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ANNOTATED

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VOL. 49

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Simmons and McCarthy, JJ. October 20, 1919.

SALE (§IIIC—72)—OF ENGINE—CONDITION—ENGINE ORDERED NOT DELIVERED—ACTION FOR PURCHASE PRICE—RESCISSION OF CONTRACT.

It being a condition of the sale that a threshing engine shall be a 25 h.p. engine, the purchaser is entitled to have the contract rescinded and the deposit returned to him upon the admission of the vendor in an action brought by him to recover the balance of the purchase price, that the machine was in fact a 22 h.p. standard machine, although the purchaser has retained and used the machine through two seasons upon the vendor's continued assurances that he would put it in good working order, if the purchaser did not know until the trial that the machine was not in fact a 25 horse power machine such as he had contracted to purchase.

Statement.

APPEAL by plaintiff from the judgment of Stuart, J., in an action to recover the balance due on a threshing engine sold to the defendant. Affirmed.

J. W. Crawford, for appellant; *McDonald, Martin* and *Mackenzie*, for respondent.

The judgment of the Court was delivered by

Simmons, J.

SIMMONS, J.:—The plaintiff claims from the defendant $825 and interest, the amount of a lien note given by defendant on the purchase price of a combination thresher and gasoline engine. The defendant sets up, as a defence, certain defects in the design and workmanship and the condition and warranty that it would thresh 800 to 1200 bushels per day and a failure to perform this condition and warranty. The defendant also alleges, as a defence, that the plaintiff represented the engine to be a 25 horse power motor and that this was a condition of the sale and that the motor in question did not fulfill this condition, and he also counterclaims for damages arising out of the failure of the engine and thresher to fulfill the above conditions and warranties.

The trial Judge found as a fact, that the plaintiff's agent did represent the engine to be a 25 horse power motor and that it did not comply with this representation, which he held was a condition of the sale and that the defendant was entitled at that date to reject the machine unless he had done such act as would disentitle him to have relief.

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The defendant kept and used the machine during the years 1917 and 1918. During the season of 1917 he threshed 6000 bushels of his own and about 2500 bushels for his neighbors and he did a small amount of threshing in the year 1918. The trial Judge held, however, that the defendant was excused from the adverse consequences of these acts by the repeated promises and assurances of the plaintiff's agents that the machine could and would be made to satisfy him and by the further fact that it was not until the trial of the action that the defendant learned that the engine was what the plaintiff called a 22 horse power engine.

At the trial the plaintiff's chief witness, Alfred Leader, who sold the machine to the defendant, admitted that it was a 22 horse power standard but that it would develop 25 horse power when properly operated. It was on this that a straight issue of facts arose here and one which necessarily would be submitted to a jury if the trial Judge had the assistance of a jury. The defendant does not adduce direct evidence as to the power of the machine but adduces his own evidence and that of others, who assisted in the operation of the engine, to the effect that it did not develop sufficient power to run the thresher. His son-in-law, Louis Minet, helped to start up and to operate the engine in 1917. He claims to be an expert in gasoline engines. He says a 25 horse power engine will operate a thresher with a cylinder 26 to 44 inches in length and that the cylinder of this thresher was only 24 inches in length. Minet says a motor engine does not produce a uniform power under operation. The maximum power is affected by various features, such as the cooling system, the effectiveness of the spark, the diameter bore of the piston, length of piston stroke, condition of the weather and other things affecting the actual power which the engine will produce under test. He also alleges that it requires a lot of work on the part of an expert and a considerable time to make an accurate test of the maximum power of such an engine. He does not suggest that he ever made such a test. One of the reasons which Minet gives for the lack of power was the heating of the cooling system, which he blamed upon an ineffective fan belt. Minet also states that the clutch did not release properly and that in order to adjust it they had to allow it to remain fixed in the engine and had to start the engine and thresher together by securing four men to pull the long belt

which connected them. He also criticizes the combination thresher and engine from this point of view, that, since the engine is set upon the same frame as the threshing machine, the distance between them is not great enough and the result is that the drive belt which connects the engine and thresher has to be maintained very tight. If it is allowed to slacken it slips on the pulley. He also criticizes the combination thresher and engine because he alleges the vibration of the motor causes a large amount of vibration in the thresher itself, which causes part of the thresher to come loose, such as bolts and fastenings.

When the engine was set up in the fall of 1917, Minet assisted Leader in starting it and he says it worked well and threshed two or three loads of oats and Minet signed a card certifying that the machine was working in a satisfactory manner. At that time Minet was, I believe, representing the defendant, so far as taking charge of the delivery of the machine and the starting of the same was concerned.

The evidence of the defendant and his other witnesses was of the same general character as that of Minet. On the second week of operation Leader was sent for, as the machine had got out of working order. Leader says he found the trouble was entirely due to a pulley which was loose, on which the drive belt operated, and that he made a good repair of this and the engine worked satisfactorily while he was there. The defendant did not contradict this evidence. Leader says there was some clutch trouble also which he adjusted and he found some bolts and other parts of the separator had worked loose and he tightened these and that these are matters of detail which may happen and are quite likely to happen in the operation of any machine.

In my view there is a good deal in the evidence to indicate that a large portion of the defendant's trouble was due to minor adjustments which an experienced operator could readily repair. However, the defendant and his witnesses did give evidence the general effect of which is, that in heavy grain the machine did not have the power necessary to do the work. The trial Judge had to perform the function of a jury and had the advantage of hearing and seeing the witnesses and I think his finding of facts, that the machine in question did not develop 25 horse power cannot be disturbed.

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The second branch of the case presents a good deal of difficulty. The defendant did not declare an intention of rejecting the machine, during the season of 1917, although he complained from time to time in regard to its defects. In February, 1918, when the plaintiff's agent pressed him for payment he did refuse payment, on the ground that the machine was not satisfactory and apparently the plaintiff's agent promised to make it work satisfactorily and nothing else material to the issue happened until July, 1918, when the plaintiff sent a man named Hunter to look over the machine and put it in repair.

In August, 1918, the defendant wrote the plaintiff as follows:—

I expect to be able to start to thresh early in September and I do not intend to take out the machine purchased from you last year. It has to be up to you to make the said machine do the work it was guaranteed to do.

I tried it last year and failed so completely that I shall not make another attempt.

And as a result the plaintiff sent two experts, Johnson and Haverson, to the defendant's premises and they started the machine and the defendant admitted that it worked satisfactorily but he said he was not satisfied that it would continue to work in a satisfactory manner, apparently intending to reserve some right of remedy in case it did not work properly. The machine then was moved to a neighbor's, named Chester Lloyd Rix, and it did not work in a satisfactory manner. The evidence suggests that a good deal of the trouble was in the separator and not due to any defect or lack of power in the engine.

The acts of the plaintiff's agent in assisting the defendant to put the machine in good working condition, very reasonably might be attributed to a desire on the part of the plaintiffs to advance their own interests and maintain a good business reputation for their products. The acts of the defendant in keeping the machine and using it, in my view, raises a pretty strong presumption against him that he accepted it. He says, however, in explanation of this that the plaintiffs refused to take it back and that even in February, 1918, he maintained that the machine was not the one which he had bargained for and that the plaintiff had to take it back and he alleges that he was assured at that time, by plaintiff's agent, that if he would make settlement they would put the machine in good working condition.

I am of the opinion that, in order to justify the retention of the

machine in September, 1918, after the experts put it in good working form, that the defendant must establish that the machine was not the one which he bargained for and that he relied upon the representations of the plaintiff to make good its deficiencies so as to conform with the terms of the bargain. However, the information which came out at the trial, that the plaintiffs rated the engine as a 22 horse power and that this was the first knowledge that the defendant had of this fact, is a circumstance which must be taken into consideration in determining the second issue as well as the first, and it brings the second issue within the same purview as the first, namely, that there is an issue of facts. The trial Judge has found that the defendant was justified in rejecting, even at date of trial, notwithstanding his acts in retaining and using the machine, as the misrepresentation of the plaintiff, which was a condition of the sale and which was the main contributing cause of the machine's failure to work satisfactorily, was not known to the defendant until the date of trial. I think that the trial Judge's finding of fact and the inference of law upon which it is based must, therefore, stand, with the result that the plaintiffs cannot succeed.

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The defendant does not, in his defence, claim, in terms, for rescission and the return of the part of the purchase price paid at delivery but the trial was conducted on the basis of such an issue without objection by the plaintiff. *Primâ facie* the defendant would be entitled to the return of the purchase money paid, and the judgment appealed from, in fact, returns to him $400 of the $604 paid by him and he does not raise any objection to this part of the judgment. The plaintiffs are entitled to the return of the engine and thresher.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

THE KING v. VROOM; Ex parte MERCHANT.

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New Brunswick Supreme Court, Crocket, J. October 20, 1919.

1. CERTIORARI (§ I A—9)—INTOXICATING LIQUOR ACT, N.B.—RIGHT OF APPEAL—ABOLITION OF.

The Intoxicating Liquor Act (New Brunswick) having taken away the right of *certiorari* as well as the right of appeal, the Court is powerless to afford any redress or relief or interfere with the decision of the Magistrate, no matter how erroneous or unjust the conviction may be if he had in law jurisdiction to make the conviction.

[*Ex parte Daley* (1888), 27 N.B.R. 129, followed; *The King* v. *Vroom; Ex parte McDonald* (1919), 45 D.L.R. 494, 46 N.B.R. 214, referred to.]

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2. INTOXICATING LIQUORS (§ III E—75)—PROFESSIONAL EXAMINATION—ILLEGAL PRESCRIPTION—DELIVERY—PERSON NOT ENTITLED TO RECEIVE—LIABILITY OF CARRIER.

A prescription for liquor given by a physician for the use of the applicant's children who have not been professionally examined by him is illegal under the New Brunswick Intoxicating Liquor Act, (6 Geo. V. (1916) c. 20.) The wife of the party obtaining the prescription is not a party entitled to receive the liquor, and anyone who innocently and in perfect good faith carries the liquor and delivers it to her, is guilty of "carrying liquor" and liable under the Act, although such liquor was administered to the children on the advice of a doctor.

APPLICATION by way of *certiorari* to quash a conviction under the New Brunswick Intoxicating Liquor Act, 1916. Affirmed.

N. Mark Mills, shewed cause.

A. R. Slipp, K.C., supported the order.

The judgment of the Court was delivered by

Crocket, J.

CROCKET, J.:—The defendant was charged in the first instance with drinking liquor prescribed by a physician, he himself not being the sick person for whom it was so prescribed, which is an offence under s. 21 of the Intoxicating Liquor Act, 6 Geo. V. 1916, c. 20, for which he would be liable to a penalty of not less than $5 nor more than $200. The prosecution, having failed on the trial to produce any evidence whatever in support of this charge, was allowed, under s. 18 of the Act, to amend the information by substituting for the original charge a charge in the following terms, viz:—

That the defendant did carry from a place in the Province of New Brunswick to wit, the town of St. Stephen, in the County of Charlotte, to a person in Chamcook, in the County of Charlotte, to wit, Mary Doucett, who was not a licensee duly appointed under this Act, or a clergyman, or other person duly entitled to receive such liquor.

The intention undoubtedly was to charge an offence under s. 15 of the Act, which makes it an offence to ship, bring or carry any package containing liquor to any person in any part of the Province other than to a licensee duly appointed under the Act, or to a clergyman or other person legally entitled to receive such liquor, but the new information omitted to specify the thing which was carried. The trial, however, proceeded without objection on the part of the defendant, and at its conclusion the magistrate adjudged the defendant guilty of the offence charged, and imposed a penalty of $20 and $32.05 costs. The order for a *certiorari* and order *nisi* to quash were granted upon the ground that the conviction was void for the reason that the amended information, omitting, as it did, to state that the defendant carried liquor, did not charge any offence against the Intoxicating Liquor

Act. The formal conviction returned by the magistrate with the writ of *certiorari* sets forth in proper form an offence under s. 15 of the Act, within the jurisdiction of the magistrate. The only point, therefore, involved in the case before me is as to whether the defect in the amended information, or the variance between the amended information and the conviction entered by the magistrate invalidates that conviction as one which the magistrate had in fact or in law no jurisdiction to make. If the magistrate had jurisdiction to make the conviction, the Intoxicating Liquor Act having taken away the right of *certiorari* as well as the right of appeal, it matters not how erroneous or unjust that conviction may be, this Court has been rendered powerless to afford any redress or relief: *Ex parte Daley* (1888), 27 N.B.R. 129. It was argued on behalf of the defendant that the Appeal Division, in the recent case of *The King* v. *Vroom, Ex parte McDonald* (1919), 45 D.L.R. 494, 46 N.B.R. 214, had on *certiorari* quashed a conviction under the Intoxicating Liquor Act where there was no defect in the information or in the conviction or no variance between the information and the conviction, upon the ground that the magistrate, in the opinion of the appeal Judges, came to a wrong conclusion on the evidence adduced before him, and that this judgment therefore overruled the judgment in *Ex parte Daley, supra*, to the effect above stated. Whether or not this is the correct interpretation of the judgment in *The King* v. *Vroom, Ex parte McDonald*, it is unnecessary for me to decide, in view of the later decision of the Courts in *The King* v. *Vroom, Ex parte Crawford* (1919), 47 D.L.R. 578, in which it was clearly pointed out by White, J., that, as *certiorari* was taken away by the Intoxicating Liquor Act, 1916, c. 20, this Court has no power to interfere with the decision of a magistrate upon a question of fact, and that *Ex parte Daley, supra*, re-affirmed, as it has been so many times, correctly declares the law as well established by a long line of English decisions dealing with the effect of the taking away of *certiorari* by statute. Is, then, the defect complained of in the amended information, or the variance which the magistrate's return shews between the information and the conviction, such a defect or variance as goes to the jurisdiction of the magistrate to make the conviction which he did make? A magistrate's jurisdiction to try and to convict in any case brought before him

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under the Intoxicating Liquor Act is derived wholly from that Act, and must therefore, I think, be exercised in strict conformity with the provisions of that Act. He has no right or authority to convict for any other offence than the offence with which the defendant is charged, or to make any conviction setting forth any offence in any other terms than those set forth in the information which he has tried, except in so far as he may be authorized by the Act to do so. Any defect or any variance between the information upon which he has tried a defendant and the conviction by which he has convicted him, whether in form or in substance, would, in my judgment, be fatal to the conviction, if there cannot be found, within the four corners of the Act from which the magistrate derives his whole jurisdiction, some provision to cure it. There is undoubtedly a defect in the information, as well as a variance between the information and the conviction, in this case, but it is contended that this defect and this variance are cured by s. 125 of the Act. This section is as follows:—

No conviction or warrant for enforcing the same or any other process or proceeding under this Act shall be held insufficient or invalid by reason of any variance between the information and the conviction or by reason of any other defect in form or substance, provided it can be understood from such conviction, warrant, process or proceeding that the same was made for an offence against some provision of this Act within the jurisdiction of the Court Magistrate, Justice or Justices or other officer who made or signed the same, and provided there be evidence to prove such offence, and that it can be understood from such conviction, warrant or process that the appropriate penalty or punishment for such offence was thereby adjudged.

