Any Judge of the Superior Court may hold any term of the Court of King's Bench, Crown side, and shall have all the powers, authority and jurisdiction of a Judge thereof and be subject to the same duties."

Article 3085, R.S.Q. 1909, may be also referred to.

Under the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34, sub-sec. 26(*b*), Superior Court in the Province of Quebec means the Court of King's Bench and the Superior Court for the said Province.

I have reached the conclusion that the Habeas Corpus Act, C.S.L.C. 1861, ch. 95, has not been repealed and is still in force and that the Judges of the Superior Court for this Province have concurrent jurisdiction with the Judges of the Court of King's Bench in matters of *habeas corpus* in criminal cases where that writ is the appropriate remedy, that is to say, in matters of summary conviction.

Was it the appropriate remedy in the present case? The object of the Habeas Corpus Act was to ensure to the subject a fair and speedy trial. It was not intended to be made use of to obtain the speedy release of a person convicted after a fair trial before a Court of competent jurisdiction.

The Court of Sessions is a Court of Record, 8 Edw. VII. 1908, (Que.) ch. 42. This was affirmed by judgment of this Court in *The King* v. *Brunet* (1917), 27 Que. K.B. 481, and the judgment of this Court was affirmed by the Supreme Court (1918), 42 D.L.R. 405, 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 16.

It may be doubted if the Judge of the Superior Court should have accepted the affidavit of the respondent to contradict and disapprove the conviction entered on the record of proceedings in the Court below.

In the case of *O'Neil* v. *Carbonneau* (1918), 29 Can. Cr. Cas. 340, 54 Que. S.C. 417, Pelletier, J. (a member of this Court) cited the opinion of Lord Campbell in the case of *The Queen* v. *Lees* (1858), 27 L.J. (Q.B.) 403 at 407 (El. Bl. & El. 827, 120 E.R. 718), which was to this effect:

> A writ of *habeas corpus* to the expediency of granting which we have also directed our attention, is not grantable in general where the party is in execution on a criminal charge after judgment, on an indictment according to the course of the common law.

Cross, J. (a member of this Court) in the case of *Rex* v. *Therrien*, 28 D.L.R. 57, 25 Can. Cr. Cas. 275, remarked:

> Where applicants are undergoing sentence in execution of convictions for criminal offences, the resort to the writ of *habeas corpus* to the Superior Court in many, if not in most cases, is misconceived. The idea given effect to in the Criminal Code is that mistakes may be corrected, and very wide powers are accordingly given to the Appellate Courts. Where that machinery exists, there is good reason for not permitting resort to a form of remedy like *habeas corpus* when, if there has been a mistake, the result must often be, not correction of the mistake, but immunity for the applicant, whether he be guilty or not.

See also *Rex* v. *Flaherty* (1918), 43 D.L.R. 253, 32 Can. Cr. Cas. 17, 27 Que. K.B. 555, and remarks of Würtele, J., in *Ex parte Gillespie* (1898), 7 Que. K.B. 422 at 426.

Where *habeas corpus* is the appropriate remedy, it is well to keep in mind that the writ is not to be made use of to release criminals on mere technicalities and in view of special provisions of arts. 754, 1019, 1121, and 1124 of the Cr. Code, it would appear that not only defects of form, but of substance in the commitment might be remedied upon application: *R.* v. *Barre* (1905), 11 Can. Cr. Cas. 1, and authorities there cited; *Coté* v. *Morin* (1917), 30 Can. Cr. Cas. 59, 53 Que. S.C. 124, and *R.* v. *Morgan* (1901), 5 Can. Cr. Cas. 63.

See the leading case of *In re Sproule* (1886), 12 Can. S.C.R. 140 at 200, 204, 242.

In the view that I take of the question submitted to us, it is not necessary to decide whether or not the recourse of the accused was limited to the right of appeal, under 1013, Cr. Code, though it may be remarked that this Court in the case of *Bastien* v. *Amyot* (1906), 15 Que. K.B. 22, refused to sanction the use there sought to be made of the writ of prohibition in a case to which resort to appeal should have been had. The reasoning of Trenholme, J., giving the majority judgment in that case, would apply against the process of *habeas corpus* being utilised where there is a right of appeal.

The respondent had been tried and convicted of a felony by a Court of competent jurisdiction and no Judge of the Superior Court or of this Court had any right, authority or jurisdiction to release the respondent under a writ of *habeas corpus* and a judgment upon a proceeding so taken is a complete nullity, a nullity of *non esse*, and a writ so issued without jurisdiction should not be obeyed.

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It is true that the distinction between felony and misdemeanour is abolished by sec. 14 of the Cr. Code, but the distinction is still retained in the Habeas Corpus Act, and I do not imagine there can be any question that the crime of which the respondent was charged and for which he was convicted, amounted to a felony.

I do not think it would best further the end of justice to sanction a practice that any person accused, tried and convicted of a crime by a Court of competent jurisdiction should be allowed by way of *habeas corpus*, supported by his own affidavit, to impugn or contradict the official Court record of his conviction, and I would hold that a Judge of the Superior Court has no jurisdiction in the matter.

The most the Judge, in the Superior Court, could do under the *habeas corpus* writ was to order the release of the accused. That was all he was asked to do and all he could do, and even admitting that he had jurisdiction to do this, he could not revise, review, reverse or annul the conviction. He had no authority or jurisdiction to pronounce upon any alleged informality or irregularity in the conviction. He might have made an order for the further detention of the accused and directed the Judge of Sessions to take such proceedings and do such further act as in his opinion might best further the ends of justice. There is no doubt that regular commitment could have been ordered; *Lafleur* v. *Vallee* (1912), 5 D.L.R. 57, 19 Can. Cr. Cas. 362.

If a prisoner confined under an informal warrant of commitment may continue to be held in custody, if a subsequent regular warrant of commitment is issued, why cannot such subsequent regular warrant of commitment be issued after judgment on the *habeas corpus* proceedings as well as before? The Crown is not now seeking the arrest *de novo* of the accused, but desires to give effect to the conviction pronounced against him by the Court having jurisdiction of the cause.

This is not prohibited by art. 11. of the Habeas Corpus Act and the cases of the *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (1873), L.R. 5 P.C. 179 and *Re Eno* (1884), 10 Que. L.R. 177, are not in point.

That the Court of Sessions had jurisdiction clearly appears from arts. 823, 825, 827 and 835, 582 and 583, Cr. Code and the recourse of an accused after conviction before such Court would

appear to be limited to the proceedings by way of appeal authorised by 1013, 1014 and 1016, Cr. Code, 10 Hals., p. 49:

Para. 102. The writ will not be granted to persons committed for felony or treason plainly expressed in the warrant of commitment or to persons convicted or in execution under legal process.

Para. 103. The writ of *habeas corpus* will not be granted where the effect of it would be to review the judgment of one of the Superior Courts which might have been reviewed on writ of error or where it would falsify the record of a Court which shews jurisdiction on the face of it.

The conviction in question has the same force and effect as a judgment or conviction pronounced by the Court of King's Bench, after a trial upon indictment before a jury, and the recourse of the convicted party against such conviction is either by way of reserved case or appeal.

The law was never intended to confer upon the Judges of the Superior Court jurisdiction in criminal matters other than the simple control over inferior tribunals, and the decisions cited confirm this view. In the Encyclopædia of Pleading and Practice, vol. 9, p. 1062:

If the Court possesses the requisite jurisdiction, no matter what errors or irregularities occur in the proceedings or judgment, provided they are not of such a character as to render them void, its action cannot be reviewed or examined into.

The accused can by a new commitment be taken to undergo his imprisonment under an existing judgment which has not been qualified or set aside and the execution whereof has only been interrupted, and he can be re-committed in execution of the judgment and valid sentence pronounced against him.

If thereupon a second writ of *habeas corpus* is issued out and the warrant of commitment under which the accused is detained is found to be regular, and in accordance with the adjudication, could it be said that it raises for the opinion of the Court the same question with reference to the validity of the ground of detention as the first? I should say not.

The citation by counsel for the accused of the holding by the Privy Council in the case of the *Attorney-General for the Colony of Hong-Kong* v. *Kwok-a-Sing*, does not help him.

The order of the Superior Court releasing the respondent from custody is without effect and should be disregarded and treated by the Judge of Sessions as an absolute nullity, and a new

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order of commitment of imprisonment of the respondent issued by the Judge of Sessions under the conviction found against the accused in that Court.

When the Judge of the Sessions of the Peace, at Montreal, having tried an accused person on a charge which was within his power to try, has made an adjudication of guilt and of punishment and it is set forth in the adjudication that an offence triable by the Judge of Sessions has been committed and the punishment mentioned is such as he had power to adjudge, a Judge of the Superior Court is without jurisdiction, in a proceeding by *habeas corpus*, to enquire into the legality of the adjudication made by the Judge of Sessions.

Pelletier, J.

PELLETIER, J.:—Condemned for theft, by competent authority, to a year's imprisonment with hard labour, the accused presented himself before a Judge of the Superior Court, who liberated him upon a writ of *habeas corpus*.

The reason for the judgment is that the accused shewed to the satisfaction of the Judge that the sentence had been illegally passed; and this illegality consisted in the fact that the magistrate had first sentenced him to a year's imprisonment and had subsequently added to the sentence the words "with hard labour."

The accused contends that he has proved this fact by his own affidavit. We have several times decided that inscriptions on the record of a Court of Record cannot be contradicted by affidavit, and upon this point we have only to continue and apply this law, which we believe applicable to the present case.

That should be sufficient to dispose of this matter: he required, in short, in order to maintain the writ of *habeas corpus*, that the Judge should set aside or ignore this law. But, in my opinion, there are still more serious reasons, and of which the chief one may be stated as follows: If a Judge of the Superior Court can, as he has done here, bring to naught, on a *habeas corpus*, a sentence of the Court of Sessions of the Peace, there then result the absolutely unacceptable consequences as follows: 1. The Judges of the Superior Court are going to have the right to sit practically in review of the decision of a properly constituted criminal Court of Record; 2. Persons found guilty by a competent authority which has a right to hear and decide their case are going to get out of prison without the form of a trial by merely filing an affidavit

in which an irregularity is claimed to be established. Thieves, incendiaries, etc., would have a fine time. It would be the dawn of a new era for them.

That is not all: if the *habeas corpus* could be upheld here a murderer found guilty by a jury, who appealed to the Court of King's Bench and to the Supreme Court, and who had not succeeded in setting aside the verdict, might likewise, and with quite as much right, go and present affidavits to a Judge of the Superior Court and cause himself to be declared free and unscathed.

The Criminal Code surrounds the accused with safeguards, it contains all the methods required to remedy defective verdicts and erroneous sentences. And it is this procedure which should be followed; otherwise there is chaos.

Moreover, I do not think that a Judge in Chambers had any power to maintain this writ of *habeas corpus*. Judges in Chambers have certain powers in *habeas corpus* matters, but they certainly have not such powers in matters which the law, under the authority of the old criminal law, calls felonies, now this is the case before us; consequently, a Judge of the Superior Court was, in this case, absolutely deprived of jurisdiction by the very law which governs *habeas corpus*. In matters within its jurisdiction, a Judge can cause a writ of *habeas corpus* to be issued, but, instead of maintaining it upon the *ipse dixit* of the guilty party, he ought, if error or irregularity were apparent, send back the record in order that it might be rectified with respect to such error or irregularity. It is said that extraordinary cases might present themselves, and that great injustice might sometimes be committed if *habeas corpus* was not available as a remedy. I admit it, but in that case application must be made to the Court of Appeal *in banc*, which has, as we have already decided, common law jurisdiction in this respect, which is practically without limit, and which offers all the guarantees desirable for extraordinary cases.

Finally, let it be sufficient for me to say that in the celebrated *Sproule* case (1886), 12 Can. S.C.R. 140, the Supreme Court made the true precedent which ought to guide us here, a precedent which our Court followed recently in *The King* v. *Flaherty*, 43 D.L.R. 253, 32 Can. Cr. Cas. 17, 27 Que. K.B. 555. In the *Sproule* case, a man found guilty of murder was released on a *habeas corpus*; the Supreme Court unanimously declared that the so-called

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judgment was non-existent. That is what I think of the order which released Goldberg in the present case. It has not, in my opinion, any more value than if it was signed by an Ontario or Manitoba Judge, and it is, I consider, as much a nullity as would be a "judgment" of a Judge in Chambers at Montreal who might pretend to set aside a judgment of the Supreme Court of Canada.

Accordingly, I would grant the motion of the Attorney-General, and would order that Goldberg be arrested and sent to prison to finish serving his sentence.

Lamothe, C.J.

LAMOTHE, C.J. (dissenting):—The following questions are submitted to us by Choquet, J., Judge of the Sessions of the Peace, at Montreal:—

1. Whether the Superior Court had jurisdiction to hear such petitions;

2. Whether a judgment rendered by the Court of Sessions, being a Court of Record, can be enquired into and set aside under a writ of *habeas corpus* by the Superior Court;

3. Whether the proper procedure in such cases would be to take an appeal direct to the full bench of the Court of King's Bench, or on a reserved case.

A motion is made by the representative of the Attorney-General, at Montreal, concluding as follows: "Wherefore the Crown asks that an order be now given by the Court of Appeal for the imprisonment of the said Samuel Goldberg."

The circumstances of the case being fully stated in the judgment of my colleague, Martin, J., I will not return to them. I would answer, shortly, the three questions put.

To the first question I answer that, in the Province of Quebec, in a *habeas corpus* matter, the Superior Court, and the Judges of that Court, have concurrent jurisdiction with the Judges of the Court of King's Bench, equally in criminal and civil matters. This jurisdiction was given to them by the laws respecting the issue of writs of *habeas corpus*,—laws reproduced in ch. 95 of the Consolidated Statutes of Lower Canada of 1861. These laws have never been repealed. There is nothing in the B.N.A. Act or in the Criminal Code, which can be interpreted as abrogating them. The statute above mentioned (C.S.L.C. 1861, ch. 95) is still in full force. The Criminal Code states that, in the Province of Quebec, the Court of King's Bench is the Court which has original criminal jurisdiction, Cr. Code sec. 2, para. (35). But the Provincial Act, R.S.Q. 1909, art. 3228, states that the Judges of the Superior Court are Judges of the Court of King's

Bench in a criminal matter. It follows that the jurisdiction of the Judges of the Superior Court, in such a case, cannot be denied. This is constantly recognised by the law—with very few exceptions.

The dictum of Archambeault, C.J., in *Duperron* v. *Jacques*, *supra*, founding the jurisdiction of the Judges of the Superior Court upon art. 1114 C.C.P. (Que.), with respect to *habeas corpus* in a criminal matter, is evidently the result of an error.

To the second and third questions, I answer as follows:—*Habeas corpus* is not an appeal; ch. 95 of the 1861 statutes does not authorise a Judge of the Superior Court, seized of an application for a *habeas corpus*, to ascertain whether the Court of Sessions has decided the facts well or ill. But I concede to the Judges of the Superior Court the right to intervene by writ of *habeas corpus*, if it should appear, on the very face of the proceedings, that a serious irregularity was committed, and that thereby an actual injustice has resulted to the accused. Cases in which such intervention may happen are rare. Ch. 95 of the C.S.L.C. 1861 does not exclude such an intervention; neither does the Criminal Code. This does not mean that the Superior Court can, upon the slightest irregularity, quash a conviction or verdict, and set aside the sentence.

The Habeas Corpus Act is special law; the remedy thereby given arises from common law. This Act is in apparent conflict with other Acts and with many rules of law and procedure. This is not a reason for refusing the application. If the Court of Sessions, for example, proceeded to sentence an accused without hearing him, cannot such sentence be set aside by means of *habeas corpus*? If the verdict was properly rendered, or the conviction properly made, and conformably to the essential rules of law and procedure, it must not be interfered with; but if the sentence exceeds what the law allows to be imposed, such sentence can be declared absolutely void upon a writ of *habeas corpus*.

It does not always follow that the prisoner should be set at liberty. If, in his application for a *habeas corpus*, he doe not attack the conviction itself, but only the sentence, for any irregularity whatever, the Judge who hears the *habeas corpus* can quash the sentence and send the prisoner back before the Court which convicted him, in order that a proper sentence may be pronounced.

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The remedy by *habeas corpus* exists even when a right to appeal is given. Neither remedy excludes the other.

It is said, in the present case, that it is a question of an offence declared to be a felony by the old criminal law, and, consequently, no Judge of the Superior Court, or of the Court of King's Bench, had jurisdiction to launch a writ of *habeas corpus*. The conclusion from this argument is that the judgment of the Superior Court freeing Goldberg would be absolutely void.

This point of view would assume that the Superior Court, or one of the Judges of that Court, was entirely devoid of jurisdiction in the matter. I do not think that there was such want of jurisdiction. Every Judge of the Superior Court has jurisdiction to order that a person in custody should appear before him, in order to ascertain the cause of his detention, to obtain an early trial for him, or to admit him to bail. If the person is accused of a certain crime called felony in the old criminal law, the Judge, upon a *habeas corpus*, ought not to release him or admit him to bail, except in accordance with sec. 699 of the Criminal Code. But this direction imposed by the Act does not affect the jurisdiction of the Judge. If the Judge makes a mistake, either in the application or the interpretation of the law, he commits an error of judgment and not an excess of jurisdiction. These two things should not be confused.

The case of *Re Sproule*, 12 Can. S.C.R. 140, decided by the Supreme Court in 1886, presented itself differently. It was the very judgment which had been given on the *habeas corpus* which was before the Supreme Court. It was an actual appeal, although they avoided calling it so. The Supreme Court decided that it had power to pronounce the judgment which should have been given by the first Judge upon the *habeas corpus*. In the present case, the record of the case decided by the Superior Court is not submitted to us; we are not asked to either revise or alter the decision given.

If it were an appeal brought before us from a judgment given by the Superior Court on a *habeas corpus*, I would set aside the judgment for several reasons, among others: (*a*) Because the sentence stated that Goldberg had been condemned to a year's imprisonment with hard labour; that such sentence constituted an authentic act, and that such authentic act could not be contradicted

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by the prisoner's affidavit; (*b*) because even if it had been established by legal and admissible proof that the words "hard labour" were not pronounced by the Judge in giving sentence, it did not result therefrom that the conviction was void and that the accused should be set at liberty. In such a case, the accused ought to have been sent back before the Court of Sessions in order that the whole sentence might be pronounced orally in his presence.

But the matter before us is not an appeal. In fact no appeal is possible, according to the law. We are asked to consider absolutely void—that is to say, as if it had never existed—a judgment of the Superior Court given on a *habeas corpus* setting a prisoner at liberty, a judgment which has not been attacked and which remains recorded with the clerk of the said Superior Court. I cannot admit that a judgment given by the Superior Court of this Province, which is our common law Court, should be considered to be a piece of blank paper with which no one is concerned. If there is such a nullity, it ought to be first judicially pronounced; until then the judgment remains and should be treated with respect. Public order requires it.

To sum up, I would answer affirmatively the first question; also the second question, with this reservation, that the Superior Court cannot enquire into the merits of the indictment; and I would answer the last question in the negative, by saying that the appeal to the Court of King's Bench, whether by direct appeal or by means of a reserved case, does not exclude recourse to *habeas corpus*. And I would reject the motion made by the Crown.

Judgment was directed to be entered as follows:—

Judgment: Considering that it appears that the accused was charged, tried and convicted before a Court of Record, to wit, the Court of Sessions sitting in and for the district of Montreal, was sentenced and committed to the common jail of this district and liberated by judgment of the Superior Court for the district of Montreal on a writ of *habeas corpus*;

Considering that by the provisions of the Habeas Corpus Act, C.S.L.C. 1861, ch. 95, the Superior Court and the Judges thereof have concurrent jurisdiction with the Judges of this Court in matters of *habeas corpus* in criminal cases where that writ is the appropriate remedy, that is to say, matters of summary conviction;

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Considering that when the Judge of the Sessions of the Peace at Montreal, having tried an accused person on a charge which was within his power to try, has made an adjudication of guilt and of punishment and it is set forth in the adjudication that an offence triable by the Judge of Sessions has been committed and the punishment mentioned is such as he had power to adjudge, a Judge of the Superior Court is without jurisdiction in a proceeding of *habeas corpus* to enquire into the legality of the adjudication made by the Judge of Sessions;

Considering that a Judge of the Superior Court is without authority or jurisdiction to receive and consider an affidavit tending to contradict the entries made of proceedings before a Court of Record;

Considering that the writ of *habeas corpus* granted in this matter was so issued and granted without jurisdiction and a proceeding so taken is a complete nullity, a nullity of *non esse*, and should not be obeyed;

Considering that it is not necessary to decide in the present case whether or not the recourse of the accused was limited to the right of appeal under art. 1013, Cr. Code;

Considering that the accused can by another commitment be taken to undergo his imprisonment under an existing judgment which has not been disqualified or set aside and the execution whereof has only been interrupted and he can be recommitted in execution of the judgment and valid sentence pronounced against him, and it is within the competency of the said Judge of Sessions to issue another commitment to return the accused to jail on the charge and offence for which he has been convicted;

It is, by the Court of our Sovereign the King, now here considered and adjudged that the said Superior Court had no jurisdiction to hear and adjudicate upon a writ of *habeas corpus* in this matter and that a judgment rendered by the Court of Sessions being a Court of Record cannot be enquired into and set aside by the Superior Court or any of the Judges thereof under a writ of *habeas corpus*, and that that part of the question reserved for the opinion of this Court should be answered in the negative and that the Judge of the Sessions of the Peace do issue another commitment of imprisonment under the conviction found against the accused, and that he may be otherwise dealt with according to law, and it

is ordered that an entry hereof be made of record in the Court of Sessions of the Peace at Montreal, this Court not finding it necessary for the disposition of the present case to decide whether or not the recourse of the accused was limited to the right of appeal under 1013, Cr. Code.

ALLARD, J., *ad hoc*, agrees with Lamothe, C.J.

Re-commitment ordered.

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SQUIRES v. TORONTO R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. June 11, 1920.

CARRIERS (§ II G—101b)—STREET RAILWAY—NEGLIGENCE—WOMAN BOARDING STREET CAR—CAR STARTING—NEGLIGENCE OF CONDUCTOR IN ALLOWING CAR TO START—WOMAN PLACED IN AN EMERGENCY—CONTRIBUTORY NEGLIGENCE.

When a plaintiff has been placed in a position which requires quick action and judgment owing to the negligence of the defendant, the principle, where one is in an emergency is applicable, and the plaintiff is not guilty of contributory negligence.

[*Wooley* v. *Scovell* (1828), 3 Man. & Ry. 105, referred to.]

APPEAL by the plaintiff from the judgment of a County Court Judge dismissing an action to recover damages for injuries sustained by the appellant, owing, as she alleges, to a car of the respondent on which she intended to take passage being started while she was in the act of getting on board of it, with the result that she was thrown to the ground and severely injured. Reversed. Statement.

T. N. Phelan, for appellant; *Peter White*, K.C., for defendant.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—The Judge did not accept the testimony of the appellant as to the position in which she was when the car had started, but accepted that of two passengers on the car, who stated that the appellant attempted to get on board the car after it had started. Meredith, C.J.O.

It is not open to question that it was the intention of the appellant to take passage on the car; that it had stopped at a usual stopping place; and that the conductor of the car knew or ought to have known that the appellant's purpose was to take passage on his car.

According to the testimony which was accepted, the appellant had approached the car at a somewhat rapid pace, and had reached a point opposite the rear vestibule and about six inches from it, and was in the act of putting out one of her hands to

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take hold of one of the bars of the vestibule, when the car was started; the appellant then attempted to get on the car, which was moving slowly, and in making the attempt was thrown from the car.

In my opinion, if, as has been found, the conductor knew or ought to have known that the appellant's intention was to take passage on his car, he was negligent in giving the signal to start before he had given the intending passenger a reasonable opportunity to get on the car or until the intending passenger had evidenced the intention not to take passage by it.

In my view, the learned Judge in dealing with the question of contributory negligence did not, as he should have done, take into consideration the position in which the appellant was placed by the starting of the car after she had put out her hand to take hold of the bar when she was but a few inches away from the step; and I do not think that continuing her effort to get on the car, as she did, amounted to contributory negligence. It is settled law that getting off a car when it is in motion is not necessarily contributory negligence. Everything depends on the circumstances, and it is not contributory negligence where the speed of the car is such that a reasonably prudent man in the circumstances would have done what the intending passenger did, and the same rule should be applied where a person is getting on a moving car.

In the circumstances of the case at bar, the proper conclusion, in my opinion, is that the appellant was not guilty of contributory negligence. According to the testimony of the witness Smith, the wheels of the car "just turned before she grabbed the car;" and he added, "I think the wheels just turned once;" the appellant succeeded in getting one foot on the step of the car and was thrown off owing to the speed being increased. Add to this the fact that the appellant was in a position which required her to judge and act quickly. She had been put in that position owing to the failure of the conductor to stop long enough for her to get on the car while it was standing still. The principle, applied where one is suddenly placed in a position in which he must act quickly—an emergency it is sometimes called—is, I think, applicable. In support of this view I refer to *Woolley* v. *Scovell* (1828), 3 Man. & Ry. 105. In that case Lord

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Tenterden, C.J., instructed the jury that, if they thought the plaintiff, who had been injured by a bag of wool thrown from a lofty warehouse, had lost his presence of mind by the act of the defendant, and in the confusion produced by the situation in which he found himself had run into danger, they ought to give their verdict for the plaintiff. I refer also to *Briggs* v. *Union Street R. Co.* (1888), 148 Mass. 72, in which the questions arising in such a case as this are considered and dealt with, and I adopt the reasoning of the Court and its statement of the law.

I would, for these reasons, allow the appeal with costs, reverse the judgment appealed from, and substitute for it judgment for the appellant for $500, the amount of the damages assessed by the learned Judge, with costs.

Appeal allowed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A.
October 11, 1920.

INTOXICATING LIQUORS (§ III G—86)—SALE OF—COMPANY LICENSED IN ONE PROVINCE—SUPPLYING LIQUOR TO AGENT IN SAME PROVINCE AT REQUEST OF COMPANY IN ANOTHER PROVINCE—PLACE OF SALE—WHAT IS.

Where a liquor company licensed in Manitoba and having a branch office in Saskatchewan, also licensed in Saskatchewan to export liquor, writes to another licensed company in Saskatchewan asking it to send a shipment to the Saskatchewan branch for which the Manitoba branch pays, the shipment being duly made, the transaction is a sale of liquor in Saskatchewan. The real transaction consisted of the acceptance of the order in Saskatchewan and the delivery of the liquor.

[Review of authorities.]

Statement.

APPLICATION for a writ of *certiorari* to quash a conviction made by a magistrate for an alleged breach of the provisions of sec. 27 of the Saskatchewan Temperance Act, 7 Geo. V. 1917 (1st sess.), ch. 23. Refused.

J. F. Frame, K.C., and *L. McK. Robinson*, for the accused.

H. E. Sampson, K.C., for the Attorney-General.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—Section 27 enacts as follows:—

27. Any person not authorised by this Act to expose or keep for sale or sell liquors in Saskatchewan for use or consumption in Saskatchewan, who exposes or keeps for sale or sells, or barters or exchanges any liquor in Saskatchewan except to a person in another province or in a foreign country for uses

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and purposes outside of Saskatchewan, shall be guilty of an offence and liable to a penalty of $200 and imprisonment for 3 months for the first offence, and in default of payment of the said sum to imprisonment for a further period of 30 days; and to a penalty of $300 and imprisonment for 6 months in case of a second or any subsequent offence, and in default of payment of said sum to imprisonment for a further period of 3 months. And if the offender is an incorporated company it shall be liable to a penalty of $1,000 for each offence.

The facts of the case, which are not in dispute, are as follows: The applicant is a member of a firm, composed of himself and one Sanderson, carrying on business under the name of "John Shaw and Company." This firm is licensed to carry on an export liquor business in Saskatchewan. The applicant Shaw conducts the business of the firm at Broadview, Saskatchewan, where the firm has an export warehouse, and Sanderson, the other member of the firm, resides in Winnipeg and conducts the business of the firm there. The Dominion Liquor Co. is a firm carrying on business in Winnipeg and Regina and other places in Saskatchewan. One of the members of the firm, which is also licensed to carry on an export business in Saskatchewan, conducts the business of the firm at Regina.

Some time in August of the present year, the Winnipeg branch of the Dominion Liquor Co. wrote to John Shaw & Co. at Broadview, requesting the latter company to ship a certain quantity of whisky to the Govanlock and Regina branches of the Dominion Liquor Co. A cheque was also sent to cover both orders. The applicant received this letter in due course, and on August 24, he shipped by freight on the C.P.R. at Broadview a certain quantity of whisky consigned to the Dominion Liquor Co. at Regina. The liquor, according to the evidence, was purchased by the Dominion Liquor Co. for the purpose of export to points outside the Province. On these facts, he was convicted of having sold intoxicating liquor in Saskatchewan, and was sentenced therefor to a fine of $200, and to 3 months' imprisonment in the Regina gaol.

The application for *certiorari* is based on two grounds:

1. That the transaction in question does not come within the prohibition of the Act; 2. That it is beyond the powers of the Provincial Legislature to make laws imposing punishment by both fine and imprisonment for enforcing a provincial law.

In the argument on the first ground, reference was made to sec. 80 of the Act, 7 Geo. V. 1917, ch. 23, which is as follows:—

80. While this Act restricts and regulates transactions in liquor and the use thereof within the limits of Saskatchewan it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in Saskatchewan and a person in any other province or in a foreign country and the provisions of this Act shall be construed accordingly.

As to the first ground:

The evidence, in my opinion, discloses a sale of liquor in Saskatchewan. The ordering of the liquor by a letter written in Manitoba by one member of the Dominion Liquor Co. did not constitute a transaction between a person in Saskatchewan and a person in any other Province. The real transaction consisted of the acceptance of the order in Broadview and the delivery of the liquor at that point. There was no sale until the order was accepted by the delivery of the goods. The fact that the liquor was purchased for the export business of the company does not seem to me to make any difference. The thing prohibited is the sale in Saskatchewan, without regard to the purposes, legitimate or otherwise, for which the liquor is purchased.

As to the second ground:

"The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in sec. 92 of the B.N.A. Act, 1867," is, by clause 15 of that section, one of the subjects of exclusive provincial legislation.

The natural meaning of "or" when used as a connective is to mark an alternative or present a choice, implying an election to do one of two things. According to Murray's New English Dictionary, vol. 7, p. 166, "or" *generally*, is a particle co-ordinating two (or more) words, phrases or clauses between which there is an alternative.

I do not, however, think that the use of the word "or" in the section under consideration was intended to mark an alternative. It has been held in a number of cases that in spite of the use of the disjunctive word "or" a Provincial Legislature has the power to authorise punishment by both fine and imprisonment, and the weight of authority is altogether in favour of that interpretation.

The following cases on this point were cited to us: *Ex parte Papin* (1871), 2 Cart. Cas. 320 and (1872), 2 Cart. Cas. 322;

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Paige v. *Griffith* (1873), 2 Cart. Cas. 324; *Aubry* v. *Genest* (1895), 4 Que. Q.B. 523; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 133; *Reg.* v. *McLean* (1893), 25 N.S.R. 449; *Reg.* v. *Wason* (1890), 17 A.R. (Ont.) 221 at 243, 245; *Reg.* v. *Frawley*, *Reg.* v. *Hodge* (1882), 7 A.R. (Ont.) 246 at 265, 269; Lefroy, Canada's Federal System, p. 575; Clement, Canadian Constitution, p. 554.

The application will, therefore, be refused.

Lamont, J.A.

LAMONT, J.A.:—I concur in the conclusion reached by Haultain, C.J.S. The main argument for the accused was that the sale of the liquor was made to a person in the Province of Manitoba. The Dominion Liquor Co., to whom the sale was made, was a partnership. The partnership had an office in Winnipeg where some of the partners resided, and also several warehouses for the exporting of liquor in Saskatchewan, where the remaining partners resided and carried on the business of the partnership. The partnership in Regina notified their Winnipeg office that it required a further supply of liquor. The Winnipeg office wrote the accused at Broadview, Saskatchewan, to ship the partnership at Regina a quantity of liquor, for which it paid in due course. The order was accepted, and the liquor shipped to Regina. On these facts, which are not in dispute, the Dominion Liquor Co. can, in my opinion, just as properly be said to be a person in the Province of Saskatchewan as in the Province of Manitoba. Partners carry on business both as principal and agents for each other, within the scope of the partnership business. See the Partnership Act, R.S.S. 1909, ch. 143, sec. 7, and *Sadler* v. *Whiteman*, [1910] 1 K.B. 868 at 889.

If the contention on the part of the accused were to prevail, a vendor of liquor in Saskatchewan could nullify the provisions of the Saskatchewan Temperance Act by arranging that his customers in Saskatchewan would establish an office in another Province and do their ordering through that office. A vendor cannot be permitted to do indirectly that which he is prohibited from doing directly.

The application should therefore be refused.

Elwood, J.A.

ELWOOD, J.A.:—On September 27 last, the applicant, John Shaw, was convicted before a Justice of the Peace for having, on or about August 24 last past, at Broadview in this Province, unlawfully sold intoxicating liquor contrary to the provisions

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of the Saskatchewan Temperance Act, 7 Geo. V. 1917 (1st sess.), ch. 23, and for such offence the applicant was adjudged to forfeit and pay the sum of $200, and to be imprisoned in the provincial gaol at Regina for three months. This is an application for a writ of *certiorari* to quash said conviction.

The facts, as material to the consideration of this matter, are the following: The applicant and one Sanderson, the latter living in Winnipeg, carry on an export liquor business at Broadview in this Province, under the name of "John Shaw & Company," and are licensed by the Saskatchewan Government to carry on an export liquor business. On or about August 22, 1920, the Dominion Liquor Co. wrote from Winnipeg, in the Province of Manitoba, to the said John Shaw & Co., asking the latter to ship 100 cases of Imperial whisky express prepaid to the branch of the Dominion Liquor Co. at Govanlock, Saskatchewan, and 125 cases to the Regina branch of the Dominion Liquor Co., and enclosed a cheque, presumably to cover both shipments. This letter was apparently received by the applicant on or about August 24, and on the same date he shipped by freight per the C.P.R. to the Dominion Liquor Co., Regina, 100 cases of Imperial whisky and 25 cases of Canadian Club, and it is for this transaction that the above conviction took place.

It appears from the evidence that the Dominion Liquor Co., is a partnership, and that one of the partners carries on the Regina branch of the business.