It is perfectly clear, I think, from this section that in order to validate any variance or other defect, whether in form or substance, three conditions must concur, viz: 1, that the impeached conviction must be one from which it can be understood that it was made for an offence against some provisions of the Act within the jurisdiction of the magistrate; 2, that there be evidence to prove such offence, that is, the offence for which the conviction is made; and, 3, that it be understood from such conviction that the appropriate penalty was thereby adjudged. The conviction in this case clearly shews that it was made for an offence against some provision of the Act within the jurisdiction of the magistrate, viz: the carrying of liquor from a place in the County of Charlotte to a person who was not a licensee, or a clergyman, or other person legally entitled to receive such liquor. It is also a conviction

from which it can be understood that the appropriate penalty was adjudged for that offence. Two of the three conditions required by the section are thus undoubtedly met. As to whether the other condition obtains "that there be evidence to prove such offence," can only be determined by a review of the evidence as returned by the magistrate, which, had there been no variance or defect in the proceedings, would have been a matter with which this Court, by reason of the taking away of *certiorari*, would, under the decision in *Ex parte Daley, supra*, and the numerous decisions re-affirming that case, have no concern. Where, however, there is a variance or defect in the proceedings, and the return shews, as here, that two of the conditions indicated by s. 125 are met, the Court obviously must examine the evidence to see if the third condition indicated obtains, that is to say, "that there be evidence to prove the offence." Was there, then, evidence to prove that the defendant carried liquor to a person not legally entitled to receive such liquor? There is no question but that under the evidence the liquor which the defendant was convicted of carrying was obtained by one Doucett (who swore that he never drank liquor of any kind) from a licensed vendor, upon a prescription obtained by Doucett from a registered physician, and that it was carried at Doucett's request by the defendant as an act of kindness and delivered to Doucett's wife at her home. The only question involved in the trial before the magistrate (after the prosecution, having failed to produce any testimony whatever in its support abandoned the original information), was as to whether Doucett's wife was a person who was legally entitled to receive the liquor, which the defendant carried to her. It was contended by Mr. Mills, in support of the conviction, that once it appeared that the defendant had the liquor in his possession or control, the case, under the terms of the Intoxicating Liquor Act, was concluded against him, failing proof upon his part that he was not guilty of the offence charged. It is quite true that several sections have been inserted into the Intoxicating Liquor Act which purport to reverse, and I have no doubt, do in fact reverse, that time-honoured and salutary principle of British law that a man is presumed to be innocent until his guilt is conclusively proved. S. 141, which is the most sweeping of these sections, reads as follows:—

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If, in the prosecution of any person charged with committing an offence against any of the provisions of this Act by agreeing to sell or in the selling or keeping for sale or giving or keeping or having or purchasing or receiving of liquor, *primâ facie* proof is given that such person had in his possession, or charge, or control, any liquor in respect of, or concerning which, he is being prosecuted, *such person shall be obliged to prove that he did not commit the offence with which he is so charged.*

This section, purporting, as it does, to reverse the common law of the land by requiring a man to prove his innocence, must be strictly interpreted. The only question which is involved in this case with respect to it is as to whether it applies to a person who is charged with an offence against any of the provisions of the Act, in carrying liquor. It is true there can be no offence of carrying liquor without the person charged "having," or "receiving" the liquor, and that the section covers all offences in "having" or "receiving" liquor, but as I read the language quoted the prosecution must be of a person charged with committing an offence against any of the provisions of the Act "in the . . . having . . . or receiving of liquor." In other words, the defendant must be specifically charged with "having" liquor contrary to the provisions of the Act. The defendant was not charged with an offence in "having" liquor, which is an offence against a specific section of the Act, but, overlooking for the moment the omission of the word "liquor" from the amended information, with an offence against s. 15 of the Act, in "carrying" liquor. For this reason, although the section covers every other offence against any of the provisions of the Act which I can conceive to be possible, except an offence committed in drinking liquor, I am of opinion that it does not apply to a prosecution for the specific offence of carrying liquor contrary to the provisions of s. 15. It was therefore, in my judgment, incumbent upon the prosecution to produce evidence to shew that Mrs. Doucett, to whom the defendant carried the liquor, was not legally entitled to receive it. I have carefully read the evidence as returned by the magistrate, and I am not prepared to say that there was no evidence from which the magistrate might reasonably have found that the liquor was liquor which Mrs. Doucett was not legally entitled to receive. The Intoxicating Liquor Act, 1916, c. 20, provides, by s. 31, that no prescription shall be furnished by a physician unless he has visited professionally the person for whom it is prescribed, and

then only in cases of actual need, and it provides also that no bottle or container of liquor shall be sold by any druggist under a physician's prescription without affixing to it a label in a form set out in the Act. Any purchase or sale of liquor, therefore, even though made upon a physician's prescription for medicinal purposes, is, under the provisions of this Act, illegal in this Province if the physician has not visited professionally the person for whom he has prescribed the liquor, or if the vendor has not affixed the label setting forth all the particulars required by the form printed in the Act, and no one would have a legal right to receive any liquor so obtained. In this case, although the physician testified on the trial that he prescribed the liquor, in his office at St. Stephen, for Doucett himself, Doucett swore that he was not sick, and that he got the prescription, not for himself, but for his children, who were suffering from colds. The undisputed fact that the liquor was received at her home by Mrs. Doucett from the defendant, intact, though after some delay, and that Mrs. Doucett made use of some of it in administering to the children a mixture of whiskey, egg and hot water, on the advice of Dr. Wade, as she swore she did, would tend to corroborate Doucett's statement that the liquor was obtained for his children; but, whatever the fact may be—whether the liquor was prescribed for Doucett or for his children—it was for the magistrate to determine, and undoubtedly there was evidence from which he might reasonably have found that the liquor was for Doucett's children and not for Doucett himself, in which event, the physician not having visited professionally the person or persons for whom it was prescribed, as required by s. 31, the liquor would be unlawfully obtained, and Mrs. Doucett would, in consequence, not be legally entitled to receive it. It was contended by Mr. Slipp, in the defendant's behalf, that even though Mrs. Doucett may not have been legally entitled to receive the liquor, there was no evidence that the defendant had any knowledge of that fact. Under the provisions of the Intoxicating Liquor Act, proof of knowledge is not necessary. A principal or master is equally guilty with his agent or servant, even though he may have no knowledge of the act of the agent or servant upon which the prosecution is founded, and the agent or servant is equally guilty with his principal or master, even though he may have no knowledge that in obeying or complying with his principal's or his

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master's request, he is committing any offence whatsoever, and both or either may be convicted for the act of one or of the other. See s. 43, and *The King* v. *The Municipality of Restigouche, Ex parte Murchie* (1914), 42 N.B.R. 529, and the cases there cited. It may seem a travesty that a person may do a purely charitable act in perfect good faith and innocence, and yet be guilty of an offence under the Intoxicating Liquor Act and rendered liable to heavy penalties, which s. 110 provides that

> no Judge, Magistrate, Justice or Justices of the Peace, or inspector or municipal council or municipal officer shall have any power or authority to remit, suspend or compromise,

but the law as it now stands in this Province, accords no escape or relief in such a case. The only fact of which proof was necessary in this case was that the defendant carried liquor to a person who was not a liquor vendor or a clergyman or other person legally entitled to receive such liquor. Innocent though the defendant's act may have been in carrying liquor prescribed by a physician and sold on prescription by a licensed vendor, to the home of a non-drinking man, for medicinal purposes, there was, as I have pointed out, evidence from which the magistrate might reasonably find that the defendant carried liquor to a person who was not legally entitled to receive such liquor, which was an offence under the Intoxicating Liquor Act, and the one for which the defendant was convicted. The conviction, therefore, in the terms of s. 125 being a conviction from which it can be understood that it was made for an offence against some provision of the Intoxicating Liquor Act (s. 15) within the jurisdiction of the magistrate, and from which it can also be understood that the appropriate penalty was thereby adjudged, and there being evidence to prove the offence, the defect and the variance complained of are cured by the terms of that section, and there is no recourse but to discharge the order *nisi* by which the defendant sought to quash the conviction.

Order discharged.

RUBBERSET Co. and RUBBERSET Co. Ltd. v. BOECKH BROS. Co. Ltd.

Annotated.

ONT.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. May 7, 1919.

TRADE NAME (§ I—2)—"RUBBERSET"—DESCRIPTIVE WORD—MONOPOLY—EXPIRY OF PATENT—ACQUISITION OF SECONDARY MEANING.

The word "Rubberset" being clearly a descriptive word, invented to express the exact article produced by a patented process, a monopoly in its use cannot be asserted after the patents covering it have run out.

In view of the short time since the expiry of the patents the word could lose its primary and descriptive character and acquire a dominating secondary meaning as describing the product of the appellant's factory.

Statement.

APPEAL from the judgment of Masten, J., in an action for infringement of a registered trade mark and for "passing off" goods manufactured by the defendant company as the goods of the plaintiffs. Affirmed.

The judgment appealed from is as follows:—

The plaintiff "Rubberset Company Limited" is an incorporated company organised under the laws of the Province of Ontario, and carrying on, in Ontario, the business of manufacturing and selling brushes. "Rubberset Company" is a name or designation under which an incorporated American company, known as Rubber and Celluloid Products Company, having its head office in the State of New Jersey, carries on a similar business, according to the process known as "Rubberset" process.

The defendants are brush manufacturers, carrying on business in the city of Toronto.

In the course of the trial, counsel for the plaintiffs applied for leave to add as a co-plaintiff the American corporation above mentioned; and, for the reasons stated by me and which appear in the record, I permitted this company to be joined as a co-plaintiff and all necessary amendments to be made in the record.

According to the statement of claim, the action is brought first on a registered trade mark and secondly as a "passing off" action. No evidence was adduced in support of the claim on the trade mark; that branch of the case was abandoned; and thus the claim as developed at the trial is wholly a claim for "passing off."

At the trial two issues emerged. First, has the term "Rubberset," as applied to brushes, acquired a secondary significance so as to mean to the public and in the trade brushes manufactured by the plaintiffs? Secondly, have the defendants infringed the plaintiffs' rights?

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RUBBERSET CO. AND RUBBERSET CO. LTD. v. BOECKH BROS. CO. LTD.

I deal first with the question of infringement.

In such an action as this, if an injunction be granted, it is granted to protect the property in the trade or goodwill of the plaintiff which will be injured by its use by the defendant. If the use of a word or name be restrained, it can only be on the ground that such use involves misrepresentation, and that such misrepresentation has injured or is calculated to injure another in his trade or business.

Certain principles relevant to the present case are well stated in the course of the judgment of Parker, J., in *Burberrys* v. *J. C. Cording & Co. Limited* (1909), 26 R.P.C. 693, at p. 701:—

"If the word or name is *primâ facie* descriptive or be in general use, the difficulty of establishing the probability of deception is greatly increased."

In any case, "it is necessary, where there has been no actual deception, to establish at least a reasonable probability of deception. In such cases the action is, in effect, a *quia timet* action, and unless such reasonable probability be established, the proper course is, in my opinion, to refuse an injunction, leaving the plaintiff to his remedy if cases of actual deception afterwards occur."

No case of actual deception is established or indeed put forward in the evidence: the claim is based solely on the ground that there is a reasonable probability of deception.

In the present case there are two outstanding facts which render it particularly difficult for the plaintiffs to establish such reasonable probability of deception.

First, the word "Rubberset" is *primâ facie* descriptive of the process by which the bristles of the brush are held in place. Second, the word "Rubberset" was originally employed to designate a certain type of brush manufactured by the plaintiffs or their predecessors in business, under patents held by them in the United States (although no patents were ever held in Canada), and after the expiry of the American patents the articles were not until some four or five years ago manufactured by any brush manufacturers other than the plaintiffs.

But, passing over these difficulties, it seems to me there is no reasonable probability of the ordinary retail customer buying the brush made by the defendant company in the belief that he is getting a brush of the plaintiffs' manufacture. This view is based

upon a consideration of the specimens themselves filed as exhibits. An examination of these specimens shews that the name "Boeckh" is so prominently stamped on every brush that it seems to me no deception of the customer who buys it over the counter is possible. If therefore any deception or confusion is to arise, it must arise from orders sent by mail. No instance of confusion in an order by a retailer on a wholesale dealer is shewn; and, so far as appears, the evidence would indicate that retailers buy direct from the factory. If that is the case, the retailer would naturally expect to have his order filled by the manufacturer from brushes of his own manufacture, and no mistake would arise. I am thus led to the conclusion that no deception is reasonably probable.

There is one circumstance and one circumstance only that militates against this view, namely, that the defendant company insist on using the word "Rubberset" as a description of their brushes, although the term "set in rubber" or "set in vulcanized rubber" would appear exactly to describe the articles; also the attempt of the defendant company's principal officer in the witness-box to explain his unwillingness was so unconvincing, lame, and impotent as to raise the suspicion that he expected to gain some advantage by using the term "Rubberset" heretofore employed exclusively by the plaintiffs.

Notwithstanding this circumstance, I have, upon the whole case, arrived at the conclusion that no reasonable probability of deception is established, and this suffices to dispose of the case.

As to whether the name "Rubberset" has come to be so appropriated by user as to mean the goods of the plaintiffs, I make no express finding, and base my judgment on the failure to establish a reasonable probability of deception.

The present action is dismissed without prejudice to the right of the plaintiffs to maintain another action if cases of deception actually occur hereafter. Costs will follow the event.

Robertson and *Pickup*, for the appellants; *Anglin*, K.C., and *McKeown*, for the defendant company, respondents.

The judgment of the Court was read by

HODGINS, J.A.:—Appeal from the judgment of Masten, J., in a passing off action. The judgment dismissed the action on the grounds that no deception was proved and that no likelihood of it existed or was apparent. Hodgins, J.A.

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The contest turns upon the use of the word "Rubberset" in connection with brushes. That word expresses, as is explained, a brush whose bristles have been fastened in and then surrounded by rubber, which is hardened or vulcanized and so "set." One witness gives as the reason for the popularity of a Rubberset brush, that it can be used in or with water, oil, or turpentine, and either hot or cold, the vulcanizing preventing the bristles from coming out.

The appellants, disregarding for the moment the question as to which of them, if any, are entitled to be called "The Rubberset Company," carry on business in the United States, where their head office and works are, and also in Canada. They had a patent or patents for this particular process of brush-making, which expired 11 years ago or about 1907. There was also a Canadian patent, but not covering the method protected by the United States patents, and a trade mark not now relied upon in any way. Brushes manufactured under the United States patents were, in 1904 or 1905, designated by the appellants "Rubberset brushes," that being, as their president, Albright, said, "a really distinguishing name."

From 1905 onward their brushes were extensively advertised under that name and pushed both in the United States and in Canada. The word "Rubberset" was the only name used to designate brushes made by the appellants under their patent process, and from the evidence it is clear that it accurately described the article produced thereby. It was a new word, coined by some one in the appellants' employ, and when its use began no one else was selling brushes under the same name.

For a number of years after the patents ran out, no one other than the appellants made brushes by the process described in them, the general attitude of the trade being, as is stated, one decrying that method of manufacture.

In Canada, only Sims and the respondents manufactured brushes similar to the appellants'. The former described his as "set in rubber," and the respondents as "rubberset." Sims began to manufacture about 5 or 6 years ago, and the respondents to call their brushes in this way about a year and a half before the trial.

The word in question is a compound one, and accurately

describes the article produced, just as the words glueset, cementset, resinset, pitchset, shellacset, etc., are used to indicate the various binding materials employed to steady and hold the brushes.

The facts therefore appear to be that the appellants, having a monopoly on a process, the product of which they designated as "Rubberset" as applied to brushes, lost that exclusive right in 1907. From that time until 5 or 6 years ago, when Sims began to manufacture here, i.e., until say 1913 or 1914, there was no competition, and therefore no opportunity to establish any exclusive right, and no one to dispute their calling their brushes anything they pleased.

In *Universal Winding Co.* v. *George Hattersley & Sons Limited*, (1915), 32 R.P.C. 479, Joyce, J., was pressed with the fact that for 7 years after the expiry of the patent no one else had used the word "Universal" in connection with textile winding machines, until the defendants adopted it: he declined to find any loss of the original and primary meaning or gain of a secondary signification referring to the plaintiffs' machines, or that, because "some imperfectly informed minds" might associate the word with the plaintiff company, the defendants' use of it was fraudulent or actionable.

As "Rubberset" is clearly a descriptive word, and was invented to express the exact article produced by the patented process, a monopoly in its use could not be asserted after the patents covering it ran out.

In view of the short space of time since their expiry, about 11 years, during one half of which there was no one competing with them in Canada, it is most unlikely that the word "Rubberset" would lose its primary and descriptive character and acquire a dominating secondary meaning as describing the product of the appellants' factory.

Indeed, no evidence worthy of the name in support of that proposition appears in the record, and there is much to lead to the conclusion that the witnesses who were called understood by "Rubberset" only a brush of that character produced by the manufacturer whose goods they happened to have in stock, and were dealing in. There is, however, evidence, which it seems reasonable to accept, that, while a brush marked "Rubberset"

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carries with it an indication that it is one which can be depended upon for the security of its bristles, it must be designated to describe that particular quality, for the setting in vulcanized rubber is not something that can be distinguished by ordinary examination. This emphasises the descriptive character of the word in question—and the use of the phrase "set in rubber" by Sims, although seemingly an exact equivalent, did not elicit any protest from the appellants.

I have gone through the cases cited on the argument and some others.

Lord Davey, in *Cellular Clothing Co.* v. *Maxton & Murray*, [1899] A.C. 326, has so admirably expressed the law which I think is applicable to this case that I cannot forbear quoting it. He said (pp. 343, 344):—

"But there are two observations which must be made: one is that a man who takes upon himself to prove that words, which are merely descriptive or expressive of the quality of the goods, have acquired the secondary sense to which I have referred, assumes a much greater burden—and, indeed, a burden which it is not impossible, but at the same time extremely difficult, to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive, but what has been compendiously called a 'fancy' word. The other observation which occurs to me is this: that where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has, of course, not been used in connection with the article—and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to except the plaintiff."

Then he cited what Fry, L.J., said in *Siegert* v. *Findlater* (1878), 7 Ch.D. 801, at p. 813:—

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"If a man invents a new article, and protects it by a patent, then during the term of the patent he has, of course, a legal monopoly; but when the patent expires all the world may make the article, and if they make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article: all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *primâ facie* use the name by which the article is known in the market."

I agree with the learned trial Judge upon the other branch of the case, and it is unnecessary to deal with the question of the appellants' technical right to maintain the action, or their disability by reason of statements said to be misleading in regard to the origin of their goods.

I would dismiss the appeal. *Appeal dismissed.*

ANNOTATION.

Annotation.

Name of Patented Article as Trade Mark.

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

The right of the public to make free use of the name of a patented article after expiration of the patent has often been sustained.

In the leading case of the *Singer Mfg. Co.* v. *Hermann Loog* (1882), 8 App. Cas. 15, Lord Selborne, L.C., said at p. 27:—

"The reputation acquired by machines of a particular form or construction is one thing; the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right under colour of the former, to invade the latter, neither have the plaintiffs any right under colour of the latter, to claim (in effect) a monopoly of the former. If the defendant has (and it is not denied that he has) a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct and unequivocal way."

See also *Singer Mfg. Co.* v. *Wilson* (1876), 2 Ch. D. 434, 456, and *Winser & Co., Ltd.* v. *Armstrong & Co.* (1898), 16 R.P.C. 167.

In another case of *Singer Mfg. Co.* v. *Stanage*, 2 McCrary, 512, Treat, J., said at p. 514: "When a patented article is known in the market by any specific

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designation, whether of the name of the patentee or otherwise, every person at the expiration of the patent has a right to manufacture and vend the same under the designation thereof by which it was known to the public . . . The original patentee or his assignees have no right to the exclusive use of said designation as a trade mark. Their rights were under the patent, and expired with it."

Other United States cases were *Singer Mfg. Co.* v. *Larsen* (1878), 8 Bissell 151, and *Singer Mfg. Co.* v. *Riley* (1882), 11 Fed. Rep. 706.

Even where no patent is obtained a person who produces a new article and is the sole maker of it may, unless care is taken, lose his exclusive right to the name. As pointed out by Fry, J., in *Siegert* v. *Findlater* (1878), 7 Ch. D. 801 at p. 813:—

"It is to be observed that the person who produces a new article, and is the sole maker of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from."

On this theory "Valvoline" as the name of an oil was held not a good trade mark in *Re Leonard & Ellis* (1884), 26 Ch. D. 288, and so also "Albion" has been held to indicate metal goods of a particular pattern, and not that of a particular manufacture in *Re Harrison, McGregor & Co.'s Trade Marks*, (1889), 42 Ch. D. 691.

The law has been thus summed up by Rigby, L.J., delivering the judgment of the Court of Appeal, in *In re Magnolia Metal Co.'s Trade Marks*, [1897] 2 Ch. 371, 391: "When the article is made under a secret process or its manufacture is protected by a patent, no person who has not acquired the secret or obtained a license from the patentee can manufacture it. Accordingly, it is established as a general rule that, when an article is made under a secret process, or when the manufacture of it is protected by a patent, the manufacturer or patentee cannot, by any means, entitle himself to a monopoly in the use, after the secret process has been discovered or the term of the patent has expired, of the name by which the manufactured article is exclusively known whilst the secret is undiscovered, or the term of the patent is unexpired."

Another valuable statement may be found in the judgment of Parker, J., in *Burberrys* v. *Cording & Co. Ltd.* (1909), 26 R.P.C. 693, at p. 701: "The principles of law applicable to a case of this sort are well known. On the one hand, apart from the law as to trade marks, no one can claim monopoly rights in the use of a word or name. On the other hand, no one is entitled by the use of any word or name, or indeed in any other way, to represent his goods as being the goods of another to that other's injury. If an injunction be granted restraining the use of a word or name, it is no doubt granted to protect property, but the property, to protect which it is granted, is not property in the world or name, but property in the trade or goodwill which will be injured by its use. If the use of a word or name be restrained, it can only be on the ground that such use involves a misrepresentation, and that such misrepresentation has injured, or is calculated to injure another in his trade or business. If no case of deception by means of such misrepresentation can be proved, it is sufficient to prove the probability of such deception, and the Court will readily infer such probability if it be shewn that the word or name has been adopted with any intention to deceive. In the absence of such intention, the

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degree of readiness with which the Court will infer the probability of deception must depend on the circumstances of each particular case, including the nature of the word or name, the use of which is sought to be restrained. It is important for this purpose to consider whether the word or name is *primâ facie* in the nature of a fancy word or name, or whether it is *primâ facie* descriptive of the article in respect of which it is used. It is also important for the same purpose to consider its history, the nature of its use by the person who seeks the injunction, and the extent to which it is or has been used by others. If the word or name is *primâ facie* descriptive or be in general use, the difficulty of establishing the probability of deception is greatly increased. Again, if the person who seeks the injunction has not used the word or name simply for the purpose of distinguishing his own goods from the goods of others, but primarily for the purpose of denoting or describing the particular kind of article to which he has applied it, and only secondarily, if at all, for the purposes of distinguishing his own goods, it will be more difficult for him to establish the probability of deception.

In another leading case of *Cellular Clothing Co. Ltd.* v *Maxton and Murray*, [1899] A.C. 326, Lord Davey said, at 343:—

"The other observation which occurs to me is this; that where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has, of course, not been used in connection with the article—and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to, except the plaintiff. And on this point I adopt what was said in felicitous language by Fry, J., in *Siegert* v. *Findlater* (1878), 7 Ch. D. 801, at p. 813: "That is, my Lords, a matter of express decision in the case of a patent. If a man invents a new article and protects it by a patent, then during the term of the patent he has, of course a legal monopoly; but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article; all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *primâ facie* use the name by which the article is known in the market."

The Supreme Court of the United States states the rule as follows:—

"(U.S. Sup. Ct., 1896). It is the universal American, English and French doctrine that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary, or be that of the inventor, has become, by his consent either express or tacit, the identifying and generic name of the thing patented'

Annotation. this name passes to the public with the cessation of the monopoly which the patent created; but such name must be so used as not to deprive others of their rights as to deceive the public, as by clearly indicating that the thing manufactured is the work of the one making it. *Singer Mfg. Co.* v. *June Mfg. Co.* (1896), 163 U.S. 169; 16 Sup. Ct. 1002; 41 L. Ed. 118, 75 O.G. 1703; 1896 C.D. 687. *Singer Mfg. Co.* v. *Bent* (1896), 163 U.S. 205; 16 Sup. Ct. 1016; 41 L. Ed. 131; 75 O.G. 1713; 1896 C.D. 711."

The following United States cases indicate the viewpoint of the Courts on this subject:—

"Lanoline" for a preparation of wool fat.

"(N.Y. Sup. Ct. 1902). Plaintiffs manufactured under letters patent a preparation of wool fat which they called 'Lanoline' which became the generic name of the article after the expiration of the patent. Defendant, a British corporation, manufactured a similar article which it called 'British Lanoline.' *Held*, that the patent having expired it had the right to call the article manufactured by it 'Lanoline' and that it violated no rights of plaintiffs by selling its product at 20 cents a can while plaintiff's was sold at 60 cents a can. *Jaffe et al.* v. *Evans & Sons, Ltd.* (1902), 75 N.Y. Supp. 257; 70 App. Div. 186."

"President" for patented suspender—name not generic.

"(U.S.C.C.A. 2nd Cir., 1916). On expiration of a patent for suspenders sold under the name and trade mark 'President,' such name and trade mark does not pass to the general public, the name never having constituted a generic description; consequently rights in the trade mark were not affected by the expiration of the patent. (For other cases, see Trade Marks and Trade Names, Cent. Dig., p. 23, par. 15; Dec: Dig. 11). *President Suspender Co.* v. *Macwilliam* (1916), 238 Fed. Rep. 159." See headnote.

"Excelsior" for step-ladders—name of patented article.

"(App. D.C., 1908). Between 1870 and 1884 several patents for improvements in step-ladders were issued to C. G. Udell, the predecessor in business of The Udell Works. Udell adopted as his trade mark the word 'Excelsior.' The Excelsior ladder embodied features of several, but not of all, of the patents. Six other styles of ladders were manufactured, some of which closely resembled the Excelsior ladder and all of which embodied features of the Udell patents. Held, that the word 'Excelsior' did not become during the life of the Udell patents the generic designation of ladders manufactured thereunder. *Udell-Predo c Mfg. Co.* v. *The Udell Works* (1908), 140 O.G. 1002." See headnote.

Same—that a trade mark is generic not to be presumed.

"(App. D.C., 1908). While care should be taken lest a monopoly be continued beyond the life of a patent through the agency of a trade name which has come to indicate to the public the patented article, the Patent Office would not be justified in presuming that a trade mark was generic. In the present case the appellee company has built up a trade in ladders because of the superior excellence of the product and the fair dealings of the company. Manifestly it would be unjust to deny the company the benefit of its reputation unless convinced that to do so would prolong a monopoly."

"Bethabara Wood" generic and descriptive term.

"(U.S. D.C. Pa., 1919). Where the name 'Bethabara Wood,' invented by plaintiff, by general use became the descriptive name for a certain wood

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many years before he secured a registered trade mark for it and before it had become associated with plaintiff's product, he acquired no exclusive right to the name, preventing defendant from handling and selling wood under that name. *Shipley* v. *Hall* (1919), 256 Fed. Rep. 539." See headnote.

"Tabasco"—Name of patented article—Patent abandoned before expiration.

"(U.S. C.C.A. 5th Cir., 1918). At the expiration of a patent the public has the right to use the name which was employed to identify the patented article during the life of the patent, but where a patent was granted for pepper sauce and the process of preparing it, and the patentee manufactured and sold a sauce under the name 'Tabasco' which, prior to the expiration of the patent, is made in a way to bring it without the protection of the patent, the use of the name continuing, the general rule does not apply, since the right to the name as a trade mark had been acquired with respect to a product which was not the subject of the patent. *McIlhenny Co.* v. *Gaidry; Gaidry* v. *McIlhenny Co.* (1918), 253 Fed. Rep. 613."

It has been held by the United States Supreme Court that the principle involved in the *Singer* cases applies, notwithstanding the fact that the patent is a foreign one. *In Re Holzapfel's Compositions Co.* v. *The Rahtjen's American Composition Co.* (1901), 183 U.S. 1; 22 Sup. Ct. 6; 46 L. Ed. 49; 97 O.G. 958; 1901 C.D. 500, the trade mark claimed was used to describe a composition patented in England and it was held that when the patent expired the right to make the composition and the right to describe it by that name is open to the public. The principle involved in the *Singer Mfg. Co.* v. *June Mfg. Co.* (1896), 163 U.S. 169, applied notwithstanding the fact that the patent was a foreign one.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 20, 1919.

PARTNERSHIP (§ II—8)—REAL ESTATE—ORAL AGREEMENT—PERSONAL PROPERTY—STATUTE OF FRAUDS.

As between partners an oral agreement concerning an interest in real estate owned by the partnership is valid. The real estate becomes, for the purposes of the partnership, personal property and not being real estate nor deliverable goods and chattels neither s. 4 nor s. 17 of the Statute of Frauds applies.

[*Gray* v. *Smith* (1889), 43 Ch. D. 208, distinguished.]

Statement.

APPEAL from the judgment at the trial dismissing an action by a partner claiming an interest in certain leasehold property as part of the assets of the partnership. Reversed. New trial ordered.

Barron and *Barron*, for appellant; *B. Ginsberg*, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The plaintiff and defendant were carrying on business in partnership as farmers, ranchers and general dealers in cattle. The plaintiff alleged that the defendant orally agreed to

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buy out the plaintiff's interest in the partnership on certain terms and sued for the price agreed. The defendant denied this, pleaded the Statute of Frauds, and counterclaimed for an order dissolving the partnership and for an accounting.

Upon the case coming on for trial, the plaintiff admitted that among the assets of the partnership was a leasehold interest in some real estate. The trial Judge then dismissed the plaintiff action, following *Gray* v. *Smith* (1889), 43 Ch. D. 208, where it was decided that such an agreement, as we have here, was within the statute and must be in writing. He also ordered a dissolution and an accounting.

The plaintiff appeals.

The decision in *Gray* v. *Smith* is scarcely as important as might at first appear, because neither the trial Judge nor the Court of Appeal was forced to give a decision upon the exact point, inasmuch as both held that in any case there was a sufficient memorandum in writing.