The above conviction is questioned on two grounds: (1) that the above acts are not prohibited by the Act in question, and (2), that the Legislature of the Province of Saskatchewan had no power to authorise the imposition of both fine and imprisonment.

The conviction objected to was had under sec. 27 of the above Act, which is as follows: (See judgment of Haultain, C.J.S., *ante* 577).

Section 80 of the same Act is as follows: (See judgment of Haultain, C.J.S., 579.)

It was contended for the applicant that the sale was not to a person in Saskatchewan, but to a person in Manitoba; that, as the order had gone from Winnipeg, it was a sale to a person in the Province of Manitoba. It was contended on the argument that the evidence disclosed that the Dominion Liquor Co. is also an

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export liquor house, and that the liquor in question was purchased for exporting to points outside the Province. I assume that that statement of facts is correct, and I reach the conclusion I do assuming that to be the state of facts.

I am of the opinion that the sale for which the conviction in question took place was a sale which took place at Broadview, and that it only became a sale when the applicant appropriated to the order received from Winnipeg the goods which were shipped to Regina. I am of the opinion that the section in question of the Act is not intended to prohibit agreements of sale, but that the transactions which are sought to be prohibited are transactions which comprise an actual disposal of liquor where the offence is one of selling. This view is borne out, in my opinion, by what was held in *Bigelow* v. *Craigellachie etc. Co.* (1905), 37 Can. S.C.R. 55 at 73; *Titmus* v. *Littlewood*, [1916] 1 K.B. 732; and *Rex* v. *People's Wine* (1917), 35 D.L.R. 115, 28 Can. Cr. Cas. 16, 10 Alta. L.R. 535.

If I am correct in this, then the sale was undoubtedly to a person in Saskatchewan, because the appropriation of the liquor was to a person in Saskatchewan. The purpose for which that person procured the liquor is, in my opinion, immaterial.

So far as the second ground is concerned, it was contended that sec. 92, sub-sec. 15 of the B.N.A. Act, which is as follows:—

> 15. The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section;

did not empower the Legislature of the Province to impose both fine and imprisonment; that the word "or," as used in the above sub-section, is disjunctive. It was not contended that the legislation contained in the Act in question is not a law of the Province made in relation to a matter coming within one of the classes of subjects enumerated in sec. 92.

The sole question before us was, that the Province had no power to impose both fine and imprisonment for enforcing any of the laws which it had power to enact.

In *Hodge* v. *The Queen*, 9 App. Cas. 117 at 132, Sir Barnes Peacock is reported as follows:—

> When the B.N.A. Act enacted that there should be a Legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the

matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow.

And at 133, as follows:—

If, as their Lordships have decided, the subjects of legislation come within the powers of the Provincial Legislature, then sub-sec. 15 of sec. 92 of the B.N.A. Act, which provides for "the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section," is applicable to the case before us, and is not in conflict with sub-sec. 27 of sec. 91; under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it—"hard labour;" in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labour."

In the *Att'y-Gen'l for Canada* v. *The Att'y-Gen'l of Ontario* (1893), 23 Can. S.C.R. 458 at 467, Strong, C.J., is reported as follows:—

The 15th sub-section of sec. 92 of the B.N.A. Act, and the decision in the case of *Hodge* v. *The Queen* preclude the possibility of any doubt as to the right of the Provincial Legislatures to impose punishments by fine and imprisonment as sanctions for laws which they had power to enact.

It is quite true that, possibly, the above quoted observations of Strong, C.J., are *obiter*, but I apprehend that they are deserving of considerable consideration by this Court.

In *Paige* v. *Griffith*, 2 Cart. Cas. 324, Sanborn, J., squarely decided that the Province of Quebec, under the above sub-section, had power to enforce laws made upon subjects within its jurisdiction by both fine and imprisonment at the same time, and on this question dissented from the judgments of Drummond, J., and Torrance, J., in *Ex parte Papin*, 2 Cart. Cas. 320, 322.

The B.N.A. Act was, of course, not a penal statute, and I apprehend it should not be construed with the same strictness as a penal statute. Sub-section 15 of sec. 92 is one giving to the Provinces full power to enforce any law coming within any of the classes of subjects enumerated in sec. 92.

In *Paige* v. *Griffith*, *supra*, Sanborn, J., comments on the fact that, prior to the B.N.A. Act, each Province had power to enforce laws which now relate to subjects under the exclusive jurisdiction of the Provincial Legislatures by fine, penalty and imprisonment, using discrimination as to one or all, as circumstances might

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require, and he concludes that the Provinces having once possessed the power to enforce laws relating to subjects which, under the B.N.A. Act, they retained the jurisdiction to legislate upon, it must be presumed that it was not intended by sub-sec. 15 to diminish the powers which these Provinces theretofore possessed.

If that contention is sound with reference to the position of the original Provinces at Confederation, it, I apprehend, is applicable to the Province of Saskatchewan, because, once we adopt the interpretation of sub-sec. 15 as applicable to the original Provinces, the same interpretation, in my opinion, must be adopted with reference to the Provinces which subsequently came into Confederation.

But apart entirely from the view of Sanborn, J., which I have just discussed, it seems to me that, where the Provinces are given the right to enforce their laws by fine, penalty or imprisonment, no good reason can be advanced for contending that it was intended that the Provinces could only use those powers disjunctively. I am of the opinion that the words "fine, penalty, or imprisonment" are to be used distributively for the purpose of enumerating all of the powers which the Provinces have for enforcing their laws, and that with respect to those powers they may use one or more of them at the same time.

In my opinion, therefore, the conviction in question should be affirmed. *Judgment accordingly.*

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British Columbia Supreme Court, Gregory, J., August 12, 1920.

EXECUTIVE COUNCIL (§ I—1)—STATUTORY AUTHORITY—PROVISIONS OF STATUTE—STRICT COMPLIANCE NECESSARY.

When the Legislature by statute authorises the Executive Council to do an action, which it has no other authority to perform, that act must be done strictly in the way laid down in the statute in question.

[Settlers Rights Act, 3-4 Edw. VII. 1903-4 (B.C.), ch. 54; *E. & N. Ry. Co.* v. *Fiddick* (1909), 14 B.C.R. 412, referred to.]

Statement.

ACTION to set aside certain proceedings on the ground inter alia, that there was no proper hearing by the Lieutenant-Governor-in-Council, as provided by sec. 3 of the Settlers Rights Act, 3-4, Ed. VII., 1903-4, B.C., ch. 54. Judgment for plaintiff.

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E. P. Davis, K.C., and *W. B. Monteith*, for plaintiff.

S. S. Taylor, K.C., for defendants.

A. M. Johnson, K.C., for the Attorney-General in Wilson-McKenzie case.

W. D. Carter, K.C., for Attorney-General in Dunlop case.

GREGORY, J.:—As these cases are practically identical, and there has been but one hearing and argument this judgment is intended to cover each of them, but for convenience I shall refer only to the record in the Wilson & McKenzie action.

In this most important case it is the greatest satisfaction to me to know that it is the intention of the parties to carry the case to the Court of last resort and that therefore my decision in no way finally disposes of the rights of the litigants.

It is urged that the action cannot succeed by reason of the fact that the plaintiff has disposed of all its interests in the land in dispute to the Canadian collieries. It is said that this is shewn by the documents put in as exhibits, but these documents have not been read to me and counsel has not even made the slightest reference to any paragraph or portion of them to shew that such is the fact. In these circumstances I do not think it is incumbent upon me to critically examine the papers to ascertain if this is so or not, particularly as I drew attention of counsel during the argument to the fact that he was making an assertion without making any attempt to shew that it was true or upon what he based it. From all the facts and documents which have been drawn to my attention it seems to me to be abundantly established that the legal estate in the disputed lands is in the plaintiff company and that it is the proper party to bring the action.

I think the plaintiff must succeed on the third ground set up by Mr. Davis in his argument, viz.: that there was no proper hearing by the Lieutenant-Governor-in-Council as provided by sec. 3 of the Settlers Rights Act, 3-4 Ed. VII. 1903-4 (B.C.), ch. 54. It is unnecessary therefore for me to state the conclusion I have arrived at upon his 6 other grounds.

Mr. Taylor urged very strongly that no hearing before the Lieutenant-Governor-in-Council of which the plaintiff was entitled to notice was necessary, that the hearing was an act of the executive, that the proceedings before it were secret and could not be enquired into, and that in any case it is quite consistent with

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the evidence that the executive had before it other material than that mentioned by Mr. Robertson. I cannot agree and in addition the Premier promised that the plaintiff should have notice of the hearing and formal notice of the hearing was sent by the Provincial Secretary to the plaintiff.

That there must be a hearing and that plaintiff is entitled to notice of it is settled for me by the decision of the Full Court upon this very section of the statute in the case of *E. & N. R. Co.* v. *Fiddick* (1909), 14 B.C.R. 412.

The proceedings on such a hearing can in no way that I can conceive of be considered as secret, and there can be absolutely no objection to a full disclosure in the Court of all that took place at such a hearing. As to the suggestion that the Council may have had before it other evidence than the declaration, etc., referred to by Mr. Robertson, I cannot admit. Mr. Robertson, a gentleman of experience and high standing at this bar, testified that he attended the hearing as counsel for the plaintiff and that he remained until the end or what he presumed to be the end and he believed it was the end, and I cannot accept any suggestion that it was not the end and that the only evidence before the Council were the declarations, etc., he referred to, particularly in view of the fact that I told Mr. Taylor during the argument that I would draw this inference unless it was shewn that it was improper. I am entirely at a loss to understand the attitude of the Crown with reference to the suggestion made by the Deputy Attorney-General in his cross-examination of Mr. Robertson as well as by Mr. Taylor, and I am quite convinced that if other evidence was before the Council they would have proved it, and in any case the plaintiff was entitled to know all the evidence which the Council considered. No evidence should have been considered by the Council of which Mr. Robertson had no notice, after allowing him to leave under the impression that the hearing was at an end.

In the circumstances the notice of the hearing given to the plaintiff was, I think, entirely inadequate, and in view of the correspondence between Mr. Robertson's firm and Mr. Brewster and other members and officers of the Government, much less than Mr. Robertson had a right to expect.

Notwithstanding the promise that ample time should be given the plaintiff to investigate the applications, etc., Mr.

Robertson experienced the greatest difficulty in obtaining any definite information upon the matter. It is unnecessary to refer in detail to all the correspondence, but attention may be drawn to the letter of September 10, 1917, to the Attorney-General (Ex. 47), which was never answered and the subsequent letter of November 10, 1917 (Ex. 49), which was answered by Ex. 31, being a letter from the Deputy Attorney-General, by a letter dated November 14, 1917, but not received until November 20. This letter inclosed a list of the applicants, 180 in number, with "as correct a description as possible of the property in respect of which they claim" but the department refused to "guarantee that the descriptions are correct" but stated that the description was "as nearly correct as it was possible to obtain from the applicants." It was well known then that Mr. Robertson desired to have permission to inspect and copy the declarations made in support of the applications, but this he was not permitted to do, the original permission given being withdrawn when a clerk was sent to make the copies. It was not until Saturday, November 2, 1918, that Mr. Robertson saw any of these documents, or rather copies of them. On that date he received notice of the hearing for the following Saturday, of the Wilson & McKenzie and Dunlop cases, and with the notice copies of the declarations in those cases only. Mr. Robertson received this notice about 12.30 on Saturday morning; all Government offices close at one o'clock on that day. In any case it would be impossible for him to do anything until the following Monday, the 4th. On the 5th he wrote the Provincial Secretary pointing out it would be impossible to prepare his cases in time for the hearing on the following Saturday, and asking for an adjournment for 2 weeks. He received no reply to this letter but over the telephone he was told to make his application for postponement to the executive on the day of the hearing and he had not the slightest idea that it would be refused until it was in fact refused.

In view of the fact that no witnesses were present in support of the application and so no one was going to be seriously inconvenienced it is difficult to see any reason for refusing such a reasonable request. If it had been intended to proceed with the hearing, Mr. Robertson might at least have been told so when he had the conversation over the telephone. In Mr. Robertson's letter

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asking for the postponement, he stated that a petition for the disallowance of the Act had been fyled in Ottawa and it was suggested and pressed by counsel that Mr. Robertson never made any attempt to prepare for the hearing and never intended to, as he was relying upon the disallowance of the Act, and that his statement that he had not sufficient time to prepare his case was mere pretense.

If I only had Mr. Robertson's statement to the contrary, I could not accept such suggestion. But Mr. Robertson's letter itself shews that there is no foundation for the suggestion. The letter is evidently written in the belief that pending the settlement of the question of disallowance the Government will not proceed with the hearing and he only asks for the postponement "in the event of it being determined to proceed at all with the applications."

I am firmly convinced that it would be a physical impossibility for any one to make the necessary investigation to properly prepare the case in the 5 days intervening between Sunday and Saturday.

It required an investigation into facts and conditions, etc., prior to December, 1883; a tedious interviewing of persons in Cranberry District; a careful examination of the public records at Nanaimo and at Victoria—Nanaimo being a four hours journey by rail from Victoria. Many of the persons who it would be advisable to interview would undoubtedly be found to be dead or to have moved from the district. There were 2 applications to be fully inquired into. I am quite familiar with the searches and inquiries which would have to be undertaken, for on August 3, 1916, I was appointed a commissioner by the then Government to inquire into the claims to Crown Grants made under the original Act, ch. 54, 3-4 Ed. VII. 1903-4. The commission was duly opened and several sittings had, but for reasons which it is not necessary to state, the inquiry was not further proceeded with.

If there is to be a hearing and notice to the E. & N. Railway, surely such notice should be a reasonable one, one which would enable the railway company to make all necessary inquiry to prepare their defence or to examine into and test the merits of the claims fyled, for if any land given to the claimants was to be taken from it, their right cannot be questioned, for in the

case of *McGregor* v. *E. & N. Ry. Co.*, [1907] A.C. 462, their Lordships of the Privy Council held at p. 466, that the plaintiffs' title to the land was "incontrovertible" apart from the Settlers Rights Act, then under consideration.

Notice of trial in action at law is under the Rules of Court, 10 days, and that after pleadings have settled the issues and there has been full discovery on both sides.

While I am convinced that the notice given to the plaintiff was entirely inadequate, I am not clear that I would be justified in acting upon that alone, but there is another and I think more grave defect in the hearing.

The evidence in support of the claim as to occupation with the *bonâ fide* intention of living thereon consisted of a number of solemn declarations taken before a notary public. It may be questioned whether the declarations are in the proper form or not. There is authority for taking some extra-judicial declarations in the Canada Evidence Act, R.S.C. 1906, ch. 145, but under our own Act, R.S.B.C. 1911, ch. 78, it would appear that under sec. 24 (1) it is only competent for a witness to make a declaration instead of taking an oath in certain specified cases, and there is nothing to shew that the declarants herein came within any of these cases. At the hearing Mr. Robertson asked that the declarants be produced before the Council and sworn. Section 26 of our Evidence Act, R.S.B.C. 1911, ch. 78, provides for the administration of an oath, and that he be permitted to cross-examine them. But this was refused. He pointed out to the Council that the Act provided no means whereby he could subpoena them, but that the Council could and should require their presence and give him full opportunity of cross-examination.

It is unnecessary to point out how vital it is in investigations into the truth to have a full cross-examination of the witnesses. It must be admitted that the statute is confiscatory in its nature. That there is no suggestion of compensation and must, I think, be strictly interpreted.

The statute says that the proof of occupation or improvement and intention to live on the land must be "reasonable proof." It does not say proof satisfactory to the Lieutenant-Governor-in-Council, and how can it be said that there is any proof whatever,

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reasonable or otherwise, when there has been no opportunity for cross-examination?

I think that the Legislature inserted the words "reasonable" to enable the Council to depart from the strict rule of evidence and to admit a certain amount of hearsay evidence, which would not be unreasonable in an inquiry into conditions so many years ago in a sparsely-settled community, but surely those persons who pretend to speak of the past and of what they have been told, etc., must submit themselves to cross-examination even more than they who speak of existing present day facts, for in such a case they can be met by others equally conversant with the conditions.

For the reasons herein set forth there must be judgment for the plaintiff. There will of course be no costs against the Crown, but the other defendants will have to pay costs. There will of course have to be an inquiry as to damages and an injunction, I suppose—but these matters and any others arising out of this judgment may be spoken to on motion to settle the terms of the judgment.

It was suggested that the Granby Company was in a different position from Wilson & McKenzie, they being innocent purchasers for value, but I cannot agree to this, they purchased with full knowledge and their title must fall with that of Wilson & McKenzie. In fact, under sec. 104 of the Land Registry Act, they have no title at all, apart from the question of registration of the Crown grant through which they claim, for they purchased not from the Crown grantee, but from Treat.

In coming to the conclusions which I have, I do not wish it to be understood that I in any way dissent from the proposition that the Courts cannot interfere with or attempt to control the policy or executive acts of the Ministers of the Crown, but when the Legislature authorises by statute the Council to do an act which it has no authority to perform, that act must be done strictly in the way the Legislature says it is to be performed.

Judgment accordingly.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. July 25, 1920.

LIMITATION OF ACTIONS (§ III G—135)—ADVERSE POSSESSION—DISPUTE AS TO OWNERSHIP OF STRIP OF LAND—PARTIALLY ENCLOSED—PAPER TITLE—EVIDENCE—EAVES PROJECTING OVER—EASEMENT.

The plaintiff had the paper title to a strip of land which adjoined land of the defendant. This strip was enclosed or partly enclosed by defendant with his own land. The Court held that, although the land was not completely enclosed, the defendant had the open, notorious, exclusive and adverse possession necessary to give him a title by possession. The fact that the eaves of the plaintiff's house projected over a small part of the land in dispute only served to retain in the owner of the paper title an easement to continue the projection.

[*Davis* v. *Henderson* (1869), 29 U.C.Q.B. 344; *Jackson* v. *Cumming* (1917), 12 O.W.N. 278, followed; *Rooney* v. *Petry* (1910), 22 O.L.R. 101, approved.]

Statement.

APPEAL by the plaintiff from the judgment of a County Court Judge dismissing an action brought in that Court for a declaration that the plaintiff was owner in fee simple of the west half of lot 32 on the north side of Bridge street, in the city of Belleville, and for an injunction restraining the defendant from trespassing thereon.

The judgment appealed from is as follows

The defendant, who owns the lot adjoining the lot claimed by the plaintiff, claims to have been in quiet, peaceable, and continuous possession of a portion of the lot claimed by the plaintiff, and sets up his right to the same by adverse possession.

There were several witnesses called by the defendant to establish possession by himself and his predecessors of these few feet of land, and there can be no question, I think, but that every one of the witnesses is speaking the truth so far as the facts are concerned. I wish to refer to one of those witnesses in particular, Robert Oliphant. He was living in the building now occupied by the plaintiff 33 years ago, and he says that at that time there was a line-fence between these two lots running from Bridge street to a post at the rear end of the lot at the brick barn, a part of the hotel property; that, while he was still living in the building, it was cut in two, and a portion of it moved westward to this line-fence, the front of the building being on Bridge street; that that portion of the fence from Bridge street to the rear of the house was then taken away, as the side of the house served the same purpose as the fence originally had; and that the fence remained the same from the rear of the house to the rear of the lot. I take it, from the

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evidence of some of the witnesses, that a barn was erected on the rear of the defendant's lot up nearly against this fence, and that subsequently the fence was taken away along the side of this barn, the barn operating as a fence at the rear of the lot, just as the house operated as a fence at the front of the lot. The barn may have been a few inches in from the fence, but in any event the fence was attached to the corner of the barn. This line-fence remained in this condition down until some time after the plaintiff bought his property, which was on the 17th December, 1915.

There was apparently no attempt on the part of any of the owners previous to the plaintiff to exercise any rights of ownership over these few feet, but it was accepted from owner to owner that the fence, as it had stood for so many years, marked the true line between these two properties.

Some time in the month of August or September, 1918, the plaintiff exercised his first act of ownership over these few feet of land by erecting a cement wall or foundation upon this land. The defendant removed that, and the result of this difference of opinion as to the ownership of these few feet was the bringing of this action on the 23rd April, 1919.

It seems clear from the evidence of Fraser Aylesworth, O.L.S., that at the front of the lot the land which was enclosed by this old line-fence included 7 feet 5 inches of the lot which passed to the plaintiff by his deed, and on the rear of the lot it includes 9 feet 4 inches. At the front of the lot the 7 feet 5 inches is made up of 4 feet 5 inches of an alleyway and 3 feet into Robinson's house.

The question, therefore, for me to determine is, whether the plaintiff is entitled to his land as shewn by his deed, or whether the defendant is entitled to these few feet which his land encroaches upon the plaintiff, by reason of adverse possession.

Mr. Porter, counsel for the plaintiff, argued that there was an easement, if anything, in connection with this matter, and therefore there must be an adverse possession for 20 years, but I cannot find on the evidence that there was any question of easement, so far as these few feet of land are concerned. As I understand the evidence, there was a right of way on the part of the defendant and his predecessors over a portion of the lot now owned and occupied by the plaintiff and his predecessors, but the way was east of the fence which marked the boundary-line between these prop-

erties, as I have said, and it was closed up by the moving of the house now occupied by the plaintiff to the west as far as the old line-fence. The 4 feet 5 inches of an alleyway now between the two houses has for 33 years at least been enclosed as a part of the property occupied by the defendant and his predecessors, aside from any question of easement or right of way. I think, therefore, I am only concerned to find whether the defendant has had such adverse possession for 10 years as will prevent the plaintiff from recovering these few feet of land.

I will consider it first from the standpoint of the defendant's paper-title. The defendant was tenant of the property he now occupies on the 16th January, 1899, as is evidenced by a rent-receipt which he produces. He was renting from Con McGuire, and apparently Con McGuire had a paper-title to the east half of lot 31, which, according to the Aylesworth survey, did not include the small strip of land in question, but which was used and occupied by Robinson, the tenant, according to the line-fence. He remained tenant in this way until the 27th May, 1905, when the then owner, H. C. Fowler, entered into an agreement of sale to the present defendant of the east half of lot No. 31, Robinson continuing to use and occupy the land enclosed by the fences as heretofore stated; and subsequently, on the 6th March, 1907, Fowler conveyed to Robinson, by deed in fee simple, the east half of lot 31, and Robinson continued to use and occupy the land enclosed by the fences as theretofore.

It seems clear, therefore, that, if the defendant's paper-title carried with it the right to possession of the strip of land in question, he had been in possession of it under the agreement for sale and conveyance for a period of about 13 years before the plaintiff exercised any rights of ownership in the land. In any event, from the date of his conveyance, the 6th March, 1907, he was in possession for over 10 years before the plaintiff built his cement wall. Further than this, if the paper-title is to be carried back through the defendant's predecessors, they have from owner to owner been in possession of this strip of land for some 30 odd years, and it was clearly such adverse possession as would bar the plaintiff. Mr. Porter, for the plaintiff, however, contends that the paper-title never carried with it this strip of land in question, because the paper-title always described the property passing as the east half

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of lot 31, while, according to Aylesworth's survey, this strip of land is a part of the west half of lot 32, the paper-title to which is held by the plaintiff. If that be true, then neither the defendant nor his predecessors held this strip of land by reason of their paper-title, but they held it, occupied it, and used it, clearly enclosed with their paper-title lot, for a period dating back over 30 years.

I find in the 1st volume of the Am. and Eng. Encyc. of Law, 2nd ed., p. 790, in the notes: "*Ignorance of Adverse Rights.* . . . It is held that the fact that one in exclusive possession under a claim of title does not suppose that he is interfering with anybody's rights does not defeat his right to claim by adverse possession." Also, under the title "*Animus Furandi not Essential*," I find this: "Cases may arise where a man may be under a mistake as to the true extent of his domain, yet if he intentionally claims title to all of which he has possession, his neighbours may be barred by lapse of time from asserting their rights." Then on p. 791: "*Taking Possession by Mistake of Lot Adjoining that Named in Deed*: Where a party received a deed to a lot of land, but took possession of an adjoining lot by mistake and claimed it as his own, a possession continued by him and his successors for more than 20 years was held to have ripened into a title."

Then the question arises whether the defendant can take advantage of the possession of his predecessors, under these circumstances, to carry his possession back that length of time. That would depend, I presume, upon whether any one of the persons in possession of this land previous to this defendant had been in adverse possession for 10 years, in order to bar the right of the owner of the adjoining lot to recover this strip of land. If so, then the right would pass to that person's successors, if they were immediate successors, and it seems clear that the successors in this case were immediate successors, as they all presumed they were taking possession of this land by virtue of the paper-title.

I have not carefully considered this question, although I am inclined to think that some of the defendant's predecessors were in adverse possession for more than 10 years, but it does not seem to be necessary to settle that question, because, if the defendant did not hold this strip of land by reason of his paper-title, as argued by Mr. Porter, then he must have held it as a trespasser, and in that sense he was in possession of this strip of land himself person-

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ally from the time he first became tenant of the east half of 31, and that was some time in January, 1899, so that he had been in adverse possession for a period of over 19 years, from 1899 to 1918. I therefore think, in whichever view one may see the matter, that the defendant is entitled to retain possession of this strip of land, and that the line-fence between these properties should be on a line extending from the north-west corner of the plaintiff's house to a post which still stands at the rear of the lot near the brick barn on the hotel property, and that that line continued to Bridge street along the outer edge of the eave on the west side of the plaintiff's house.

The plaintiff's action is, therefore, dismissed with costs.

E. G. Porter, K.C., for appellant; *Eric N. Armour*, for respondent.

The judgment of the Court was delivered by

FERGUSON, J.A.:—Appeal by the plaintiff from a judgment of Deroche, Judge of the County Court of Hastings, dated the 5th January, 1920, dismissing with costs the plaintiff's claim for damages for trespass on lot 32 on the north side of Bridge street, in the city of Belleville. Ferguson, J.A.

Having carefully perused and considered the evidence and exhibits, with the opinion of the learned trial Judge, I am of the opinion that he has so fully and accurately stated the facts that it is not necessary for me to state them again.

The learned trial Judge has found that, while the paper-title to the strip of land in dispute is in the plaintiff, yet the defendant has been in open, notorious, exclusive, adverse possession of the strip for more than 10 years, and has thus acquired title by possession. The appellant contests this conclusion on two grounds: first, that, while the strip in dispute is on the defendant's side of the fence, he did not acquire title by possession, because he had not maintained a gate at the street end of the 4.5-foot alleyway between the houses of the plaintiff and defendant; secondly, that the projection of the roof or eaves of the plaintiff's house over part of the land in dispute is sufficient to prevent the running of the statute in favour of the defendant.

The defendant bought his property and entered into possession thereof in the belief that he had acquired the paper-title up to the line of the plaintiff's house, and the fence extending from the north-west corner of the house to the rear of the lots, and he used,

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occupied, and enjoyed all the lands in dispute as a part of his property in the same manner, by the same acts, and to the same extent, as he would have used, occupied, and enjoyed it had he been, as he thought he was, the holder of the paper-title thereto.

The plaintiff did not acquire title to his lot and house until 1915, whereas the defendant purchased his property in May, 1905, having previously continuously occupied it as tenant from June, 1899.

The plaintiff and his predecessors in title resided on the lands adjoining the strip in dispute; they had notice and knowledge that the defendant, from 1899, was occupying and using it as demised to him, and later as his own, under a claim and belief that he had a title thereto; yet it was not until 1917—two years after this plaintiff became the owner—that any objection or dispute was raised. In these circumstances, I am of opinion that, although the defendant's lands were not completely enclosed by the erection of a gate on the Bridge street end of the alleyway, yet, on the principles enunciated in the accepted authority of *Davis* v. *Henderson* (1869), 29 U.C.Q.B. 344, followed in *Jackson* v. *Cumming* (1917), 12 O.W.N. 278, he has had the open, notorious, exclusive, and adverse possession necessary to acquiring a title by possession, unless the fact that the roof or eaves of the plaintiff's house project over a small part of the land in dispute is sufficient to prevent the statute running in the defendant's favour.

That question was considered by Mr. Justice Riddell in *Rooney* v. *Petry* (1910), 22 O.L.R. 101, and, after an exhaustive review of the authorities, he came to the conclusion that the maintenance of the projecting roof only served to retain in the owner of the paper-title an easement to continue the projection, and did not prevent the statute running in favour of the person in possession of the surface. The judgment of Mr. Justice Riddell is not binding upon this Court, but the reasoning of the learned Judge and the authorities relied upon by him seem to me to justify and support his conclusion.

I am, for these reasons, of opinion that the appeal should be dismissed with costs; if, however, the plaintiff desires it, the judgment may be amended by declaring that it is without prejudice to any easement or easements the plaintiff may have acquired or retained over the lands in dispute, in respect to the roof and eaves.

Appeal dismissed.

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Quebec Superior Court, in Review, Lemieux, C.J., Letellier and Belleau, JJ. February 18, 1919.

1. SUNDAY (§ III—30)—SUNDAY WORK—NECESSITY—COMPLAINT—OMITTING TO DENY EXCEPTIONS—JURISDICTION—CRIMINAL CODE, SECS. 717, 1125—R.S.C. 1906, CH. 153—C.C.P. (QUE.), ART. 1003.

A charge of a breach of the Sunday observance law, alleging that the accused illegally transacted business in the ordinary course of its business, and that, for the purpose of gain, it employed certain other persons and made them work on a Sunday, is sufficiently particularised, and the complainant is not bound to deny, in his complaint, the excepted cases which might constitute the defence of the accused.

[See Cr. Code, sec. 717, as amended 8-9 Edw. VII. (Can.) ch. 9.]

2. PROHIBITION (§ II—5)—EXCESS OF JURISDICTION—IRREGULARITY.

In order that an irregularity may give rise to prohibition it is necessary that it be equivalent to an excess of jurisdiction.

[See also *Farquharson* v. *Morgan*, [1894] 1 Q.B. 552; *Clarke Bros.* v. *Knowles*, [1918] 1 K.B. 128, 87 L.J. (K.B.) 189; *Rex* v. *McAuley* (1918), 30 Can. Cr. Cas. 145; *Rex* v. *Spence* (1919), 31 Can. Cr. Cas. 365; *Goulet* v. *Winters* (1919), 49 D.L.R. 484, 32 Can. Cr. Cas. 111, 56 Que. S.C. 521; *Montreal Abattoirs Ltd.* v. *Recorder's Court* (1917), 32 Can. Cr. Cas. 220, 27 Que. K.B. 162.]

Statement.

APPEAL to the Court of Review from the Superior Court of the District of Three Rivers.

The judgment of the Superior Court of the District of Three Rivers, pronounced June 29, 1918, by Drouin, J., is confirmed.

This judgment was quashed upon an inscription in law, a writ of prohibition issued upon the application of the applicant, and which was intended to prevent the carrying out of a conviction pronounced against it for a breach of Sunday observance.

The following are the recitals of the judgment of the Superior Court:—

Considering that the applicant sets up, as the first ground for prohibition, that the infraction of which it was accused is not an infraction in law, because, it says, the act charged against it is not a fault, and would only be an infraction by the additional statement in the complaint, summons and conviction that the applicant, in committing it, was not covered by any of the exceptions mentioned in sec. 12 of the Lord's Day Act, or found in any provincial law;

Considering that we cannot adopt such a doctrine, and that this law cannot be put upon the same footing as those of which breaches do not consist merely in the act itself, but also in the circumstances in which it is committed, which conditions then constitute, with the act, a breach; which is what happens every time that the

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Legislature enacts that an act cannot be done without a permissive license by authority;

Considering that the true interpretation of sec. 5 of the Lord's Day Act, R.S.C. 1906, ch. 153, consists in first finding, and as a sure principle, a prohibition to do certain acts on Sunday, and then a reference to some exceptions in other provisions of the same law, or scattered through the provincial laws upon the same subject—exceptions which accused persons should put forward by way of exceptions;

Considering, moreover, that this ground relates to a wrong information or an ill-founded judgment and cannot, consequently, support a proceeding which is neither a writ of error nor a writ of appeal;

Considering that the second claim of the applicant is that, before the Court of Sessions of the Peace, it proved that it is protected against the prohibitive clauses of this Act by certain exceptions given in sec. 12 and in the provincial law of Quebec upon the same subject;

Considering that there is an attack based on an ill-founded judgment, an application to quash a judgment, which cannot be presented by way of prohibition;

Considering that it is necessary so to decide thereon, when the applicant pleads customs recognised in the Province of Quebec;

Considering that there might be error in the sentence pronounced by the Court of Sessions of the Peace, but that we cannot escape from the conviction that this Court had jurisdiction to take cognisance of the complaint laid against the applicant;

Considering, moreover, that the proceeding by way of prohibition is of strict pleading, and cannot be used in cases where the law furnishes any other way of proceeding; that the Criminal Code offers to the applicant a way of obtaining what he wants, more advantageous, since it could give new evidence and argue from that already given in the Court of Sessions, by choosing to appeal to the Court of King's Bench, sitting as a Criminal Court;

Considering that we cannot, taking into consideration the law as it stands, entertain the opinion that the Dominion Parliament had not the right to pass such a law, nor that it is unable to give effect to this law, if there is a conflict between it and any provincial law;

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The Court maintains the inscription in law against the application for a writ of prohibition, and quashes and sets aside the writ of prohibition issued at its instance, with costs.

This judgment was confirmed in review, the following opinions being delivered.

J. E. Méthot, K.C., for applicant; *Lachance, Ahern* and *Morin*, for respondent.

LETELLIER, J.:—The question in this case is an application for a writ of prohibition obtained by the plaintiff against the Court of Sessions of the Peace of Three Rivers, Felix Marois of Quebec, and Alfred Marchildon, magistrate of the District of Three Rivers.

The following are the facts which gave rise to the application:—

On February 7, 1916, Felix Marois, Registrar of the Council of Conciliation and Arbitration of the Province of Quebec, laid a complaint before the magistrate Marchildon against the appellant, which read in these words:—

That the said company, at the place called St. Pierre-des-Chutes-Shawinigan, County of St. Maurice, on Sunday, February 24, 1916, unlawfully committed a breach of the Lord's Day Act, in that it unlawfully transacted business in the ordinary course of its business as a manufacturer, and appertaining to such trade, and that, for the purpose of gain, it employed then and there and made to work Jules Frigon, Adélard Saint-Martin, Donat Gosselin, and Ernest Côté, contrary to the statute in such case made and provided.