We are somewhat at a loss with regard to the facts because the terms of the partnership agreement were not put in evidence nor was the lease.

Whether a share in a partnership which owns real estate is personalty or realty or an interest in the one or the other, may depend to some extent upon the agreement between the parties, as will be seen from the discussion in *Boyd* v. *Att'y-Gen'l for British Columbia* (1917), 36 D.L.R. 266, 54 Can. S.C.R. 532. That case however is not, I think, as helpful or at least as decisive as appellant's counsel seemed to believe, because the point involved was whether under a British Columbia Succession Duties Act certain timber limits owned by a partnership which carried on business entirely in Ontario, except as to the mere ownership of the limits, could be made the subject of a tax upon the death of one of the partners in Ontario. It was attempted, in order to avoid the tax, to shew that the deceased's property was merely a share in the balance of the partnership assets over liabilities, and that this share as a piece of property was situated not in British Columbia but in Ontario. The Attorney-General succeeded in a divided Court. While there are, on the ruling judgments, many expressions of opinion as to the nature of a partnership interest where real estate is owned and which are to some extent helpful, the

actual decision seems to me not to clear up our present problem very much. Not much more seems to have been said than is contained in s. 24 of the Partnership Ordinance, N.W.T. Ord., 1911, c. 94, which says:—

> Where land or any interest therein has become partnership property it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner) as personal or movable and not real estate.

Duff, J., in the *Boyd* case, *supra*, refers to the partnership agreement, and shews that there was a clause which did in fact point to "a contrary intention." That is the reason why it is to be regretted that we have not the partnership agreement before us, if it was in writing at all. The majority of the Court simply held that the deceased partner did own property in British Columbia having a direct interest in the timber limits themselves.

The clause above quoted from the Partnership Ordinance is also in the English Partnership Act of 1890, 53 & 54 Vict. c. 39, passed the next year after *Gray* v. *Smith*, *supra*, was decided, but in 22 Hals., p. 56 (note K), it is said that the rule is based on a long line of cases. The rule doubtless rested upon the equitable doctrine of conversion. Courts of equity in dealing with partnership matters undoubtedly treated all partnership property as personalty as between the partners, unless a contrary intention appeared.

But, nevertheless, the partnership is not a separate person like a joint stock company, as was pointed out in the *Boyd* case, and in reality each partner has an actual partial interest in every piece of partnership property.

What would appear to be the real problem is whether in such a case as this, which relates entirely to an alleged oral bargain between the partners in regard to the partnership assets, the Court should pass beyond the old rule of equity, now made into a statute, and still look at the various items of the partnership assets in their original quality as realty or personalty, as each parcel might appear to be.

In *Gray* v. *Smith*, the rule afterwards inserted in the statute does not seem to have been invoked or brought to the attention of the Court.

There might have been a good deal to be said, before the statute was passed, in support of the view that, notwithstanding

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the mere equitable rule, applied in winding up partnership affairs, when it came to an action between the partners, the Statute of Frauds would still stand in the way of enforcing any agreement between them for the purchase and sale of a share of the assets where they owned real estate together. But now that the rule has been put in a statute, it has become the law in a different sense, *i.e.*, not merely in equity but strictly, and I can see no reason for not giving the statute its full effect as between the partners so as to make the Statute of Frauds inapplicable. The interest of the partner in the assets of the partnership is neither real estate nor deliverable goods and chattels, so neither s. 4, nor s. 17, would apply. The dissenting Judges, in *Boyd* v. *Att'y-Gen'l for British Columbia*, did insist strongly upon the view that the interest of a partner in the partnership property, even when it includes real estate, is pure personalty, and even in the judgment of Duff, J., it appears to have been a special clause in the partnership agreement that prevented him from adopting the same view.

Gray v. *Smith* does not seem ever to have been followed or affirmed upon the particular point in question.

In 20 Cyc., p. 238, the American rule is stated thus:—

> Real estate owned by a partnership becomes for the purposes of the partnership personal property, and an oral agreement in relation to it, if made between the members of the firm and if the contract has to do with partnership matters, is valid. As concerns strangers to the partnership, however, the nature of the property is not changed, and contracts with them affecting firm realty must be in writing.

The only Canadian case which I have found that deals with the point is *Sim* v. *Sim*, (1890), 22 N.S.R. 185, and in that case there was alleged to have been an exchange, and it is not clear that the statute was considered as applying to the partnership property because the outside property which one party was to get for his share was itself real estate.

I am not sure, either, whether in applying the Statute of Frauds to an agreement for the sale of an interest in lands, it ought not to appear that the parties were directly and consciously bargaining about an interest in specific land, which of course they would not be doing in the case of a mere agreement to sell out a share in a partnership which happened to have among its assets an interest in land. But as this point was not argued, I leave it with the mere suggestion.

I think the appeal should be allowed with costs, the judgment below set aside, and a new trial ordered. The costs of the first trial should also, I think, be costs to the plaintiff in any event, because it was rendered entirely useless by the defendant raising a point on which he obtained a success which was not justified.

Perhaps one ought to add that of course there is a possibility that the partnership agreement might have contained a clause, such as was disclosed in *Boyd* v. *Att'y-Gen'l for British Columbia*, which would shew that "contrary intention" referred to in s. 24 of the Partnership Ordinance. This is, however, so very unlikely that I think it not necessary to indicate merely hypothetically what our view of the matter would be in such a case. That contingency should be left open for the second trial.

Appeal allowed; new trial ordered.

FLEMING v. WILKIE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

SALE (§ III C—70)—CONTRACT—"IN GOOD RUNNING ORDER"—CONDITION NOT CARRIED OUT—RESCISSION—RETURN OF DEPOSIT.

A contract for the sale of a separator contained a stipulation that the separator was to be put in running order. The machine was never put in running order although the plaintiff had the necessary parts needed in stock.

The Court held that the defendant had not agreed to buy the various parts of a separator but a separator in good running order, and as he had not been able to get that article he was entitled to have the contract rescinded and his deposit money returned.

Statement.

APPEAL by defendant from the judgment at the trial in an action to recover the balance due on a lien note, given for the price of a separator. Reversed.

W. F. Cameron, for appellant; *A. G. Mackinnon*, for respondent.

Newlands, J.A.

NEWLANDS, J.A.:—This action is brought for the balance due on a lien note given by defendant to plaintiff for the price of one Great West separator. This separator was sold to the defendant by Wilkies, Ltd., under a written contract. The lien note in question was therefore either given without consideration, or it was given in consideration of the sale by Wilkies, Ltd., of the separator under the written contract. The evidence shews, I think, that the latter was the case. This contract contains a provision that "the separator is to be put in good running order." The evidence shews that this was never done.

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Newlands, J.A.

The Sale of Goods Act, R.S. Sask., 1909, c. 147, provides (s. 13 (a)):—

Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract.

The stipulation in the contract shews that, at the time of the sale, the separator was not in good running order. It is to be put in running order. It cannot therefore be construed as a warranty that the separator was in running order. It is therefore, in my opinion, a condition and not a warranty, and, as the condition was never complied with, nor did the property pass, the machine never having been removed from the place it was at the time of sale, nor was it taken possession of by defendant, he has the right therefore to repudiate the contract, and the plaintiff cannot recover.

The defendant pleads that, by reason of the failure to put the separator in running order, he is entitled to have the contract rescinded and to recover back the money he paid plaintiff on this lien note.

I am of the opinion that he is entitled to this relief, and I would, therefore, rescind the contract and dismiss the plaintiff's claim. As plaintiff in his statement of claim admits the payment, I think defendant is entitled to judgment for that amount with interest at 8% from the date of payment.

The appeal should be allowed with costs.

Lamont, J.A.

LAMONT, J.A.:—On April 3, 1917, the defendant signed the following document:—

Wilkies Limited, Davidson, Sask.

in the Province of Saskatchewan, the following machinery hereby now agreed to be purchased, upon which the purchaser agrees to pay for One Great West Separator 36 x 60 with self feeder and overhead weights payable as follows: Cash $250.00 and give in settlement lien notes bearing interest, before and after maturity, at 8 per cent. per annum from the date thereof.

Note for $250.00 due Oct. 1, 1917. Payable at the office of the Vendor at Davidson, Sask.

The Vendor does not give any warranties with this machinery other than the following:—

That the separator is to be put in running order and we are to send out an expert on being notified that purchaser is ready to thresh.

The purchaser hereby agrees that he will receive the machinery for which this order is given at Davidson, Sask., and that he will settle for the same in accordance with the foregoing terms . . .

In testimony whereof the purchaser has hereunto set his hand the day and first above mentioned, P.O. Davidson, Sask. Prov. (Sgd) Robert Fleming. Signed in presence of L. M. Wilkie, witness.

Accepted at Davidson, Sask., this 3rd day of April, 1917.

Wilkies Limited, Davidson.
By D. WILKIE.

The defendant made the cash payment, and gave his lien note for the balance. The separator referred to was at the time in possession of Wilkies Ltd., Davidson. As the defendant did not have an engine in 1917, he never called for the separator until the following year. In the summer of 1918, he told the plaintiff to put the machine in order. The plaintiff told one Hamlin Skalding to put the separator in running order. Skalding worked on it on July 12 and 13, 1918, but he testified that the machine was not in running order when he left it, that it required some parts, a list of which he gave the plaintiff. On December 7, the defendant told the plaintiff he would require the separator the following Tuesday. As nothing further was done to put the machine in running order, the defendant left it where it was, which was just where it was situate when he signed the above agreement.

The defendant resists payment on the lien note, on the ground that the separator never was put in running order and that he never accepted it.

The plaintiff admits that certain parts were needed to put the machine in good running order, but says he had all these parts in stock, and was ready to put them on "when the machine went out to be started up."

The witnesses for the defence—and also an independent witness called in reply by the plaintiff—testified that the separator was not in running order. Varley, the plaintiff's witness, testified that it would take about half a day to put it in running condition.

On this evidence it is abundantly clear that the separator never was put in running order. The defendant therefore was never able to get the machine he agreed to purchase. The plaintiff not being willing to deliver the article which the defendant agreed to purchase, cannot, under this contract, recover the purchase price. It is not enough that he had the necessary parts in stock; the defendant did not agree to buy the various parts of a separator, but a separator in good running order. Not being able to get that

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article, he is entitled to have the contract rescinded The lien note was made in favour of "D. Wilkie," while the contract was made with "Wilkies Limited," and the cash payment would appear to have been made to the plaintiff. I therefore assume that in taking the security sued on in his own name, D. Wilkie was acting for Wilkies Limited, and that he holds the same as trustee.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the defendant with costs on the claim, and also judgment on the counterclaim for a rescission of the agreement and a return to him of the moneys paid.

If the defendant fails to obtain a return of the moneys paid from D. Wilkie, this judgment is not to prejudice any right he may have to collect the same from Wilkies Limited.

Haultain, C.J.S.
Elwood, J.A.

HAULTAIN, C.J.S. and ELWOOD, J.A., concurred with LAMONT, J.A. *Appeal allowed.*

CAN.
S. C.

CASE THRESHING MACHINE Co. v. MITTEN.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 14, 1919.

SALE (§ I D—20)—OF GOODS—CONTRACT DELIVERY—ACCEPTANCE AND RETENTION—RESCISSION.

A contract for the purchase of "one Case 40 horse power gas engine" contained a clause: "In no event shall the purchaser have any claim whatever under the agreement against the vendor for any damages but only for the return of moneys paid and securities given and his claim for such shall only arise after he has returned the goods to the place where he received them."

The Court held that on the evidence the engine delivered and accepted by the purchaser was the engine described in the contract, that the purchaser was bound by the written contract, notwithstanding certain verbal representations that had been made by the vendor's agent, and that by paying a promissory note given in part payment, and by not returning the engine as required by the above clause, he had forfeited any right he might have had to rescission.

[*J. I. Case Threshing Machine Co.* v. *Mitten Bros.* (1918), 44 D.L.R. 40, reversed.]

Statement.

APPEAL by defendant from the judgment of the Court of Appeal for Saskatchewan (1918), 44 D.L.R. 40, 12 S.L.R. 1, in an action to recover the price of a gas engine. Reversed.

Eugene Lafleur, K.C., and *F. L. Bastedo*, for appellant; *N. A. Belcourt*, K.C., for respondent.

Idington, J.

IDINGTON, J. (dissenting):—I agree so fully with the reasoning upon which the judgments of the trial Judge and that of Lamont,

J., on behalf of the majority of the Court of Appeal proceed, that I must dissent from the judgment herein allowing entirely this appeal.

Idington, J.

I may be permitted to add that the generic term "gas engine" is in the circumstances ambiguous and fails to describe accurately what beyond doubt all concerned had in mind; and regard must be had to the conduct of the parties and collateral inscription on the machine in order to make clear what kind of gas engine was meant.

I have an impression in view of the state of the pleading that possibly a new trial limited to the determination of what would have been the proper sum to allow for the engine might well have been directed, but in view of the decided opinions of my colleagues I have not seen any good purpose to be served by fully examining that aspect of the case.

Duff, J.

DUFF, J.:—The written contract declares in explicit words that the terms of the agreement between the parties are to be found in the writing and in the writing exclusively. In face of this provision it is not, in my opinion, competent for a court of law to resort to contemporary conversations or prior conversations or even to the legend on the article for the purpose of discovering a contract differing in its terms from that expressed in the unambiguous language of the instrument.

Anglin, J.

ANGLIN, J.:—After some hesitation I concur in the allowance of this appeal. This case is distinguishable from *Schofield* v. *Emerson Brantingham Implement Co.* (1918), 43 D.L.R. 509, 57 Can. S.C.R. 203, inasmuch as the evidence here establishes acceptance by the defendants of the engine supplied to them as that which they had agreed to purchase from the plaintiff. Their letters of Oct. 20 and 26, 1916, afford practically conclusive proof of that fact. Moreover, there is no warranty that the engine contracted for would run on kerosene, such as I thought existed in the *Schofield* case, *supra*, in regard to the rated horse power, breach of which would support a claim for damages. The defendants may have relied on some promises made to them by employees of the plaintiff that the engine would be made satisfactory to them; but their contract precludes effect being given to such promises. The provisions of a formal written contract executed without fraud, mistake or surprise, cannot be entirely ignored.

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CASE THRESHING MACHINE CO. v. MITTEN.

Brodeur, J.

BRODEUR, J.:—This is an action by the appellant company to recover from the respondents the amount due by virtue of promissory notes which defendants have signed for the price of some agricultural machinery.

In 1915, the defendants, who are farmers and dealers, bought a separator and a 40 horse power engine with different attachments for the price of $4,410. Those different articles were all delivered by the plaintiff company to the defendants on May 21, 1915. The defendants then gave a second-hand engine in part payment and made in favour of the plaintiffs three notes amounting to $3,660, falling due on the first of November, 1915, 1916 and 1917 respectively.

On November 1, 1915, a note became due and it was duly paid without any protest on the part of the purchaser.

In 1916, a few days before the payment became due, the defendants wrote a letter to the plaintiffs stating that they did not intend to make their payment this year until they were given their commission certificates on their machinery and, namely, on this gas engine and separator which they had received on May 21, 1915.