This complaint was laid under sec. 5 of R.S.C. 1906, ch. 153, which reads as follows:—

5. It shall not be lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods chattels or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

The exceptions mentioned in this sec. 5 are found in sec. 12, and read in part as follows:—

Notwithstanding anything herein contained, any person may on the Lord's Day, do any work of necessity or mercy, and for greater certainty, but not so as to restrict the ordinary meaning of the expression "work of necessity or mercy," it is hereby declared that it shall be deemed to include the following classes of work:—

. . . . . .

(*d*) Starting or maintaining fires, making repairs to furnaces and repairs in cases of emergency, and doing any other work, when such fires, repairs or

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work are essential to any industry or industrial process of such a continuous nature that it cannot be stopped without serious injury to such industry, or its product, or to the plant or property used in such process.

. . . . . .

(*w*) Any unavoidable work on the Lord's Day to save property in case of emergency, or where such property is in imminent danger of destruction or serious injury.

The complaint, as laid, therefore contains no statement of the exceptions mentioned in paras. (*d*) and (*w*) of sec. 12.

The present applicant made a defence before the magistrate in which it maintained that the complaint and the information do not contain any real charge, because they do not deny, in describing the breach, the exceptions in which work is allowed. The offence is not of working on a Sunday, but arises from the fact of working when the accused is not within one of the exceptions in sec. 12 of the Act or under some provincial laws. The defence was rejected by the magistrate of the district on June 25, 1916, and the trial was had upon the merits of the complaint and judgment was rendered ordering the accused defendant to pay $50 fine and the costs.

On January 15, 1918, the applicant obtained the issue of a writ of prohibition preventing the execution of the sentence. The Superior Court set aside this writ of prohibition by a judgment on June 29, 1918, upon an inscription in law.

On the application for a writ of prohibition the applicant raised some legal points which may be briefly stated as follows: The complaint, the summons, and the conviction do not shew the commission of a breach, for, outside of the assertion of the doing of an act on February 24, 1916, they do not contain the assertion that such act took place when the applicant was not within the conditions mentioned in sec. 12 of the Act, and, in particular, in paras. (*d*) and (*w*) of this section. The petition complains, moreover, that the complaint is irregular and void, and that the sentence is *ultra vires* the Parliament of Canada; for the law of Quebec should apply. In short, the applicant denies that the Magistrate's Court has jurisdiction, and claims that the want of jurisdiction of the said Court is apparent on the record itself.

An inscription in law was made against this application, and was maintained. This inscription summed up by affirming that the complaint was sufficiently particularised (*libelée en droit*),

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and that the grounds set up by the application could not be so set up by way of prohibition, but only by an appeal to the Court of King's Bench (Crown side).

Before the Court, the applicant did not attack the legality of the Act; and, this with good reason, for I think that it was within the powers of the Dominion Parliament to pass this Lord's Day Act.

The complaint, the summons and the conviction are especially attacked, because these proceedings only contain the statement that certain acts contrary to law were done on Sunday, February 24, 1916, and because the complaint does not contain the exceptions, mentioned in the Act, allowing certain works to be done on Sunday.

We do not at all see upon what the applicant bases a conclusion from this fact that the complaint is not regular. The section states that it shall not be lawful for any person to carry on or transact any business of his ordinary calling, or in connection with such calling, for gain, or to employ any person to do any work, business or labour on Sunday. That is the breach, as described in the Act.

As with every rule, there are exceptions; and these exceptions are provided for by the Act, and are contained in sec. 12 of the said Act, and enumerated in a number of paragraphs. And other exceptions are likewise contained in the provincial Act in articles 4466 *et seq.* R.S.Q. 1909. Should the complaint actually contain the statement that the accused is not found among these exceptions?

To settle this question, it is necessary only to refer to the criminal procedure which applies to the present case. Section 15 of the Lord's Day Act refers us to that part of the Criminal Code which is called "summary convictions." Now, we find sec. 717 of ch. 146, R.S.C., 1906, which enlightens us on this point. It reads as follows:—

"If the information or complaint in any case negatives any exemption, exception, proviso or condition in the statute on which the same is founded it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he wishes to avail himself of the same." Section 717 of the Criminal Code,

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1906, above quoted was repealed by 8-9 Ed. VII. 1909 (Can.), ch. 9, and a new section substituted in terms as follows:—

717. Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and whether it is or is not so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant.

To sum up, the complaint should contain all that is required by the Act to constitute a breach. Now, in our case, the complaint contains all that sec. 5 requires in order to constitute the breach therein mentioned. This is all that the complainant had to do; it is all that he had to prove. It remained to the accused or to the prisoner to plead all the reasons for exemption or exceptions which are in his favour. Consequently, the complaint was sufficient, and the conviction based upon such complaint is likewise valid in form.

The offence against the Act consists in working on Sunday under certain conditions, and the complaint states that the accused did work for gain on a Sunday. It is for the latter to plead to this charge and to establish that he is within one of the exceptions. That is what he did also before the Court of Sessions of the Peace.

But, outside of the point that the complaint is sufficiently particularised, I consider that the applicant cannot set up this ground by writ of prohibition. An improperly drawn information or an ill-founded judgment may give the right to a writ of error or an appeal, and yet not take away the jurisdiction of the magistrate.

We do not wish to discuss all the grounds raised by the proceedings on the record of the Superior Court by the petition and by the inscription in law. We wish to keep to the reasons which were raised by the appellant's factum.

It does not attack the constitutionality of the Act, as it did in the first trial. Before us, it does not attack the jurisdiction of the magistrate except on this principle that there is no breach set forth. We think it is wrong; but supposing it was right in its claims with regard to the wording of the complaint, it is not by way of prohibition that it can attack the conviction, but only by appeal. Section 1125 of the Criminal Code mentions irregularities

which might be contained in the complaint and which might not be of such a nature as to invalidate the conviction, and this section contains para. (*c*), which says:—

> The omission to negative circumstances, the existence of which would make the act complained of lawful, whether such circumstances are stated by way of exception or otherwise in the section under which the offence is laid, or are stated in another section.

Such irregularity would not oust the jurisdiction. Sec. 1124 states clearly that no conviction made by a Justice of the Peace shall be held invalid for any one of these irregularities above mentioned if the Court, before which the question is raised, is satisfied that an offence of the nature described in the conviction, order or warrant has been committed and is within the jurisdiction of the Justice of the Peace.

So, everything complained of by the applicant can be set up in an appeal lodged with the Court of King's Bench, but in no way takes away the jurisdiction of the magistrate, and cannot, consequently, be the subject of a writ of prohibition.

All the authorities cited by the applicant do not apply, or no longer apply since the coming into force of secs. 717 and 1125 of the Criminal Code.

The writ of prohibition is the supreme remedy, when there are no others. But here there was a right of appeal, a more efficacious method, and the only one by which the applicant can raise this question of exemptions set up in its factum.

LEMIEUX, C.J.:—The company obtained a writ of prohibition on the ground that the lower Court exceeded its jurisdiction, under art. 1033 C.C.P. (Que.), the excess of jurisdiction consisting in the fact that the magistrate upheld a complaint in which every case of exception recognised by law had not been set out. Lemieux, C.J.

In spite of law and settled principle, the purpose or object of the writ of prohibition seems to be too often misconceived. The writ should only be issued and maintained when the inferior tribunal exceeds its jurisdiction or has exercised a jurisdiction which is not within its competence.

By jurisdiction, is understood the authority of a Court to try and decide a case. This jurisdiction is taken for granted from the power to try and decide cases, but does not depend on the regular exercise of such power, or on the legality of the decisions rendered. Jurisdiction must always be distinguished from the

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exercise of it. What constitutes jurisdiction is the authority to render any judgment in a case and not the nature of the judgment rendered.

There exist, unquestionably, remedies against judgments on account of error or illegality; but such can be applied only by a special proceeding, by way of appeal or *certiorari*. But from the moment that a Court has jurisdiction it is a matter of absolutely no importance that the proceedings taken and followed in order to obtain judgment were grossly irregular, or that the decision given was manifestly wrong. If the Court had jurisdiction or power, by law, to hear the complaint, whatever may be the judgment rendered upon such complaint, the judgment cannot be attacked for want of jurisdiction.

This rule, which does not allow a contest as to the validity of a judgment or order of a Court, since such Court has jurisdiction with respect to the object of the litigation, is based upon considerations of public order and is intended to insure a permanent and stable character to judicial decisions and on the rights which they confer. Otherwise the business of the Courts would offer no guarantee of certainty or security.

On the other hand, if a Court has not jurisdiction, it is of no importance that the procedure followed and the decision given are absolutely correct and entirely regular; if the judgments and orders are of no value, they can be declared void upon a writ of prohibition.

We are only going to summarise the clear settled principle as sanctioned by the law which we find stated in 24 Cyc. (tit. Jurisdiction).

Our Courts of justice have pronounced to the same effect as is quoted below, particularly Sir L. N. Casault in *Piché* v. *Corporation de Québec* (1874), 8 Que. L.R. 270. We read in *Mayor of London* v. *Cox* (1867), L.R. 2 H.L. 239 at 278:—

> In a prohibition for want of jurisdiction, the question is not whether the party or the Court has done a wilful wrong, but whether the Court has or has not jurisdiction.

We have often given decisions to the like effect, especially in *Breton* v. *Landry* (1898), 13 Que. S.C. 31, that the writ of prohibition is never granted as a ground of appeal or of revision of judgments rendered by inferior Courts, but merely to bring back

these Courts within the limits of their jurisdiction, from which they departed or are on the point of departing. Consequently, this writ should not be granted to remedy an irregularity of procedure committed by an inferior Court, if such irregularity is not equivalent to an excess of jurisdiction. Nor should this writ be granted to repair an illegality, however grave it may be, committed by a Court, in the course of a proceeding in which it has jurisdiction *ratione materiae*. In order that an irregularity may give rise to prohibition, it is necessary that it be equivalent to an excess of jurisdiction. "The irregularity must however be such as to amount to an excess of jurisdiction; and a mere mistake or error be it ever so manifest . . . will not be a ground for prohibition." See Lloyd's County Courts Practice, 8th ed., p. 210, also High's Extraordinary Legal Remedies, 3rd ed., sec. 765.

See also *Beaudry* v. *Lafontaine* (1900), 17 Que. S.C. 396; *Cherrier* v. *Térihonkow* (1889), 17 Rev. Leg. 481; *Montreal Abattoirs* v. *Recorder's Court of Montreal* (1917), 23 Rev. de Jur. 470, recently confirmed by the Court of Appeal (1917), 32 Can. Cr. Cas. 220, 27 Que. K.B. 162, and carried to the Supreme Court of Canada, which said that it had no jurisdiction to hear the appeal (1918), 59 Can. S.C.R. 681.

In the face of such settled and express law, we think that the writ of prohibition issued in this case was ill-founded and should be quashed, and that the complaint and the conviction were well-founded.

I think that had the law required that the complaint should state the exceptions, that nevertheless the complaint should not be quashed merely because it had not fulfilled this requirement. Such omission would, in my opinion, only constitute a mere irregularity, which would not take away the jurisdiction of the Court.

If it was a serious and prejudicial irregularity, it could be remedied either by writ of *certiorari* or by appeal, as my colleague, Letellier, J., shews in his notes.

I deem it my duty, in this matter, to make some remarks which the circumstances warrant.

The breach of the Sunday observance law was committed by the appellant company on February 13, 1916. It is, therefore, three years since the breach was committed, and, by having

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recourse to dilatory proceedings, they have succeeded up to now in escaping the enforcement of the law. It is distressing to see certain public bodies having recourse to such litigious strategems to attack matters relating to social order, to rise against judicial authority, and to make havoc of its decisions.

Society generally is interested in the proper observance of Sunday. Industry and commerce, and particularly their patrons, should aid the legislator to perceive that workmen require, in order to fulfil their duties and perform their work, to follow the exercise of their religion and to hear the necessary instruction respecting moral and sociologial Christianity. Workmen whose conscience is not brightened by the word of truth and strengthened by a religious ideal, bring less courage, honesty and loyalty to the accomplishment of their task. The undertaking, whatever it may be, will not derive benefit from a number of people who violate a precept of Divine law.

The workman who is made irreligious or indifferent, by keeping him away from church and preventing him from observing the Sunday, becomes an easy prey for agitators who might come to work on his passions which he no longer keeps in check. Lastly, employers should understand that Sunday work is not profitable, and will not cause the factor to make progress. The workman is an economic factor and produces only if he is conscientious; you may guage his efficiency, or, if you wish, his production, by his morality. When one sees industrial bodies rising, so to speak, against the law, and giving an example of insubordination against legislation affecting society generally, one cannot be surprised by agitations which frequently arise between capital and labour, and by subversive doctrines which infest certain countries less religious than our own.

Appeal dismissed and prohibition denied.

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REX v. CRAMER.

Ontario Supreme Court, Meredith, C.J.C.P. June 23, 1920.

INTOXICATING LIQUORS (§ III A—58)—DRIVER OF MOTOR CAR FOR HIRE—CARRYING MAN AND PARCELS—LIABILITY FOR "HAVING" LIQUOR IN A PUBLIC PLACE.

A driver for hire of a motor-car, who is employed by another man to take him and his parcels containing intoxicating liquor from the railway station to his dwelling house, is not guilty of unlawfully "having" liquor in a public place. It is the man who employs him who has them and alone has control of them; the driver does not "have" either the man or his parcels.

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Meredith, C.J.C.P.

MOTION to quash the conviction of the defendant by a Police Magistrate. Conviction quashed.

J. E. Lawson, for the defendant, the applicant.

F. P. Brennan, for the magistrate.

MEREDITH, C.J.C.P.:—The applicant was convicted of unlawfully having liquor in a public place, contrary to the provisions of sec. 41 of the Ontario Temperance Act; but nothing is said in that section about a public place; that which the section condemns, in so far as such a case as this is affected by it, is having liquor "in any place whereseoever, other than the private dwelling house in which he resides." It is immaterial whether the place is a public or a private one; the question is, whether the place is or is not one where liquor might lawfully be; and no one could reasonably contend that the section in question prevents the carriage of liquor from a place where it lawfully was to a place where it lawfully might be, even if that were not expressly provided for, as it is, in sec. 43.

The liquor in question was being carried by the owner, or his partner or agent, from a railway station, where it lawfully was, to a dwelling house, where it lawfully might be, if that were the private dwelling house in which the person "having" it resided. It was the dwelling house of his sister, in which he had often, but not always, resided.

The applicant was merely a driver, for hire, of a motor-car, employed by the other man to take him to the railway station, and, after taking him there, employed to take him and the parcels in question with him to the dwelling house I have mentioned.

The applicant denies having any knowledge that the parcels thus taken contained intoxicating liquor, and denies having in any way handled them. But, assuming that he did take part in loading them on his car and in unloading them and carrying them into the dwelling house, how does that alone make him guilty of the severely punishable offence of unlawfully having intoxicating liquors? It was the man who employed him who "had" them, and alone had control of them: the driver did not "have" either the man or his parcels.

Why the man who really "had" them was not prosecuted, why he was merely a witness at the trial of the applicant, is not disclosed, and is difficult to understand.

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If his conduct were unlawful, if he were not taking his parcels where lawfully they might be, he should have been prosecuted for "having" them in a place where lawfully they might not be, if not for other more serious offence.

Whether one who aids and abets another in unlawfully "having" intoxicating liquor, without himself "having," in any manner, the liquor, is guilty of any offence, need not be considered; because no such case was made against the applicant, and no evidence was adduced which would support it if made: see the Ontario Temperance Amendment Act, 1917, 7 Geo. V. ch. 50, sec. 30, adding a new sub-section to sec. 84 of the original Act.*

The magistrate seems to have been under the erroneous impressions: that having liquor in a public place constituted, alone, an offence under sec. 41; and that, because the parcels were in the applicant's "for hire" motor-car, they were in his possession, and he "had" them, within the meaning of that section, though in fact and in law he had no possession of or power over them—no more than if they were his fare's luggage.

The conviction must be quashed on this broad ground: it is not necessary to consider any of the narrower objections to it. *Conviction quashed.*

*(2) The person actually selling, or otherwise contravening any of the provisions of this Act, is for the purposes hereof styled "the actual offender," whether acting on behalf of himself or of another or others, and the actual offender shall personally incur the penalties prescribed by this Act, and at the prosecutor's option the actual offender shall be prosecuted jointly with or separately from the occupant, but both of them shall not be convicted of the same offence, and the conviction of one of them shall be a bar to the conviction of the other of them therefor.

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LEE v. LEE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. October 8, 1920.

COURTS (§ II A—150)—ACTION FOR ALIMONY WITHOUT DIVORCE OR JUDICIAL SEPARATION—JURISDICTION OF PROVINCIAL COURT TO AWARD ALIMONY.

In Alberta a wife has the right to bring an action for alimony without divorce or judicial separation and the Court has jurisdiction to award alimony in such a case.

[Review of authorities and legislation. See also annotation 48 D.L.R. 7.]

Statement.

APPEAL from the judgment of Simmons, J., refusing an application for the continuance of an injunction granted by a District Court Judge under the provision of sub-sec. 2 of sec. 16 of the Supreme Court Act, 7 Ed. VII. 1907 (Alta.), ch. 3. Reversed.

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LEE v. LEE.

Harvey, C.J.

H. C. Macdonald, for appellant; *D. H. Elton*, for respondent.

The judgment of the Court was delivered by

HARVEY, C.J.:—The plaintiff, the wife of the defendant, is suing him for alimony alone without divorce or judicial separation. By sub-sec. 2 of sec. 16 of the Supreme Court Act, 7 Ed. VII. 1907 (Alta.), ch. 3, it is provided that:—

> In any action for alimony the Court may, whenever such a course appears to it to be proper, and either before or after judgment, grant an injunction for such time and upon such terms as may be just to prevent any apprehended disposition of his property, either real or personal or both, by the defendant therein.

The plaintiff applied to Simmons, J., for the continuance of an injunction granted by a District Court Judge under the above provision, but he refused the application on the ground that the Court has no jurisdiction, in order to have the question, which has been discussed at considerable length in one of the law magazines, brought before the final Court of this Province.

The ground that the Court has no jurisdiction is not aptly expressed, because the argument admits that the Court has jurisdiction but contends that no right exists in a wife to obtain alimony alone and therefore there is nothing calling for the exercise of the jurisdiction. It is argued that all that the provincial legislation purports to do is to confer jurisdiction on the Court and not to confer on wives rights to alimony and that in any event the subject alimony is comprised within the subject "marriage and divorce" which is assigned exclusively to the Dominion Parliament by the B.N.A. Act.

I cannot accept either branch of the argument and in my opinion it is founded on too narrow an interpretation of the words "alimony" and "jurisdiction" and too wide an interpretation of the expression "marriage and divorce."

The argument, at least in its entirety, is not a new discovery, for we find part of it raised in *Soules* v. *Soules* (1851), 2 Gr. 299, and in *Severn* v. *Severn* (1852), 3 Gr. 431. In the latter case Mr. Mowat (later, for so long, the distinguished Attorney-General and Premier of Ontario), argued at 432, that:

> In England permanent alimony is never assigned, except as incidental to a decree of divorce; that in this case there is neither a decree for a divorce, nor any power to make such a decree and consequently no jurisdiction in relation to alimony.

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The argument was rejected by the Court in the judgment delivered by the Chancellor, the Hon. Wm. Hume Blake, one of the ablest of Upper Canada's Judges. It was also pointed out that the jurisdiction had been exercised and decrees of alimony granted since 1837 or for 14 years and that it was then too late to question the right to make such decrees.

In 1894, the Dominion Parliament, which had a few years previously established a Supreme Court for the North West Territories and declared its jurisdiction, and a few years later had established a Legislative Assembly for the Territories, by sec. 20 of 57-58 Vict. 1894, ch. 17, enacted that:

> For the removal of doubts, it is hereby declared that subject to the provisions of the North West Territories Act the Legislative Assembly has and shall have power to confer on the territorial Courts jurisdiction in matters of alimony.

In 1895 by Ordinance No. 14 (see Ordinances of the N.W.T. for that year), the Legislative Assembly declared that:

> The Supreme Court of the North West Territories shall have jurisdiction to grant Alimony to any wife who would be entitled to Alimony by the law of England or to any wife who would be entitled by the law of England to a divorce and to Alimony as incident thereto or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights: and Alimony when granted shall continue until the further order of the Court.

This, except for the last sentence, is in the exact words of the Ontario statute which had been in force for several years.

When the Supreme Court of Alberta was established in 1907 (7 Ed. VII., ch. 3), it was given all the jurisdiction formerly possessed by the Supreme Court of the North West Territories; but the section above quoted was re-enacted in the same words (sec. 16).

Since 1895 until the present, without interruption and without question, decrees for alimony without divorce have been granted by our Courts and if as was thought in *Soules* v. *Soules*, *supra*, 14 years was long enough to firmly establish a right and practice, certainly 25 years ought to be at least equally effective.

But I do not think the establishment of the right needs to be rested upon acquiescence.

Although the words I have quoted (now sec. 16, 7 Ed. VII. 1907, ch. 3), in form confer only a jurisdiction on the Court,

it is impossible for me to think that the Legislature did not intend to confer, in effect, the substantive right, on the wife who fulfilled the conditions of the statute, to demand the relief from the Court which it was empowered to give. If the words of the Ordinance and Act had followed those of the Dominion Act and only given the Court jurisdiction "in matters of alimony," then it might have been argued that the Legislature was only considering the question of the Court's jurisdiction but when it sets out the particular circumstances under which the jurisdiction is to be exercised, something more must have been contemplated. It is the intention of the statute to which effect must be given and we know from experience that words are not always used in statutes any more than in common parlance in their strictly literal meaning. A comparison with the other sections of the Act emphasises this point. Sections 9 and 10 declare the jurisdiction of the Court without in any way declaring rights of litigants asking for the exercise of that jurisdiction. Then sec. 12 provides that the Court shall have power to relieve against a forfeiture. The word jurisdiction is not used but the form of the statute is to give the authority to the Court not the right to the aggrieved party. Then sec. 15 provides that: "The Court shall have the jurisdiction to grant and shall grant relief," &c. Can there be any doubt that the intention is to give the right to the person to the relief which the Court is given jurisdiction and required to grant?

Section 17 provides for registration of a judgment for alimony. This is no question of jurisdiction, but a right to the holder of a judgment impliedly recognising the existence of a right to obtain such a judgment.

I see no advantage in labouring this point further though before leaving it I might ask the question, what is to prevent the Court from granting the alimony which it is empowered to grant?

We then have to consider what is alimony.

MacQueen's Husband & Wife, 4th ed., at 213, defines alimony as "an allowance made to a wife out of her husband's means for her support either during a matrimonial suit or after its termination."

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If we were forced to apply this meaning to the word in our statutes we might find ourselves left where we started and it appears to me that it is the application of this narrow meaning which largely supports the argument advanced against the right of action.

The Encyclopædia of the Laws of England (vol. 1, p. 300), however gives no such narrow meaning, defining it as "a pecuniary allowance payable upon a separation by one of the parties to a subsisting marriage to or on behalf of the other party to the marriage", and Murray's New English Dictionary defines it as "1. Nourishment; supply of the means of living, maintenance" and "2. *esp.* The allowance which a wife is entitled to from her husband's estate, for her maintenance on separation from him for certain causes."

Neither of these interpreters defines alimony as conditional upon a divorce or other judicial separation or a decree for restitution of conjugal rights, and even if that were the usual acceptation of the word and we find it used in a statute where such a meaning is clearly not intended, we must give it a meaning appropriate to the intention.

This brings us to the question of the competence of the Legislature to enact the legislation.

Leaving aside the effect of the empowering Act of 1894 and considering only our own statute of 1907 I feel no doubt that the section in question is entirely within the authority of the Legislature. In my opinion, it cannot be successfully contended that "alimony" comes within the subject of "marriage." It is true that it presupposes a marriage. The duty of the husband to support his wife whether she lives with him or apart from him is a matter of civil rights as between husband and wife and it is not the subject of "husband and wife" but of "marriage and divorce" which is assigned to the Dominion Parliament. Then it cannot be said that it is essential to divorce, for even in England while it is given as an incident to divorce it is given quite apart from divorce upon failure to observe an order for restitution of conjugal rights. It is in my opinion nothing more or less than a matter of civil rights arising out of a particular relationship and quite clearly therefore within the jurisdiction of a Province

if not included within the express words of "marriage and divorce" which for the reasons I have stated in my opinion is not the case.

I would, therefore, allow the appeal with costs and direct the continuance of the injunction till trial subject to any modification by a Judge on application. *Judgment accordingly.*

MONTREUIL v. ONTARIO ASPHALT BLOCK Co. Ltd.

Ontario Supreme Court, Sutherland, J. June 17, 1920.

APPEAL (§ VI C—289z)—BOTH PARTIES DESIRING TO APPEAL FROM SAME JUDGMENT TO DIFFERENT TRIBUNAL—PRIORITY BY FILING SECURITY—SUPREME COURT ACT, R.S.C. 1906 ch., 139, SEC. 75—PRIVY COUNCIL APPEALS ACT, R.S.O. 1914, CH. 54, SEC. 3.

Where the plaintiff desired to appeal from the decision of the Appellate Division of the Supreme Court of Ontario to the Supreme Court of Canada, and the defendants desired to appeal to the Privy Council, the plaintiffs being the first to furnish security, their application for an order approving of their security was granted, and defendant's application for a like order was refused.

[*Hatdy* v. *Merchants Despatch Co.* (1884), 4 O.R. 723, distinguished.]

MOTION by the plaintiffs for an order approving of the security furnished by them upon a proposed appeal to the Supreme Court of Canada, from the judgment of the First Divisional Court of the Appellate Division, *Montreuil* v. *Ontario Asphalt Block Co. Limited* (1920), 52 D.L.R. 563, 47 O.L.R. 227; and motion by the defendants for an order allowing the security for costs given by them upon a proposed appeal to His Majesty in His Privy Council from the same judgment. Statement.

E. D. Armour, K.C., for plaintiffs.

A. W. Langmuir, for defendants.

SUTHERLAND, J.:—On the 19th March, 1920, judgment was delivered herein by the First Divisional Court. On the 13th May, the defendants' solicitors caused notice of appeal therefrom to His Majesty's Privy Council to be served, at 11 a.m. or thereabouts, on the plaintiffs' solicitors, at Windsor, Ontario, where the solicitors for all parties reside. Sutherland, J.

Between 3 and 4 o'clock in the afternoon of the same day, the agents of the plaintiffs' solicitors at Toronto, in pursuance of instructions alleged to have been sent to them a day or two before, served on the agents for the defendants' solicitors there, a notice of appeal to the Supreme Court of Canada "from so much of the judgment" as declared "that the defendants the Ontario Asphalt

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Block Company Limited are entitled to a lien on the lands of the plaintiffs for buildings thereon, and directs a reference to ascertain the amount by which the value of the said lands has been increased by such buildings."

On the 14th May, the plaintiffs' solicitors filed a bond of the United States Fidelity and Guarantee Company as security in connection with their said appeal, and on the same day served a notice of the filing thereof on the said agents of the defendants' solicitors at Toronto, and also, by special leave theretofore obtained from Maclaren, J.A., a notice of motion, returnable on the 17th May, for an order approving of the said security.

This latter motion was, on the day named, adjourned until the 20th May, and again on that day until the 25th, when it came on to be heard before me.

Meantime a notice of motion, bearing date the 19th May, had been served by the defendants' solicitors on the plaintiffs' solicitors, returnable on the said 25th May, for an order allowing the security for costs given by the defendants in the action, and proposing to read, in support of such application, a bond filed by them as such security.

Both parties are, of course, entitled to appeal.

The defendants urge that, if the plaintiffs are permitted to go to the Supreme Court, and the defendants are subsequently dissatisfied with the judgment of that Court, and wish to appeal therefrom to the Privy Council, they can only do so after leave obtained. The only case I was referred to was *Hately* v. *Merchants' Despatch Co.* (1884), 4 O.R. 723. I quote from the head-note:—

"*Per* Armour, J.: Where there is a general judgment against several defendants, Rule 510 does not permit them to sever and appeal to different Courts, but they were all bound to appeal to the tribunal to which the defendant taking the first step had appealed, and on this ground the appeal should be dismissed."

It was suggested that, as the defendants had served the first notice of appeal, they had taken the first step. Whatever might be the case as between different defendants, I can hardly think that the case referred to would necessarily have application to plaintiffs and defendants both desiring to appeal.

It is provided by the Supreme Court Act, R.S.C. 1906, ch. 139, sec. 75, that no appeal shall be allowed to the Supreme

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Court until the appellant has given proper security, as therein indicated. The Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 3, provides that no appeal shall be allowed until the appellant has given security as in said section mentioned. Neither of these Acts expressly requires that a notice of appeal shall be given, except in the special cases referred to in sec. 70 of the Supreme Court Act. Under both Acts, the first important thing to be done is to furnish the necessary security.

It appears to me that it was the plaintiffs who took the first effective step towards prosecuting an appeal, when they filed their bond and served notice of filing and of an application for its allowance.

Apart altogether from this, I would incline to the opinion that, where either litigant desires to take an appeal to the final appellate Canadian Court, he should not be deprived of that right except for good reason. I am, therefore, of opinion that the plaintiffs' application should be granted, and decline to make the order asked by the defendants on their motion.

In the somewhat unusual circumstances, the costs of both motions may well be costs in the cause.

Judgment accordingly.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. September 15, 1920.

TAXES (§ I F—87)—EXEMPTION OF BUILDING SET APART AND IN USE FOR THE PUBLIC WORSHIP OF GOD—WHAT PROPERTY INCLUDED IN EXEMPTION.

Under the provisions of the Municipal Act, R.S.B.C. 1911, ch. 170, sec. 228 (1), as amended by 4 Geo. V., 1914, ch. 52, sec. 197 (1), the exemption from taxation of "Every building set apart and in use for the public worship of God" includes exemption of the land on which the building is situate.

APPEAL by plaintiff from the judgment of Macdonald, J., in an action commenced to prevent the corporation of the City of Victoria selling St. Andrew's Cathedral at a municipal tax sale. Reversed.

Statement.

F. A. McDiarmid, for appellant; *H. B. Robertson*, for respondent.

MACDONALD, C.J.A. (dissenting in part):—I am so fully in accord with the trial Judge that I shall confine what further I have to say to narrow limits.

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It is of importance to note that the Legislature has for assessment purposes severed the land from the improvements thereon, which include the buildings. It was argued with plausibility by appellant's counsel that as the building could have no useful existence without the land, "building" must be read to mean building and site, in other words, that by judicial construction the Court ought in effect to replace in the section that part of it which the Legislature had deliberately stricken out. To assist this submission it was argued that because of secs. 21, 22 and 23 of the Interpretation Act, R.S.B.C. 1911, ch. 1, set out in full in the reasons below, no notice must be taken of the state of the law previous to the amendment of 1913. Section 21 has no application at all to this case, and the others I think, mean only that the repeal or amendment of a statute is not in itself to imply a legislative interpretation of the law, but this is not to say that the Court is precluded from construing a statute in the light of its history. But apart from its history it will be seen that the Legislature has granted in apt and precise words exemption of the building and a survey of the whole Act not only fails to shew that a wider meaning was intended, but on the contrary, rebuts any such notion.

Mr. McDiarmid's argument would be well nigh irresistible if the case were not governed by statute and the question were the meaning of "building" at common law.

As pointed out by the Judge, the municipality has authority to exempt all other buildings in the municipality from taxation but not their sites. Upon the exercise of such authority all other buildings in the municipality would be placed in precisely the same situation in respect to taxation as that occupied by the church, and all the sites thereof would be in like situation with the church site, and the consequences claimed to follow thereupon would exist as to all alike and every taxpayer could, if appellant's contention is sound, properly be heard to say, "You cannot assess my land since at common law it is part and parcel of my building, which is exempt, and you cannot sell my land for default in payment of taxes assessed against it, because my building which is exempt from assessment is situate upon it."

I do not think it would be useful here to refer to the many sections of the statute to which attention has been directed by

appellant's counsel in an exhaustive endeavour to find inconsistencies which would appear if his submission were not accepted. There are not a few such, but they cut both ways. They are not vital but such as are found in abundance in many voluminous statutes. The Act as a whole must be looked at and effect given to what is its true intent and meaning. Notwithstanding minor defects the scheme of the Act is amply manifested by its provisions and creates no doubt in my mind as to the soundness of respondent's contentions, and while it may not be necessary to decide whether the municipality can sell more than the land severed by law from the building, which as I understand it was all it intended to do, yet in view of the general importance of the dispute I desire to say that in my opinion the municipality may sell both site and building for arrears of taxes levied upon the land alone.

MARTIN, J.A., would allow the appeal.

Martin, J.A.

McPHILLIPS, J.A.:—This appeal brings under review the provisions of the Municipal Act, R.S.B.C. 1911, ch. 170, sec. 228, (1), as amended by 4 Geo. V. 1914, ch. 52, sec. 197 (1), relative to the exemption of "Every building set apart and in use for the public worship of God."

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The apparent policy which the language at once indicates is exemption in favour of all buildings used for the public worship of God—and of course churches used for the public worship of God come within this terminology—and the particular church in question in the present action is the St. Andrew's Cathedral, situate on Blanchard St. in the City of Victoria. The action was commenced to prevent the Corporation of the City of Victoria selling the cathedral at a municipal tax sale for claimed arrears of taxes imposed against the land upon which the cathedral is situated. The cathedral is a substantial building of stone and brick with deep footings and foundations well sunk into the soil, admittedly a building of permanent character, in use for many years and is still being used for "the public worship of God," but notwithstanding this declared statutory exemption assessments have been imposed and because of default in payment of these assessments tax sale proceedings are being pressed, now restrained by injunction, pending the final determination of this action.

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I do not find it necessary to in detail refer to the various provisions of the statute law that have been enacted from time to time, but content myself by saying that throughout there has been a plain statutory policy of exemption of all buildings in which the public worship of God takes place. The fact that in the R.S.B.C. 1911, ch. 170, sec. 228 (1) (Municipal Act), the added words "and the site thereof" were inserted and later struck out, 3 Geo. V. 1913, ch. 47, sec. 16, in my opinion in no way supports the contention that "building" cannot be held to carry along with it as exempt the actual land upon which the edifice is situate. In this connection, it is well to remember secs. 22 and 23 of the Interpretation Act, R.S.B.C. 1911, ch. 1. These sections read as follows:—

(22) The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was or was considered by the Legislature to have been different from the law as it has become under such Act as so amended.