That letter remained unanswered. The appellant company did not feel disposed to pay any commission or to issue these commission certificates and the defendants failed to pay the notes which became due on November 1. An action was then taken by the plaintiffs a short time after, for the payment of the balance of the purchase price of the machinery, viz., $2,928. The defendants pleaded fraud and misrepresentations, claiming that it had been represented to them that the engine was a kerosene burning engine and that they had not received delivery of the machinery purchased. They counterclaimed also, repeating the allegation of fraud.

The trial Judge found (1918), 11 Sask. L.R. 238, that there was no fraud or misrepresentation but gave the defendant a set-off in damages for $1,885 on the implied condition that the engine was to be a kerosene burning engine. This judgment was confirmed by the Court of Appeal (1918), 44 D.L.R. 40, Newlands, J., dissenting.

It seems to me that this defence of the respondents is the result of an afterthought. The machinery which was sold and

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delivered was a gas engine. The gas could be formed either by kerosene or by gasoline; in fact, there were two tanks on which the words *kerosene* and *gasoline* were painted. There seems to be no doubt that it did not work properly with kerosene (at least the evidence is conflicting on that point) but it worked very well with the use of gasoline. If the defendants were not satisfied with the machine as it was, why did they not return it in due time? or why did they not then take proceedings to that effect? But they kept the machine for a year and made during that year enough profit to pay the cost of the whole machine. They paid their note which became due during that year, without any protest; and then, a year after, they would have paid the notes which then became due if the company had been willing to pay them some commission for which, I suppose, they had a claim more or less legitimate.

They seem to have waived in that way the rights which they might have if the machine did not run properly with kerosene; and in that respect they are too late now to claim what they virtually abandoned.

I am then, with deference, obliged to differ from the opinion expressed in the Courts below.

The appeal should be allowed with costs of this Court and of the Courts below.

Mignault, J.

MIGNAULT, J.:—The appellant claims from the respondents the price of certain farming machinery sold to them, among which was a gas traction engine, and the respondents have refused to pay because this engine, which apparently was designed to work with gasoline and kerosene as a fuel, would not run on kerosene. The respondents signed an order for the machinery on May 21, 1915, while the appellant's engine was loaded on the cars, and it was immediately after delivered to them. This order or contract contains very strict conditions to which the respondents submitted by signing it, among others the following:—

4. Said goods are warranted to be made of good material, and durable with good care, and to be capable of doing more and better work than any other machine made of equal size and proportions, working under the same conditions on the same job, if properly operated by competent persons, with sufficient power, and the printed rules and directions of the manufacturers intelligently followed.

6. The purchaser shall not be entitled to make any claim for any breach of warranty unless he within ten days after his first using the said goods sends

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by registered letter a notice of the defect complained of, describing the same, and stating when it was discovered, addressed to the home office of the vendor, and to the dealer through whom this order was taken and unless the vendor fails to remedy such defect within a reasonable time after the receipt by it of such notice.

8. In no event shall the purchaser have any claim whatever under the agreement against the vendor for any damages but only for the return of moneys paid and securities given, and his claim for such shall only arise after he has returned the said goods to the place where he received them.

11. Nothing done by either party shall operate as a waiver of any of the provisions of this agreement unless the same is evidenced by writing signed by the party to be charged with such waiver.

12. The whole contract is set forth herein. There are no representations, warranties or conditions, expressed or implied, other than those herein contained, nor shall any agreement collateral hereto be binding upon the vendor unless it is in writing hereupon or attached hereto and duly signed on behalf of the vendor at its said home office.

The undersigned hereby acknowledge to have received a full, true and correct copy of this order, and that no promises, representations or agreements have been made to or with me not herein contained.

The trial Judge, who decided in favour of the respondents, and whose judgment was affirmed by the Court of Appeal of Saskatchewan, Newlands, J., dissenting, has found that there was no misrepresentation on the part of the appellants, but that the respondents had previously purchased from the latter a gas engine which, when delivered, admittedly proved unsatisfactory in that it would not pull the load when working on kerosene. The appellants, the trial Judge finds, agreed to take back this engine and credit the respondents with $750 on the purchase of another gas engine, the one in question, which, it was distinctly understood between the parties, was to be a kerosene burning engine. A casual examination of the engine, he adds, would lead to the belief that it was of a type specially designed to operate with kerosene, for it had two tanks, the larger one labelled "kerosene," and the smaller one for gasoline which was to be used only for starting the engine. He also finds that the appellant's agent Given had previously represented to and assured the respondents that the engine would operate on kerosene, and that he had seen engines of this type operating on kerosene, using 3½ gallons of kerosene to plow an acre of land. When it was attempted to run the engine on kerosene, it stopped, and the appellant, the trial Judge finds, promised the respondents to send experts to make it work on kerosene, and did so, but to no avail.

Under these circumstances the trial Judge held that the action of the respondents in relying on the undertaking of the appellant to make the engine work on kerosene, was entirely reasonable. He adds that he is satisfied that the respondents agreed to purchase one kind of engine, that that kind was never delivered to them, and that the engine actually delivered was worth at least $1,885 less than the engine they should have received. And in answer to the contention of the appellants that this engine answers the description in the order "one 40 Horse Power Case Gas Engine," he finds that this description is ambiguous, applicable to any type of gas engine, warranting the admission of evidence to shew which type of engine was intended.

The whole question is whether on these findings of fact, the appellant is entitled to recover from the respondents. The position of the latter is weakened not only by the terms of their contract, but also by the letters which they wrote to the appellant, which, up to that of Nov. 11, 1916, do not mention the grievance that the engine would not run on kerosene, but merely complain that certain commission certificates which they claimed from the appellant had not been sent to them.

I have looked at this case from every possible angle, but notwithstanding Mr. Belcourt's able argument for the respondents, it all comes back to the question whether the respondents can escape from the obligations of the contract they have signed. The trial Judge has found that there were no misrepresentations on the part of the appellant, and therefore the contract stands. It is no doubt a very rigorous one, but persons who sign such a contract cannot expect a court of law to relieve them from its obligations because its terms seem harsh. The respondents strenuously argued that the engine they contracted for was not delivered to them. If this means that the appellant did not deliver the engine mentioned in the order, the contrary is proved and even admitted by the respondents. It it means that the engine delivered was defective and did not come within the description and warranties of the contract, the respondents have not returned the engine as required by paragraph 8 of their contract. Although the respondents allege in their plea that the engine was returned to the appellant, such is not the fact, and the respondents in their factum admit that they are liable to pay what the engine is worth.

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The appellant did not specifically deny this averment of the respondents (see r. 153 of the Saskatchewan Rules of Court), but when the objection founded on paragraph 8 of the contract was argued before this Court, the respondents did not suggest that the engine was returned, and they could not do so in view of the evidence and the judgment of the trial Court which shew that the engine was never returned, but has been dealt with by the trial Judge as having been sufficiently paid for. Under these circumstances, r. 153 does not relieve me from my duty to deal with this case according to the state of facts which appear by the record.

I am for these reasons forced to the conclusion that the appeal should be allowed with costs throughout, and that the appellant's action should be maintained and the respondents' plea and counterclaim dismissed. *Appeal allowed.*

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REX v. DOJACEK.

Annotated.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. May 23, 1919.

INTOXICATING LIQUORS (§ III D—70)—MEDICATED INTOXICANT—"DRINKS AND DRINKABLE LIQUIDS WHICH ARE INTOXICATING"—INTERPRETATION.

A special finding by the trial magistrate that an elixir preparation contained sufficient medication to prevent its use as an alcoholic beverage and no more alcohol than was necessary to keep its component parts in solution negatives his finding that it is liquor as defined in the Manitoba Temperance Act, 6 Geo. V. 1916, c. 112, by reason of its containing over 2½ per cent of proof spirits and negatives his finding that it is a "drinkable liquid" which is intoxicating. The intention of the Act is not to include such a preparation in its prohibition of sales of "drinks and drinkable liquids which are intoxicating."

[Manitoba Temperance Act, 6 Geo. V. 1916, c. 112, s. 49, considered; *Rex.* v. *MacLean* (1918), 40 D.L.R. 443, 29 Can. Cr. Cas. 270, approved and followed.

Statement.

MOTION on behalf of accused for an order absolute on *habeas corpus* and to quash a summary conviction under the Manitoba Temperance Act.

W. Manahan, contra.

Perdue, C.J.M.

PERDUE, C.J.M.:—The accused was convicted under s. 49 of the Manitoba Temperance Act, 6 Geo. V. 1916, c. 112, by R. M. Noble, Police Magistrate, for that the accused "did unlawfully keep liquor in a place other than in a private dwelling-house in which he resides." The accused is the manager of the Ruthenian Booksellers & Publishers, Ltd. This company is the distributing

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agent in western Canada for the manufacturers of a patent medicine known as "Triner's American Elixir of Bitter Wine." The offence proved was that the accused had in the bookstore, which was not his place of residence, a quantity of this medicine in bottles. It is admitted that the liquid in question contains 16 to 18% of alcohol in volume. It was shewn that it also contained 18 grains per fluid ounce of cascara sagrada, said to be a strong laxative, besides some 8 other drugs in lesser proportions. It was admitted by the prosecutor that this medicine is registered under the Patent Medicine Act, 7-8 Ed. VII. 1908, c. 56.

The magistrate has found on the evidence that the patent medicine in question "contains sufficient medication to prevent its use as an alcoholic beverage, and no more alcohol than is necessary to keep its component parts in solution." But he also finds that it "is a liquor as defined in the Manitoba Temperance Act, as it contains over 2½% proof spirits, also that it is a drinkable liquid which is intoxicating."

Sub-s. (*e*) of s. 2 of the Manitoba Temperance Act is as follows:—

> The expression "liquor" or "liquors" shall include all fermented, spirituous and malt liquors, and all combinations of liquors, and all drinks and drinkable liquids which are intoxicating; and any liquor which contains more than 2½% of proof spirits shall be conclusively deemed to be intoxicating.

The definition is in effect the same as that contained in the old Liquor License Act, which was repealed by the Temperance Act; see R.S.M., 1913, c. 117, s. 2, sub-s. (*g*); except that the last clause of sub-s. (*e*) of s. 2 of the Manitoba Temperance Act commencing "and any liquor etc.," is not found in the corresponding subsection of the Liquor License Act.

Taking the definition in the Manitoba Temperance Act, the medicine in question does not come within any of the terms "fermented," "spirituous," "malt liquors" or "combinations of liquors." It must therefore come under the expression "all drinks and drinkable liquids which are intoxicating," if the conviction is to be sustained. The evidence shews and the magistrate has found that the liquid in question is prevented from being used as a beverage by reason of its medication. It could not therefore be classed as a "drink." There remains the question, is it a "drinkable liquid" within the meaning of the Act? It

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appears to me that this case rests wholly upon the interpretation to be placed on this expression.

The word "drinkable" may mean capable of being drunk. In that case "drinkable liquids" would include all liquids, because a liquid, no matter how nauseous or deadly it may be, is capable of being drunk. The word "drinkable" would, if taken in that sense, be unnecessary, as "liquid" standing alone would be sufficient. But "drinkable" may also mean *suitable for drinking* and be synonymous with *potable*, using the word in the sense in which we speak of water as being drinkable or undrinkable, that is, fit or unfit for drinking. I have already referred to the meaning placed upon the words "liquor" or "liquors" in the Liquor License Act. They are there defined as meaning and comprehending "all spirituous and malt liquors, and all combinations of liquors and drinks and drinkable liquids, which are intoxicating." The Liquor License Act authorized the issue of licenses to sell the liquors defined in the Act. These liquors were drinkable liquids which were intoxicating and were sold as beverages.

They were drinkable in the sense of being potable. Where, under the provisions of the Liquor License Act, local option was in force, no licenses for the sale of liquors were issued and a local prohibition prevailed within the local option district. No sale of liquors, and therefore no drinks or drinkable liquids which were intoxicating could lawfully be sold within such a district.

The clauses in the Liquor License Act relating to the prohibition of sales of liquor in local option districts very closely resemble, and in some respects are practically identical with, corresponding clauses in the Manitoba Temperance Act, 1916. The object of the local option clauses in the former Act was similar to that of the present Act. The former provided means for introducing local prohibition, the latter makes prohibition general throughout the Province. The power of a Province to pass local option prohibitions in regard to the sale of liquors was upheld by the Privy Council in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, [1896] A.C. 348. Local option was aimed at suppressing the vice of intemperance in the consumption of alcoholic liquors in particular localities. The Manitoba Temperance Act is aimed at suppressing the same vice by making the prohibition general throughout the Province. This Act has been pronounced by the

Privy Council to be within the powers of the Province to enact; *Att'y-Gen'l of Manitoba* v. *Manitoba License Holders Association*, [1902] A.C. 73.

Provincial prohibition has been the natural outcome of provincial local option law. The power to locally prohibit, upheld in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion*, *supra*, was extended by the later Privy Council decision to a power to prohibit throughout the Province.

There is an intimate connection between the present law and the previous one. In ascertaining the meaning of an ambiguous expression in a statute an earlier Act dealing with the same subject should be referred to. Lord Mansfield thus stated the rule in *Rex* v. *Loxdale* (1758), 1 Burr. 445, at 447:—

> Where there are different statutes in *pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.

The principle of interpretation stated by Lord Mansfield as above was fully approved by the Court of Appeal in *Goldsmiths Co.* v. *Wyatt* (1906), 76 L.J.K.B. 166. See also *The Queen* v. *Titterton*, [1895] 2 Q.B. 61. It is clear that the expression "drinks and drinkable liquids which are intoxicating," found in the definition of "liquor" or "liquors" in the Liquor License Act, meant intoxicating liquids suitable for drinking, having specially in view such alcoholic beverages as would be supplied to customers in a licensed hotel, or sold in a shop licensed to sell liquors. That being the meaning of the expression in question where it appeared in the Liquor License Act, the same meaning should be given to it in the present Act, which takes the place of the other in dealing with the subject of prohibition.

Going further back into the history of temperance legislation, we find that the Temperance Act, 27-28 Vict. 1864, c. 18, where in force, prohibited the sale of

> any spirituous or other intoxicating liquor, or any other mixed liquor capable of being used as a beverage part of which is spirituous or otherwise intoxicating.

In the Canada Temperance Act, 41 Vict. 1878, c. 16 (D), the prohibition is against the sale of

> any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage and part of which is spirituous or otherwise intoxicating.

The Act of 1864 was intended to provide for the repression of abuses resulting from the sale of intoxicating liquors; see preamble.

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The Act of 1878 aimed at

promoting temperance and providing uniform legislation in all Provinces respecting the traffic in intoxicating liquors.

The intention of the Manitoba Temperance Act is to suppress the liquor traffic in that Province by prohibiting provincial transactions in liquor: see preamble. It seems clear that all this legislation was aimed at preventing the excessive use of alcoholic liquors as beverages.

In the Alberta Liquor Act, Alta. stats., 1916, c. 4, the interpretation clause defining the meaning of the expression "liquor" or "liquors" was originally exactly the same as sub-s. (e) of s. 2 of the Manitoba Temperance Act. It was held by the Appellate Division of the Supreme Court (Harvey, C.J., dissenting), that the word "liquor" where used in the Act as it stood originally, meant a liquid commonly known as or adapted for reasonable use as a beverage for human consumption. See *Rex* v. *MacLean* (1918), 40 D.L.R. 443, 29 Can. Cr. Cas. 270.