(23) The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

The words "and the site thereof" are very comprehensive in their nature and the intention of the Legislature might well be to obviate difficulties that would unquestionably arise if the words taken in their fair meaning were held to be somewhat expansive in effect and cover the historic site surrounding Christ Church Cathedral and analogous cases throughout the Province. (See Murray's New English Dictionary, vol. 9, Part I, at 113.)

In the present case if the assessment was illegal it was a void assessment *ab initio*, a wholly invalid assessment and my view is that it was illegal and nothing that has occurred can validate that which was a void assessment and the appellant is unaffected by any provision by way of a statute of limitations as contained in the Municipal Act (see *City of London* v. *Watt & Sons* (1893), 22 Can. S.C.R. 300; *Toronto Ry. Co.* v. *Toronto Corporation*, [1904] A.C. 809), and the appellant rightly invokes the action of the Court by way of perpetual injunction to restrain the tax sale when the attempt is made to sell property which by the language of the Legislature in its plain meaning is clearly exempt from any assessment or sale under the provisions of the Municipal Act. It was admitted upon the argument at this Bar by counsel for the Corporation of the City of Victoria, the respondent in the appeal,

that the land occupied by St. Andrew's Cathedral except what is relatively an infinitesimal part, is wholly built upon and it was not contended for that there was any portion assessed that would not be deemed as wholly built upon land and covered by the building, so the whole question narrows itself to whether the assessment is valid or invalid within the meaning of the language "Every building set apart and in use for the public worship of God."

Now what was the basic purpose and intention of the Legislature in granting this exemption? It could only be immunity from taxation, *i.e.*, the building for "the public worship of God" was not to be subject to the peril of tax sale proceedings, it was to be wholly exempt and not to be an illusory exemption, it must follow that the actual site is intended to be exempt and an effective meaning must be given to the language of the Legislature. That in other analogous legislation there is found at times specific mention of the lands occupied by the building proves nothing as the Legislature must be assumed to know the law and in using the word "building" intended as the fair reading of the enactment imports to give an effective exemption (See as to the meaning of the word "house:" *Cole* v. *West London & C.P. Ry. Co.* (1859), 27 Beav. 242, 54 E.R. 94, Romilly, M.R., at p. 245:—"If Mr. Cole had granted a house called Belmont Lodge . . . it is clear that the whole of this garden would have passed by such a grant;" also see *Grosvenor* v. *Hampstead Junction R. Co.* (1857), 1 DeG. & J. 446, 44 E.R. 796.) It is instructive upon this point of what is meant by "building" to note the judgments of Lindley, M.R., Rigby, L.J., and Vaughan Williams, L.J., in *Low* v. *Staines Reservoirs Joint Committee* (1900), 64 J.P. 212, 213, 16 T.L.R. 184, there sec. 92 of the Lands Clauses Consolidation Act, 8-9 Vict. 1845, ch. 18, was under consideration, but the decision is based upon the law as to the meaning of "house" in the case of a grant and the Legislature must be held to have used the word "building," in my opinion, with like meaning.

Lindley, M.R., at p. 213:—

Now it has been decided long ago, first by *Shadwell*, V.C.—and the decision has been adopted ever since, for a period of at least 50 years—that "house" in this section must be taken in the same sense as that in which it would be taken in the case of a grant. It follows then that "house," in the case before us, must not be taken to mean merely the actual building—it must be

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taken to include everything that would pass by a grant of this particular house. I cannot suggest any description of parcels on the conveyance of this house which would not have the effect of passing the property in the paddock, unless, of course, words were inserted expressly to exclude it. I have turned to *Sheppard's Touchstone*—a book which has been referred to by me over and over again, and which I have always found right. The author says this: "When the grant is of the messuage with the appurtenances, the garden, etc., and several acres of land, if attached to the house, for the convenience of the house, as lawn, pleasure ground, paddock, etc., would, it is apprehended, pass" (p. 246, 7th ed.). Now let us, bearing this *dictum* in mind, look at this particular case. This is the case of a strip of land at the back of a house, and all we have to do is to ask ourselves whether a grant of this house—describe it as you will—would not necessarily have the effect of passing this paddock too. I do not care whether you call it a paddock or not. Ask any conveyancer whether it would be possible to pass the house without also passing the paddock. I mean, of course, without making special reference to the latter.

Rigby, L.J., at p. 213:—

I am of the same opinion. Had the construction of sec. 92 been open, I should rather have demurred to construe "house" as meaning everything that passes on a conveyance. But the point was settled long ago. This paddock would pass by a gift in a will of "my house near Sunbury," or "my house in which I live," or by any phrase of a similar kind which failed in more precise description. The test is this: Is this piece of ground such as might be reasonably attached, and is *de facto* attached, to the "house" in question? Provided it be so attached it does not then matter in the least whether it be used as a garden or an orchard, or for any other use whatever. It is part of the house within the meaning of sec. 92.

Vaughan Williams, L.J., at p. 213:—

I agree with the other members of the Court. With regard to their criticism of the earlier decisions on the construction of sec. 92, I agree with their strictures on interpreting "house" in that section as it would be interpreted in a conveyance. Those decisions, however, are of such long standing that they cannot be now attacked, and I do not propose to attack them. That being so, the meaning of the word "house" is defined, as pointed out by Lindley, M.R., with perfect correctness in *Sheppard's Touchstone*. I will not read the quotation over again. I have accordingly simply to ask myself whether this paddock has been occupied with the "house" for purposes of convenience. That is always a question of evidence and whenever there is *primâ facie* evidence that a piece of land such as this has been occupied for purposes of convenience, the assumption is that it has been so occupied with the house. That assumption, of course, may always be rebutted by evidence, but in this case it is actually reinforced by the circumstances of the case—by the shape, for example, and boundaries of this paddock. Above all, the assumption is reinforced by the cogent fact that it is only possible to get at the paddock by passing through the house or garden. But it may be said that if the problem be pressed to its logical conclusion we might find ourselves in great difficulty, because we might have to come to the same conclusion even in the case of 100 acres. The answer to that is this; that inasmuch as con-

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venience is always a question of fact, logic must not be allowed to drive us into any such difficulty whatever. In each individual case we must have regard to a number of different considerations; the size, situation, etc., of the piece of land in question, and in many such cases one might find oneself compelled to refuse to draw the inference which I have drawn here.

The plain intention of the Legislature is that "Every building set apart and in use for the public worship of God" shall be withdrawn from the operation of the Municipal Act, and coming specifically to the consideration of the exemption section and subsections (R.S.B.C. 1911, ch. 170, sec. 228; 2 Geo. V. 1912, ch. 25, sec. 34; 4 Geo. V. 1914, ch. 52, sec. 197 (1), (3)), it will be seen how anomalous the situation becomes if the words "building" and "hospital" do not include the land upon which the structures are built.

Attention has been called to sub-sec. (3) of sec. 197, and we find that after referring to "hospital" not itemising the actual land built upon, there is contained the amplification of the exemption, viz., "and the land adjoining thereto (adjoining the hospital is clearly meant) and actually used therewith, not however exceeding twenty acres in case of a public hospital and three acres in case of a private hospital."

We have here a dictionary as indicating the meaning and intention of the Legislature and it accords with common sense that "building" is to be held to be comprehensive of the land actually occupied and upholding the building. To admit of tax proceedings that will evade this plain meaning of the Legislature would be a denial of justice and would be a violation of the plain reading and plain intent of the Legislature and render nugatory that which is the declared policy of the Legislature. Even were it possible to read the enactment as contended for by the respondent, I might in passing say that it would be a barren victory, as with the building exempt, attached to the soil as it is the injunction would be rightly maintainable inhibiting any tax sale proceedings which would affect or imperil the utilisation of St. Andrew's Cathedral "for the public worship of God," any sale thereof would be abortive and of no effect even if unrestrained by injunction and the purchaser would find himself absolutely unable to take possession of the cathedral, and in the result it would be nothing but an illusory sale and purchase. The building being exempt cannot be sold for taxes, the acquirement by sale for

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taxes (if that is permissible) of the title to the land occupied by the building cannot, in the face of the statutory enactment conferring exemption, give title to the building. What must be done is to give effect to the intention of the Legislature (*Att'y-Gen'l* v. *Carlton Bank*, [1899] 2 Q.B. 158), and here it is plain that the policy is to exempt from taxation the "building" in use for the public worship of God. The building as of necessity must rest upon land. Wherein is there evidence of any intention to give other than a complete exemption? It follows that it is reasonable to give "building" the meaning that the law gives it in a grant, *i.e.*, it comprises the land at least upon which it is situate.

In view of the express exemption by statute, it becomes necessary for the respondent to establish that there is express and unambiguous language that will admit, notwithstanding the exemption of the "building," the taxation of the land upon which the "building" rests. (See *Brightman* v. *Tate* [1919], 1 K.B. 463. Maxwell on Statutes, 5th ed., 461.) This onus has not been discharged. There is nothing to indicate the intention to impose a charge upon the land, the implication is all to the contrary (*Oriental Bank* v. *Wright* (1880), 5 App. Cas. 842 at 856). Here it is clear that the preservation of the church was in the mind of the Legislature—and what indication is there that the intention of the Legislature is confined to the edifice alone? Rather should it be viewed as comprehensive of the land and in accordance with the accepted and well known meaning attached to the description if contained in a grant.

The final determination of the present case turns upon what is meant by the language used, *i.e.*, what is its fair meaning? Lord Davey, in the *London Corporation* v. *Netherlands Steamboat Co.*, [1906] A.C. 263 at p. 268, said:—

> A great many authorities have been referred to . . . so far as they lay down general principles applicable to the construction of statutory enactments exempting particular persons from the payment of rates, they may be usefully consulted. . . . Ultimately the opinion of your Lordships must be formed on the language and effect of the particular enactments now in question.

(See also *London (City) Corp.* v. *Associated Newspapers* [1915] A.C. 674, Lord Parmoor at 700, as to cases decided on other Acts.)

In *Associated Newspapers Ltd.* v. *City of London*, [1916] 2 A.C. 429, Viscount Haldane at p. 439 said: "The question must in

each case depend on the meaning of the particular words used," and at p. 444, we find this further language: "The words are not sufficiently clear to operate by way of repeal of exemptions given in express terms," and the present case is one of exemption in express terms and should be given the widest meaning. Undoubtedly, the policy of the Legislature is to encourage the building of churches for the public worship of God and that they should be preserved to the people admitting at all times of the worship of God therein without the peril of being affected by taxation.

For the reasons above expressed, I am of the opinion that the appeal should be allowed and that there be a declaration that the building—St. Andrew's Cathedral—was and is exempt from taxation—the building including in its meaning the land upon which the structure rests, and that there be an injunction restraining any tax sale proceedings. The allowance of the appeal will, of course, also dispose of the counterclaim of the respondent, being a claim for the taxes as a debt due to the Corporation of the City of Victoria—such a claim is not maintainable—the assessment was illegal and void (see *North Cowichan* v. *Hawthornthwaite* (1917), 42 D.L.R. 207, 24 B.C.R. 571; *Toronto R. Co.* v. *Toronto Corp.*, [1904] A.C. 809). *Appeal allowed.*

Re OTTAWA GAS Co. and CITY OF OTTAWA.

Ontario Supreme Court, Appellate Division, Maclaren and Magee, JJ.A., Masten, J., and Ferguson, J.A. July 6, 1920.

MUNICIPAL CORPORATIONS (§ II G—231)—INJURY TO GAS PIPES UNDER HIGHWAY—COMPENSATION UNDER MUNICIPAL ACT—PRESUMPTION OF LEGALITY AS TO USE OF STREETS FOR—EVIDENCE—ONUS.

Where a gas company was incorporated under the general Act respecting gas and water companies, 16 Vict. 1853, ch. 173, the incorporation and corporate rights being confirmed and restated by a special Act of the Province of Canada passed in 1865, ch. 88, authorising the company to lay down . . . all necessary . . . gas-pipes for the conveyance of gas . . . and providing that the company may recover compensation for damage to its property, and whose pipes have been laid and remained laid for more than forty years, there is a presumption that such use of the streets by the gas company is legal, and there being no evidence of any act on the part of the municipal corporation purporting to cancel the rights of property which the gas company possessed, the company is entitled to damages for injury to the pipes by the city corporation, and even if such forfeiture had been attempted it would not give the city corporation the right to divest the gas company of its rights in the pipes or give to the city corporation the right to interfere with or injure them.

[*Abell* v. *Village of Woodbridge* (1917), 37 D.L.R. 352, 39 O.L.R. 382, referred to.]

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Statement.

APPEAL by the Municipal Corporation of the City of Ottawa from an award of A. H. Armstrong, city arbitrator. Affirmed.

The arbitrator's reasons for his award were given in writing as follows:—

In the month of January, 1915, the city council passed a by-law, No. 3902, authorising the construction and laying down of certain new mains for water distribution in the city of Ottawa. In the performance of this work they opened up, in the latter part of the year 1916, a large trench in a portion of Gloucester street for the purpose of laying one of the water-mains therein. The claimants, the Ottawa Gas Company, many years previously, had laid a gas-main with service-pipes attached in the said street, and had replaced their old main by a new one in the year 1913. From Elgin street, which is the easterly termination of Gloucester street, to Metcalfe street, a distance of one block, and for a distance of 100 feet westerly from Metcalfe street, the trench was dug so close to the location of the gas-main that the earth supporting the pipe loosened and fell away, exposing the pipe at various places along the trench. The loosening and falling away of the earth caused the pipe to sag and slip out of place, whereby the main was damaged, and serious leaks of gas developed from time to time. The service-pipes laid from the main to the houses along the said portion of Gloucester street were also broken and damaged in the work of opening up the trench. The claimants had to expend upwards of $1,100 in locating the various leaks of gas and repairing the damage occasioned from time to time to their main-pipes and service-pipes by the work of the city corporation. The work of filling in the trench was done in the winter season, and the earth with which it was filled, after the water-main had been laid, was in a frozen and lumpy condition. As a result it did not settle readily and firmly so as to afford the claimants' pipe solid support, and the gas-main continued to develope so many leaks, and to give the claimants so much trouble and expense in making repairs, that they found it necessary to remove it. Their main was accordingly taken up and relaid about 3 feet back from where the trench had been opened up, where it would have solid ground for support. The cost of removing the pipe amounted to $478.76.

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The solicitor for the claimants was not aware when he served the city corporation with the notice of claim herein that his clients had expended a considerable sum of money in locating the leaks and making repairs to their gas-main before the same was removed, and claimed in the notice the cost of the removal of the pipe only. On the hearing the claimants asked for an amendment increasing their claim to the sum of $892.39, which sum includes, in addition to the cost of the removal, the expense of making the repairs, as estimated by the city engineer, who had supervision of the work. The city corporation consented to this amendment, on the condition that no further or other claim for damages in the premises should be made against them.

The city corporation do not dispute that they damaged the claimants' gas-main and service-pipes, as alleged, or that the work done by them made it necessary to remove the gas-main, but they assert that the claimants were making an unauthorised use of their pipes, and therefore are not entitled to any compensation. It is contended that the claimants are authorised to distribute gas in the city of Ottawa for lighting purposes only, and that the gas passing through the damaged main was not distributed for lighting purposes, but for other purposes for which gas may be used.

In the year 1854 the claimants were incorporated under the Gas and Water Companies Act, 16 Vict. ch. 173 (Can.), under the name of "The Bytown Consumers Gas Company," for the purpose of supplying the town of Bytown with gas-lights. Subsequently, in the year 1865, the said company had an Act passed, 29 Vict. ch. 88 (Can.), confirming the powers given them by their charter, enlarging the territory in which they could carry on operations, and changing the company's name to "The Ottawa Gas Company." Section 3 of the said Act gave the company the right to recover "compensation for any damage or injury which may be done to any of the plant or pipes, laid down, or thereafter laid down by them" in the city of Ottawa, to which name the aforesaid town of Bytown has been changed, "and the value of all loss of gas . . . occasioned by such damage or injury, together with any expense they may be put to for repairing such damage or injury, or in excavating or laying down other plant or pipes, and covering

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the same up." In the year 1879, 42 Vict. ch. 23 (O.), being an Act to extend the powers of gas companies, was enacted, giving all gas companies then existing or thereafter formed, and whether incorporated by special Acts or under any general Act, authority to manufacture and supply gas for heating, cooking, and all other purposes for which gas is capable of being used. Section 5 of the last mentioned Act provides that "no company shall be entitled to the benefit of this Act until it has obtained the consent of the municipal corporation of the city or local municipality within which the powers thereby given are to be exercised by such company; such consent to be by by-law, and to be on such terms and conditions as the by-law may provide." These provisions are incorporated in the Act respecting joint stock companies for supplying cities, towns, and villages with gas and water, in the Revised Statutes of 1887 and 1897, but were repealed by the Ontario Companies Act (1907), 7 Edw. VII. ch. 34.

No evidence of any by-law having been passed by the city corporation giving the claimants the consent provided for in sec. 5 of 42 Vict. ch. 23, or any subsequent Act in which the said section has been re-enacted, was given before me; and the city corporation contend that, in the absence of proof of any such by-law, the claimants have power to distribute gas through their mains in the city of Ottawa for lighting purposes only. They further contend that, if it is not shewn that the gas distributed through the damaged main in Gloucester street aforesaid was used for lighting, the claimants are not entitled to any compensation from them, either for damages or for the cost of the removal of their pipe.

The evidence adduced before me by the claimants does not shew conclusively that residents on that portion of Gloucester street where the claimants' main was damaged were using gas for lighting, nor does the evidence given by the city corporation shew that they were not using it for this purpose.

The east end of Gloucester street, where the gas-main was damaged, is situated very close to the centre of the city, and this street is a very old one and is shewn on the first subdivision of the property, which now comprises the main part of the city. The portion of it in question was built upon many years ago, and practically all the houses thereon had gas-connections and used gas for lighting until recent years, when electricity has almost

entirely supplanted gas for lighting purposes in the city of Ottawa. Evidence was given by the claimants to establish that a small percentage of the gas distributed through their mains in the city was, at the time their main was damaged, and is still, being used for lighting. They also proved that their pipes throughout the city are a veritable meshwork, connecting with one another at all the intersections of the streets on which their pipes are laid. Their main in Gloucester street connects with all the mains laid in other streets which cross the said street, and it also connects at the east end of Gloucester street with a much larger main laid under Elgin street, which latter main is a large feeder leading from the gas-works, which are situated a short distance from the southerly end of Elgin street aforesaid. There is a large section of the city to which gas is supplied situated to the south-west of the point where the claimants' main was damaged as aforesaid, and the damaged main was one of the pipes in the claimants' system through which this large section of the city was supplied with gas. It was shewn that, if the damaged main on Gloucester street was cut off, not only would it deprive the residents along a portion of that street of gas, but the supply of gas to other sections of the city would be sensibly diminished. The claimants, therefore, contend that, whether or not residents on that portion of Gloucester street where the pipe was damaged were using gas, this main was a part of their system for distributing gas to a large section of the city; and that, as some part of the gas distributed by this main at least was used for lighting purposes, they are entitled to compensation, notwithstanding the absence of any by-law giving the consent required under sec. 5 of 42 Vict. ch. 23, aforesaid.

I find, on the evidence, that the main on Gloucester street which was damaged by the city corporation was part of the claimants' distributing system, and that a portion of the gas passing through the said main was used for lighting purposes. The claimants, under the powers which they possessed and apart from any by-law, had the right to have it there to supply gas for lighting to residents along that street, or residents in any other street in the city where it may be required for such purpose. The circumstance that the greater part of the gas passing through this main was probably being used for other purposes does not, in my opinion,

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deprive them of the right to claim compensation for damage to their main and the cost of the enforced removal of the same. It is a reasonable conclusion from the evidence that some of the gas in this main, which is as much a part of the claimants' distributing system as any other pipe they have laid down, was used for lighting, a purpose for which they are authorised to distribute it, notwithstanding the absence of any by-law passed by the city corporation.

Even if it were established by the city corporation that none of the gas distributed by this main was used for lighting, I am of opinion that they would still be liable to compensate the gas company for the damage to their pipe and the cost of removal. The claimants had the right, under statutory authority, to lay down the main. Assuming that they used it for other purposes than those for which they were authorised to use it, this would not, in my opinion, give the city corporation the right to damage or injure their pipe without being liable to make compensation. In such case the city corporation would have a means of restraining the claimants from making an unauthorised use of their pipes, but I do not think it would be within their rights to stop such unauthorised use by tearing up, damaging, or otherwise interfering with the claimants' pipe.

For the reasons aforesaid, I do not consider it necessary to go into the question of the claimants' right or authority to distribute gas in the city of Ottawa for other than lighting purposes, in the absence of any by-law of the city corporation giving such consent.

I allow the claimants the amount of their claim as amended, namely, the sum of $892.39, and also the costs of the proceedings.

F. B. Proctor, for appellants; *G. F. Henderson*, K.C., respondents.

The judgment of the Court was delivered by

Masten, J.

MASTEN, J.:—An appeal from the award of A. H. Armstrong, Official Arbitrator, dated the 8th March, 1920, whereby he awarded to the claimants the sum of $892.39 as compensation for damages occasioned by the municipal corporation (the City of Ottawa) to the gas-main and service-pipes of the claimants (the gas company), when opening up a trench along Gloucester street, in Ottawa.

The facts are set forth in the reasons for the award of the learned arbitrator and need not be repeated.

The sole controversy between the parties is stated by the learned arbitrator, as follows:—

"The city corporation do not dispute that they damaged the claimants' gas-main and service-pipes, as alleged, or that the work done by them made it necessary to remove the gas-main, but they assert that the claimants were making an unauthorised use of their pipes, and therefore are not entitled to any compensation. It is contended that the claimants are authorised to distribute gas in the city of Ottawa for lighting purposes only, and that the gas passing through the damaged main was not distributed for lighting purposes, but for other purposes for which gas may be used."

In other words, the city corporation contend that by the terms of the constating instruments under which the gas company is incorporated its franchise is limited to the use of its pipes for the conveyance of gas for lighting purposes, and that it is exceeding its rights in conducting gas through its mains to be sold and used for cooking and heating purposes; that none of the gas passing through the Gloucester street pipe is used for gas lighting; and that this action on the part of the gas company *ipso facto* works a forfeiture of the pipes in question and of the right to place and have them under the street, and precludes the gas company from recovering any compensation for their injurious affection.

The case was argued before this Court on the assumption by both parties, first, that it is a proper case for claiming compensation under the Municipal Act rather than by an action against the city for negligence in laying their water-pipes; and, second, that the rights originally conferred by by-law 110, passed in 1854, are still in force. It is to be noted in this connection that the city allowed the company to move and relay these pipes and have not assumed to cancel the license to have the pipes there.

In the course of the very admirable argument which was addressed to this Court, many interesting questions of company law were raised, but it appears to me that the appeal ought to be disposed of on the short and simple ground that the pipes in question always have been and are still the property of the gas company, and that they have been injuriously affected by the municipal corporation.

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The gas company having been incorporated in 1854 under the general Act respecting Gas and Water Companies (1853), 16 Vict. ch. 173, its incorporation and corporate rights were confirmed and restated by a special Act of the late Province of Canada, passed in 1865 and chaptered 88. That statute recites that: "The Town Council of the Town of Bytown did, on the 17th day of April, in the said year 1854, enact and pass a by-law, numbered 110, granting to the said company authority as such company to lay down pipes, for the conveyance of gas, under all or any of the streets, squares, and other public places of the said Town of Bytown." And then enacts in clause (1): "And the said by-law number 110, made by the then Town Council of the Town of Bytown, was, and is, and shall continue, legally operative and binding, for the purposes therein contained."

Clause (2) authorises the company to lay down under the streets, squares, and public places thereof (that is, in Ottawa and adjacent parts throughout which it was authorised to operate), respectively, all necessary metal or other gas-pipes for the conveyance of gas, and gives power at all times, and from time to time, to open up and dig up all and any of the streets, squares, or public places in the city of Ottawa.

Clause (3) provides that the company may recover compensation for damage to its property.

Counsel admitted that the pipes in question were laid by the gas company more than 40 years ago. They always have been and are now connected with and form part of the general distributing system of the gas company. Being part of their general system of pipes, they are, for many purposes, real estate: *Consumers Gas Co. of Toronto* v. *City of Toronto* (1897), 27 Can. S.C.R. 453.

Quite apart from the express words of the statute which I have quoted, it is clear that, the pipes in question having been laid and having remained without objection for so many years where they are, there is a presumption that such use of the street by the gas company is legal. See the cases collected in *Abell* v. *Village of Woodbridge and County of York* (1917), 39 O.L.R. 382, at p. 389, 37 D.L.R. 352, at p. 358.

The onus was therefore on the municipal corporation to establish that the property in these pipes, and the right to retain them

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under Gloucester street, which were originally vested in the gas company, had become forfeited. So far from the municipal corporation satisfying this onus, the arbitrator has found as a fact that the evidence given by the municipal corporation fails to shew that the company were not using the main for conveying gas for lighting. He also finds positively that a portion of the gas passing through this main was used for lighting purposes.

No evidence shewing any act on the part of the municipal corporation purporting to assert, declare, or enforce a forfeiture, or otherwise to cancel the rights of property and occupation which the gas company possessed, was adduced; but, even assuming for the moment that such forfeiture had been attempted and declared by the city corporation, and assuming further that the use of the pipes in question for the conveyance of gas for heating and cooking was unwarranted, I am still unable to understand how such an act on the part of the gas company would confer on the city corporation the right to divest the gas company of its property in these pipes, or give to the city corporation a right to injure or otherwise interfere with them.

I am therefore of opinion that the pipes in question, and the right to have them where they are, have not become forfeited, lessened, or otherwise affected. The pipes are still the property of the gas company, located as of right where they are, and have been injuriously affected by the action of the city corporation; and the result is that the gas company are entitled to damages.

This short ground suffices to dispose of the present appeal; and it is therefore, in my view, unnecessary, and consequently undesirable, to deal with the other important and interesting questions raised on the argument.

If the city corporation desire to question the right of the gas company to conduct gas through their pipes for purposes other than gas lighting, they should do so by direct action, claiming appropriate relief, and not by way of collateral attack such as is attempted in these proceedings, and the present decision should not affect the rights of either party in such an action.

Appeal dismissed.

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HARRIS v. McEWEN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 11, 1920.

EVIDENCE (§ II H—224g)— VEHICLES ACT (SASK.)—DAMAGE SUSTAINED BY REASON OF MOTOR CAR—BURDEN OF PROOF—JURISDICTION OF APPELLATE COURT TO SET ASIDE JUDGMENT.

Section 43 of the Vehicles Act, 8 Geo. V. 1917 (2nd sess., Sask.) ch. 42, throws the burden on the owner or driver of a motor car of proving that the damage sustained by any person by reason of such motor car did not arise through the negligence or improper conduct of such owner or driver, and in an action for damages for injuries caused by plaintiff having been struck by defendant's car, the Court of Appeal, if of opinion that such onus has not been satisfied, will set aside a verdict for defendant and allow judgment for the plaintiff.

Statement. APPEAL from the judgment of a District Court Judge dismissing an action for damages caused by the plaintiff being struck by defendant's motor car. Reversed.

E. F. Collins, for appellant; *F. W. Turnbull*, for respondent.

The judgment of the Court was delivered by:

Elwood, J.A. ELWOOD, J.A.:—This is an action brought by the appellant for damages alleged to have been sustained by him through having been struck and knocked down by an automobile driven by the respondent in a reckless and negligent manner. It was further alleged in the statement of claim that the automobile in question was using bright and glaring lights, contrary to the Vehicles Act, 8 Geo. V. 1917 (2nd sess., Sask.), ch. 42. The District Court Judge dismissed the plaintiff's action.

While the District Court Judge does not expressly find that the appellant was not struck by the respondent's car, yet that is practically, I take it, the effect of the judgment. I have no hesitation in coming to the conclusion, under the testimony, that the injuries from which the appellant undoubtedly subsequently suffered were caused by being struck by the respondent's car, either when the front wheel touched him or when the hind wheel touched him when the car skidded.

The lights on the respondent's car were undoubtedly those permitted by the Vehicles Act.

The District Court Judge finds that the respondent was not going at an excessive rate of speed, and he bases that finding upon the evidence of the man who looked after the respondent's car, who stated that the car at top speed would not exceed 14 or 15 miles an hour. I do not think that evidence was at all conclusive. There was no speedometer on the car; and, as opposed to that

evidence, there is the evidence of the same man that a car going at that rate could be stopped in from 5 to 10 feet. The evidence shews that the respondent, immediately he saw an accident was imminent, applied his brakes, and the car skidded to the left at right angles over the curb on to an adjoining lot, altogether a distance of 50 to 60 feet before it stopped. That, to my mind, coupled with the evidence of the witnesses for the plaintiff, convinces me that the car was going at a very much higher rate of speed than 15 miles an hour, and that it was probably about 25 miles an hour, as estimated by the plaintiff's witnesses. In addition to that, there is the evidence of Moffatt, that, after the respondent's car stopped, he immediately ran over, grasped the door of the respondent's car and said, "What in hell are you celebrating driving like that?" That conversation is not denied by the respondent, and I cannot understand such an expression being made use of unless there was something to cause it, and to my mind it helps to corroborate the testimony on behalf of the appellant that the respondent was driving at an excessive rate of speed.

Section 43 of the Vehicles Act, ch. 42 of 8 Geo. V. 1917 (2nd sess., Sask.), in part is as follows:

(2) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

That section throws the burden upon the respondent of proving that the damage which the appellant sustained did not arise through the respondent's negligence or improper conduct.

In my opinion the respondent has not satisfied that onus. In fact, I think that the evidence shews that it was through his negligence that the accident occurred; that if he had been driving at a moderate rate of speed and had had his car under proper control the accident would never have occurred.

I would, therefore, allow the appeal with costs, and allow judgment for the plaintiff for the amount claimed with costs.

Appeal allowed.

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BAGSHAW v. BAGSHAW.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. June 25, 1920.

DIVORCE AND SEPARATION (§ III A—15)—CRUELTY ENTITLING TO ALIMONY —SEXUAL INTERCOURSE—EFFECT ON HEALTH.

Insistence by a husband on having sexual intercourse with his wife during periods of menstruation is not cruelty which will entitle her to alimony in the absence of evidence as to the effect of this upon her physical or mental health.

[*Evans* v. *Evans* (1790), 1 Hagg. Con. 35, followed.]

Statement. APPEAL by the defendant from the judgment of SUTHERLAND, J., at the trial, in favour of the plaintiff in an action for alimony. Reversed.

D. L. McCarthy, K.C., and *D. C. Ross*, for appellant.

Gideon Grant, for respondent.

Ferguson, J.A. FERGUSON, J.A.:—Appeal by the defendant from a judgment of Sutherland, J., dated the 24th October, 1919, awarding the plaintiff alimony and costs. The result of the appeal turns on the answer to the question: Does the evidence establish, not cruelty in *any* sense of the word, but that kind or degree of cruelty which the Courts have recognised as justifying a wife in leaving the bed and board of her husband?

It seems to me to be a well-established principle of the law of this Province, as well as of the law of England, that the plaintiff in an alimony action has not established what our law calls cruelty unless she has shewn that the defendant has subjected her to treatment likely to produce or which did produce physical illness or mental distress of a nature calculated permanently to affect her bodily health or endanger her reason, and that there is reasonable apprehension that the same state of things will continue: *Lovell* v. *Lovell* (1906), 13 O.L.R. 569; *Whimbey* v. *Whimbey* (1919), 48 D.L.R. 190, 45 O.L.R. 228.

The cases of *Mackenzie* v. *Mackenzie*, [1895] A.C. 384, and *Kelly* v. *Kelly* (1869-70), L.R. 2 P. & D. 31, 59, shew that cruelty, within the meaning of the foregoing rule, may be established by a course of conduct in which the husband has not committed any one offence that standing by itself would justify a finding, as well as by the proof of some isolated act or assault of such a grave nature as clearly to establish injury to health or a reasonable apprehension that such act will be repeated and is likely to cause permanent injury to health of mind or body.

Some learned Judges have referred to the rule as being harsh, unreasonable, and not in accord with modern thought. Viewed as an abstract proposition of law, and considered without reference to the context of the judgment on which it is founded, and which Meredith, J.A. (now Chief Justice of the Common Pleas), in the *Lovell* case (13 O.L.R. at p. 579) referred to as "the source from which all inspiration upon the question of cruelty is almost invariably derived," the rule appears to be more susceptible to criticism than it does when read as part of the judgment referred to by the learned Chief Justice, for it deals with the meaning of the rule, the reason for the rule, the policy of the law, the duty of the trial Judge, and the circumstances and considerations that should guide a court in arriving at a conclusion as to what is cruelty within the meaning of the rule.

That judgment was pronounced as long ago as 1790. It has been frequently considered and criticised, but it seems to have stood the tests of time and criticism, and I think I can say, with the learned Judge who pronounced it, that the Court has never been driven off the ground that the plaintiff in an alimony action, claiming on the ground of cruelty, must establish danger to life, limb, or health.

Because I have found the reasoning for the judgment referred to as a source of our law on this question very helpful in understanding and interpreting the rule, and in applying it to the evidence, and also because, during the argument of the appeal in this case and in another appeal heard shortly before it, the rule was much discussed and criticised by my Lord the Chief Justice, as well as by counsel for the respondents, and further because I think it in the interest of the administration of justice that not only the rule but the reasons for it should be stated in a modern case, and in a modern report, I am, at the risk of unduly increasing the length of this opinion, quoting a large part of the judgment of Sir William Scott in *Evans* v. *Evans* (1790), 1 Hagg. Con. 35 to p. 40.

"The humanity of the Court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Everybody must feel a wish to sever those who

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wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness; but my situation does not allow me to indulge the feelings, much less the *first* feelings of an individual. The law has said that married persons shall not be *legally* separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons, which the law approves, and it is my duty to see whether those reasons exist in the present case.

"To vindicate the policy of the law is no necessary part of the office of a Judge; but if it were, it would not be difficult to shew that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom, and that real humanity, that regards the general interests of mankind. For though in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation, may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands, and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood, that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness—in a state of estrangement from their common offspring—and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

"That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, *What is cruelty?* In the present case it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the

comfort, but they affect the health, and even the life of the party. I shall therefore decline the task of laying down a direct definition. This however must be understood, that it is the duty of Courts, and consequently the inclination of Courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of '*per quod consortium amittitur*' is but an inadequate test; for it still remains to be enquired, what conduct ought to produce that effect? whether the *consortium* is reasonably lost? and whether the party quitting has not too hastily abandoned the *consortium*?

"What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage-state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the Courts much injustice may be suffered, and much misery produced, the answer is, that Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous: and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

"Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation; for the Court has no scale of sensibilities, by which it can

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gauge the quantum of injury done and felt; and therefore, though the Court will not absolutely exclude considerations of that sort, where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed; of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number amongst its necessaries, is not cruelty. It may, to be sure, be a harsh thing to refuse the use of a carriage, or the use of a servant; it may in many cases be extremely unhandsome, extremely disgraceful to the character of the husband; but the Ecclesiastical Court does not look to such matters: the great ends of marriage may very well be carried on without them; and if people will quarrel about such matters, and which they certainly may do in many cases with a great deal of acrimony, and sometimes with much reason, they must decide such matters as well as they can in their own domestic *forum*.

"These are negative descriptions of cruelty; they shew only what is *not* cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the Court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the other books of practice, is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health, is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited, in which the Court has granted a divorce without proof given of a *reasonable apprehension* of bodily hurt. I say an *apprehension*, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be *reasonable*: it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent

resistance—by calling in the succours of religion and the consolation of friends; but the aid of Courts is not to be resorted to in such cases with any effect."

The cases of *Whimbey* v. *Whimbey*, *Lovell* v. *Lovell*, and *Russell* v. *Russell*, [1895] P. 315, and [1897] A.C. 395, are, I think, conclusive that the law laid down by Sir William Scott in the foregoing opinion is in accord with the modern decisions by which this Court should, and whether we like it or not, must, be guided and governed in arriving at our conclusions in the case at bar.

After a careful perusal of the evidence, in the light afforded by the arguments of counsel and the authorities referred to by them, including those I have quoted from, I have arrived at the conclusion that the respondent's physical or mental health was not affected by the acts complained of by her, and that she did not leave her husband's home because her health was affected or because she feared it would be affected, and that there is not in evidence any ground for reasonable apprehension that, if she had remained with or if she should now return to her husband, her health would be affected by the appellant's course of conduct towards her. In her pleading the plaintiff did not allege that her health was affected or that she had any apprehension that it would be, and at the trial she offered no evidence, medical or otherwise, going to shew an impaired condition of health. The learned trial Judge says:—

"The plaintiff does not expressly testify that her health has been undermined or go very far at all in the direction of saying that she fears it will be. She puts it that his whole course was such a trial with respect to this matter that at last she came to the conclusion that she could not longer endure it and that she must leave. . . . What the plaintiff does say is, that so insistent was the defendant in his desire for sexual intercourse with her that through the whole period, even at times of menstruation, he would insist upon having connection with her.

"Now we can imagine the bodily effect in connection with such a matter and can easily believe that a woman would not be merely dissatisfied but disgusted and repelled, nauseated, by such insistence and compulsion; and, if it were persisted in, even though for a long time it might be overlooked in so far as not taking any

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definite action about it, nothing would be more apt in the end to cause her to lose respect for her husband and in the end conclude that she could no longer submit to such treatment.

"I think it would tend to affect her physically, even though it were not specifically testified perhaps that it did.

"I think this case is in this respect differentiated from any case that has come to my observation, at all events. I am of opinion that if it were found in a case like this that the husband did persist in this course until a time came when the wife determined that for that reason alone she could no longer endure it, but would separate, it ought to be a good basis for a decree to be made. . . . I credit her story that he was insistent on sexual intercourse with her at unreasonable and improper times, meaning thereby the periods of menstruation particularly, . . . and I come to the conclusion that in the end that cause was a main determining feature."

Of the many accusations of misconduct made by the respondent against the appellant, the one on which the learned trial Judge seems to have based his decree is unreasonable demands for sexual intercourse made and persisted in by the appellant. With all deference, I am of opinion that the conclusions which the learned trial Judge stated in the foregoing extracts from his opinion are not justified or supported by the evidence. At an early stage in the trial the plaintiff made what seems to me to be a most unsatisfactory general statement to the effect that the appellant had insisted on having sexual intercourse with her during periods of menstruation. She did not plead, or in her examination for discovery mention, such a ground of complaint. In her evidence at the trial she only gives two specific instances of such requests. In both instances she refused to accede to the request and successfully resisted her husband (see pp. 425, 426, and 427 of the plaintiff's evidence in chief). The appellant denies the charge; and, in the face of such denial, and in view of the conduct of the respondent and the vague indefinite nature of her evidence on this point, in which she does not expressly state that the husband ever accomplished his desire or purpose when it would have been unreasonable or unseemly for him so to do, I think the learned trial Judge went beyond the evidence in drawing the inferences and arriving at the conclusion that the appellant did actually have sexual inter-

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course with the respondent during her menstruation periods. In the absence of medical testimony, I am not qualified to determine or prepared to find that, if the appellant had had such intercourse, it either did or would necessarily result in the impairment of the plaintiff's physical or mental health. One's sense of decency and propriety may be greatly shocked by evidence going to shew that a husband had or even desired to have sexual intercourse with his wife during menstruation, but it has not yet been decided that conduct which shocks one's sensibilities is a good basis for an alimony decree, unless it is clearly established by evidence that such conduct is calculated permanently to affect the health of the person seeking the decree. In this case such evidence is conspicuous by its absence.

I would, for these reasons, allow the appeal and dismiss the action with the usual order as to costs in alimony actions.

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

MACLAREN and MAGEE, JJ.A., agreed with FERGUSON, J.A.

Meredith, C.J.O.

MEREDITH, C.J.O.:—I reluctantly agree with the disposition of this appeal which is proposed by my brother Ferguson. I agree with him that we are bound by the authorities to hold that the respondent has not made a case entitling her to alimony; that the law should be as he states it to be, is, in my opinion, to be deplored, and it is not, in my judgment, in accordance with modern views as to the relations between husband and wife. To withhold alimony, unless the conduct of the husband is such as to lead to the conclusion that it has impaired, or that it will impair, the physical health or the mentality of the wife, is to say that a husband may subject his wife daily, and even hourly, to such treatment as makes her life a veritable hell upon earth and she is without remedy if she is robust enough to suffer it all without impairment of her physical health or her mentality.

Appeal allowed.

MERCURIO v. RECORDER OF THE CITY OF QUEBEC.

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Quebec King's Bench, Carroll, J. March 10, 1919.

HABEAS CORPUS (§ I C—12)—CHARGE OF KEEPING DISORDERLY HOUSE UNDER MUNICIPAL BY-LAW—PARTICULARS—CONSTITUENT ELEMENTS—COMMITMENT IRREGULARLY SIGNED BY CLERK OF COURT—BY-LAW 26*a* OF THE CITY OF QUEBEC—CRIMINAL CODE, SEC. 228—CONSTITUTIONAL LAW.

A complaint under a municipal by-law under which the accused is charged "with having kept a disorderly house" in contravention of a by-law in like terms is insufficient and void, in that it does not shew the

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constituent elements of the offence. Even if the by-law passed under the Statute 30 Vict. 1866, Que., would support a charge which is now more appropriately brought under the Criminal Code, the commitment was bad as it was signed only by the Clerk of the Recorder's Court, while under the by-law it was not the Recorder's Court but the Recorder alone who had the right to pass sentence and to sign the commitment.

MOTION for discharge on *habeas corpus*. Discharge granted.

Onésime Gagnon, for applicant; *Chapleau & Thériault*, for respondent.

CARROLL, J.:—An application asking for the issue of a writ of *habeas corpus* was made to me some days ago. This application was granted, and I am appealed to to decide upon the merits of the writ.

Mercurio was charged under a by-law of the City of Quebec—by-law No. 26*a*—of which para. 2 reads as follows:—

> Whoever keeps, occupies, inhabits or frequents a house of prostitution, a disorderly house, or ill-famed or reputed ill-famed, in the city of Quebec, is liable to a fine not exceeding $160; or in default of payment of the fine and costs, to an imprisonment at hard labour during a space not exceeding six months; but the imprisonment shall cease upon payment of the fine and all costs due at the time of said payment; or for not more than six months imprisonment without the option of a fine, or the two together, all according to the discretion of the Recorder.

The applicant has therefore been accused of having kept a disorderly house, and has been sentenced upon this count of the indictment.

At the time of his trial, a motion to quash was made before the Recorder's Court, alleging nullity of the complaint, as it did not state that the house kept by Mercurio was a *common* bawdy house (*débauche publique*), an expression which constituted the essential element of a breach.

In the application which has been made to me, the applicant sets up other grounds of nullity. He claims that the conviction is illegal, because it was not signed by the Judge who gave the judgment; that the evidence should have been taken down in writing; that the order of imprisonment does not state any offence known to the law, and that it was signed by the clerk of the Court instead of by the Judge who pronounced sentence.

The attorneys for the City of Quebec pleaded in writing, saying, in substance, that the entire trial was carried on in conformity with the provisions of the city's charter; that the said offence is mentioned in ch. 57, of 29-30 Vict. 1866, sec. 29, as amended by 5 Geo. V. 1915 (Que.), ch. 88, that the order is

drawn up in the terms of the statute, and that, under the city's charter, an order for imprisonment can be signed by the clerk of the Recorder's Court.

I will discuss the question on the supposition that by-law 26*a* of the City of Quebec is based on a law which is constitutional

It seems strange that there was an offence from the fact of keeping what is called "une maison déréglée" (a disorderly house). The word "déréglée" is not a faithful translation of the English word "disorderly." On consulting Larousse's dictionary, I see that the word "déréglée" in its ordinary sense means "out of order, working irregularly." It is only figuratively that the word signifies to fall into irregular ways, to become opposed to the rules of morality.

However that may be, by assuming that this expression might mean "to keep a house of prostitution," the complaint and conviction are insufficient, because they do not contain the elements of the offence.

This principle has often been affirmed by the Courts. Thus, in the case of *The Queen* v. *Coulson* (1893), 1 Can. Cr. Cas. 114, Armour, C.J., of the Court of Appeal for Ontario, said, at 117: "The conviction here is bad, because it does not specify the particular act or acts which constituted the alleged practising of medicine." In that case there was a complaint in general terms, against a physician for illegally carrying on the profession of medicine, and it did not specify how the offence had been committed.

In *Rex* v. *Leary* (1904), 8 Can. Cr. Cas. 141, a conviction for malicious damage to property, which is a general offence provided for by the statute, was quashed, because it had not specified the property damaged, nor the nature of the damage caused. There is a decision to the same effect in England, in *Smith* v. *Moody*, [1903] 1 K.B. 56.

It has likewise been decided that a conviction upon a charge of being a vagrant, without specifying in what the vagrancy had consisted, is void: *Rex* v. *McCormack* (1903), 7 Can. Cr. Cas. 135. In the latter case Hunter, C.J., of British Columbia, decided that the accused has a right to be informed of the particular offence with which he is charged, and of the elements of such offence.

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In England, where the Summary Jurisdiction Act, 1879, states that the description of the offence in the terms of the statute is sufficient, Wills, J., expressed the following opinion, [1903] 1 K.B. at 61:—

I think that sec. 39 of the Summary Jurisdiction Act of 1879, which provides that it is sufficient to describe the offence in the words of the statute creating the offence, cannot be supposed to have been intended to break down the very important rule which has prevailed now for at least 200 years in the administration of justice with respect to the sufficiency of particulars in a conviction. I do not think for a moment that it was intended to relieve persons who had to draw up convictions from inserting anything which was necessary as an ingredient of the offence of which the particular defendant has been found guilty. When one comes to the description of the offence itself, then it is quite sufficient if it is described in the terms of the statute, however general they may be. At the same time the old rule must prevail, that whatever is necessary to shew that the person convicted has done something which brought him within the words of the statute, must still be specified. [And further, at p. 62]: It is not that there is any insufficiency in the description of the offence itself; the description of the offence follows the words of the statute; but there is insufficiency with respect to the ingrediency of the offence which the appellant has committed and for which he has been convicted. I think sufficient information as to injury to property ought to have been given in the conviction.

In that case the opinion of Alverstone, C.J., is to the same effect as that of Wills, J.

The charter of the City of Quebec authorises the Recorder to take cognisance of offences such as that charged against the applicant, and to hear and decide such offences. This jurisdiction is given to the Recorder as *persona designata*. It is not given to the Recorder's Court. And there is a reason which justifies this distinction. The Recorder's Court of the City of Quebec may be held by the mayor, or by the mayor and a member of the council, or by two members of the council. These persons cannot have sufficient legal knowledge, and, in the matter before us, the Legislature only desired to confer jurisdiction on the Recorder personally. This distinction was made by Langelier, A.J.C., in the case of *Dallaire* v. *City of Quebec* (1907), 32 Que. S.C. 118. The Judge there stated that the Recorder's Court constitutes a tribunal entirely distinct from the Recorder himself, and this is so even when the Court is held by the Recorder himself.

I would not attach much importance to this distinction if it were not for the consequences which have followed the conviction. We know that commitments must be signed by the magistrate

who convicts. In the present case the Recorder alone had the right, by statute, to convict, and consequently, he alone had the right to sign the commitment. In place of that, it was signed by the clerk of the Recorder's Court, without apparent authority for doing so. He can sign the commitment when the Recorder's Court has jurisdiction to hear and decide an offence, but not when such jurisdiction is delegated exclusively to the Recorder himself.

As I have just said, I discuss these questions by supposing that by-law 26*a* and the provincial Act upon which it is based, are constitutional, but, although the question has not been directly submitted to me, I think it my duty to say that in the future it will be better, in matters of this sort, to proceed under Part XV. of the Criminal Code.

The Parliament of Canada has legislated, as a criminal matter, upon these offences, for the whole Dominion, and it is to this legislation that we must have recourse in order to punish offences which are there mentioned.

For these reasons I maintain the writ of *habeas corpus* and order that the prisoner be set at liberty.

The consequence is regrettable with respect to this particular case, but it is impossible to allow such general abuse of procedure as has been committed in this case.

Offences like those of which the applicant is accused are very severely punished, and rightly so; but, since accused persons are liable to imprisonment, they have at least the right to know of what they are accused; it is necessary that the conviction disclose an offence; that the commitment be signed by the person who has authority to do so, and not by one who has no authority.

Discharge granted.

Re TORONTO ELECTRIC COMMISSIONERS and TORONTO R. Co. and CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Mulock, C.J. Ex., Riddell, Sutherland, and Masten, JJ. June 30, 1920.

RAILWAY BOARD (§ II—10)—JURISDICTION—ORDER FOR REMOVAL OF POLES AND WIRES FROM CERTAIN TORONTO STREETS—LIABILITY OF TORONTO R. CO. TO PAY FOR—ONTARIO RAILWAY ACT, R.S.O. 1914 CH. 185, SEC. 59—DETERMINATION OF DAMAGES.

There is no statute expressly making the Toronto Railway Company liable to pay to the Toronto Electric Commission the cost of the removal by the Commission of the poles and wires from certain avenues in the city of Toronto. The only statute that can be appealed to is the Ontario

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Railway Act, R.S.O. 1914 ch. 185, sec. 59, but the Railway and Municipal Board is given no jurisdiction to determine the damages under this section. In any case the determination of damages is a finding of fact and not of law, and an order of the Board ordering the railway company to pay the cost of the removal of the poles and wires, the application being heard by the chairman and vice-chairman, the chairman exercising his right under R.S.O. 1914 ch. 186, sec. 7, is invalid.

THE Toronto Electric Commissioners (Toronto Hydro-Electric system) applied to the Ontario Railway and Municipal Board for an order for the removal of the Toronto Railway Company's trolley poles and wires on Carlaw, Guelph, and Pape avenues, in the City of Toronto.

The Toronto Railway Company and the Corporation of the City of Toronto were served with notice of the application and named as respondents.

The application was heard by two members of the Board, viz., the Chairman (McIntyre) and Vice-Chairman (Ingram).

The following order was made by the Board on the 16th March, 1920:—

"Whereas the Board, on the 4th day of January, 1917, ordered the construction of a certain line of street railway on Carlaw avenue, Guelph avenue, and Pape avenue, in the City of Toronto:

"And whereas the plans of the proposed construction were duly approved by the Board:

"And whereas, pursuant to such order and the plans so approved, certain poles and wires were erected by the Toronto Railway Company:

"And whereas, on the 31st day of May, 1918, the applicants launched this application to the Board for an order compelling the Toronto Railway Company to remove such wires and poles, on the ground that their proximity to the poles and wires of the applicants endangered life and property:

"And whereas the Board, after hearing the evidence adduced upon the application and counsel for all parties, and after reserving judgment until the 3rd day of October, 1918, delivered judgment on the said last named day:

"And whereas, on the application of the Toronto Railway Company, permission was given to the said company to remove the said wires, and the issuance of the order pursuant to such judgment was postponed *sine die* on account of war conditions, the rights of all parties thereto being preserved in the interim:

"And whereas, by order dated the 24th October, 1919, the order of the Board dated the 4th day of January, 1917, was amended by extending the time for construction of the said line of railway, and the said line was ordered to be constructed according to new plans thereof filed with the Board, all the parties hereto being ordered to do respectively such construction work as was necessary to carry the said new plans into effect:

"This Board doth find and determine that the poles and wires of the respondent the Toronto Railway Company upon Carlaw avenue, Langley avenue (formerly Guelph avenue), and Pape avenue, were, at the date of this application, in such close proximity to the poles and wires of the applicants as to endanger life and property.

"And this Board doth further order that the respondent the Toronto Railway Company do pay to the applicants any costs, charges, and expenses they may be put to in carrying out the work called for by the said new plans approved by the Board, which is rendered necessary solely by the existence of the poles and wires of the respondent the Toronto Railway Company upon the above streets.

"And this Board doth further order that the respondent the Corporation of the City of Toronto do pay to the applicants any other costs, charges, and expenses which the applicants may be put to in carrying out the said work pursuant to the said plans.

"And this Board doth further reserve leave to any party hereto to apply for further directions for the carrying into execution of this order or for determining the incidence of cost in any specific case."

The learned Chairman of the Board gave written reasons for the order so made.

The Vice-Chairman disagreed with the finding of the Chairman and with the reasons upon which the finding was based. In a written memorandum, the Vice-Chairman so stated, and added that he had made known his views to the Chairman at the time the judgment was being prepared, but the Chairman declined to accept them, and exercised his right under and pursuant to sec. 7 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, which is as follows:—

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7. Two members shall form a quorum, and, except as provided by section 8, not less than two members shall attend at the hearing of every case, and the Chairman, when present, shall preside, and his opinion upon any question of law shall prevail.

On the 1st April, 1920, the Appellate Division of the Supreme Court of Ontario granted leave to the Toronto Railway Company to appeal from the order of the Board.

The following grounds were stated in the notice of appeal:—

(1) That the Ontario Railway and Municipal Board is a Provincial Court, and therefore the appointment of the members of the Board can only be made by the Governor-General, under sec. 96 of the British North America Act, and therefore the proceedings before the Board are *coram non judice*, and the order complained of is therefore a nullity.

(2) That the order or judgment of the Board is wrong in law, and that, in the circumstances, the Board had no power to order the Toronto Railway Company to pay the cost of the removal of the structures placed on the three streets.

D. L. McCarthy, K.C., for the appellants.

G. R. Geary, K.C., for the city corporation, respondents.

C. M. Colquhoun, for the Toronto Electric Commissioners, respondents.

Riddell, J.

RIDDELL, J.:—This is an appeal by leave from an order of the Ontario Railway and Municipal Board whereby the Toronto Railway Company are ordered to pay the cost of removal by the Toronto Electric Commissioners of their poles, so far as this cost is made requisite by the building by the Toronto Railway Company of their lines on three avenues in the city.

We heard long and elaborate arguments with much citation of cases and statutes; but, in my view, the case turns on a very narrow point.

The order appealed from is dissented from by Mr. Ingram, who says:—

"I disagree with the finding given in this judgment, and with the reasons upon which the finding is based. I made known my views to the Chairman at the time the judgment was being prepared, but he declined to accept them and exercised his right under and pursuant to sec. 7 of ch. 186, R.S.O. 1914."

The order is valid therefore only if the decision be one of law;

and the learned Chairman must be considered as deciding that the Toronto Railway Company is liable as a matter of law for this cost. The law he must draw from statute or common law or from the interpretation of an agreement.

There is no statute expressly making the Toronto Railway Company liable to pay to the Toronto Electric Commission the cost of the removal by the Commission of the poles in question. The only statute that can be appealed to is the Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 59,* but the Railway and Municipal Board is given no jurisdiction to determine the damages under that section: the fact that the Commissioners are a public utility body gives them no more rights in that regard than any other person. And, in any case, the determination of damages would be a finding of fact and not of law.

At the common law there is no such liability: *Vaughan* v. *Taff Vale R.W. Co.* (1860), 5 H. & N. 679, 157 E.R. 1351; and there is no agreement that the Toronto Railway Company shall pay anything to the Commissioners.

If the Commissioners claim through the city corporation they are met by the *res adjudicata* of the original order. It is fair to say that they repudiate the position of statutory agents, and, I think, successfully distinguish *Ridgway* v. *City of Toronto* (1878), 28 U.C.C.P. 579; *McDougall* v. *Windsor Water Commissioners* (1900-01), 27 A.R. (Ont.) 566; 31 Can. S.C.R. 326; *Young* v. *Town of Gravenhurst* (1910-11), 22 O.L.R. 291; 24 O.L.R. 467. It is, however, unnecessary to decide this point, as, granting that the Commissioners are not statutory agents, their position is in no way bettered.

As it seems to me, the Commissioners must rely upon such ordinary methods of enforcing any claim they may have under sec. 59 of the Railway Act as are open to all who may consider themselves injured by the railway. The Courts are open, and so far the jurisdiction of the Courts has not been taken away.

I would allow the appeal of the railway company, with costs here and below, including the costs of obtaining leave to appeal.

*59. The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested for all damage by them sustained by reason of the exercise of such powers.

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Masten, J.

MULOCK, C.J. EX., and SUTHERLAND, J., agreed with RIDDELL, J.

MASTEN, J.:—In this case I have had an opportunity of perusing the judgment of my brother Riddell, and I agree with the conclusion reached by him and with the reasoning on which it is founded. I express no opinion on the question as to whether the Toronto Electric Commission is a statutory agent of the respondents the Corporation of the City of Toronto, as, in the view now taken, it is not necessary to consider that question, and I have not considered it.

I would allow the appeal with costs.

Appeal allowed.

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COUSINS v. GREAVES.

Saskatchewan Court of Appeal, Lamont, J.A. October 10, 1920.

DAMAGES (§ III E—135)—FINDING BY TRIAL JUDGE THAT CERTAIN THEORY WRONG—CONSIDERATION OF IN ASSESSING.

A trial Judge in an action for damages caused by the defendant's scrub bull having trespassed on plaintiff's land and served plaintiff's pure-bred heifer, found that there was no such thing as "throwing back" on account of such breeding, but took this theory into consideration when determining the damages.

Held, that the trial Judge was in error in taking the theory into consideration after finding as a fact that it was erroneous.

Statement.

APPEAL by defendant from the judgment at the trial in an action for damages. Reversed.

Procter, for appellant; *H. H. Towill*, for respondent.

Lamont, J.A.

LAMONT, J.A.:—On July 28, 1918, the plaintiff was the owner of a pure-bred shorthorn heifer aged 16 months, named Ella of Wyedale, and also of a grade heifer aged 13 months. These he allowed to run in his pasture. On the same date the defendant was the owner of a black bull which was not pure-bred. The plaintiff and defendant lived on adjoining farms. The line fence between them, while not a lawful fence, was in good order and sufficient to keep in cattle under ordinary circumstances, as the trial Judge has found. On the night of July 28, the defendant's bull got into the plaintiff's pasture, evidently by jumping the said line fence, and served both of the plaintiff's heifers, which were then in season, with the result that later they both had calves. For this trespass the plaintiff brought the present action, and he claimed damages for depreciation in the value of the heifers, which he alleged was caused by their being bred

at too young an age. Breeding the heifers while so young, he claimed, resulted in a serious interference with their growth and development. He also claimed that the pure-bred heifer, as a result of having been bred to a scrub bull, had been rendered useless for the purpose of breeding pure-bred stock. This contention was based upon the theory that the heifer, as a consequence of having been bred to a scrub bull at an early age, was liable, on being subsequently bred to a pure-bred bull, to "throw back" to the first bull to which she had been bred. As to what was meant by "throwing back" the trial Judge found as follows:

> By "throwing back" is meant that the heifer, having had a calf from the black bull, it is apt to affect her future breeding, so that even if she were bred to a registered pure-bred shorthorn bull, traces of the black bull might appear in her progeny. Any traces of black in a pure-bred shorthorn would be fatal to its value as such.

The Judge found as a fact that the pure-bred heifer had been physically injured by being bred to the defendant's bull at her age, that it had stunted her growth and affected her shape. With regard to the probability of "throwing back," he said: "I find that there is no such thing as 'throwing back' with regard to these cattle. However, notwithstanding I so find, I think the theory should be taken into consideration in determining the damages suffered by the plaintiff." The plaintiff in his evidence placed the damage done to the pure-bred heifer at $400, and to the grade heifer at $20. The trial Judge awarded him $400 for both. From that judgment this appeal is brought.

Counsel for the defendant do not dispute the contention on behalf of the plaintiff, that the bull was a trespasser, and in my opinion he was. Counsel however sought to reverse the judgment on the following grounds: (1) That the plaintiff was guilty of negligence which contributed to the trespass by allowing his heifers when in season to run in a field adjoining that in which the bull was kept. (2) That the trial Judge assessed the damages on a wrong principle.

Negligence on the part of the plaintiff contributing to the trespass was, in my opinion, not established. It was not shewn that the plaintiff knew or ought to have known that his heifers were in season on the night in question, even if that would be a defence—as to which I express no opinion. The plaintiff is therefore entitled to recover such damages as are the natural and

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probable consequence of the trespass; that is, those that are produced immediately and naturally by the act complained of.

In assessing the damages the trial Judge took into consideration as an element of damage the decreased value of the pure-bred heifer in the minds of certain witnesses by reason of the belief held by them that the heifer was liable to "throw back." Having found as a fact that such belief was erroneous, the trial Judge in my opinion erred in taking the theory into account in assessing damages. Any depreciation in the selling value of the heifer resulting from such mistaken belief cannot be said to be the result of any act on the part of the bull. No act on his part or on the part of his owner was responsible for creating the erroneous belief; therefore, any damage resulting from that cause cannot be attributed to him. In *McLean* v. *Brett* (1919), 49 D.L.R. 162, 15 Alta. L.R. 43, a case in some respects very similar to the case at Bar, Stuart, J., in delivering the decision of the Appellate Division of the Supreme Court of Alberta, 49 D.L.R. at 166, said: "The question of a possible influence upon the strain of subsequent offspring was much discussed, but I think the suggested damage on this ground was too remote and uncertain to be considered." In my opinion the plaintiff is entitled to recover as damages the decreased value of the heifer arising as a result of having her growth stunted by being bred at a very early age. It seems reasonable to me that the calf would take from its mother for sustenance that which would otherwise have gone to nourish the mother and increase her size. It also seems reasonable to me that to carry a calf at her age might interfere with the heifer's shape, so that afterwards she might not present, to the extent she otherwise would, at all events, the appearance of a pure-bred animal, as several of the witnesses testified. It is only in these two respects that the plaintiff, so far as I can see, has suffered damage for which the defendant should be held liable.

The amount of damage attributable to those causes is difficult to determine. There is evidence that before the trespass the plaintiff had been offered $600 for 3 young cattle, of which the pure-bred heifer in question was one and was said to be the best. A number of witnesses at the trial valued her at from $80 to $100, but that was on the basis that she could only be valued as a grade

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cow, owing to the belief that her future progeny might shew a strain of the black bull. The plaintiff's son estimated her depreciation in weight owing to the trespass at 300 lbs. This, of course, was a pure guess. No data were given upon which such an estimate could be justified. As against this depreciation the plaintiff got the calf. In the absence of any very definite evidence as to the depreciation resulting from these two causes, and considering that the plaintiff got the calf, I am of opinion that $100 would be a sufficient compensation to the plaintiff. The heifer is still a pure-bred heifer, and her future progeny, if bred to a pure-bred bull, will also be pure-bred. There is no evidence upon which to base a conclusion that this progeny would in any way be affected by the interference with the shape of the heifer caused by the trespass.

As to the grade heifer, the plaintiff himself said at the trial that she had then recovered from whatever damage she suffered. The plaintiff claimed that he had been put to the trouble of milking this heifer, as her calf had died at birth. The calf did die, but its death was the result of negligence on the part of the plaintiff in permitting her to have her first calf unattended, which the evidence shews no farmer should do.

The appeal, in my opinion, should be allowed with costs, and the judgment below reduced to $100, with costs on the appropriate scale. *Appeal allowed.*

MASON & RISCH Ltd. v. CHRISTNER.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Ferguson, JJ.A. June 14, 1920.

DAMAGES (§ III A—75)—SALE OF GOODS—PURCHASER'S REFUSAL TO ACCEPT —MEASURE OF COMPENSATION—NO OPEN MARKET—GOODS TAKEN BACK AND RESOLD BY OTHER AGENT.

When a buyer wrongfully refuses to accept purchased goods, the damages for which he is liable are, if there be a market for them at the place of delivery, the difference between the contract-price and the market or current price after deducting the expenses of resale. The onus of proving that there was an open market is on the purchaser and, in the absence of such proof and assuming that the goods were resold by another agent for the same amount and the agent paid the same commission, the proper amount would be the actual loss sustained by the vendor according to the foregoing principles.

Statement.

APPEAL by the defendant from the order and decision of MIDDLETON, J., (1920), 47 O.L.R. 52, dismissing an appeal from the report of a Local Master. Varied.

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MASON & RISCH LTD. v. CHRISTNER.

Maclaren, J.A.

J. M. Ferguson, for appellant; *J. G. Kerr*, for respondents.

The judgment of the Court was delivered by

MACLAREN, J.A.:—This is an appeal by the defendant from a judgment of Middleton, J., of the 26th January, 1920, dismissing an appeal by the defendant against the report of the Local Master at Chatham, awarding the plaintiff $391 damages for breach of a contract for the sale of a piano.

The plaintiffs are piano manufacturers at Toronto, and the defendant resides at Chatham. On the 29th April, 1918, one John Glassford, the local agent of the plaintiffs at Chatham, entered into an agreement with the defendant for the purchase by the latter of an upright player piano of a certain style, the manufacture of the plaintiffs, for the sum of $850, of which $500 was to be payable by instalments, with interest, and the plaintiffs were to allow the remaining $350 for a certain Heintzman upright piano which the defendant had. The defendant signed and delivered to Glassford a lien-note embodying these terms, and providing that the new player piano was to remain the property of the plaintiffs until payment of the whole of the purchase-price and interest. The defendant's offer was accepted by the plaintiffs, by a letter of the 14th May, 1918, and they proceeded to finish the instrument selected to comply with the defendant's contract. On the 27th May, the defendant wrote Glassford cancelling the order he had given, and on the following day he telegraphed the plaintiffs to the same effect.

The plaintiffs finished the piano selected, and tendered it to the defendant, who refused to accept it, when they brought an action for $858.40 damages for breach of contract. The defendant pleaded misrepresentations by Glassford, and that the plaintiffs were aware that the Heintzman piano in question belonged to the defendant's wife, and that she absolutely refused to give it up. The action was tried by Masten, J., who held that the defendant had failed to prove the misrepresentations alleged; but that, inasmuch as the property had not passed, the plaintiffs were not entitled to the full purchase-price, as in an action for goods bargained and sold, as they had claimed. He therefore pronounced a judgment declaring that the contract had been established; that the defendant had committed a breach of his contract, and directed a reference to the Master at Chatham to take an account of the

loss directly and naturally resulting in the ordinary course of events from the defendant's breach of contract. The judgment is reported in full in (1920), 46 D.L.R. 710, 44 O.L.R. 146 where the law on the subject is fully discussed.

Two witnesses were examined before the Master: the general manager of the plaintiff company and their agent Glassford. Extracts from the examination of the defendant for discovery were also read. The Master reported that the damages amounted to $391; but he does not say on what principle he assessed them.

Middleton, J., in his judgment, regarding the argument before him, says (47 O.L.R. at p. 53): "The appeal is upon the ground that the Master should not have allowed damages upon the basis of the profit lost, but, as there was no difference between the ordinary sale-price and the contract-price, should have allowed only nominal damages or at the most the cost incident to making another sale of the instrument."

In my opinion, it will be found that what the Master has really done is quite in accord with the latter alternative suggested by the appellant's counsel.

This being a transaction where the consideration consists partly of money and partly of goods, the principles relating to sales apply, and not those relating to barter or exchange. See Chalmers' Sale of Goods Act, 7th ed., p. 5; Halsbury's Laws of England, vol. 25, p. 209; Corpus Juris, vol. 7, p. 931, and the cases there cited in support.

It is well-established that, when a buyer wrongfully refuses to accept purchased goods, the damages for which he is liable are, if there be a market for them at the place of delivery, the difference between the contract-price and the market or current price after deduction of the expenses of the resale.

See the remarks of James, L.J., in *Dunkirk Colliery Co.* v. *Lever* (1878), 9 Ch. D. 20, at p. 25; Joyce on Damages, vol. 2, sec. 1651, p. 1698.

I quite agree with Middleton, J., that, according to the evidence, there was no "open market" for player pianos, in the sense that the term is used in the cases. They are not sold like grain or cattle or stock upon the open market or exchange. I am of opinion that Middleton, J., lays down the correct rule when he

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says (47 O.L.R. at p. 53), that "the fundamental principle in all cases of breach of contract is that, so far as money can do it, the other party to the contract shall be placed in as good a situation as if the contract had been performed, this principle being subject to the qualification that the plaintiff has cast upon him the obligation of taking all reasonable steps to mitigate his loss consequent upon the breach," and in support he cites *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, [1912] A.C. 673, and *Payzu Limited* v. *Saunders*, [1919] 2 K.B. 581. If goods can be sold on the open market, the vendor's duty is to offer for sale, and so mitigate his damage; but this rule has no application to cases in which there is not an open market for the goods. See Leake on Contracts, 6th ed., p. 778; *Elbinger Actien-Gesellschaft* v. *Armstrong* (1874), L.R. 9 Q.B. 473, at p. 476. The onus of proving that there was an open market for this piano at Chatham or elsewhere was upon the defendant, and he does not even attempt to prove it. The Master heard the testimony of the witnesses McConnelly and Glassford, who were examined before him, and had the examination of the defendant for discovery, and had besides the local knowledge to know and appreciate the situation at Chatham.