In *Gleeson* v. *Hobson*, [1907] V.L.R. 148, where the statute defined liquor as "any wine, spirits, ale, beer, porter, cider, perry or other spirituous or fermented liquor of an intoxicating nature," it was held that liquor meant a liquid commonly known and adapted as a drink or beverage for human consumption.

If this Court were to decide that "liquor" as defined in the Act includes all liquids capable of being drunk which contain over 2½% of alcohol, it would make illegal the sale, not only of patent medicines, but of well known specifics, liniments, tinctures, essences, extracts, perfumes, condiments, etc. If that interpretation were applied no licensed druggist could sell, except under a doctor's certificate, any patent medicine containing more than 2½% of alcohol, which would comprise virtually all patent medicines. No licensed retail druggist could sell to his ordinary customers any perfume in liquid form or any flavouring extract without danger of incurring the heavy penalties imposed by the Act.

In other Provinces power has been given to pass orders-in-council regulating and permitting the sale of liquids containing alcohol. I have not been able to find any such power in the Manitoba Temperance Act, 1916.

In Saskatchewan, flavouring extracts were thoughtfully excepted from the operation of the Act. In that Province a

licensed retail druggist or, perhaps even a grocer, may sell a phial of vanilla or peppermint without rendering himself liable to a fine of $200 or imprisonment in default of immediate payment.

In the Encyc. Brittanica, 11th ed., under the heading "Alcohol" (S.S. Industrial Alcohol), I find the following passages:—

> The great importance of alcohol in the arts has necessitated the introduction of a duty-free product which is suitable for most industrial purposes, and at the same time is perfectly unfit for beverages or internal application.
>
> (S.S. methylated spirit.) For retail purposes the "ordinary" methylated spirit is mixed with .357% of mineral naphtha, which has the effect of rendering it quite *undrinkable*.

I cannot believe that the Legislature intended to propound the paradox that a liquid which has been made *quite undrinkable* becomes a drinkable liquid for the purposes of temperance legislation.

I think the prosecution has failed to prove that the patent medicine in question was a "liquor" within the meaning of the Manitoba Temperance Act. I think the conviction should be quashed and that the fine and costs, if already paid, should be returned to the accused.

Cameron, J.A.

CAMERON, J.A.:—In this case, there are set out in the judgment of Dennistoun, J.A., the material facts, sub-s. (*g*) of s. 2 of the Manitoba Temperance Act on the construction of which the validity of the conviction depends and the reasons for judgment of the magistrate. The question to be decided comes to a narrow point. Did the Legislature by sub-s. (*g*) above referred to, intend to use words applicable to those liquids only that can reasonably be considered beverages, or capable of being used as such, or did it intend to give the words a wider meaning that would include all liquids containing more than the prescribed percentage of alcohol that are capable of being swallowed? This last interpretation would extend the restrictive provisions of the Act to a great number and variety of patent medicines and of perfumes, lotions, paints, varnishes and other compounds into which alcohol enters as a solvent or preservative.

The Manitoba Temperance Act repealed the Liquor License Act, R.S.M., 1913, c. 117, and it is useful to scrutinize the provisions of the latter Act which was in force for many years in this Province. We are entitled to examine the previously existing law in seeking to ascertain the meaning of an enactment apparently obscure or uncertain.

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We find the definition of the word "liquor" in sub-s. (*g*) of s. 2, of c. 117, identical with that in the Act before us save that it does not contain the percentage provision. We have provisions for the issue of licenses for the sale of liquor and prohibitions of its sale by others than those licensed. In s. 156 we have provisions as to chemists and druggists keeping and selling liquors on the conditions set forth, one of which, in the case of a retail druggist, was that he should sell only on a registered medical practitioner's prescription. There are also to be found elaborate provisions for the adoption of a local option by-law by any municipality, the effect of which was to introduce a system of prohibitions upon the sale of liquor and on its possession, similar to those found in the present Act. These provisions are to be found in s. 265 of the Act, and refer to wholesale and retail druggists; the licenses required of them; their obligations in reference to the sale of liquor in detail; the privileges of veterinary surgeons and dentists; the sale of alcohol for mechanical and scientific purposes and other matters. Many of those provisions applicable to local option districts reappear in the present Act.

Now, it is the fact that during all the time the Liquor License Act, R.S.M., 1913, c. 117, was in force, the idea was never seriously entertained that its provisions applied to patent medicines, or to perfumes or paints or the other similar liquids mentioned and there was no attempt made to extend the interpretation of the word "liquor" in that Act to include those liquids or mixtures. Unquestionably it was understood that the License Act applied only to transactions in liquids capable of being used as beverages, an understanding quite justified by the wording of the Act. And I fail to see in the present Act any intention disclosed on the part of the Legislature to depart from or modify the previous Act, as it was administered and understood throughout the Province for many years, in respect of the meaning to be attached to the word "liquor."

I would look upon the percentage proviso in sub-s. (*g*) of the Temperance Act as merely relating to evidence and not as altering the meaning of the preceding words "drinks and drinkable liquids." If the widest possible interpretation be given to those words, we would be forced to the singular conclusion that a can of varnish, or a bottle of perfume could only be bought from a licensed druggist

on a medical practitioner's prescription. That was certainly not the case under the old License Act, and I cannot believe that such a result was intended by the present legislation.

I have read with attention the judgments of the members of the Supreme Court of Alberta in *Rex* v. *MacLean* (1918), 40 D.L.R. 443, 29 Can. Cr. Cas. 270, on the effect of a statutory provision practically identical with that before us, and I agree with the conclusions arrived at by the majority of the Court. I refer to the judgment of Beck, J., where he says, at p. 163, referring to the provisions of the Dominion Proprietary or Patent Medicines Act, 7-8 Ed. VII. 1908, Can., c. 56, and of the Provincial Liquor Act:

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> I think there is no conflict (between these two Acts), because I think that the clear intention of The Liquor Act in its interpretation of "liquor," is to give to that word the meaning of liquor which, to substitute the words of the Dominion Act, can be used as an alcoholic beverage; and that in neither Act is absolute possibility or impossibility of such use intended, but that, in both cases, the kind of liquor, the sale of which is prohibited, is liquid which is commonly known or adapted for reasonable use as a drink or beverage for human consumption or which is reasonably capable of being used as a substitute for such a beverage or of being converted into such a beverage. See the Victoria decision of Cussen, J., in *Gleeson* v. *Hobson*, [1907] V.L.R. 148, discussing the meaning of the word liquor under a similar Act.
>
> In any case under either Act the question whether the liquid in question comes within the prohibition is a question of fact.

Beck, J.'s conclusion was that the Crown had not established that the mixture or liquid in question before the Court was a liquor within the meaning of the Liquor Act.

I think it was not only not shewn that the "Elixir" in question is a liquor within the meaning of the Manitoba Temperance Act, but the contrary was established, as the finding of the magistrate shews. The question is one of fact in each case to be decided on the evidence.

I would set aside the conviction.

Haggart, J.A.

HAGGART, J.A.:—The patent medicine known as "Triner's American Elixir of Bitter Wine" in my opinion is not "drinkable," nor is it an alcoholic beverage within the meaning of those terms used in the Manitoba Temperance Act.

I do not think the evidence warranted the magistrate's finding that the liquid was drinkable. His conclusion that the preparation contained sufficient medication to prevent its use as an alcoholic beverage and no more alcohol than was necessary to keep its

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component parts in solution would have justified him in dismissing the summons.

The order absolute should go for the *habeas corpus*, and the conviction should be quashed.

I have read the reasons of the Chief Justice and I agree with them.

FULLERTON, J.A.:—Application to quash a conviction made by R. M. Noble, Police Magistrate, dated February 18, 1919. The offence charged was that Dojacek "did unlawfully keep liquor in a place other than in a private dwelling-house in which he resides."

The evidence shews that the accused is the manager of the Ruthenian Booksellers & Publishers Ltd., an incorporated company. The company is the distributing agent for western Canada of a preparation known as "Triner's American Elixir of Bitter Wine," and it is in respect of this wine that the charge was laid.

The magistrate gave reasons in writing for his conclusions which are as follows:—

I find that Triner's American Elixir of Bitter Wine kept by the accused in a place other than the private dwelling house in which he resides, is a liquor as defined in the Manitoba Temperance Act, as it contains *over* 2½% proof spirits, also that it is a drinkable liquid which is intoxicating, but it contains sufficient medication to prevent its use as an alcoholic beverage, and no more alcohol than is necessary to keep its component parts in solution; that the preparation was on the market and handled by the accused as a patent medicine before the passing of the Manitoba Temperance Act.

The wine in question contains between 16 and 17% of alcohol in volume, and is registered under the Proprietary or Patent Medicine Act of Canada, 7–8 Ed. VII. 1908, c. 56.

Charles Norton, consulting chemist for Joseph Triner Co., Chicago, who are the manufacturers of the wine, was called as a witness for the defence.

He stated that each fluid ounce of it contained:

Cascara Sagrada	18 Gr.
Dandelion	10 "
Licorice	2 "
Gentian	2 "
Cloves	½ "
Sweet Orange Peel	½ "
Calamus	¼ "
Cinnamon	¼ "
Magnesia	¾ "

The validity of the conviction depends upon the interpretation to be placed on s. 2 (*e*) of the Manitoba Temperance Act which reads as follows:—

> The expression "liquor" or "liquors" shall include all fermented, spirituous and malt liquors, and all combinations of liquors, and all drinks and drinkable liquids which are intoxicating; and any liquor which contains more than two and a half per cent. (2½%) of proof spirits shall be conclusively deemed to be intoxicating.

The contention of the Crown is that any liquid, however unpalatable or even poisonous, so long as it contains 2½% of proof spirits, comes within the statutory definition of "liquor."

On the other hand, counsel for the accused contends that the word "drinkable" means "suitable for being drunk" or "fit for drinking."

In order to arrive at the meaning of the words we are entitled to look at previous legislation on the subject as well as at all the other provisions of the Act.

The Liquor License Act, R.S.M., 1913, c. 117, which was formerly in force in Manitoba defines "liquor" thus: "The expression 'liquor' or 'liquors' means and comprehends all spirituous and malt liquors, and all combinations of liquors and drinks and drinkable liquids, which are intoxicating."

If the construction contended for by the Crown is correct, the result is that hundreds of liquids containing over 2½% alcohol, which are commonly used in every household, are being daily illegally purchased and used by the general public.

While the definition of "liquor" is practically the same in both Acts no one ever dreamed that under the old Act a license was required for the sale of such an article as forms the subject of the conviction here.

The preamble to the Manitoba Temperance Act recites: "Whereas it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor."

What the liquor traffic was in Manitoba before the Manitoba Temperance Act came into force is well known, and it certainly did not include the sale of patent medicines, for example, many of which contain large percentages of alcohol.

S. 37 of the Manitoba Temperance Act, which makes provision for alcohol being obtained from wholesale druggists for mechanical and scientific purposes, requires the applicant to make an affidavit stating among other things: "that *the alcohol is . . . not*

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to be used as a beverage or to be mixed with any other liquid for use as a beverage."

S. 49, sub-s. 2, provides that persons who are permitted to have liquor in their possession for certain purposes "shall not use or consume or allow to be used or consumed any of said liquor *as a beverage.*"

S. 57, which authorises a physician to prescribe liquor or administer it himself, contains the following provision:—

S. 62. . . . every person who directly or indirectly keeps or maintains by himself or by associating or combining with any other or others, or in any manner aids, assists or abets in keeping or maintaining any clubhouse, club or association room or hall or other place in which any liquor is received or kept for the purpose of use, gift, barter or sale as a beverage . . . shall be held to have violated section 48 of this Act. . . .*

If the Act were given the interpretation contended for by the Crown it would have the effect of absolutely prohibiting the sale of many articles in common use. For example, take perfume, which contains a very large percentage of alcohol. I suppose it can hardly be contended that perfume is required for mechanical or scientific purposes within the meaning of s. 37 of the Act. How then can it be legally procured? A retail druggist holding a license can only sell liquor for medicinal purposes, and then under a *bonâ fide* prescription from a physician who can only give a prescription in case he deems intoxicating liquor necessary for the health of his patient. The sale of perfume is therefore prohibited, and also the sale of many other articles containing alcohol which is frequently used either as a preservative or to keep the ingredients in solution.

I cannot think that the Legislature ever intended to make the Act applicable to such preparations.

Reading the whole Act together, I think what was intended was to prevent the use of intoxicating liquors as a beverage.

In the case of *Rex* v. *MacLean* (1918), 40 D.L.R. 443, 29 Can. Cr. Cas. 270, the Supreme Court of Alberta had to construe a provision in the Liquor Act of Alberta in the exact words of s. 3 (*e*) of our Act.

The Court there held that the word "liquor" means a liquid which is commonly known or adapted for reasonable use as a drink or beverage for human consumption.

I would quash the conviction.

*EDITOR'S NOTE.—S. 57, does authorise a physician to prescribe liquor but the quotation in the judgment is from s. 62.

DENNISTOUN, J.A. (dissenting):—This is an application for *certiorari* in respect to a conviction under the Manitoba Temperance Act. It is agreed by counsel that the Court may dispose of the matter finally if of opinion that an order *nisi* should issue.

The information is laid under s. 49 of 6 Geo. V. 1916, c. 112, for unlawfully keeping liquor in a place other than a private house. The accused is the manager of the Ruthenian Booksellers and Publishers Ltd., which is a limited company and acts as distributing agent of "Triner's American Elixir of Bitter Wine," which he obtained in 50 or 100 case lots and sold to small shopkeepers. He acted in this capacity before the Manitoba Temperance Act came into force and has continued to do so. He is not a druggist and is not qualified to obtain a license under the Act either for wholesale or retail business. The magistrate's findings of fact are as follows:—

I find that "Triner's Elixir of Bitter Wine" kept by the accused in a place other than the private dwelling house in which he resides, is a liquor as defined by the Manitoba Temperance Act, as it contains over 2½% proof spirits, also that it is a drinkable liquid which is intoxicating, but it contains sufficient medication to prevent its use as an alcoholic beverage, and no more alcohol than is necessary to keep its component parts in solution; that the preparation was on the market and handled by the accused as a patent medicine before the passing of the Manitoba Temperance Act, and my interpretation of that Act is that such liquids must be sold only in accordance with the terms of the said Act.

The statute defines "liquor" in the following terms:—

2.—(*g*). The expression "liquor" or "liquors" shall include all fermented, spirituous and malt liquors, and all combinations of liquors and all drinks and drinkable liquids which are intoxicating; and any liquor which contains more than 2½% of proof spirits shall be conclusively deemed to be intoxicating.

As "Triner's Bitter Wine" admittedly contains much more than 2½% proof spirits, the magistrate was unquestionably right in finding that it is intoxicating and it only remains to determine whether he was right in adjudging that it possesses the other statutory qualification of "liquor" and is a "drinkable liquid." Upon the meaning of those two words the case in my opinion turns. The magistrate finds

that it is a drinkable liquid which is intoxicating, but it contains sufficient medication to prevent its use as an alcoholic beverage, and no more than is necessary to keep its component parts in solution.