As I have said, the Master does not expressly state on what grounds he proceeded in assessing the damages at $391; but I think probably because he knew that there was no open market in Chatham or vicinity for such an instrument, and that the plaintiffs had, on its rejection by the defendant, removed it to their warehouse in Toronto. Assuming that it would be or was resold by another agent for the same amount, and the agent paid the same commission as Glassford, the proper amount would be the actual loss sustained by the plaintiffs according to the foregoing principles.

We find such amount would be $325, and not $391. Under the circumstances, there should be no costs of the appeal.

Judgment below varied.

WAMPLER v. BRITISH EMPIRE UNDERWRITERS AGENCY.

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Ontario Supreme Court, Orde, J. June 14, 1920.

INSURANCE (§ III D—60)—INSURANCE OF MOTOR CAR—CONSTRUCTION OF POLICY—CAUSE OF DAMAGE NOT COVERED BY.

A policy insuring a motor car contained an endorsement as follows: "In consideration of $28.05 premium . . . it is hereby understood and agreed that this policy is extended to cover the insured to an amount not exceeding $1,700 on the body, machinery and equipment while within the limits of the Dominion of Canada and the United States, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits subject to the conditions before mentioned and as follows: (A) Fire, arising from any cause whatsoever, and lightning. (B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the insured is legally liable." Held, that damage to the plaintiff's motor-car while being unloaded from a ferry-boat, caused by the boat backing away and allowing the car to drop into the water was not covered by the policy, the loss not having been caused by the stranding, sinking or collision or burning of the ferry-boat.

[*Atlas Ass'ce Co.* v. *Brownell* (1899), 29 Can. S.C.R. 537; *Commercial Union Ass'ce Co.* v. *Margeson* (1899), 29 Can. S.C.R. 601, followed.]

Statement.

ACTION upon a policy of insurance issued by the defendants insuring the plaintiff against loss in respect of an automobile.

J. G. Kerr and *J. A. McNevin*, for the plaintiff.

A. C. Heighington, for the defendants.

Orde, J.

ORDE, J.:—The action is brought to recover the loss sustained by the plaintiff in respect of a motor-car upon which he was insured by the defendants.

The car, at the time of the accident, was in charge of a son-in-law of the plaintiff. He and his wife were crossing with the car from the mainland to Walpole Island, upon a ferry which was operated by means of a chain. When the ferry reached the island, he was told it was all right to go ahead, and he proceeded to drive the car off the ferry on to the land. While he was doing so, after the front wheels had reached the land, the ferry began to move away, with the result that the car dropped into the water.

The car was manufactured by Dodge Brothers, of Detroit, and after being raised from the water was taken to Detroit to be repaired. The cost of raising the car and of the repairs and new parts, together with duty and exchange, came to $1,202.02. By the statement of claim the plaintiff claims to recover $1,131.07.

By the policy the defendants "agree with the insured . . . as respects loss sustained by reason of the ownership or maintenance of the automobiles enumerated and described . . . and covered by endorsement or endorsements attached."

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Then follow such particulars as the name and address of the insured, the period covered by the insurance, the description of the car, etc.; then, under a heading "Amount of Insurance," are several columns headed respectively "Fire Theft and Transit," "Fire and Transit," "Extra Personal Effects," "Rate %," and "Premium." In the first column, "Fire Theft and Transit," are the figures "$1,700." Under the "Rate %" is "1.65," and under "Premium" is "$28.05." Opposite these columns is a space headed, "Give No. of each endorsement attached to this policy," and in this space are the words "No. Two & C." Attached to the policy are two slips, one marked "Non-Valued Endorsement (Fire Theft and Transit) No. 2," and the other marked "Theft Endorsement (C)." So far as the nature and extent of the risk insured against are concerned, the material part of these endorsements is as follows:—

"In consideration of $28.05 premium . . . it is hereby understood and agreed that this policy is extended to cover the insured to an amount not exceeding $1,700 on the body, machinery and equipment while within the limits of the Dominion of Canada and the United States, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits, subject to the conditions before mentioned and as follows:—

"(A) Fire, arising from any cause whatsoever, and lightning.

"(B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the insured is legally liable."

"(C) Theft, robbery or pilferage, excepting . . ."

One of the defences is that the loss is not covered by the policy, not having been caused by the stranding, or sinking, or collision, or burning of the ferry-boat from which the car slipped into the water. I have given this question much thought, and have come to the conclusion that this defence must be sustained. If the loss in transit is to be limited to the specific causes mentioned in the paragraph marked (B) above quoted, then it is clear that the policy does not cover the loss in this case. The motor-car itself sank, but there was no stranding, or sinking, or collision, or burning of the conveyance in or upon which the car was being

carried. The accident was a most unusual one. The ferry apparently was insufficiently moored to the shore of the island, and the weight of the car, or the mere act of propulsion in driving it on to the shore, caused the ferry to back away. No strained interpretation can possibly extend any of the specific causes set forth in clause (B) to cover such a case. Nor do counsel for the plaintiff attempt to bring the case within any of those specified causes. But they urge that the language of the policy is ambiguous, and, relying upon the principle that in such cases the policy must be construed against the insurer, they contend that the loss is covered by the policy. While the policy is perhaps not happily worded, yet, upon a fair and natural reading of it, I am unable to see any ambiguity in it whatever.

Mr. Kerr argues that the contract of insurance is contained in the main body of the policy itself, and that the columns headed "Amount of Insurance" and "Fire Theft and Transit," with the amount $1,700 written in the latter column, constitute a general agreement to insure against loss from fire, or from theft, or while in transit, to the amount of $1,700, and that the provisions of the endorsement are to be construed as an enlargement of the risks beyond those covered by the general agreement. And he lays great stress upon the word "extended," in that part of the endorsement above quoted, as indicating such an enlargement. I am unable to see the force of this contention. If the earlier words are to be construed as setting forth the extent and nature of the insurance, then their scope is so wide that the words of the endorsement add nothing.

In his argument Mr. Kerr laid no stress upon the column headed "Give No. of each endorsement attached to this policy," and the words inserted therein "No. Two & C." The sole purpose of that portion of the policy headed "Amount of Insurance," and the columns which accompany it, is, in my judgment, to serve as a guide or index to the endorsements, by indicating in a general way the kind of insurance covered by the policy, the exact nature and extent of which are to be found in the endorsements to be annexed as indicated by their respective numbers or letters. The word "extended," as here used, does not indicate anything in addition to what goes before, in the sense that it adds anything to the extent or nature of the insurance. It is used rather in the

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sense in which one speaks of "extending" the items of an account by writing in the amounts, or of "extending" a stenographer's notes by transcribing them in longhand. The endorsements are really the completion, or filling out, or amplification, of the wording of the policy, but it is to the endorsements, and to the endorsements only, that we are to look to ascertain the real nature of the risk undertaken by the defendants.

But here counsel for the plaintiff contend that clause (B) must be divided into the two parts which are separated by the dash, and that each must be construed separately from the other. So construed, the first part, "While being transported in any conveyance by land or water," would clearly cover the loss in the present case, because those words, without qualification, would cover every conceivable loss sustained by the motor-car while being so transported. But then, why the second part of the clause at all? The language of the first part is wide enough to include everything which appears in the second part, except, perhaps, general average and salvage charges.

Clauses (A), (B), and (C) are intended, in my judgment, to define the three kinds of risk assumed by the insurers: (A) covering fire, that is, fire destroying or damaging the car itself, and lightning; (B) covering loss while being transported in any conveyance by land or water; and (C) covering "theft," "robbery," and "pilferage." It must be observed that in clauses (A) and (C) the nature of the risk is definitely described by nouns, namely, "fire," "lightning," "theft," "robbery," and "pilferage." The corresponding words in clause (B) are "stranding," "sinking," "collision," "burning," and "derailment." And the risk which the policy assumes is the stranding, sinking, collision, burning, or derailment of the conveyance containing the motor-car while being transported by land or water. It is not the stranding, sinking, etc., of the motor-car itself which is covered, but of the conveyance; and any damage to the motor-car resulting from any such accident to the conveyance would be covered by the policy. The opening words of the clause are to be interpreted solely as marking the occasion upon which any of the specified accidents to the conveyance will entitle the insured to recover.

For these reasons, I am of the opinion that the peculiar accident which in the present case caused damage to the plaintiff's

motor-car was not contemplated by the terms of the policy, and is not covered by it.

The plaintiff further contends that, whether liable upon the the policy or not, the defendants are estopped by the consent and admissions of their adjuster Robert Marsh, who was sent to investigate and adjust the plaintiff's claim. It is alleged that he gave certain directions to the repairers as to what was to be done with the car, and otherwise acted towards the plaintiff in a way consistent only with the assumption that the insurers were liable. The adjuster denies these assertions; but, apart from his denial, it is fairly clear that, when he was despatched by the insurers to investigate the loss, they could not have been aware of the exact nature of the accident. In fact it would be one of his duties to investigate this, as well as to ascertain the amount of the damage and to report. The policy contains this provision: "This company shall not be held to have waived any provision or condition of this policy, nor of this endorsement, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for." In the face of this provision, it is difficult to see how any act of the adjuster could be binding upon the defendants.

But, quite apart from this provision, I am of the opinion that nothing that the adjuster is alleged to have done could estop the defendants from setting up the defence that the loss is not covered by the policy. The power to bind the defendants in this way could not be a necessary incident of the adjuster's duties, and it would require some express authority from the insurers to enable him to waive their rights or to estop them from setting up this defence. See *Atlas Assurance Co.* v. *Brownell* (1899), 29 Can. S.C.R. 537, and *Commercial Union Assurance Co.* v. *Margeson* (1899), 29 Can. S.C.R. 601.

There were also certain questions raised as to the action being premature, and as to whether or not the delivery of formal proofs of loss had been waived; but, in view of my opinion upon the broad question of liability under the policy, it seems unnecessary for me to go into them.

The action will be dismissed with costs.

Action dismissed.

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C. A.

BLEECKER v. STUTSMAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., and Newlands, Lamont, and Elwood, JJ.A. October 11, 1920.

PRINCIPAL AND AGENT (§ I A—11)—EMPLOYMENT OF A PHYSICIAN BY SON OF EMPLOYER—EMPLOYEE ILL—LIABILITY OF SON.

The fact that a son who resides in his father's house, telephones for a physician to attend one of his father's servants, who is ill, does not raise a presumption that the son intends to be responsible for the physician's fee.

Statement.

APPEAL by defendant from the judgment at the trial in favour of the plaintiff in an action to recover an amount due for medical services. Reversed.

C. E. Gregory, K.C., for appellant.

L. McK. Robinson, for respondent.

The judgment of the Court was delivered by:

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff is a medical doctor registered under the Medical Profession Act, R.S.S. 1909, ch. 106. At the request of the defendant, he attended one Roy Hendrickson, an employee of defendant's father, at the father's farm.

The request for the services was by telephone, and was to the effect that Roy Hendrickson was sick and to come and attend him.

The trial Judge found in favour of the plaintiff.

In my opinion this case depends upon the ordinary law of principal and agent.

In 1 Hals., p. 220, para. 464, it is said: "Where a person in making a contract discloses both the existence and the name of a principal on whose behalf he purports to make it, he is not, as a general rule, liable on the contract to the other contracting party whether he had in fact authority to make it or not." And in 18 Am. & Eng. Mag. of Law, p. 432, it is stated: "A physician's right to compensation depends upon contract express or implied. The services of a physician being valuable, the law will imply a contract to pay a reasonable compensation therefore by any one receiving the benefit of such services. This implied contract is in the first instance usually with the patient, or where one stands in such relation with the patient as to be liable for necessaries furnished him as the relation of parent and child, husband and wife, guardian and ward, the implied promise is by such person. But a promise by a third person to pay for medical services

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rendered another may be inferred as in any other case where the circumstances are strong enough."

Roy Hendrickson being the servant of defendant's father and living in his father's house, where defendant also resides, would suggest that defendant was acting for his father rather than for himself. There was no promise on his part to pay, the plaintiff never asked him who was to pay for his services, and there was nothing in his conduct which would suggest that he was undertaking to pay for the plaintiff's services. I do not think that the fact that a son residing with his father who telephones for a physician to come and attend his father's servant who is ill, raises any presumption that the son intends to pay for such services. He is no more than a messenger, and, as he acted for a disclosed principal, there must be some circumstances to shew that he intended to render himself liable, and as there are not any in this case, I do not think he is liable, and the appeal should therefore be allowed with costs. *Appeal allowed.*

TAMBLYN Ltd. v. AUSTIN.

ONT.

S. C.

Ontario Supreme Court, Kelly, J. June 25, 1920.

1. LANDLORD AND TENANT (§ III C—88)—DEMISE OF FLOOR OR ROOM BOUNDED BY OUTSIDE WALL—WHAT INCLUDED IN—USING PREMISES IN DEROGATION OF LESSEE'S RIGHTS—LIABILITY.

The demise of a floor or a room or an office bounded in part by an outside wall *prima facie* includes both sides of that wall, and a lessee may restrain the lessor from using the exterior of the wall in derogation of the lessee's rights.

[*Hope Bros.* v. *Cowan*, [1913] 2 Ch. 312; *Carlisle Café Co.* v. *Muse Brothers & Co.* (1897), 77 L.T. 515 followed; see also *Goldfoot* v. *Welch*, [1914] 1 Ch. 213.]

2. LANDLORD AND TENANT (§ II B—10)—LEASE—PARTICULAR CLAUSE—CONSTRUCTION—ENJOYMENT AS FACTOR IN CONSTRUING—ADMISSION OF ORAL EVIDENCE.

A lease contained the following clause "you are only getting the ground floor and access to the cellar." The lessee had used the cellar for a number of years, and the Court held that oral evidence was admissible to show how the lessor and lessee had by their conduct interpreted the lease, and that considering the enjoyment of the cellar by the lessee that he was entitled to its exclusive use as part of the demised premises.

Statement.

ACTION to restrain the defendant, the plaintiff company's landlord, from proceeding with the erection of a stairway upon the store-premises demised to the plaintiff company, and from in any way interfering with the user by the plaintiff company of the premises, and for an order directing the removal of the stairway built by the defendant.

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TAMBLYN LTD. v. AUSTIN.

Kelly, J.

The defendant counterclaimed a declaration that the plaintiff company was not entitled to the use of the cellar under the store, nor to the use or occupation of the land lying immediately to the north of the store, and an injunction restraining the plaintiff company from using the cellar and the land to the north.

A. C. McMaster, for plaintiff; *J. Hales*, for defendant.

KELLY, J.:—It is admitted that the plaintiff, an incorporated company, carries on the business of dispensing druggist and chemist in leasehold premises, 1496 Queen street west, in Toronto, being at the north-east corner of Queen street and Macdonell avenue, and that the defendant, also a druggist and chemist, is now the owner of the premises, subject to the plaintiff's lease; that prior to the 1st May, 1909, the plaintiff leased from the defendant's predecessor in title the said premises, 1496 Queen street west, for a term of five years, and entered upon the user and enjoyment thereof; that the plaintiff, on the 1st May, 1914, and the 1st May, 1919, obtained, from the defendant's predecessor in title, renewals of the lease for successive terms of five years each, the term of the current renewed lease expiring on the 1st May, 1924.

The plaintiff has continued in possession of the premises so demised, as tenant thereof, since obtaining the lease on or about the 1st May, 1909. During the currency of the existing renewal, the defendant purchased the property of which the premises so held by the plaintiff form a part. Above the plaintiff's store-premises are other storeys or floors, access to which was by stairway leading from Queen street. In December, 1919, the defendant, without the sanction or approval of the plaintiff, proceeded to erect upon and attach to the exterior of the north wall of the building a stairway leading from Macdonell avenue to the part of the building immediately above the store-premises so occupied by the plaintiff, and running diagonally across part of a window in the north wall of the plaintiff's premises, thus obstructing to some extent the access of light thereto.

On the 31st December the plaintiff brought this action to restrain the defendant from proceeding with the erection of the stairway and from building any other structure in any way interfering with the user of its premises; and for an order directing the removal of the stairway or structure so built by the defendant.

The defendant not only disputes the plaintiff's claim but by counterclaim asks a declaration that the plaintiff is not entitled to the use of the basement under the store, or to use or occupy the lands lying immediately to the north of the store; and an injunction to restrain the plaintiff from so using the cellar and the said adjacent property. On the 31st December, an interim injunction order was issued restraining the defendant as asked in the writ of summons, and on the 22nd January, 1920, that order was continued until the trial or disposition of the action.

The leases dated respectively the 1st May, 1914, and the 1st May, 1919, are in evidence. They are identical in language except their date. In each the plaintiff agrees to rent from W. F. Morley, for five years, "the store known as 1496 Queen street west, being the north-east corner of Macdonell avenue, Toronto," and the plaintiff agrees to keep the said store and premises, including the water-taps and connections, in a good state of repair, reasonable wear and tear excepted, and when giving up possession to leave the same in a clean state, making good any damage done to the windows, walls, doors, or any part of the said premises; and to clean the sheds and outhouses when notified by the commissioner or inspector so to do. It also contains this term: "You are only getting the ground-floor of the above building and access to the cellar."

When the plaintiff entered into possession, there was an entrance to the cellar from Macdonell avenue, which, however, about 1911 or 1912, at the suggestion of the plaintiff's representative, and with the approval of the lessor, was closed up, the area approaching it being filled in with earth, since which time there has been no other entrance or access to the cellar but through the plaintiff's store. A door leads through the north wall of the store into a yard or vacant area of land, running along the northerly wall of the store and extending to Macdonell avenue.

In December, 1919, the defendant's workmen, engaged in making alterations or repairs to the premises above the plaintiff's premises, found it necessary to get to the cellar to make gas and water connections; and, having gained access to the cellar through the plaintiff's store without the formality of first obtaining permission, they were ordered out. This was the beginning of the trouble which culminated in this action, though it is admitted

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for the plaintiff that bad feeling, evidently due to business rivalry, had previously existed between it and the defendant. By arrangement the workmen were afterwards permitted to complete the work they had begun in the cellar.

The evidence is that the plaintiff was given possession of and has continued to use the cellar for the purposes of heating the premises, storing coal and other commodities, and for other purposes as well, all along believing that it had exclusive right thereto. There is no evidence that the lessor or any other person but the plaintiff made use of the cellar during all the years it has so occupied it. The plaintiff had also used the vacant land at the rear of the store for the purpose of bringing goods from Macdonell avenue to and through the door leading into the store: this also was satisfactory to and without objection from the lessor.

On the exterior of the north wall are marks indicating that at some time there had been a stairway there; but there is no positive evidence on which one can safely rely that it was there at or since the making of the lease by virtue of which the plaintiff entered into possession of its premises. The new stairway does not very seriously interfere with the light, though it is undoubted that it does create some obstruction, and from the plaintiff's standpoint the interference is accentuated by the fact that that part of the plaintiff's premises is, and all along has been, used as a dispensary, in which satisfactory light is essential. To the extent to which there is such obstruction, the building of the stairway is a derogation from the plaintiff's rights acquired under its lease.

A more serious objection is in the unauthorised use by the defendant of the exterior of the wall of the premises demised to the plaintiff. In *Hope Brothers Limited* v. *Cowan*, [1913] 2 Ch. 312, it was held that the demise of a floor or a room or an office bounded in part by an outside wall *primâ facie* includes both sides of that wall, unless there be an exception or reservation or something in the context to exclude it. This case followed *Carlisle Café Co.* v. *Muse Brothers & Co.* (1897), 77 L.T. 515, 67 L.J. (Ch.) 53.

There is not in the demise to the plaintiff any exception or reservation excluding the application of this rule; and, in my opinion, the plaintiff is entitled to restrain the defendant from using the exterior of the wall of its store for the purpose of erecting the stairway.

It is, I think, settled by authority that, in the circumstances as I find them, the defendant is not entitled to the relief he asks in his counterclaim. Having regard to the conditions which existed at the time of the original lease with respect to the cellar and what has occurred since, and on the evidence that the plaintiff has always during its occupancy of the premises had exclusive use of the cellar, and that the renewals of the lease were made with the full knowledge by the lessor that it was so used, the reasonable inference is that the lessor intended that the cellar should form part of the premises demised. Lessor and lessee seem to have interpreted, by their conduct, just what the lessee should hold and enjoy. The question of parcel or no parcel is one of fact for the jury: *Lyle* v. *Richards* (1866), L.R. 1 H.L. 222. The question whether any particular property is included in the lease depends on the words of the lease as applied to the circumstances of the property, evidence being admissible to shew the state and condition of the property at the time the lease was granted; and though *primâ facie* particular property would be included, yet this will not be so if the circumstances shew a contrary intention: Halsbury's Laws of England, vol. 18, para. 871, p. 413. The description is capable of being explained by possession: *Booth* v. *Ratté* (1890), 15 App. Cas. 188, at p. 192.

To the extent to which the plaintiff has, during its tenancy, made use of the vacant land to the north of the store, the same rule may be applied, lessor and lessee having treated the lease as including the right to such use. The inference deducible from their course of conduct is supported by the term of the lease which requires the lessee to clean the sheds and outhouses, which must refer to something outside of and beyond the store-building itself.

At the trial the defendant took exception to the lease because of its not being under seal, though this is not raised in the pleadings. In his statement of defence, however, he sets up and recognises the written lease and confines his objection to the plaintiff's right to use the basement or cellar of the premises and the land lying to the north of and adjacent to the store itself. The counterclaim assumes that there is an existing lease. This objection fails on two grounds: first, that it is not one which, if not pleaded, should be entertained at the trial; and, secondly, if the objection had been

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raised in the pleadings, the defendant would be in the inconsistent position of having admitted the existence of a valid lease and objecting that such lease had not been made.

To restrain the defendant may be a hardship, but the plaintiff insists on its strict legal rights. As to the question of delay, there is something to be said in the defendant's favour. The work of erecting the stairway began about the 23rd December, and was almost completed when the injunction was issued on the 31st December. From something that passed between the plaintiff's manager and the defendant before the work began, the defendant seems to have gotten the impression that no objection would be offered to the building of the stairway. The manager had no authority to give consent, and I do not find that he assumed to give it. The defendant says that he saw no reason to expect that he would be restrained.

The injunction will be continued, and the defendant will, at his own expense, remove the stairway which he has erected, the plaintiff affording every opportunity for that being done.

The counterclaim will be dismissed; and there will be a declaration that the plaintiff is entitled to the exclusive use of the cellar as part of the demised premises, and is also entitled to use the vacant land to the north of the building for the purpose and to the extent to which it has heretofore, during the currency of the lease and renewals, used it.

In the circumstances to which I have already referred, the defendant will pay one-half of the costs of the action and counterclaim. *Judgment accordingly.*

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STEWART v. WILLIAMSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 11, 1920.

BROKERS (§ II B—10)—SALE OF PROPERTY—SUIT FOR COMMISSION—DISPUTE AS TO AMOUNT—VALUE OF AGENT'S SERVICES—EVIDENCE.

When the amount of commission to which an agent is entitled on the sale of property is in dispute, it must be settled according to the value of the services rendered by the agent as determined by the evidence at the trial.

[See Annotation; Brokers—Real estate agents commission, 4 D.L.R. 531.]

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APPEAL by plaintiff from the trial judgment in an action to recover the amount of commission due on a sale of property. Reversed.

S. R. Curtin, for appellant; *H. G. W. Wilson*, K.C., for respondent.

HAULTAIN, C.J.S.:—In this case the defendant employed the plaintiff as an agent to find a purchaser for certain property belonging to him. A sale was subsequently made by the defendant to a purchaser who was introduced by the plaintiff. The plaintiff claims $550 as commission, on an alleged agreement that he was to have a commission of 5% on the purchase price, which was $11,000. On the trial the action was dismissed with costs, but no reasons for judgment were given by the trial Judge.

The plaintiff in his evidence said that, in making the bargain with the defendant, the defendant told him that he would pay a good commission, and that in reply the plaintiff said that the regular commission was 5%, and that if he obtained a purchaser for $11,000 he would expect that commission. The defendant, on the other hand, swore on his examination in chief, that, while the question of commission was mentioned, no amount was stated or agreed upon, and that the plaintiff finally said, "I'll leave that to you." On cross-examination he said, "I would not say that I remember all the conversation. There may have been mention of 5%, but I do not recall it. I will not swear that it was not mentioned." After the sale was made, the parties met and discussed commission. The plaintiff says that he claimed $550, but that the defendant gave him $100, and claimed to set off an amount of $350, which he claimed he had lost through the fault of the plaintiff in some other transaction. The plaintiff subsequently drew on the defendant for $100, but the draft was returned unpaid. The defendant's evidence with regard to this conversation was as follows:

> Plaintiff mentioned commission. I gave him $50 and asked how that was. He said that was no use. He wanted me to give him a cheque in addition for $150, making total $200. I said that was too much. I then said I'd give a cheque for another $50 making total $100. On leaving he said he would draw on me for another $100. I said it wouldn't do him any good. We discussed loss of hides and wool. I told plaintiff I would have paid him more commission if I had'nt had that loss. I did not charge the loss against him. It was about $320 or $330. No claim for commission of 5% or $550 in that

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conversation, I don't think these amounts were ever claimed or mentioned. Plaintiff did draw later for $100 and I refused it . . . On the train after the sale plaintiff wanted $200 in settlement of his commission.

Reading all this evidence would lead me to the conclusion that the plaintiff had established his case for an agreed commission of 5%. But as the trial Judge, who heard and saw the witnesses, found against the plaintiff, I should not care to interfere with that finding. But the evidence in my opinion shews the plaintiff is entitled to some commission or remuneration, and as $200 seems to have been agreed to by him in the last stage of the transaction I would allow him that amount.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for $100 and his costs of action.

Newlands, J.A.

NEWLANDS, J.A.:—The defendant employed plaintiff to find him a purchaser for certain property. Plaintiff found a purchaser, who paid the price defendant asked, viz. $11,000, and plaintiff now sues for a commission of 5%, less $100 paid him by defendant.

Plaintiff says that he told defendant the usual commission was 5%, and if he got a good price he would expect full commission. Defendant says no commission was agreed upon, plaintiff saying he would leave it to him, and he therefore paid plaintiff the $100, which he claims is sufficient.

Defendant, however, in his evidence says, "I told plaintiff I would have paid him more commission if I had not had that loss (*i.e.* loss on a deal he had with plaintiff on some wool). I did not charge the loss against him."

This is an admission that the $100 he paid him was not a sufficient compensation for the work plaintiff did for him.

I do not think plaintiff has proved a contract for 5% commission and he gives no evidence as to what his services were worth. Upon this point defendant says plaintiff offered to take $200, $100 of which defendant paid him, and that the plaintiff said he would draw on him for the other $100. This plaintiff did. This being the only evidence upon the value of plaintiff's services, I would therefore allow the plaintiff $100 in addition to the $100 paid him by defendant.

The appeal should, therefore, be allowed with costs, and judgment entered for plaintiff in the District Court for $100, and costs.

LAMONT, J.A.:—This action is for commission on the sale of lands. The defendant admits that he agreed to give the plaintiff a commission if he found a satisfactory purchaser for the defendant's property. He also admits that the plaintiff did find such a purchaser, to whom he sold the property for $11,000. The plaintiff says that he told the defendant he would expect a 5% commission. The defendant says he asked the plaintiff what his commission would be and that the plaintiff replied that he would leave that to him. The defendant paid the plaintiff $100 as commission. The plaintiff said it was not enough, and that he wanted an additional $100, and subsequently he made a draft on the defendant for $100. This the defendant refused to accept. The defendant admits that he told the plaintiff that he would have allowed him a larger sum than $100 as commission, but for a certain loss he had suffered in respect of a deal for some hides and wool, made, presumably, by the plaintiff, but which loss he also said he did not charge against the plaintiff. The plaintiff brought this action for $450, being a 5% commission on $11,000 after crediting the defendant with the $100 paid. The trial Judge dismissed the action.

If the defendant would have paid a larger commission than $100 but for the loss he sustained, he must have thought that the plaintiff's services were worth more than that sum; and as he says he did not charge the loss to the plaintiff, he should not have taken it into account when fixing the plaintiff's commission. As the trial Judge dismissed the action, I take it that he accepted the evidence of the defendant that there had been no agreement to pay the 5% claimed, and that no amount had been fixed as the plaintiff's commission. This, however, does not disentitle the plaintiff to a reasonable remuneration for his services. Even if we accept the defendant's statement that the plaintiff said he would leave the amount of the commission to him, that would not entitle the defendant to say, "Well, I will pay you only a dollar," nor does it prevent the plaintiff, at any rate in the absence of evidence on the part of the defendant as to what in his judgment the plaintiff's services were worth, from recovering the value

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of such services. The only evidence as to the value of these services is that of the plaintiff himself, who states that 5% is the regular rate of commission, but admits that he only asked the defendant for an additional $100. The plaintiff's willingness to take $200 for his remuneration, under the circumstances of this case, he not being a real estate agent, represents more nearly, in my opinion, his own view of what he was entitled to than the 5% claimed.

As the defendant admits these services were worth more than $100, but does not say they were not worth $200, and as no other evidence was given upon the point, I think we are entitled to say that the best evidence given at the trial shews that the plaintiff's services were worth $200.

The appeal, in my opinion, should be allowed with costs, the judgment dismissing the action should be set aside, and judgment entered for the plaintiff for $100 with costs.

Elwood, J.A.

ELWOOD, J.A. concurs with Lamont, J.A.

Appeal allowed.

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Re BEAVER WOOD FIBRE Co. Ltd. AND AMERICAN FOREST PRODUCTS CORPORATION.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Ferguson, JJ.A. June 10, 1920.

ARBITRATION (III—17)—DISPUTES UNDER CONTRACT—BREACH—DAMAGES—JURISDICTION—CONDUCT OF PARTIES—ENFORCEMENT OF AWARD.

When a contract provides for a reference to arbitration of any question arising under it, and the proper conclusion, upon the evidence, being that the conduct of the parties showed damages to be a matter in dispute and a subject of reference, the award will be enforced.

[*Re Green and Balfour Arbitration* (1890), 63 L.T. 97, distinguished. See Annotation; Arbitration—Conclusiveness of award, 39 D.L.R. 218.]

Statement.

APPEAL by plaintiffs from the order of ROSE, J., (1920), 51 D.L.R. 643, 47 O.L.R. 66. Reversed.

Everett Bristol, for appellant.

A. G. Slaght and *J. Cowan*, for respondent.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—The sole question is, whether the matter of the damages which the breach of the contract had caused and to which the Beaver company was entitled was one of the matters referred. Whatever question there otherwise might be, I think it is perfectly clear upon what happened in this case—and indeed, as my

brother Ferguson put it during the argument, I do not think it could be a very much stronger case—that all parties treated the matters that were referred as two questions: one question being whether there had been a breach of the contract; and the other—if there had been a breach—what damages should follow as compensation for the breach.

At the opening of the proceedings, Mr. White, acting for the now appellant, stated what the matters referred were, and no objection was made as to his statement; and for, I should judge, many days, covering many pages, the evidence was gone into, most of it with regard to the damages. The statement of counsel for the respondent at the close of the proceedings is the clearest evidence that he recognised that the question of damages was within the scope of the reference and had been gone into before the arbitrators; the language of counsel for the respondent upon that occasion is susceptible of no other meaning, and was a statement in the plainest terms that the question of the damages was one of the matters in dispute. The conduct of the parties upon that occasion clearly shews that everybody recognised that that was one of the matters in dispute which had been referred and was to be dealt with by the arbitrators.

The position taken in the Court below, and taken here, is a highly technical one. I should have thought that, where a person who is entitled to have commodities delivered to him, and they have not been delivered, is making a claim that there had been a breach of the contract, stating that he had suffered loss, the other side stating that there was no breach, there was a dispute both as to liability and as to the amount to which the person who has suffered by the breach was entitled.

This is, I think, a plain case upon the facts, and I do not think the view I take could have been present to the mind of my brother Rose.

On the question of setting aside the award, it is elementary that where the parties have chosen to constitute a court for themselves that court is a court to determine both the law and the facts, and if there is no misconduct on the part of the arbitrators, however much they may have erred either as to the law or the facts, the Court has no jurisdiction to interfere. The only excep-

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tion to that rule that I know of is where the error appears on the face of the award or is shewn by some document incorporated with it.

Re Green and Balfour Arbitration, (1890), 63 L.T. 97, 325, relied by the respondent and by my brother Rose, is distinguishable. What the arbitrators in that case did was plainly beyond the scope of the reference. The dispute, and the only one that had arisen, was as to whether the salmon tendered was equal to the "contract guarantee," and what the arbitrators did was to award "that the buyers accept the salmon, and that the sellers make an allowance to the buyers of one shilling and sixpence per case." That was plainly not a matter referred, which was the single one, "Was the salmon equal to the contract guarantee?"

In the case at Bar, the contract provided for a reference to arbitration of any question arising under it, and I rest my judgment on it being the proper conclusion, upon the evidence, that the parties, by their course of conduct before the arbitrators, established that the question as to the damages was a matter in dispute and that it was a subject of the reference.

Appeal allowed and order made for enforcement of the award.

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HENDERSON v. STRANG.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 3, 1920.

COMPANIES (§ V E—212)—SUBSCRIPTION AND PAYMENT FOR SHARES—MONEYS USED FOR FINANCING COMPANY'S PURCHASES—QUESTION OF LOAN TO SHAREHOLDER—ACTION BY MINORITY SHAREHOLDER—STATUS.

When, by a by-law of a company, a cheque in payment of a majority of its stock, was authorised to be endorsed over to the subscribing shareholder's firm to finance certain purchases of the company, this transaction cannot be regarded as a loan to a shareholder.

A minority shareholder cannot maintain an action against the will of the majority, after acquiescence in and benefit from the company's operations, and as well as the agreement regarding the disposition of the cheque as evidenced by the company's by-law.

Statement.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Ontario (1919), 48 D.L.R. 606, 45 O.L.R. 215, reversing the judgment at the trial (1918), 43 O.L.R. 617, for plaintiff in an action for relief in respect of transactions between defendants and defendant company in which plaintiff was a shareholder. Affirmed.

I. F. Hellmuth, K.C., and *Birmbaum*, for appellant.

W. Nesbitt, K.C., and *A. W. Langmuir*, for respondents.

DAVIES, C.J.:—At the close of the argument in this case I was not satisfied with the soundness of the judgment appealed from, 48 D.L.R. 606, 45 O.L.R. 215. Subsequent consideration of the facts has not removed my doubts, but as I am not clearly convinced that the judgment is unsound I will not dissent from the judgment now proposed, dismissing the appeal.

Idington, J.

IDINGTON, J.:—The appellant suing as a shareholder, as she does, asking the Court to interfere with the internal management of a corporate company's affairs, must clearly establish that what she complains of is either something done *ultra vires* the powers of the company or such an oppressive and unjust exercise of the powers of the majority shareholders for the promotion of an advantage to themselves to the peculiar detriment of the minority, or that what is complained of is fraudulent.

Whether or not there may be (of which I am doubtful) possible cases of an exceptional character founded on grounds beyond those I specify, in which the Court can find any jurisdiction for giving relief to a single shareholder suing as appellant, does not matter, for those put forward herein either rest upon some one of the grounds I specify or fail entirely.

The J. B. Henderson & Co., Ltd., now in question, and in which appellant is a shareholder was incorporated on September 23, 1909, under and by virtue of the first part of the Companies Act, R.S.C. 1906, ch. 79, for the following purposes and objects:—

(a) To purchase, acquire and take over the business heretofore carried on at the said City of Toronto by the said James Black Henderson under the name, style and firm of J. B. Henderson & Co. as Commission Agents and Dry Goods Merchants, and the good will thereof and the stock-in-trade, furniture and effects of the same. (b) To carry on the business, both wholesale and retail of general dry goods merchants, drapers, haberdashers, milliners, dressmakers, tailors, furriers, lacemen, clothiers, hosiers, glovers and general outfitters. (c) To acquire, purchase, hold, sell, dispose of, supply, manufacture and produce all manner and kind of goods, wares and merchandise dealt in or appertaining or incidental to the business or any part of the business aforesaid, and to carry on as aforesaid the business of commission agents in all the lines of goods hereinbefore mentioned. (d) To acquire any business of the nature or character which the company is authorized to carry on and the good-will thereof. (e) To act as agents for traders, dealers and manufacturers of any goods, wares or merchandise of the nature or description hereinbefore mentioned. (f) To purchase, acquire, hold, lease and dispose

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of patent rights and licenses and such motive and manufacturing powers or any interest therein as may be considered desirable or necessary for or in connection with the aforesaid objects of the Company: (g) To pay out of the funds of the Company the costs of and incidental to the incorporation, promotion and organization of the Company. The operations of the Company are to be carried on throughout the Dominion of Canada and elsewhere.

The capital stock of the said company was to be $100,000, divided into one thousand shares of $100 each.

The respondent, Wm. Strang, a merchant in Glasgow, Scotland, subscribed for a single share on Nov. 20, 1909, at Toronto.

The husband of the appellant, who was the James Black Henderson referred to above, subscribed on Sept. 15, 1909, for $23,500, and she, next day, for $1,000.

Three other persons subscribed on said Sept. 15, for the respective sums of $5,000, $100, and $100.

No more was ever subscribed, except by said William Strang, who later subscribed for a sum which, with his first for one share, made a total of $51,000.

The stock-in-trade and goodwill of the Henderson business was taken over at the sum subscribed by him.

There were by-laws passed and directors elected constituting a Board consisting of the said Strang, said J. B. Henderson, and one McJanet, who was an employee of the company, who had subscribed the said $5,000. Of these Strang was elected president and Henderson vice-president.

By-laws were duly adopted for carrying on the business.

The foregoing outline presents all the leading features of the kind of company which this was, and how it started about its business.

The said Strang gave his cheque to the order of the company for the full amount of his stock in May, 1910. That cheque was duly acknowledged as payment for said shares and kept by said company in charge of its officers in Toronto and a stock certificate was issued by them on August 25, 1910, to Strang for the full amount of his 510 shares.

The cheque was then duly indorsed over by said Henderson, as vice-president, to the order of William Strang & Co., a firm carrying on business in Glasgow.

If that is not payment then there might be something to complain of.

I agree with the trial Judge, 43 O.L.R. 617, and two of the Judges in the Court of Appeal, 48 D.L.R. 606, 45 O.L.R. 215, that it was payment.

And it was none the less so because the cheque was so indorsed over to the firm which agreed to hold themselves liable for the due application of the amount to meet the engagements of the company in Great Britain and elsewhere abroad, in order to facilitate, both by cash advances and credits, the purchases and other dealings of the company in carrying on its business.

Nor was it less a payment because those thus getting it in due course chose, instead of going through the form of presenting it and getting the cash, to adjust the matter by a debit and credit account in their ledger.

The said firm seems to have had not only ample means but also credit in the commercial world to accomplish all that was had in view by all concerned.

In the result this mode of handling the business was continued for 6 or 7 years on the most friendly and satisfactory terms to all concerned.

The business as a result became (when the war stress is considered) a more prosperous concern than the firm of Henderson & Co. could have hoped for, but for the aid thus furnished.

Then there arose personal differences with Henderson, who, with two other persons, started in Toronto a business of their own.

This suit seems to have been instituted by Henderson's wife to wreck the incorporated company and serve the ends of him and his new firm.

And, as part of the scheme for doing so, the pretension is set up not only that there never was a payment of stock but also that as an incident of so holding the Courts appealed to are also bound to hold that Strang never was qualified to act as a director and hence all done by the board was null and void.

With a holding that the cheque so indorsed over, as already stated, not to him but to his firm, was a complete payment, these pretensions all fall.

One more claim is made in that alternative, and it is that the Court must order the payment by said firm of the money to the company.

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Why? For what end? Evidently not even the solemn, formal mockery of handing it back to officers who are in the result virtually the nominees of the man attacked, and who is a majority shareholder in the company, but apparently the petty purpose of wasting money in law costs and exchange and embarrassing the management of the business.

It is claimed the money thus held subject to calls to answer the requirements of the business abroad and for no other purpose, was a loan to William Strang and not to the firm, who are, inconsistently enough, also sued for its recovery, and therefore *ultra vires* as being in breach of the section of the Companies Act, R.S.C. 1906, ch. 79, sec. 29 (2) which provides that "the company shall in no case make any loan to any shareholder of the company."

There was in no sense, such as comprehended in the statutory provision, a loan to Strang, or indeed to any one else, but simply a mode adopted of carrying on the business of the company in the most economical and advantageous way possible to all concerned. And to execute that purpose, evidenced thereby, a system was adopted of making good reciprocally to each party concerned therein on a fair and equitable basis by due allowances on either part in the way of interest, instead of dividends and remittances thereof and cross remittances of earnings from money on deposit.

To any one reading the long agreement providing for every contingency that is therein set forth, nothing but an honest business effort to deal justly and conformably to the law is manifest.

If there had been anything in the way of simulation, as a basis of fraud in violation of the enactment invoked, it would have developed, in the actual operation of the scheme for years of accounting, something which appellant could have put forward to demonstrate that as fact beyond peradventure there was a basis furnished for the Court to lay hold of and act upon to prevent a violation of the statutory law invoked.

In the numerous accounts kept, rendered and produced in evidence there is nothing pointed to of that sort such as would support such a contention.

Indeed counsel quite properly admitted there was no fraud, but insisted that the mere form was bad and hence *ultra vires*.

I submit we must ever attempt to grasp, if we can, the substance, and not pursue the mere shadowy forms as a basis of action.

The appellant having acted for many years upon this assumption of an honest observance of the law, and recognised the course adopted as such, can hardly be permitted now to turn round and say that those co-operating with her for years were doing something else and she innocent.

They are both in the same relative position towards each other whether good or bad, legal or illegal.

And if illegal she cannot be heard now to plead ignorance but must be held responsible for the position in which her husband, for example, has placed her. And that is to disqualify her from maintaining this action even if it had been well founded otherwise, as I hold it is not.

The appeal should be dismissed with costs.

DUFF, J.:—I think this appeal should be dismissed on the short ground that the appellant, by her conduct, has precluded herself from attacking the transaction she now seeks to impeach. Duff, J.

Assuming the transaction to be *ultra vires*, she could only maintain her status by shewing that the ends of justice required that she should be permitted to sue in her own name in opposition to the wishes of the majority of the shareholders.

Under the circumstances disclosed by the evidence I am forced to the conclusion that the appellant's claim has no foundation of substantial justice and that she has not made good her right to maintain the action in her own name.

ANGLIN, J.:—The material facts of this case, as I read the evidence, are accurately and succinctly stated in the judgment of Riddell, J., 48 D.L.R. 606, at 610, 45 O.L.R. 215. For the reasons assigned by that Judge, I am of the opinion that the shares allotted to Strang have been fully paid up and that for the sum of $51,000 in question the firm of Wm. Strang and Son, and not Wm. Strang as the holder of unpaid shares, is accountable to the J. B. Henderson Co. I cannot view all that took place—the forwarding of Strang's cheque to the company—the entry of payment in its books—the indorsement of the cheque over to it by Wm. Strang & Son—the solemn agreement executed by the members of that firm fixing the terms on which the $51,000 represented by the cheque should be held and dealt with by them—as the mere sham and attempted evasion of the statute which Meredith, C.J.C.P. seems to consider it. A very substantial change was effected in the rights and Anglin, J.

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obligations both of the company and of the firm of Wm. Strang & Son sufficient to put the reality of the transaction beyond question. The company's rights under the agreement against Wm. Strang & Son in respect of the $51,000 are consistent only with that sum being its property held for its benefit and purposes, as defined in that document, and therefore inconsistent with the company not having received payment of that amount from Strang, or with his being still its debtor for the same sum in respect of unpaid shares.

Without expressing a concluded opinion upon it, I incline, with all the appellate Judges, to the view that if the transaction between the company and Wm. Strang & Son should be regarded as a loan, it would not be in contravention of sec. 29 (2) of the Company's Act, R.S.C. 1906, ch. 79. But, for the reasons given by Meredith, C.J.C.P., I concur in his view, which is also that of Britton and Riddell, JJ., 48 D.L.R. 606, 45 O.L.R. 215, that that transaction was not a loan but a "deposit on special terms," as Riddell, J., puts it, and as such entirely outside the statutory prohibition.

I agree with the trial Judge in his disposition of the grounds of claim which he has designated (b), (c), (d), and (f), 43 O.L.R. 617.

I would merely add that, if this action might have been maintainable by the J. B. Henderson Co., the evidence warrants an inference, if not of actual participation at least of such acquiescence by the present plaintiff in the acts which she now impeaches that "the necessity for the Court doing justice," (*Russell* v. *Wakefield Water Works Co.* (1875), L.R. 20 Eq. 474, 480; *Towers* v. *African Tug Co.*, [1904] 1 Ch. 558; *Fullerton* v. *Crawford* (1919), 50 D.L.R. 457, 59 Can. S.C.R. 314); would appear not to require that she should be allowed as a shareholder, suing on behalf of herself and all other shareholders (other than the individual defendant) of the defendant company, to assert its rights.

I would dismiss the appeal.

Brodeur, J.

BRODEUR, J.:—I concur with my brother Anglin.

Mignault, J.

MIGNAULT, J.:—The two main questions here are the following:

1. Did the respondent, Strang, pay for the 510 shares which he agreed to take in J. B. Henderson & Co., Ltd.? 2. Was the agreement signed on August 24, 1910, between J. B. Henderson & Co., Ltd., and William Strang and Son, *ultra vires* of the company?

On the first question, the finding of the trial Judge was that Strang did pay for his shares, the Judges of the Appellate Division being equally divided as to this payment, although they all agreed that the judgment should be reversed.

The facts of the case are not at all complicated, although a great mass of evidence both documentary and by witnesses has been placed in the record. It appears that for some years James Black Henderson of Toronto was the Canadian purchasing and selling agent of the Scotch firm of William Strang & Son, of Glasgow, Scotland, composed of Wm. Strang and four of his brothers. In the summer of 1909, Henderson was in rather poor health, and Strang being in Toronto, it was decided to form a joint stock company to take over Henderson's business, under the name of J. B. Henderson & Co., Ltd. Strang desired to have a controlling interest in this company, which was natural as it was to handle his firm's goods, and upon its formation, with a capital of $100,000, he subscribed for 510 shares, representing $51,000, at par. Henderson, on the other hand, sold to the new company his stock-in-trade and good will for $23,500, taking in payment 235 fully paid shares. The other stock subscribers were W. G. McJanet, 50 shares or $5,000; Albert E. Weston, one share or $100; Robina Stark, one share or $100, and Mrs. J. B. Henderson (Henderson's wife, the present plaintiff) ten shares or $1,000.

All parties fully recognised that the authorised capital of the company was more than it required to carry on its business, and as its purchases of goods were almost entirely to be made in Europe, and principally from the firm of William Strang & Son, it was also evident and fully admitted by the interested parties that adequate financial arrangements would have to be made in Europe in order to buy goods there on the most advantageous terms.

Several schemes were devised and discussed and finally it was agreed that the stock subscribed by all save Strang would be issued as preference stock, entitled to a 6% dividend, and that Strang's stock would be issued as common stock. And as to Strang's stock, inasmuch as he was advised that it would have to be paid, he agreed to send over to the company his cheque for $51,000, or its equivalent in sterling, it being understood that the company would indorse the cheque and remit it to William Strang

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& Son as a special deposit free from interest, where it would serve to finance purchases made by the company on the European market, the company paying interest at 6% on all sums withdrawn by it, or advanced by William Strang & Sons on account of purchases made by the company. Strang was not to be entitled to interest on his $51,000, and no dividend was to be payable on his common stock until the 6% on the preference stock had been paid, and then the latter stock would rank equally with the common stock on any dividend that might be declared.

This arrangement was duly carried out and authorised by a by-law of the company and by a contract made by it with William Strang & Son. The question now is—and it must be remembered that this question is raised, not by a creditor of the company, but by a shareholder—whether what was done is equivalent to a payment by Strang of the stock subscribed by him.

Had Strang's cheque been cashed by the company, and had the latter immediately remitted the sum of $51,000 to William Strang & Son as a special deposit in accordance with the arrangement made, it could not have been contended that Strang had not paid for his stock, whatever opinion might be entertained with regard to the deposit of this sum with William Strang & Son. But by cashing Strang's cheque and remitting the proceeds to William Strang & Son, the company would have incurred expense for exchange and brokerage, and this expense it avoided and absolutely the same result was attained by indorsing over Strang's cheque to William Strang & Son. There is no question whatever as to the absolute good faith of all the parties, and this being so, I cannot but think that Strang paid for his stock as effectually as he would have done had his cheque been cashed by the company and the proceeds remitted to William Strang & Son. And, in my opinion, this conclusion is fully supported by the decision of the Judicial Committee in *Larocque* v. *Beauchemin*, [1897] A.C. 358.

I am therefore of opinion that Strang paid for his shares.

The question whether the arrangement arrived at was *ultra vires* of the company should, in my judgment, be answered in the negative. I cannot look upon the deposit of Strang's cheque with William Strang & Son as being a loan to a shareholder. It was what it purported to be, a mere deposit for the benefit of the company, in order to secure the most advantageous terms for its

purchases on the European market. And moreover the firm of William Strang & Son was, by the law of Scotland, duly proved in this case, a legal entity entirely distinct from Strang personally.

I also fail to see in such a deposit, although it was of a large part, even the greater part, of the company's capital, anything beyond the powers of the company. Two things must be remembered here. First there is no suggestion of bad faith or fraud, nor of any prejudice suffered by the creditors of the company or by its shareholders, all of whom agreed to the arrangement. Secondly, the firm of William Strang & Son is a legal entity distinct from Strang personally. Had that firm been a corporation or a bank—and had it acted as banker as well as vendor in its relations with the company—I cannot imagine that it could be contended that by making a deposit of the sum paid by Strang for his shares under such an arrangement, the company exceeded its powers. And inasmuch as the firm of William Strang & Son is an entity distinct from Strang personally, in the absence of any suggestion of fraud, I cannot see that Strang's interest in the firm—whatever it may be—affects the validity of the transaction any more than it would have affected it had this firm been a corporation or a bank in which Strang had shares. The stipulation that the company should pay 6% interest on any withdrawals out of the sum of $51,000 would have been very objectionable if the contract had been made with Strang personally for it would have given Strang interest on his common stock if the company took possession of its own moneys, irrespective of the declaration of any dividend. But this stipulation was made with a third party, and the appellant does not suggest any intent to defraud creditors of the company or its shareholders.

The contention is, however, made in the appellant's factum that the agreement entered into was wholly for the benefit of Strang as majority shareholder, and that it was oppressive on the minority shareholders. I cannot view it as such. On the contrary, I think that the arrangement was most advantageous for the company, and, if any shareholders derived therefrom more benefit than others, it was the minority shareholders, whose stock was preference stock entitled to a dividend of 6% before any distribution of profits and in such distribution or dividend the holders of the preference stock shared on the same basis as Strang.

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holder of the common stock. It is obvious, moreover, that the company through this arrangement was enabled to purchase its goods on the European market on much better terms than if the settlement for each purchase had to be made separately by the acceptance and negotiation of drafts through the vendor's bank. After 9 years only, on account of some trouble between Henderson and Strang, is the complaint made that this contract was *ultra vires*, and this complaint is by a shareholder who has benefited thereby and not by a creditor of the company. In my opinion, in view of the circumstances of the case, this appeal should not be entertained.

As a consequence, the appeal should be dismissed with costs.

Appeal dismissed.

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REX v. MAKER.

Ontario Supreme Court, Orde, J. August 19, 1920.

INTOXICATING LIQUOR (§ III E—79)—APARTMENTS ABOVE STORE—INTERNAL COMMUNICATION—MEANING OF PRIVATE DWELLING HOUSE—AMENDMENT TO ONTARIO TEMPERANCE ACT, 8 GEO. V. 1918, CH. 40, SEC. 3.

When the building above the ground floor of certain premises is not used exclusively for living apartments, the apartments in question cannot be regarded as a private dwelling house within the meaning of the amendment to the Ontario Temperance Act, 8 Geo. V. 1918, ch. 40, sec. 3. And where the premises above and below are occupied by the same person internal communication with the ground floor is prohibited under the above section.

Statement.

MOTIONS to quash the several convictions of Michael Maker, Nicholas Maker, and W. Aziz, by the Police Magistrate for the Town of Napanee, under sec. 41 of the Ontario Temperance Act, 6 Geo. V., 1916, ch. 50, for having or keeping intoxicating liquor in a place other than a private dwelling house.

E. G. Porter, K.C., for the defendants.

F. P. Brennan, for the magistrate.

Orde, J.

ORDE, J.:—Each of the three defendants was convicted by the Police Magistrate at Napanee, under sec. 41 of the Ontario Temperance Act, of having or keeping liquor in a place other than a private dwelling house. The conviction in each case is attacked on the ground that the magistrate erred in holding that the place was not a private dwelling house, and in the cases of Nicholas Maker and W. Aziz on the further ground that the liquor in respect of which each of them was convicted "was found

and seized at the same time at which the seizure of the liquor of Michael Maker was made and in the same dwelling."

The three defendants occupy rooms or apartments on the first floor above the ground floor of the building known as the Rennie block, in Napanee. Upon the ground floor are a moving picture theatre operated by Michael Maker, a dry goods shop occupied by Michael Maker, and a tailor shop occupied by one Hogan. Between the theatre and the dry goods shop is a hallway opening from the street, and in no way connected with either theatre or shop. From the hall a stairway runs to the next storey. From the hallway at the head of this stairway is a doorway into a large room, called in the evidence a mission-hall or church, and rented to the Plymouth Brethren. Another doorway leads into Michael Maker's quarters, which are occupied by Michael Maker and his wife and family and by Nicholas Maker. This hall is blocked about midway by a vault, but from Maker's rooms there is access to the rear hall and also to the rooms occupied by Aziz. From the rear hall there is a stairway allowing egress to the yard in rear. The third storey is partly occupied by Miss Rennie, and also contains a hall occupied by the C.O.F. Society. (The evidence does not disclose what the initials "C.O.F." mean. I presume they stand for "Canadian Order of Foresters.") From the rear part of the hallway in the second storey (that is, the flat above the ground floor) another hallway runs at right angles, and from it two doors open into the mission-hall. From this hallway a stairway had at one time communicated with Michael Maker's shop.

In order to comply with the requirements of the Ontario Temperance Act, as he thought, and after an interview with the License Inspector (as to which the evidence is conflicting), Michael Maker closed up the means of communication between the shop below and the flat in which he and the other defendants live, by placing nails over the latch of one of the doors, and by otherwise nailing up the doorways. There was some conflict of evidence as to the real nature of this closing of the means of communication. The Inspector seems to have had little difficulty in getting through, though the defendants say he had to use force to do so. If my decision in this case had to be confined to the question whether or not there was any evidence on which the magistrate could find that there was a means of communication between the dwelling

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houses of the defendants and the store below, I do not see how I could, on the authorities, interfere with the finding of the magistrate. In all cases where an opening between a private dwelling and a place of business has to be closed in order to take the case out of the exceptions enumerated in sub-para. (i) of sec. 2 (*i*) of the Act, it must be largely a question of good faith on the part of the occupant of the dwelling. When both premises are occupied by the same person, then the nature of the means taken to close the opening ought to be above all possible suspicion. I do not think it is incumbent upon him to brick up the opening or to close it with lath and plaster (though that might be the more prudent course). When you find, as in the present case, the License Inspector swearing that the bent nail over the latch on one of the doors could be turned aside by the finger, and that the hinge screwed over the door could be easily pulled away because the screw-heads were small enough to pass through the screw-holes, doubts are raised as to the *bona fides* of the effort made to comply with the law.

But, without going further into this point, I pass to another, which, while it was not dwelt on, either in the evidence or on the argument, at any length, seems to me to be fatal to the case of the defendants. Section 2, para. (*i*), 6 Geo. V 1916, ch. 50, defines a "private dwelling house" as "a separate dwelling with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence." Interpreted alone, these words might have presented difficulty in many cases, but some of the difficulties are settled by the qualifications which follow. As these qualifications stood prior to the amendment of 1918 (8 Geo. V. ch. 40, sec. 3), the existence under the same roof with the dwelling house of any shop or place of business, broadly speaking, took the dwelling out of the definition: *Rex* v. *Purdy* (1917), 41 O.L.R. 49. It was then immaterial whether the shop was below or above or alongside the dwelling, if they were in the same "building" or "house." To this sweeping exclusion from the definition, the legislation of 1918 made an exception. By sec. 3 of 8 Geo. V. ch. 40, there is added to subpara. (i) of para. (*i*) the proviso: "Provided, however, that where the office, shop or place of business mentioned in this subdivision is on the ground floor of any building which above the ground floor is used ex-

clusively for living apartments having no internal communication with the ground floor, such apartments . . . , shall be regarded as a private dwelling house."

The object of this amendment is, of course, plain. The occupation of quarters for living purposes above shops and places of business is so common that it would have created an unfair distinction to exclude them from the category of "private dwelling houses." But the scope of the section is clear. That portion of the building above the ground floor must be *exclusively* occupied as a dwelling house. The Legislature did not intend, when it declared that the ground floor might be eliminated from consideration, to remove in the slightest degree any of the limitations which qualified the definition of a "private dwelling house" by the earlier words of para. (*i*), in so far as those limitations applied to the upper portion of the building. And so it declared that that portion of the building above the store must be used "exclusively" for living apartments. Mr. Porter strenuously argued that "exclusively" had reference to that portion of the upper storey occupied for living purposes, and that if the apartments occupied by the defendants were used for living apartments only, then it was immaterial that some other portion of the same floor might be used for some other purpose, even if covered by the same roof and forming part of the same building. I do not so read the proviso. The words are "any building which above the ground floor is used exclusively." The exclusive use refers to the whole of the building above the ground floor.

Here the building contains, above the ground floor, the mission-hall or church, used by the Plymouth Brethren, and on the third floor the C.O.F. hall. In my judgment, the upper storeys are not exclusively used for living apartments. It is to be noticed that by para. (*i*), sub-para. (i), the partial occupation or use of a building as a "public hall" "or hall of any society or order" deprives the residential part of the building of its "private" character. It would be somewhat anomalous to exclude the right to have a public hall within the same building as a dwelling house, when the dwelling comprises the whole of the rest of the building, and to permit it in the case of a dwelling house occupying only the upper part of the building.

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In the cases of Nicholas Maker and W. Aziz a further ground is set up, namely, that "the liquor was found and seized at the same time at which the seizure of the liquor of Michael Maker was made and in the same dwelling." It is not suggested that no liquor of Nicholas Maker or of W. Aziz was found, but that the seizure was made at the same time and in the same place. This is not the case of two persons being convicted of the same offence under sec. 84 (2).* Each defendant was proved to have liquor in a forbidden place. It is surely a novel suggestion that under these circumstances only one is guilty because the place is the same or the seizure took place on the same day. They were all severally guilty of distinct offences; and, even if the liquor had belonged to them as co-owners, they would each have been equally guilty of a distinct offence. Section 84 (2) applies to cases where there is an "occupant" liable on technical grounds and an "actual offender." In the present case all the accused are "actual offenders."

The convictions must stand, and the motions to quash are dismissed with costs. *Judgment accordingly.*

*Sub-section 2 of sec. 84 was added by the Ontario Temperance Amendment Act, 7 Geo. V., 1917, ch. 50, sec. 30, and is as follows:—

(2) The person actually selling, or otherwise contravening any of the provisions of this Act, is for the purposes hereof styled "the actual offender," whether acting on behalf of himself or of another or others, and the actual offender shall personally incur the penalties prescribed by this Act, and at the prosecutor's option the actual offender may be prosecuted jointly with or separately from the occupant, but both of them shall not be convicted of the same offence, and the conviction of one of them shall be a bar to the conviction of the other of them therefor.

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DONALD v. JUKES.*

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher, McPhillips and Eberts, JJ.A. April 6, 1920.

PRINCIPAL AND SURETY (§ II—15)—DEBT—ASSIGNMENT OF—RIGHTS OF ASSIGNEE—NOTICE—LAWS DECLARATORY ACT R.S.B.C., 1911, CH. 133, SEC. 2, SUB-SEC. 35.

Under the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, sec. 2, sub-sec. 35 it is not necessary to give the primary debtor as well as the surety notice before the assignee commences an action against the guarantor whose liability has accrued at the date of the assignment, who then becomes a debtor within the meaning of the Act.

Statement. APPEAL by plaintiff from judgment of Macdonald, J. Reversed.

*Appeal to Supreme Court of Canada pending.

L. G. McPhillips, K.C., for appellant; *Reginald Symes*, for respondent.

MACDONALD, C.J.A.:—It is admitted by counsel for respondent that if it can properly be held that the moneys advanced to Jukes by Edwards were the moneys of the plaintiff, then subject to a question which I shall come to presently, plaintiff is entitled to succeed.

Now her claim is that the moneys advanced as aforesaid were her own moneys. It is not in dispute that she had obtained a large sum of money under insurance policies on her late husband's life. It would appear too that she had advanced others of her own moneys to assist the estate of her late husband which was a large one, but burdened with obligations. The only suggestion of dishonesty in the transaction is that the assignment of the Jukes agreement by Edwards to the plaintiff was preferential. There is some doubt about the solvency of the estate but this is not an action to set aside the transfer and I refer to these matters only as bearing upon the credibility of the plaintiff.

Edwards, who appears to be a credible witness, swears to the fact that though the instrument sued on describes the transaction as an advance made by him, as trustee, to Jukes, it was in reality not of the estate moneys, but plaintiff's own moneys which he advanced. The plaintiff herself gives clear and, as I think, truthful evidence that the investment was made of her moneys and for her benefit and this evidence upon which I rely is to be found in her examination for discovery put in at the trial by defendant's counsel. I conclude, therefore, that the moneys advanced to Jukes, the principal debtor, were hers, and when the security therefore was assigned to her, it became hers in her own right and not as administratrix.

The other question referred to above arises owing to the absence of notice of the assignment to the principal debtor. Notice in conformity with sec. 2 sub-sec. 25 of the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, was duly given to the defendant, the surety. The plaintiff has, as she might do, sued the surety alone and as she has, as to him, strictly complied with the terms of said sub-section, I think she is entitled to succeed.

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With regard to the set-off, there can I think, be no doubt that it cannot be raised against her. She acquired the chose in action long before the principal debtor acquired the set-off of which the defendant is endeavouring to take advantage.

The appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—I do not think it necessary under the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, sec. 2 sub-sec. 25, that notice be given the primary debtor in order that the assignee may maintain an action against the guarantor whose liability has accrued at the date of assignment. He is then a debtor within the meaning of the Act.

The trial Judge (Macdonald, J.), so considered it and gave judgment in favour of the plaintiff but allowed a set-off to the defendant to the amount of the judgment holding that the moneys advanced to Jukes for the primary debtor were the moneys of the Donald estate and not the personal moneys of Mrs. Donald.

Mr. Symes admitted upon the argument that if these were Mrs. Donald's private moneys the set-off could not be allowed. With respect, I have reached a different conclusion to the trial Judge.

That they were Mrs. Donald's private moneys is shewn by her examination for discovery put in by the defendant himself, apart altogether from Edward's evidence which is to the same effect but is objected to.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This appeal, in my opinion must succeed. With great respect to the trial Judge (Macdonald, J.), I cannot arrive at the conclusion which he did, save in respect to that portion of the Judge's judgment in which he held that "it was not essential that the primary debtor should also receive notice of the assignment" to entitle the defendant being sued by the plaintiff.

With great respect to the trial Judge, the fallaciousness of the further reasons for judgment arises through the inquiry into that which was not admissible or permissible, that the plaintiff suing in her individual capacity in respect to her own estate—was called upon to go into matters of account of the estate of her late husband of which she is administratrix. I can see no warrant for any such inquiry, and there was manifest error in the direction and requirement that the accounts be taken in this action. Here the

plaintiff must be treated as an assignee for value of the debt sued for. The evidence is all one way—it was her money. What right is there to set up the fact that she is an administratrix of an estate that has nothing whatever to do with the indebtedness? If nothing else it would be highly inconvenient and embarrassing to enter into this very irrelevant inquiry and it was not rightly open upon the pleadings.

The plaintiff did not bring the action for the benefit of the estate of which she is administratrix. It cannot by any stretch of imagination be an action that could be classified as such, nor can it be said that she is other than the real plaintiff. No other person is to be the beneficiary, nor will the moneys, if recovered, be assets of the estate of which she is administratrix.

I would put the *test*—had the defendant been sued by Edwards would it have been possible to raise this set-off which is now attempted to be set up? Assuredly not. It is to be noted that Edwards *was* appointed by the Court trustee of the real estate of the late James Charlton Donald, and, assuming for the moment that the moneys advanced were moneys held by Edwards as said trustee, would it be possible or equitable that by obtaining the assignment of a debt due by the late J. C. Donald, the debt due to the trustee could be extinguished? It is only necessary to state this proposition to see its utter fallaciousness; it also calls up visions of a preferential position achieved as against other creditors of the estate and many matters of complexity and embarrassment.

Then let us pursue the matter a little further. The plaintiff is entitled to enforce the debt sued for by virtue of the assignment made to her by Edwards; she sues in her individual capacity, she is in no way liable in respect of the debt attempted to be set off, (nor was Edwards, the assignor, liable)—that she is the administratrix of the estate of the late J. C. Donald who was the mortgagor and liable in respect of the mortgage debt attempted to be set off, matters not—that is a matter entirely foreign to the cause of action sued for here.

I do not find it necessary to, in detail, examine or refer to the many authorities that could be referred to but content myself by saying that the right of set-off exists only when in the same right and that is not this case—in truth the point is an elemental

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one in my opinion and needs no particular authority. I might say, though, that the authorities that the trial Judge refers to in his judgment, which with great respect are attempted to be distinguished, fully support the view I here express—and that may be again stated as being that the set-off cannot be admitted, the debt has no virtue or force whatever as affecting or meeting the debt sued for by the plaintiff in this action and is not a debt which the plaintiff can be called upon to pay or acknowledge out of her own estate or capable of being said in this action as coming under the rules of equitable set-off or mutual credit.

I would allow the appeal, the plaintiff to have judgment for the amount sued for, as allowed by the trial Judge, but wholly disencumbered of the set-off which was erroneously allowed, the plaintiff to have the costs throughout and of this appeal.

Eberts, J.A.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

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ROTMAN v. PENNETT.

Ontario Supreme Court, Lennox, J. April 25, 1920.

DAMAGES (§ III P—340)—AGREEMENT—LEASE OF STORE—BREACH—INFIRMITY OF TITLE—OWNER ACTING IN GOOD FAITH—LOSS OF PROFITS—LEGAL EXPENSES.

Breach of an agreement to make a lease to the plaintiffs of a store and premises being due to infirmity of title, the defendant acting in good faith and believing that she had the right to make the lease, does not entitle the plaintiff to damages for loss of profits but only to the amount of the proper and necessary preparatory legal expenses.

[*Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158; *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch.D. 519; *Rowe* v. *School Board for London* (1887), 36 Ch.D. 619 applied and followed.]

Statement.

ACTION for damages for breach of the defendant's agreement to make a lease to the plaintiffs of a store and premises.

H. A. Stewart, K. C., for the plaintiffs.

H. A. O'Donnell, for the defendant.

Lennox, J.

LENNOX, J.:—The plaintiffs sue to recover $5,000 damages for breach of the defendant's agreement to grant them a lease for five years from the 1st September, 1919, of store premises known as number 20 (or 22) Beckworth street, in the town of Smith's Falls. The exact description is of no consequence, as counsel for the defendant admitted, at the trial, that the agreement, although very informal, is sufficient within the meaning of the Statute of Frauds.

At the time the agreement was entered into, one Peter Johnston was in possession of the premises under a lease for five years from the defendant's husband, who is now deceased. This lease will not expire, by effluxion of time, until the 30th September, 1922. The tenant Johnston has the right, however, to terminate it at any time on giving one month's notice and paying a bonus of $35, being equal to one month's rent.

At the time of entering into the agreement for the lease, all the parties thereto understood that the defendant also had the right to terminate Johnston's lease by giving him a month's notice. The basis of this understanding was that, after her husband's death, the defendant, thinking that the lease was one-sided and that she should also have a privilege of terminating the lease, such as Johnston has, and that the provision was omitted by mistake, went to a partner of Mr. Sparham, the solicitor who drew the lease, and he thereupon inserted a provision purporting to enable the defendant (as executrix) to terminate the lease by giving a month's notice to Johnston; and Johnston initialled it by way of shewing his consent.

Upon the evidence of Johnston, who is a Chinaman, I am satisfied that he did not understand the meaning or effect of the alteration, and upon the evidence of this witness and Mr. Sparham, who drew the Johnston lease, I am satisfied that the lease, as it was before the alteration, correctly expressed the agreement come to between the original lessor and lessee, namely, the defendant's husband, William Pennett, and the tenant, Peter Johnston.