When the case was before the magistrate, the Dominion

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Proprietary or Patent Medicine Act, 7-8 Ed. VII., c. 56, was considered by him, and the references in his judgment just quoted were no doubt prompted by the provisions of that Act.

I am of the opinion that the Dominion Act has no bearing on the present case and does not enter the same field of legislation. It is a statute to regulate the sale of patent medicine, and it makes it an offence to sell an alcoholic beverage as a medicine. It does not license or sanction the sale of alcoholic patent medicines even when medicated; all that can be said is that it does not then prohibit the sale. *Rex* v. *Axler* (1917), 40 O.L.R. 304; *Rex* v. *Warne Drug Co.* (1917), 37 D.L.R. 788, 29 Can. Cr. Cas. 384, 40 O.L.R. 469.

The magistrate's finding that "Triner's Bitter Wine" contains sufficient medication to prevent its use as a beverage is therefore of no importance, as the Manitoba Act does not primarily concern itself with beverages, though they are referred to in certain sections of the Act, but only with drinkable liquids.

These words were discussed in *Rex* v. *MacLean* (1918), 40 D.L.R. 443, 29 Can. Cr. Cas. 270, a case under the Liquor Act of Alberta (1916, c. 4), which defined liquor in terms identical with those used by the Legislature of Manitoba. It is interesting to note in passing that the Alberta Legislature has since amended the definition by striking out the words "all drinks and drinkable liquids" thus simplifying the meaning of the statute and removing the uncertainty which remains in the Manitoba Act.

Harvey, C.J., 40 D.L.R., at 444, was of opinion that the word "drinkable" was unnecessary. He says:—

> Leaving aside the first portion of the definition we find that "all combinations of liquors, and all drinks and drinkable liquids which are intoxicating" are liquors within the meaning of the Act. It is argued that the word "drinkable" limits the meaning of the word "liquid" because the word "liquid" itself means something which is not eatable and therefore can only be consumed by drinking and the word is therefore valueless if it simply means "capable of being drunk" and it must therefore mean "suitable for being drunk," or "fit for drinking." But it will be observed that this does not carry us very far for the adjective is not applied to any of the other described liquors and by the terms of the definition any "combination of liquors," or any drink which is intoxicating, however nauseous, is liquor within the meaning, unless the terms are qualified in the same way, and I can see no justification whatever for any such qualification. It appears to me that the word "drinkable" must be given its common meaning though its use in this connection thus appears unnecessary.

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In the present case the magistrate has found as a fact that "Triner's Bitter Wine" is a "drinkable liquid," using the words in their ordinary sense, "capable of being drunk."

I agree with this finding as there is sufficient evidence to support it.

It is not necessary to find that it can be consumed in anything but small quantities. Alcohol is found in certain well known beverages in such strength that only very small quantities can be taken at a time; they are nevertheless "drinks and drinkable." In my judgment it was the consumption of alcohol by the people, except under medical supervision, which the Legislature set out to abolish, and not merely the suppression of well known alcoholic beverages under familiar names, leaving medicated concoctions, of equal or greater alcoholic strength, to take their place.

Counsel for the Crown agrees that if the law is as laid down by the magistrate in this case, and I think it is, no druggist who is not licensed under the Act can deal in patent medicines, scent, extracts, tinctures, etc., which are drinkable and contain more than 2½% proof spirits, and no storekeeper can sell them under any circumstances unless he is qualified, and obtains a druggist's license, and then only under a doctor's prescription.

The Provinces of Ontario and Saskatchewan and Alberta have amended their Temperance Acts so as to make provision for such a state of affairs. The Province of Manitoba has not yet done so, and one must take the plain ordinary meaning of the words used in the statute as alone indicating the intention of the Legislature. *Vacher* v. *London Society*, [1913] A.C. 107.

Evidence was given at the trial with regard to the quantity of this preparation which would be necessary to produce intoxication, with a view to shewing that before a stage of intoxication could be reached nausea and sickness would intervene. The statute does not concern itself with intoxication, nor with the varying effect which alcoholic mixtures may have upon individuals.

It prohibits the sale of drinkable liquids which contain more than 2½% of proof spirits. It matters not how small the quantity which is or can be taken, or whether any be consumed at all.

The motion should be dismissed and the conviction affirmed.

Conviction quashed.

Annotation.

ANNOTATION.

Interpretation of Statutes in Pari Materiâ.

It is a rule of interpretation that where there are different statutes *in pari materiâ*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other. *Rex* v. *Loxdale* (1758), 1 Burr. 445, 447, 97 E.R. 394, 395; *Goldsmiths Co.* v. *Wyatt* (1906), 76 L.J.K.B. 166; *Rex* v. *Dojacek* (reported *supra*), per Perdue, C.J.M.; *The Queen* v. *Titterton*, [1895] 2 Q.B. 61, 67. The Court is not to speculate as to the policy of the legislature, but is to interpret the relevant statutes taken as a whole. *Toronto & Niagara Power Co.* v. *North Toronto* (1912), 5 D.L.R. 43, 28 T.L.R. 563. That sense of the words in a penal statute is to be adopted which best harmonizes with the context and promotes in the fullest manner the policy and object of the legislature. The rule of strict construction is not violated by permitting the words to have their full meaning or the more extensive of two meanings when best effectuating the intention. *McGregor* v. *The Canadian Consolidated Mines Ltd.* (1906), 12 B.C.R. 116; *The Queen* v. *Symington* (1895), 4 B.C.R. 323. The language of a particular enactment is to be read in connection with the other language of the same statute. *Spruce Creek Power Co. Ltd.* v. *Muirhead* (1904), 11 B.C.R. 68. Where there is a repugnancy between two Acts passed at the same session, that contained in the later chapter will prevail. *British Columbia Electric Ry. Co. Ltd.* v. *Stewart*, 14 D.L.R. 8, [1913] A.C. 816, 109 L.T.R. 771; affirming *In re Point Grey Electric Tramway By-law* (1911), 16 B.C.R. 374.

The various other subjects dealt with under the same sub-division heading of a statute may have an effect upon the interpretation of a clause contained in it and widen the scope of the sub-division heading given to a group of subjects. *United Buildings Corporation* v. *City of Vancouver*, 19 D.L.R. 97, [1915] A.C. 345. The statutes of the various component Provinces entering Confederation at the time of the passing of the British North America Act (Imp.), which latter is the basis of the constitution of the Dominion of Canada, will be referred to for the interpretation of the lists of subjects assigned respectively to the Federal Parliament and to the provincial Legislatures. *Re the Marriage Law of Canada*, 7 D.L.R. 629, [1912] A.C. 880. Sometimes a later Act will provide that it and a prior statute are to be read and construed together as one Act. The effect in that case may be to take away a privilege or exemption which existed under the first Act by reason of a clause in the later Act being inconsistent with such exemption or privilege. *Charing Cross etc. Supply Co.* v. *London Hydraulic Power Co.*, [1913] 3 K.B. 442, 29 T.L.R. 649, 77 J.P. 378, affirmed, [1914] 3 K.B. 772, 78 J.P. 305. Where two Acts passed at different sessions are inconsistent in their terms, the later Act will prevail. *Duke of Argyle* v. *Commissioners of Inland Revenue* (1913), 109 L.T.R. 893, 30 T.L.R. 48. In the absence of an express clause in a statute, a later statute dealing with the same subject does not repeal the preceding one, unless the survival of one be so repugnant to the other that both cannot receive simultaneous application. *Bourassa* v. *Parish of St. Barnabé* (1917), 53 Que. S.C. 198.

The omission in a consolidating statute of a clause in one of the Acts which were made the subject of the consolidation but which were not expressly repealed, will not repeal by implication the prior enactment which was not included in it. *Kennedy* v. *Godmaire*, (1913), 44 Que. S.C. 323.

Annotation.

If special legislation is inconsistent with general legislation existing at the time, then it is to be taken that the Legislature, having such power, has seen fit to exempt from the effect of the general legislation the rights and privileges conferred by the special Act. *Killin* v. *Swatton* (1896), 18 Cox C.C. 477, 76 L.T.R. 55; *Quesnel Forks Gold Mining Co.* v. *Ward & Cariboo Co.* (1918), 42 D.L.R. 476.

A general later statute does not by implication abrogate an earlier special Act. *City of Vancouver* v. *Bailey* (1895), 25 Can. S.C.R. 62; *Bailey* v. *Vancouver* (1895), 4 B.C.R. 433; *Rex* v. *Macdonald* (1917), 33 D.L.R. 770, 28 Can. Cr. Cas. 311, 10 S.L.R. 138; *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, 48 L.J. Ex. 186; *Barker* v. *Edger*, [1898] A.C. 748, 67 L.J.P.C. 115; *Esquimalt Waterworks Co.* v. *City of Victoria*, [1907] A.C. 499, 76 L.J.P.C. 75; *Surrey Commercial Dock Co.* v. *Bermondsey*, [1904] 1 K.B. 474, 73 L.J.K.B. 293; *Moran & Son, Ltd.* v. *Marsland*, [1909] 1 K.B. 744, 78 L.J.K.B. 346.

Where a statute is a re-enactment of a former statute, the interpretation of the former statute will usually be applied. *Laursen* v. *McKinnon* (1913), 9 D.L.R. 758, 18 B.C.R. 10; *Eastern Construction Co.* v. *National Trust Co.*, 15 D.L.R. 755, [1914] A.C. 197; reversing *National Trust Co.* v. *Miller* (1912), 3 D.L.R. 69, 46 Can. S.C.R. 45. But it is not obligatory on the Courts so to do in respect of a Dominion statute for the Interpretation Act, R.S.C. 1906, c. 1, s. 21 (4), provides that Parliament shall not, by re-enacting any Act or enactment or by revising, consolidating or amending the same, be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language.

Uniformity of decision in the construction of federal laws is particularly desirable. *McKinnon* v. *Lewthwaite* (1914), 20 D.L.R. 220, 20 B.C.R. 55; applying *B. C. Loan and Agency Co.* v. *Farmer* (1904), 15 Man. L.R. 593 and *Plenderleith* v. *Parsons* (1907), 14 O.L.R. 619, to the interpretation of the word "liabilities."

A statute practically copied from an English Act is to be interpreted in accordance with the judicial decisions which had been given upon it in England. *Pettit* v. *Canadian Northern Ry. Co.* (1913), 11 D.L.R. 316, 23 Man. L.R. 213, 15 Can. Ry. Cas. 272; *Sawyer-Massey Co. Ltd.* v. *Weder* (1912), 6 D.L.R. 305, 5 Alta. L.R. 362.

Where a provincial Legislature enacts a provision taken from a statute of another Province in which the statute has received a settled interpretation, it will be presumed to have been intended that such provision should be understood and applied in accordance with that interpretation. *Ward* v. *Serrell* (1910), 3 Alta L.R. 138; *Witsoe* v. *Arnold and Anderson Ltd.* (1914), 15 D.L.R. 915; *Cambridge* v. *Sutherland* (1914), 20 D.L.R. 832, 8 Alta. L.R. 25; *B. & R. Co.* v. *McLeod* (1914), 18 D.L.R. 245, 7 Alta. L.R. 349. And while this rule does not include cases decided in the territory of origin after the adoption of the law elsewhere, the Courts of the adopting territory will give great weight to the interpretation placed upon the statute in the territory of origin. *MacMillen* v. *Pierce* (1917), 37 D.L.R. 242, 13 Alta. L.R. 151.

Words printed in the schedule to an Act and which appear to contradict the meaning of the Act itself will be rejected. *Houghton's Case* (1877), 1 B.C.R. 89.

The title or heading would not control the meaning of plain language in any of the sections which immediately follow it; *Fletcher* v. *Birkenhead Corporation*, [1906] 1 K.B. 605; but it may properly be looked at in order to

Annotation. determine the sense of any doubtful expression in a clause ranged under the title. *Rex* v. *Hayward* (1902), 5 O.L.R. 65, 6 Can. Cr. Cas. 399; *Rex* v. *Shand* (1904), 8 Can. Cr. Cas. 45, 51; *Hammersmith and City R.W. Co.* v. *Brand* (1869), L.R. 4 H.L. 171, at pp. 203, 204; *The Queen* v. *Local Government Board* (1882), 10 Q.B.D. 309, at p. 321; *Union S.S. Co. of New Zealand Ltd.* v. *Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365, at p. 369.

Apart from statute it is doubtful whether marginal notes are to affect the construction of a statute. *Rex* v. *Battista* (1912), 9 D.L.R. 138; 21 Can. Cr. Cas. 1; *Sutton* v. *Sutton* (1882), 22 Ch. D. 511. As to the R.S.C. 1906, there is an express enactment that the marginal notes thereon shall form no part of the Revised Statutes; 6-7 Edw. VII., Can., 1907, c. 43, s. 3.

Where any Dominion Act confers power to pass Orders-in-Council or regulations, expressions used in the latter are to have the same meanings as in the Act itself, unless the contrary intention appears. Interpretation Act, R.S.C. 1906, c. 1, s. 37.

ALTA.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 20, 1919.

SALE (§ 1 B—5)—IMMEDIATE—VESTING OF PROPERTY—DESTRUCTION—BURDEN OF LOSS.

Where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee and all the consequences resulting from the vesting follow, one of which is that if it is destroyed the loss falls on the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement for sale.

Held, that a contract for the sale of certain straw and hay, the purchaser agreeing not to "use" the straw until it was paid for, was a contract for an immediate sale, and the property in the goods passed immediately to the vendee who must suffer the loss, it having been subsequently destroyed.

Statement. APPEAL by defendant from the judgment of Jackson, J., in an action to recover the balance of the purchase price for straw stubble and timothy pasture sold by the plaintiff to the defendant. Affirmed.

S. S. Dunham, for appellant.

R. Andrew Smith, for respondent.

Harvey, C.J. HARVEY, C.J., concurred with McCarthy, J.

Stuart, J. STUART, J.:—I agree with McCarthy, J., on the point of the passing of the property in the straw and hay. The evidence seems to indicate that at the time of the bargain the grain was not threshed and therefore the straw not separated. But, I think upon its being separated by the threshing, the property passed to the purchaser in the absence of anything to shew a contrary

intention. The purchaser agreed not to "use" the straw until it was paid for. That very word itself seems to point to a passing of the property with a promise, by the defendant, not to "use" what had become legally his own, until he had paid for it. The defendant, I think, had no right to be so careless of his own interests after he had paid half the purchase price as to leave the care of what was his own, half of it perhaps absolutely, his own, to the vendor. There is no very satisfactory evidence from which we can say how much of the straw was destroyed in the few days before the defendant went and took possession and how much was destroyed after that.

The defendant did exercise acts of ownership, even before that time. He had paid half the price and though he was precluded from "user" until all was paid, he certainly was not precluded from doing what was necessary to protect his own property. I think it is wrong to confuse "*user*" with "taking delivery" in this case. There was no legal impediment in the defendant's way preventing him from taking care of the property himself. And I think the duty to do so lay as much upon him as upon the vendor.

I would dismiss the appeal with costs.

SIMMONS, J., concurred with McCarthy, J. Simmons, J.

McCARTHY, J.:—This is an appeal from the judgment of Jackson, J., in favour of the plaintiff. McCarthy, J.

The action was brought to recover the balance of the purchase price of certain rough feed consisting of straw stubble and timothy pasture alleged to have been sold by the plaintiff to the defendant.