The defendant, in pursuance of her agreement with the plaintiffs, in due time and in good faith notified Johnston to give up possession on or before the 30th August. The defendant would be a gainer by $10 a month if she could carry out her agreement with the plaintiffs. Johnston refused and refuses to give up the premises. I am of opinion that the defendant cannot put him out. The defendant submits that she is unable to carry out her agreement with the plaintiffs by reason of a defective title, and is, therefore, at most, only liable for any expenses the plaintiffs have incurred for solicitor's charges and disbursements, if any, in preparing to carry out the agreement. I think the defendant's contention is well-founded.

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I allowed counsel for the plaintiffs to put in such evidence as he desired. The evidence was directed to proving that, relying upon the agreement, the plaintiffs purchased greater quantities of goods than they otherwise would have done and were compelled to handle them in adjoining store premises, which they also hold under a lease, at a disadvantage, and without sufficient room for convenient handling or proper display. They gave evidence of their "turnover," and of the better facilities available in the Johnston premises, but no evidence of having made profits in the years gone by, or that they would make profits in the defendant's premises—probably expecting that I would infer that profits would inevitably accrue. The plaintiffs, husband and wife, both take part in carrying on the business, and, as they are exceptionally shrewd and capable persons, I think the making of profits on their operations is not a remote possibility. Still, as they have not, in the voluminous schedules filed, or otherwise, given me any information upon the question of profits, assumption of profits is, at best, only conjecture, and the wildest conjecture if I attempted to state any definite sum. Owing to the rise in price, I am of opinion that, so far, the plaintiffs have profited by delayed sales, if, in fact, their sales have been retarded by lack of accommodation.

There was nothing said to the defendant as to the plaintiffs' plans or the expansion of their trade, or how or for what purpose they intended to use the defendant's premises. They occupied part of the adjoining premises as a dwelling, and, for anything that appeared, might have intended to use the premises in question as a dwelling only.

The plaintiffs' counsel relied upon *Coe* v. *Clay* (1829), 5 Bing. 440, 130 E.R. 1131, 3 Moo. & P. 57; *Wallis* v. *Hands*, [1893] 2 Ch. 75; and *Marrin* v. *Graver* (1885), 8 O.R. 39: the latter, I presume, for the judgment of Wilson, C.J. It is to be observed that, although great weight is always attached to the opinion of that eminent Judge, his was a dissenting judgment, and the decision of the other Judges, of whom Armour, J. (afterwards Chief Justice), was one, is clearly against the right of the plaintiffs to recover for loss of profits, even if the plaintiffs here had established loss of profits, which they have not done.

Assuming, however, that, in an action such as this, a plaintiff may sometimes recover for loss of profits as special damages, and assuming, without admitting, that the plaintiffs here could recover for loss of profits, if the defendant wilfully refused to carry out her agreement, it is all irrelevant if the decisions as to the measure of damages, where the default is owing to infirmity of title, govern the decision of this case. I think they do. I think the utmost that the plaintiffs *could have* established a right to recover by way of damages is the amount of their proper and necessary preparatory legal expenses. I said "could" because there is no direct evidence that the plaintiffs incurred expense; although I infer that they have paid or are liable for the drawing up of the lease, exhibit 4, and I will assume that they took legal advice as to the construction of the Johnston lease. The plaintiff Markinan says he saw it, I presume at the time of the agreement, and noticed the provision as to 30 days' notice by the lessor.

Mr. O'Donnell, who is yet in the ranks of the younger members of the Bar, shewed a thorough grasp of what is really the issue in this action, and I trust he will not resent my reference to the excellent judgment with which he selected his authorities and presented his argument. It will be sufficient to refer to only two or three of the cases, and possibly to one other. It is to be kept in mind that the claim set up is for non-delivery and is not framed as an action for deceit. If it were, it would be necessary to establish actual fraud. I have no doubt at all as to the entire good faith of the defendant. All the parties to the agreement believed that Johnston's lease could be terminated by a month's notice from the defendant. They were all mistaken. That is all. In the subsequent discussions and negotiations I find that the defendant acted in good faith. There is not much conflict of testimony. Where there is conflict, I prefer the defendant's evidence to the evidence of the plaintiffs.

The leading case is, of course, *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158. The action there was brought by the purchasers to recover for the loss of their bargain, the vendors being unable to convey by reason of infirmity of title. Lord Chelmsford in the House of Lords said (p. 207): "If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor

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any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract: he can only obtain other damages by an action for deceit." If this applies to an agreement for a lease it more than meets the defendant's position, for it is not pretended that the defendant was guilty of bad faith at the time of entering into the agreement. Lord Hatherley, at pp. 210, 211, said: "The foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates, it is recognised on all hands that the purchaser knows on his part that there is some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title."

Under the heading "Breach of Agreement for Lease," in Halsbury's Laws of England, vol. 18, p. 380, para. 827, it is said: "Where non-performance by the lessor is due to defective title, the lessee cannot recover damages for loss of his bargain, but only the actual expense to which he has been put" (*Bain* v. *Fothergill*), except in the case of wilful default: *Ward* v. *Smith* (1822), 11 Price 19, 147 E.R. 388. As I have pointed out, *Bain* v. *Fothergill* arose out of a sale of land. I presume an agreement for a lease is *pro tanto* an agreement to sell. However, the question was set at rest in *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519, where the tenant sued for renewal of a lease, and, alternatively, for damages, and it was held by Kay, J., upon the authority of *Bain* v. *Fothergill*, that the plaintiff could not recover damages for breach of covenant arising out of infirmity of title.

Almost immediately following the *Towse* case is the decision of Kekewich, J., in *Rowe* v. *School Board for London* (1887), 36 Ch. D. 619, which, although not arising out of an agreement for a lease, is based upon the broad, intelligible principle that the exception extends to contracts generally concerning an interest in land. Ultimately, and before the action was tried, the School Board were able to do what they agreed to do, and at the trial the claim

was for damages occasioned to the plaintiff by delay in obtaining possession of a right of way. At pp. 623 and 624, Kekewich, J., said: "To my mind the distinction between a sale of the fee simple of real estate, or the granting of a lease—which would certainly come within *Bain* v. *Fothergill*—and a contract to grant a right of way is one that cannot be sustained. A contract to grant a right of way with the concurrence of all necessary parties is a contract for the sale of real estate. It is a contract which cannot be performed if the contracting party has not the title to the real estate, or does not acquire a title. It is just as essential to the grant of a right of way as it is to the conveyance of an estate in fee simple, that the vendor should have a title to the land over which the right of way is to be given. The sewers, and the construction of the roads, and all those matters are only supplementary. The grant of the right of way is the thing which the School Board contract to give, and which they were to acquire. It was for this that they were to obtain the consent of all necessary parties, and that is to my mind the precise equivalent of what was mentioned and discussed in *Bain* v. *Fothergill*, namely, the sale of real estate, and I think it falls within the rule there laid down. The School Board have not performed their contract, because Jenkins kept them out of possession; and although he had not a title, he said that he had a title, and therefore for a time the School Board were unable to give the possession, which they were bound to give."*

The $45 in Court, with its interest, will be the plaintiffs.' I will allow, for the expenses referred to, $10. There will be judgment for the plaintiffs for these two sums, $55, with Division Court costs, and for the defendant for her costs according to the tariff of this Court, the money allowed to the plaintiffs to be applied on account of the defendant's costs.

Judgment accordingly.

*See also *McCune* v. *Good* (1915), 23 D.L.R. 662, 34 O.L.R. 51.

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THE KING v. ENGLAND.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 24, 1920.

INDICTMENT, INFORMATION AND COMPLAINT (§ II G—60)—CRIMINAL LAW—OFFENCE—DATE IN INDICTMENT—ALIBI PROVES DATE INCORRECT—VERDICT OF GUILTY—DATE NOT MATERIAL PART OF INDICTMENT.

While the date of offence should be alleged in the indictment, it is not necessary to be laid according to truth, unless time is the essence of the offence. Consequently, the jury may find the accused guilty of the alleged offence, if there is sufficient evidence to warrant them arriving at such a conclusion, even though they may find that the alleged offence was not committed on the actual date specified in the indictment.

[*Severo Dossi* (1918), 13 Cr. App. Rep. 158 followed.]

Statement. APPLICATION by defendant for leave to appeal from a conviction for uttering forged paper. Refused.

C. D. Richards, for defendant; *J. P. Byrne*, Attorney-General, contra.

The judgment of the Court was delivered by

Hazen, C.J. HAZEN, C.J.:—This was an application for leave to appeal under sec. 1015 of the Criminal Code. The accused was tried at Fredericton in June last before Chandler, J. The indictment as found contained 4 counts, 2 charging forgery of 2 prescriptions for intoxicating liquor on March 18, 1920, and 2 for uttering the said prescriptions on the same day, knowing them to be forged.

The defendant was acquitted on the 2 counts for forgery, and found guilty on the two for uttering, and sentenced to 2 years penal imprisonment in the penitentiary at Dorchester upon each of the last 2 counts, the said sentences to run one after the other. Application was made to the Judge after a verdict was entered and before sentence, for a reserved case, and was refused. Four grounds are stated in the notice of appeal from this refusal, but all were abandoned when the matter came before this Court, with one exception, which is as follows:—

4. That the learned trial Judge was in error in his direction to the jury in answer to a question by one of the jurors as follows: (See at conclusion of Judge's charge, pp. 112 and 113 of record).

Question by Juror Morrison:

May I ask for some information upon one point? Supposing the jury believe that the prisoner forged or uttered these documents, say the 19th instead of the 18th, would they be justified in finding him guilty?

Answer by His Honour:

Well, I think, Gentlemen, it is this way. The best I can tell you is this, that if you really do conscientiously believe that this man did really forge these documents, if that is your honest belief and you believe that beyond a

reasonable doubt, you will find him guilty. The rest of it is merely a question of law. I would not worry about this technical matter, but if you really do believe that this man did forge these documents or utter them knowing them to be forged, why then it is your duty to find him guilty without any regard to dates.

The defence that was set up at the trial was an alibi, and witnesses were called to shew that the defendant could not have forged or uttered these documents on the 18th instant, and the contention of his counsel was that he had framed his defence simply with regard to the date mentioned in the indictment, and that if evidence had been given to shew that he was guilty on some other date he was not called upon to meet the charge, and the Judge was wrong in informing the jury that if they believed that the man did forge the documents or utter them knowing them to be forged, that it was their duty to find him guilty without regard to the date.

The sections of the Criminal Code quoted by the counsel for the defendant, *viz.*, 852, 853 and 855, do not seem to me to support this contention, neither do the cases to which he has called the attention of the Court, and in any event I think the Court is precluded from agreeing with his contention by the case of *Severo Dossi*, 13 Cr. App. Rep. 158, decided in the Court of Criminal Appeals on June 17, 1918. In that case it was submitted that if a man is put on his trial on an indictment which charges him with committing an offence on a specific date and no amendment is made before or during the trial, and the jury find that he has not committed the offence on that day and have returned a verdict of not guilty, it must be allowed to stand, and that this is especially so where the defence is an alibi or a kindred plea. In giving judgment in the matter, Atkin, J., said, at 159:—

> The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him Not Guilty and that that verdict must stand . . . From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

and in support of this he cites from Coke's Institutes, which I will refer to a little later on, and proceeds at p. 160:—

> Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were

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entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment. It is, therefore, unnecessary to consider whether there was power to amend the indictment.

In 2 Co. Ins. 318, reference is made to the case of one Syer who was indicted of burglary at the Sessions of the Peace "holden for the County of Norfolk." It was charged in the indictment that the burglary was committed on August 1, but it fell out in evidence that it was done not on August 1, but on September 1, and the jury found there was no burglary done and thereupon it was found not guilty, and afterwards he was indicted again for burglary committed on September 1, and it was resolved by Wray and Periam, and by the greatest part of the Judges that he ought not to be tried again, for he might have been found guilty upon the first indictment, for the day is not material. The same *Syer* case is referred to in 3 Co. Inst. at 229-230, but more fully:—

At Twelfe sessions of the peace holden at Norwich for the county of Norfolk, *anno* 32 Eliz. one Syer was indicted of burglary, supposed to be commited 1 *Augusti anno* 31 Eliz. whereunto Syer pleaded not guilty And upon the evidence it appeared that the burglary was committed 1 *Septembris anno* 31 Eliz so as at the time alledged in the indictment there was no burglary done; and it was conceived that the very true day in the indictment was necessary to be set down in the indictment, for that the judgment doth relate to the day in the indictment, and so avoid feoffments, leases, &c. for that as it was also conceived, the feoffee, lessee, &c. when the attainder is upon a verdict should not falsify in the time of the felony; and thereupon the jury found Syer not guilty. And at the same sessions Syer was again indicted for the same burglary done 1 *Septembris anno* 31 Eliz. when in truth it was done. And he that gave the charge at that sessions doubted, whether upon this matter Syer might plead *auterfoitz acquite* for the same burglary, (for seeing the offender is allowed no counsell, the court ought to do him justice and assign him counsell *in favorem vitæ*, though he demand it not, to plead any matter in law appearing to the court for his discharge; and thereupon he stayed the proceedings against him, and the assizes being at hand he acquainted the justices of assize, Wray chief justice, and justice Peryam with this case, and with the doubts conceived thereupon; who answered him, that the like case had then been lately propounded by justice Peryam to all the justices of England; and by them three points were resolved. 1. That the crown was not bound to set down the very day when the treason, felony, &c. was done, but the day set down in the indictment being before or after the offence done, the jury ought to find him guilty, if the truth of the case be so; and if it be alledged before the offence done, to find the day when it was done in *rei veritate*, for they are sworn *ad veritatem dicendam*, and then the forfeiture shall relate but to the day in the verdict, which was the day of the offence done, and not to the day in the indictment. 2. That if the triers find the

offender guilty generally, yet the feoffee or lessee, &c. if the offence be alledged in the indictment before it was done to their prejudice, may falsify in the time but not for the offence. For seeing the crown is not bound to set down the very just day when the treason or felony, &c. is done, and that the triers have chief regard and respect of the offence itselfe, God Forbid, but that the subject might falsify as concerning the time of the offence. 3. If the offender be found not guilty, he in that case might plead upon a new indictment, *autrefoitz acquit*; and so Syer in the case aforesaid did, and was thereupon discharged according to the said resolutions.

In the case of England it is impossible of course to say whether the jury did or did not accept the evidence that was offered in support of the alibi that was set up, but it is clear that they found him guilty of uttering forged documents, which was the alleged offence, and I do not see how it can possibly be contended that the date on which this took place was an essential part thereof. In the *Syer* case, *supra*, upon which the Court of Criminal Appeal founded its decision, it was stated that if the day was alleged before the offence done, the jury ought to find the day on which it was done in *rei veritate*, for they are sworn *ad veritatem dicendam*, and that then the forfeiture shall relate but to the day in the verdict which was the day of the offence done. This of course was necessary in the days when the property of a felon was forfeited to the Crown from the day on which the felony was committed, but it seems to me would have no application under the changed conditions of the criminal law as it exists today.

I am therefore of opinion that the application for leave to appeal should be dismissed.

Application dismissed.

Re O'DONNELL AND NICHOLSON.

Ontario Supreme Court, Orde, J. August 21, 1920.

DEEDS (II A—24)—CONVEYANCE TO DEAD PERSON—INSTRUMENT INOPERATIVE—TITLE BY POSSESSION—LIMITATIONS ACT—CLAIM OF HEIRS OF GUARANTOR.

A deed to a person, his heirs and assigns, that person having previously died, is wholly inoperative to convey any estate either retroactively to that person in his lifetime or directly to his heirs.

And the heirs, although showing a title acquired under the Limitations Act, must give a purchaser satisfactory evidence that the rights of any person claiming under the grantor are barred by lapse of time under the statute.

Statement.

APPLICATION by a purchaser of land, under the Vendors and Purchasers Act, R.S.O. 1914, ch. 122, for an order determining the validity of an objection to the vendor's title.

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RE O'DONNELL AND NICHOLSON.

Orde, J.

Daniel Urquhart, for purchaser. *G. M. Willoughby*, for vendor.

ORDE, J.:—One of the links in the chain of title as registered is a conveyance by way of grant from one Levi Snider to one Henry McCartney, dated the 24th April, 1879, and registered on the 12th May, 1904. Henry McCartney had in fact died on the 4th January, 1879, more than three months prior to the date of the conveyance. It is not suggested that the deed was really executed prior to his death and by some error dated afterwards, but it appears that McCartney had purchased, or agreed to purchase, in his lifetime, and died before the conveyance was made; and that, through the stupidity of some unlicensed conveyancer, the deed was so drawn and executed as to purport to convey to Henry McCartney, his heirs and assigns.

The purchaser objects to this deed as being wholly inoperative to convey any estate in the lands to any one. The purchaser's objection must be sustained. Among the necessary incidents to a deed are that there shall be at least two parties to it and that it shall be delivered: (First), Coke upon Littleton, 35. b.; Blackstone, vol. 2, pp. 296 and 306. Among the requisites mentioned by Blackstone (p. 296) is "that there be persons able to contract and be contracted with for the purposes intended by the deed." There was not when the deed was executed by Levi Snider any such person as the Henry McCartney with whom he purported to contract. Nor was there any such person to whom or for whose benefit the deed could be delivered. There is no principle which can make the purported conveyance operate retroactively so as to vest an estate in Henry McCartney during his lifetime.

Mr. Willoughby argued that the grant might operate as a direct conveyance of the fee to McCartney's heirs. It is stated in 2 Preston's Conveyancing, p. 394: "With reference to indentures between parties, it seems to be a general rule that no one can be considered as a party to a deed unless he be named as a party in the clause containing the names of the persons who are formally made parties." And in 8 Bythewood and Jarman's Conveyancing, 413, it is said: "Where the deed is expressed to be made between the parties, the parties named are alone parties to the instrument." See the argument in *Reeves* v. *Watts* (1866), L.R. 1 Q.B. 412, at p. 414.

Now, while it might be that a deed made between A. as grantor, of the one part, and "all the heirs at law of B." as grantees, of the other part, might be operative in favour of the heirs as if expressly named (see Elphinstone on Deeds, pp. 126, 127, as to deeds in favour of a class), this deed is expressed to be made between Levi Snider and Henry McCartney, and I do not see how his heirs can be substituted as the parties with whom the deed is made. In any event, the heirs in this deed do not take any estate on the face of the deed. The words are merely words of limitation to describe the estate in fee which the deed purported to convey to Henry McCartney. Even if the deed could operate as a direct grant to the heirs as if named, they would in 1879 have received merely a life-estate and not the fee.

I must hold, therefore, that the deed in question was wholly inoperative to convey any estate, either retroactively to Henry McCartney in his lifetime or directly to his heirs. Its only value is as a piece of evidence, operating perhaps in the nature of an estoppel as against Levi Snider and his heirs or legal personal representatives.

I am also asked to pass upon the sufficiency of the evidence of possession. There seems to be ample and fairly satisfactory evidence that the widow and heirs of Henry McCartney (who had gone into possession prior to his death) occupied the land exclusively from 1879 to 1905, when the present vendor acquired the lands, and by the present vendor since that date. What is lacking, and what I think the purchaser is entitled to, is satisfactory evidence that the right of any person claiming under Levi Snider, and who may have been under some disability, has been effectually barred by lapse of time. It seems hardly possible that after 41 years any such right could now exist, having in view the limitations fixed by the Limitations Act, R.S.O. 1914, ch. 75, secs. 40, 41, and 42, but I do not think I ought to determine this without further information.

If there are to be any costs on this application, they should be paid by the vendor. *Judgment accordingly.*

ALTA.

S. C.

REX v. NAT BELL LIQUORS Ltd.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Ives, JJ. October 16, 1920.

STATUTES (§ II B—111)—PENAL—RETURN CALLED FOR—PENALTY FOR NEGLECT OR REFUSAL TO FILE—ACCIDENTAL OMISSION—NO MENS REA—NO VIOLATION.

An accidental omission in a return required under the Alberta Liquor Export Act, and the verification of it by affidavit, does not constitute a violation of the Statute, calling for such return, and imposing a penalty for neglect or refusal to make the same.

As a general rule of our law a guilty mind is an essential ingredient of crime, and should be considered in construing all penal statutes.

Statement.

APPEAL from Walsh, J. (1920), 53 D.L.R. 482, refusing a motion to quash a conviction for failure to make a return in pursuance of the Liquor Export Act, 8 Geo. V. 1918 (Alta.), ch. 8. Affirmed by an equally divided Court.

H. A. Friedman, for appellant.

H. H. Parlee, K.C., for Attorney-General.

Harvey, C.J.

HARVEY, C.J., concurs with Ives, J.

Ives, J.

IVES, J.:—I think this appeal fails. I can add little to what has been said by my brother Walsh in his judgment (1920), 53 D.L.R. 482, which is under consideration. There is no question that a guilty intention on the part of the accused's president who acted for the accused is entirely absent. The neglect which results in the conviction was clearly a stenographer's oversight and in turn an oversight of the president of the appellant, when he came to verify the document which the stenographer had prepared for him. The offence arises under secs. 4 & 6 of the Liquor Export Act, 8 Geo. V., 1918 (Alta.), ch. 8.* This is clearly one of the well known exceptions to the general rule that a guilty intent is essential to constitute a crime. Here the Legislature has created what is popularly described as a quasi criminal offence, by ordering those engaged in the liquor export trade to make full returns of liquor receipts and penalising a neglect or failure to do so. That the neglect results from pure oversight does not release from liability to pay the penalty. See *Sherras* v. *De Rutzen*, [1895] 1 K.B. 918; *Pearks, Gunston & Tee* v. *Ward*, [1902] 2 K.B. 1 and *Mousell Bros. Ltd.* v. *London & Northwestern R. Co.*, [1917] 2 K.B. 836. With my brother Walsh I am astonished at the severity of the penalty, almost the maximum and imposed,

*See amendment, 10 Geo. V. 1920, ch. 7.

as the magistrate states, because he had previously fixed that sum in an entirely different—and counsel states—flagrant case. While this Court cannot reduce the amount of the fine the Crown can do so by remission and I have no hesitation in strongly recommending that in justice this fine should be largely remitted and the penalty thus reduced to meet what the evidence shews to be but a technical guilt.

STUART, J.:—I would allow this appeal with costs and quash the conviction with costs.

The defendant was carrying on a business specifically permitted by the law of the Province and a business which in the absence of statute is quite lawful in itself. For the obvious purpose of more rigidly enforcing another law as to sales in the Province the Legislature saw fit to impose some regulations in regard to the method of conducting the business in which the defendant was engaged. The constitutionality of the law providing these regulations is not here brought in question.

Persons engaged in the business are required to do a number of things. Section 6 is intended, apparently, to impose the minimum penalty of $500 for the omission ,refusal or neglect to do any of the acts ordered to be done.

In my view, a person accused under this stringent Act, must be brought clearly and plainly within its provisions before he can be made liable to the penalty. Section 6, 8 Geo. V. 1918, ch. 8, itself has to be treated generously by the Court before it can be said to impose any penalty at all. It says that any person who "refuses or neglects . . . to give, furnish or do *any other matter, act or thing* required by this Act *for which no penalty has been provided* shall thereby commit an offence, &c." Now, in order to sustain the conviction the Court must, *in favour of the prosecution*, undertake to say that what the Legislature intended to say was " for *the refusal or neglect to do which* no penalty has been provided, &c." We must say "Why, of course, that is what the section means, that is what it meant to say."

We can certainly assume, I think, that the Legislature was not thinking of a penalty for *making* the return called for by sec. 4. Where the penalty is so severe I do not think it is the

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Court's duty to interpret the language of the statute liberally in favour of the prosecution and against the liberty of the subject.

Section 4 says that

> every person (engaged in the business in question) shall on the first day of each and every month hereafter make a return to the Attorney General verified by an affidavit shewing—(1) a statement in detail of all liquor received by such person during the month immediately proceeding, etc.

Now, the accused did make a return. It did verify it by affidavit. It did shew a statement in detail of all liquor received in the sense that that is what the statement was, upon the face of it. It did in effect say or state that all the liquor received was "as follows."

But admittedly it was not an exactly true statement. A slight and purely accidental omission was made. A small shipment of a few gallons was omitted by error of a stenographer and the omission was not noticed by the officer of the company who verified the statement by affidavit.

In these circumstances, I do not think the accused violated the Act. My opinion is that the "neglect" referred to in sec. 6 is neglect to make a return at all. To insure the accuracy of the return the Legislature required an affidavit of verification. If such affidavit were knowingly false or made with reckless indifference as to its truth or falseness and was in fact false then a prosecution for perjury would succeed.

But I think the accused in this case complied substantially with what he was ordered to do. I do not propose for my part to read into the statute, in addition to that which must be read into it, to make sec. 6 intelligible at all, the word "true" before the word "statement" in sec. 4. The very case upon which the Judge below relied in dismissing the application to quash shews that a slight and purely accidental omission of an item from a document required to be returned signed or filed will not justify the Court in saying that there was no such document returned or filed.

All of the cases to which we were referred, dealing with the subject of *mens rea*, are decisions of Courts of merely co-ordinate authority with this Court; and, though they are undoubtedly entitled to great respect, they are in no sense decisive or binding upon us.

In *Pearkes' Dairies Ltd.* v. *Tottenham Food Control Committee* (1918), 120 L.T. 95, at 98, Shearman, J. said this:

> Some confusion, however, has been created in certain cases owing to the fact that it has been stated that some criminal acts can be committed although there is no *mens rea* on the part of the person charged. But that is only true if the word *mens* is used inaccurately. Criminal acts may be done by a person who is morally innocent. There is a class of acts which are criminal because the statute which forbids them shews plainly that what it aims at is not the intentional disregarding of the statute but the intentional doing of the prohibited act.

I quote that passage in order to emphasise what I wish now to say. Shearman, J. was speaking of the positive act of doing something which the statute has *forbidden*. In our present case we have the reverse situation. We have a charge of an omission or neglect to do something commanded to be done.

We are so far from having the accused intentionally doing a forbidden act that we have it, through its officer intending, fully intending, and desiring to do what had been commanded, we have it through its officer honestly attempting to do what was commanded. We have it honestly thinking that it had done the thing commanded. That thing was not a *single act*. It was the making up and sending in of a return containing a statement of a large number of items. And there was a purely accidental and unintentional omission of a single small item. Now no doubt the Act may be read, with judicial amendment as I have pointed out, as imposing a penalty for the neglect, as well as the intentional omission, to perform that complex act. But when the minimum penalty possible is $500 and the maximum is $2,000, it is my opinion that if the Legislature intended to enact that the mere unintentional neglect to insert any single item, however small, in the return demanded, should subject the individual to such a penalty, then, according to the admitted principle of interpretation of penal statutes creating new offences not in themselves morally wrong it ought, I repeat, very clearly and plainly say so. For the reasons I have given I do not think the Legislature has said so with anything like the requisite clearness and perspicacity.

BECK, J.:—The terms of the Act and the admitted facts are set forth in the reasons for judgment of other members of the Court.

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In my opinion it was improper to convict the defendant of an offence under the section in question inasmuch as it was proved, and is now admitted, that there was no guilty mind (*mens rea*) in the representative of the defendant whose omission to comply with the provisions of the section is complained of. I note authorities in support of my opinion. Brooms Legal Maxims, 8th ed. p. 256, says: *Actus non facit reum nisi mens sit rea.* An Act does not make a man guilty, unless there be guilty intention. As a general rule of our law a guilty mind is an essential ingredient of crime and this ought to be borne in mind in construing all *penal statutes.*

[Subject to certain exceptions it is essential] to make any person liable for disobeying a *penal statute*, that something more should be proved than the Act or omission prohibited; *i.e.*, it must be shewn that the act or omission was made with a particular motive or intention. . . . Where the proceeding, whether civil or criminal in form, is for a *statutory penalty*, independent of the civil damage to an individual, it seems to be accepted as the general rule that, [if a person does an act *in itself indifferent*, it must be distinctly proved before he can be said to have had "a guilty mind" that he did this *indifferent* act with a criminal intention; but if the act which he does is in itself unlawful, then the person who does the act will be assumed to have had a criminal intention and if he fails to justify or excuse the doing of the act, the law will hold him to be guilty, etc.]. (Craie's Hardcastle on Statutes 2nd ed., pp. 463-4 where a number o f cases are cited).

Reg. v. *Tolson* (1889), 23 Q.B.D. 168 was a Crown case reserved, heard by fourteen Judges; nine against five held that in a prosecution for bigamy a *bona fide* belief on reasonable grounds at the time of the second marriage afforded a good defence.

Cave, J., one of the Judges among the majority, said (23 Q.B.D. at 181):

At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, "*actus non facit reum, nisi mens sit rea.*" Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy or perversion of that faculty, as in lunacy. Instances of the existence of this *common law doctrine* will readily occur to the mind. So far as I am aware it has never been suggested that these exceptions do not *equally apply in the case of statutory offences*, unless they are excluded *expressly or by necessary implication.*

Craie's Hardcastle after quoting this passage observes at p. 465,

Assuming the correctness of this view, the result reached by the learned Judge can be attained by reference to *the ordinary rule of construction, that a rule of the common law*, whether as to substantive or objective law, *is not abrogated by statute, except by express provision or necessary implication.*

referring to the chapter of the work (ch. 4), in which that rule is laid down and discussed, pp. 301, *et seq.*

In *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, a Divisional Court composed of Day and Wright, JJ., decided on the principles above stated, that a conviction for breach of a statutory prohibition against a licensed victualler supplying liquor to a police constable while on duty could not be sustained where the licensed victualler *bona fide* believed that the police constable was off duty. The Court also held that the introduction of the word "knowingly" or of a like word into the description of the offence merely placed the burden on the prosecution of proving guilty knowledge; while in its absence the proof of absence of a guilty knowledge was on the accused. That decision was quoted with approval in *Bank of New South Wales* v. *Piper*, [1897] A.C. 383, a decision of the Judicial Committee of the Privy Council and the general rule of law as I have set it out was reaffirmed.

A later case is *Christie* v. *Cooper*, [1900] 2 Q.B. 522. The Court held that a *mens rea* was an essential element to the offence there in question—one under a statute relating to trademarks.

The principles laid down by *Sherras* v. *De Rutzen*, *supra*, must, in view of their confirmation by the Privy Council, be taken as settling the law so far as this Court is concerned. There are a number of decisions which are irreconcilable with each other and some which offend against the correct rule and would now be decided otherwise. I think a careful examination of the case of *Rex* v. *Burrell* (1840), 12 Ad. & E. 460, 113 E.R. 886, upon which the Judge of first instance relied is rather a decision in favour of the view that a return having been made, a *bona fide* error in the return is not a breach of the provision requiring a return.

In respect of the Act in question here, there is no express provision excluding the element of guilty knowledge nor do I find the slightest ground for a necessary implication to the like effect either in any provision of the Act or in any supposed purpose of the enactment. The purpose may have been to afford the Department of the Attorney-General information upon which to check up the exporter's business with the view of discovering whether or not he was complying with the requirements of the law. If the required return was the only information by reference

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to which such a checking up could be made, there might be room for argument that the return was so essential and fundamental that a necessary implication arose, not only for its being made, but also for its absolute literal correctness in all particulars, without regard to innocent defaults or errors; but the statute itself is very explicit in its directions that the exporter shall if he is already doing business forthwith after the passing of the Act and whether so or not upon acquiring or obtaining any liquor for the purposes covered by the Act or on commencing business (1) register (2) state particular location and site of premises (3) give a detailed statement of all kinds and quantity of each kind and brand; and from time to time give such other and further particulars as the Attorney-General may require. Provisions are also made relating to the construction of the building; the keeping of the liquor therein; and the transportation and shipment (sec. 3); also for the inspection of the premises, the liquor and all papers and documents relating thereto. It is furthermore shewn by the evidence that the police had access to the records of the express companies conveying liquor into the Province. There is, furthermore, of course, the liability under the Criminal Code for wilfully making a false return under sec. 4 of the Act.

There is, in my opinion, another ground—one taken by the defendant's counsel—upon which also, the conviction ought to be quashed. *Certiorari* is not taken away by the Liquor Export Act of 1918, under which the charge is laid. Even if it were, I think that would not prevent the Court giving effect to the ground that the accused is entitled to have the magistrate exercise the duties imposed upon him by his office. That is a right which the accused has in natural justice and the Courts have constantly, on *certiorari*, set aside the proceedings of magistrates, where the rules of natural justice have been disregarded. Here the magistrate had, having convicted the accused, the jurisdiction to impose a fine between $500 and $2,000. The obvious duty of the magistrate was to fix the precise amount of the fine having regard to the circumstances of the case. The defendant was entitled to a decision as to the amount of the fine based upon the magistrate's *bona fide* consideration of the circumstances of the case. Had the magistrate, as a result of such a consideration, fixed a fine,

the Court, I suppose, could not interfere with it, though of opinion that it was grossly excessive. But the magistrate in this case did not, it is evident, give that consideration to the amount of the fine, which justice called for.

He says in his reasons:

"In fines, I set the standard last week, and I will abide by that. I may give $2,000, the maximum penalty, but as I said, I will rest it on the same as the other day. I will find the Nat Bell Liquor Co. guilty of this charge and inflict a fine of $1,700 and costs. I regret having to do this."

Magistrates, (as well as other like tribunals), must, where they have a discretion, exercise it "according to rules of reason and justice," Lord Halsbury, L.C. in *Sharp* v. *Wakefield*, [1891] A.C. 173, at 179; "They have to decide judicially," Cotton, L.J. in *Leeson* v. *General Council of Medical Education* (1889), 43 Ch.D. 366, at 379; "They are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are, as it has been said, founded upon its (justice's) very essence," *The Queen* v. *London County Council; Ex. parte Akkersdyk*, [1892] 1 Q.B. 190, at 195.

Convictions and similar adjudications will be set aside in *certiorari* not only for want or excess of jurisdiction, strictly so called, or for fraud, but also on the ground of bias, pecuniary or other interest, misconduct, (though innocent of a wrong intention), such as absence of notice, refusal of right to adduce evidence, or to a necessary adjournment. See Short & Mellor, Crown Practice, 2nd ed. pp. 43 *et seq.*

These latter grounds are but instances of the broad ground that the rules of natural justice must be conformed to so as to obviate any detriment or possible detriment of the accused.

For the reasons I have stated I would quash the conviction with costs against the informant.

Appeal dismissed, the Court being equally divided.

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