The feed was consumed by the stock of a third party (Bryan's) while it was still upon the premises of the seller and the defence raised is two-fold—first that the property in the feed had not passed from the plaintiff, the seller, to the defendant, the buyer, and consequently the loss must fall upon the seller; secondly, that, even supposing that were decided against the defendant inasmuch as these goods were on the plaintiff's premises it was incumbent upon him to take the same care of them as a reasonable and prudent man would take if they were his own—with regard to the latter it is to be observed that although this ground was urged before us upon the argument it cannot be said to have been pleaded in the defence in terms.

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The first question is, whether at the time the goods were consumed they were the property of the seller, the plaintiff, or the property of the buyer, the defendant. In order to decide that, as well as to decide the second question, we must look to see what was the course of dealing which existed between the parties. The contract is evidenced by a cheque in the following terms.

Lethbridge, Oct. 5, 1918.

The Canadian Bank of Commerce,
Lethbridge Branch.
Pay Walter Tangye or order Fifty Dollars.
$500
for rough feed on E¼ 2-9-20
balance of $450 to be paid before using.

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At the time this cheque was given the plaintiff was the tenant and residing on the property described on the cheque; his lease expired on the last day of March, 1919.

The defendant paid the cheque for $50 and $200 additional before the end of October. Shortly thereafter the plaintiff put into possession of the buildings on the premises one Bryan and it is alleged that Bryan's horses and cattle consumed the fodder sold.

The defendant claims to have notified the plaintiff of what was happening as soon as it came to his notice.

It would appear from the evidence that the defendant knew that some third party was going into occupation of the buildings on the premises for in his evidence he says "he told me something about the lease, and he could not let me have the buildings, but he could sell the field."

It would also appear that about the time of the payment of the $200 the plaintiff informed the defendant that he had purchased another farm to which he afterwards moved about Dec. 23, 1918.

There is evidence that the plaintiff ordered Bryan to take his horses off and sought the assistance of the police to make him do so.

About the first of the year as appears in the statement of defence the defendant put his stock into the pasture and hauled away a certain amount of the straw. Bryan apparently went into possession of the buildings on the premises on Dec. 19, 1918.

and on Dec. 26, 1918, the defendant notified the plaintiff by letter that Bryan's stock was running on the pasture and that he looked to him (the plaintiff) to protect the property and that he would expect him to reimburse him for the damages occasioned thereby and on Jan. 2, 1919, a notice to the same effect was sent to the plaintiff by the defendant's solicitor but the evidence does not disclose that the plaintiff ever gave Bryan possession to run his stock on the premises.

This being the state of things existing between the parties, the first question is when these goods were consumed whether the property had passed from the seller to the buyer. In my opinion it had.

Tarling v. *Baxter* (1827), 6 B. & C. 360, 108 E.R. 484, would seem to be in point.

James Tarling against Baxter, 1827. A., on the 4th of January, agreed to sell to B. a stack of hay for the sum of £145., to be paid on the 4th of February, the same to be allowed to stand on A.'s premises until the 1st of May. B. stipulated that the hay should not be cut until it was paid for: *Held*, that this was a contract for an immediate and not a future sale, and that the property in the hay passed by it immediately to the vendee, and that the same having been subsequently destroyed by fire, the loss fell upon him.

Per Bayley, J., 6 B. & C., at pp. 363-4, and 108 E.R., at p. 486:

It is quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire. And the question is in whom the property in this hay was vested at that time. By the note of the contract delivered to the plaintiff, the defendant agreed to sell the plaintiff a stack of hay standing in Canonbury Field at the sum of £145., the same to be paid for on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next.

Now this was a contract for an immediate, not a prospective sale. Then the question is, in whom did the property vest by virtue of this contract? The right of the property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless payment is duly made, and yet the property in these goods may be in the vendee. The fact in this case, that the hay was not to be paid for until a future period, and that it was not to be cut until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price. The rule of the law is, that where

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there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that, if it be destroyed, the loss falls upon the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement of sale. It seems to me that the true construction of the contract is, that the parties intended an immediate sale, and if that be so, the property vested in the vendee, and the loss must fall upon him. The rule for entering a nonsuit must therefore be made absolute.

To my mind in the case before us the *intention* of the parties is clearly ascertainable from the fact that before the use of the fodder by the defendant he had given possession to Bryan to turn in his pigs and to the plaintiff to turn in horses on the premises, satisfying me that he was exercising acts of complete ownership over the goods.

It appears to me therefore looking at all the circumstances of the case it is impossible to doubt that the true intention of the parties was that the property was in the buyer and no longer in the seller at the time it was consumed, the latter having ceased to have anything to do with it as far as he was concerned.

The second question is whether the goods, having been consumed by trespassing cattle, the seller exercised that reasonable care in their preservation that a reasonable man would. I think that he did. It is unnecessary for me to repeat that he moved some distance away from the premises, the fact that he has sold the fodder to the defendant does not necessarily make him the custodian of the goods. The plaintiff's version of the arrangement was that the defendant was to remove the goods about freeze up. The defendant says he could remove them at any time. The former arrangement to me is the one that would seem to be the most probable and for this reason and the plaintiff's efforts to get the stock other than the defendant's off the premises to which I have already referred he cannot be held liable for what happened.

I think therefore upon that point also, the defence fails and I would dismiss the appeal with costs.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

SALE (§ I A—1)—CONTRACT—ENTERED INTO ON SUNDAY—VALIDITY.

A contract for the sale and delivery of goods entered into on Sunday is null and void as being in contravention of the Act to Prevent the Profanation of the Lord's Day (R.S.S. 1909, c. 69.)

One who has taken delivery of goods sold under a void contract must either return the goods or pay for them.

Statement.

APPEAL by defendant from the trial judgment in an action on a contract entered into on Sunday.

E. Laycock, for appellant.

T. P. Morton, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—I agree with the conclusions arrived at by my brother Lamont, whose judgment in this case I have had an opportunity of looking over, and will only add a few remarks on one branch of the case.

The contract in this case is shewn to have been concluded on a Sunday, and is, therefore, *primâ facie*, "utterly null and void" under an Act to Prevent the Profanation of the Lord's Day. (R.S.S. 1909, c. 69). It was contended on behalf of the plaintiff that he should recover on a *quantum meruit*, because the goods were not delivered until later on, on a week day, and there was an implied promise to pay on the part of the defendant because he received them.

In the case of *Williams* v. *Paul* (1830), 6 Bing. 653, 130 E.R. 1433, cited in support of this contention, the defendant retained the animal which had been sold on a Sunday and *afterwards made a promise to pay for it*. This promise created a new and valid contract of purchase and sale. But no new promise to pay will be implied simply because the defendant has taken delivery of the goods. *Simpson* v. *Nicholls* (1838), 3 M. & W. 240; 7 L.J. Exch. 117.

The plaintiff, therefore, cannot recover either on the original contract or on a *quantum meruit*.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff sues for the balance due on the sale by him to the defendant of 67 tons of hay.

The defence is that the contract was made on a Sunday and is, therefore, void.

As the hay was delivered on a week day, there is, in my opinion,

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an implied promise to pay for same, and plaintiff can recover on that claim.

It is also pleaded that some of the hay was spoiled, but, as there is no evidence that this happened before delivery, it must fail.

The appeal should be dismissed with costs.

LAMONT, J.A.:—The plaintiff has brought this action upon a contract in writing for the sale by him to the defendant of a quantity of hay, and, in the alternative, for goods sold and delivered.

The defence is that the contract was made on a Sunday, and is therefore null and void, as being in contravention of the Act to Prevent the Profanation of the Lord's Day, R.S.S. 1909, c. 69.

That the written contract was entered into on Sunday, Oct. 13, 1918, is established. The evidence also shews that during the week following said date the plaintiff loaded 68 tons of hay upon the cars. The defendant received the same and billed out the cars.

S. 3 of the Act to Prevent the Profanation of the Lord's Day, reads as follows:

> 3. All sales and purchases and all contracts and agreements for sale or purchase of any real or personal property whatsoever made by any person or persons on the Lord's day shall be utterly null and void.

The contract for the sale of the hay in question having been made on Sunday was, therefore, void, and the plaintiff is not entitled to recover on such contract.

On behalf of the plaintiff it was contended that he was entitled to succeed on his alternative claim for goods sold and delivered without any reference to the contract which was made on a Sunday, on the ground that the defendant on a week-day took delivery of the hay, and must therefore be held to have impliedly promised to pay for the same.

I do not think it can be doubted that the hay was delivered pursuant to the void contract. The question then is: The defendant having possession of the plaintiff's hay pursuant to a contract rendered void by the statute, is he entitled to sell the same and keep the proceeds without compensating the plaintiff therefor? In my opinion he is not, as there is no pretence that the plaintiff was making him a gift of the hay.

In *Sinclair* v. *Brougham*, [1914] A.C. 398, at p. 431, Lord Dunedin says:

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Now I think it is clear that all ideas of natural justice are against allowing A. to keep the property of B. which has somehow got into A.'s possession without any intention on the part of B. to make a gift to A.

In *Trades Hall* v. *Erie Tobacco Co.* (1916), 29 D.L.R. 779, 26 Man. L.R. 468, the defendant's tobacco got into the possession of the plaintiffs by means of a contract which was *ultra vires* the plaintiffs and, therefore, void. It was held by the Manitoba Court of Appeal that the plaintiffs must return the goods or pay their value.

In Brice on Ultra Vires, 3rd ed., at p. 640, the rule is laid down as follows:

> Though a corporation cannot be sued, any more than an ordinary citizen, directly upon a transaction which does not bind it, yet if it sets up this defence it must restore to the other party what it has obtained from him . . .
>
> The principle is that a person not directly liable must account for benefits which he has received from an invalid transaction, and pay to the other party the amount or value of the benefits received by him.

The plaintiff's hay having got into the defendant's possession by virtue of an invalid contract, and the defendant having sold the same, the plaintiff is entitled to have him account for the proceeds thereof, and the matter will be referred back to the Judge of the District Court to take the account.

As the plaintiff in his statement of claim did not ask for an accounting by the defendant, he is not entitled to his costs, and as the defendant's defence was a barefaced attempt to retain moneys to which he knew he was not entitled, I would not allow him any costs either. On amending his pleading to claim an accounting, the plaintiff will be entitled to judgment for whatever sum the District Court Judge may find to be due on the reference.

No costs of appeal to either party.

Elwood, J.A.

ELWOOD, J.A., concurred with Haultain, C.J.S.

Judgment accordingly.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Fullerton, JJ.A. October 15, 1919.

INSURANCE (§ IV B—170)—CHANGE OF BENEFICIARY—PROVINCIAL ACT—RESTRICTIONS IN DOMINION COMPANY'S CHARTER.

A provincial Insurance Act, which purports to enable an insured to revoke the benefit of insurance on his life made or appropriated in favour of any person whomsoever and divert the insurance to new beneficiaries or to himself or his estate, does not override or destroy the special provisions contained in a policy issued by a Dominion company, in conformance with its charter and which limits such powers.

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Statement.

Perdue, C.J.M.

APPEAL from a judgment of Macdonald, J., on a stated case under s. 42 of the Manitoba Trustee Act (R.S.M. 1913, c. 200), to determine who was entitled to certain insurance moneys. Reversed.

W. F. Hull and *F. W. Sparling*, for E. Richardson.

J. F. Davidson, for the executors.

PERDUE, C.J.M.:—This is a special case stated for the opinion of the Court of King's Bench under s. 42 of the Manitoba Trustee Act, R.S.M. 1913, c. 200. On April 6, 1895, an endowment certificate was issued by the Supreme Court of the Independent Order of Foresters by which the Order agreed to pay to the widow, or other beneficiary designated on the certificate, or to the personal representatives of Hugh Richardson, $2,000. The certificate contained other covenants entitling the insured to an annuity, when he should attain the age of 70 years, and to a payment of $1,000 in case of total and permanent disability, but neither of these two latter covenants comes in question.

Richardson, in accordance with the constitution and laws of the Order, designated his wife Bessie (Elizabeth) as the beneficiary of the insurance by an instrument in writing attached to the endowment certificate. Both Richardson and his wife were at the time of the issue of the certificate and the designation of the beneficiary residents of Battleford in the then North West Territories.

Richardson died on Feb. 7, 1916, leaving a will dated Jan. 18, 1915, by which after certain bequests he bequeathed to his executors on certain trusts all his residuary estate including "life insurance or the proceeds of any policy of insurance." One of the trusts is that one-half of such residuary estate should be paid to his housekeeper, Florence Besley. His wife claims the insurance money as the duly designated beneficiary. The Independent Order of Foresters have paid the insurance money into Court and the special case was stated for the opinion, advice and direction of the Court.

The following are the questions submitted:

1. Whether the proceeds of the said endowment certificate or policy, being the moneys now paid into Court, pass and become payable out to the executors under and by virtue of the said will, or are they payable to the said Elizabeth Richardson as beneficiary named therein?

2. Whether the said Florence Campbell, *nee* Besley, is entitled to any

interest in the said proceeds of the said endowment certificate or policy, or moneys now in Court; if so, what share?

3. If it should be found that the said beneficiary Elizabeth Richardson is legally entitled to the said moneys or proceeds, whether the amount of the said assessment or interest and costs should be paid out of the said testator's estate to the said Elizabeth Richardson?

The case was heard by Macdonald, J., who directed that the proceeds of the endowment certificate should be paid to the executors and form part of the estate of the deceased for the purpose of distribution in accordance with the provisions of the will. From this decision the present appeal is brought.

The Supreme Court of the Independent Order of Foresters was originally incorporated under R.S.O. 1877, c. 167, but afterwards received incorporation under Dominion statute, c. 104 of 1889, amended by c. 51 of 1889 and c. 100 of 1901. By 3-4 Geo. V., 1913, c. 113, the Acts of incorporation were consolidated and amended and the name was changed to the "Independent Order of Foresters," which I shall refer to as the Society or the Order. By s. 3 of the consolidating Act it is declared that the constitution and laws of the Society filed in the office of the Superintendent of Insurance on Jan. 26, 1909, as amended by the amendments filed in the same office on Sept. 30, 1911, are the existing constitution and laws of the Society, and, subject to the provisions of s. 11 of the Act (which does not affect the matters in question on this appeal), are binding upon the Society and every member thereof until repealed, altered or amended as provided by the constitution and laws. A printed copy of the constitution and laws of the Society has been put in as part of the material.

The objects of the Order or Society are fraternal and benevolent, one of its purposes being to give such aid and benefits to its members and those dependent on them as may be provided in the constitution and laws. One of these benefits is insurance in favour of the beneficiaries of a member: Constitution, s. 4. See also the purposes and objects of the Order as declared and set out in c. 104 of the Act of 1889.

By s. 10 of the Act of 1913 it is declared that the insurance powers of the Society shall be exercised in conformity with the provisions of the Act and in conformity with the provisions of the Insurance Act, 1910, applicable to the Society, but it is to be subject to future legislation by Parliament respecting insurance powers of fraternal societies.

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By s. 9 the Society shall be entitled to receive a license under the Insurance Act, 1910, 9-10 Ed. VII., c. 32, renewable from year to year so long as the Society complies with the provisions of that Act, applicable to the Society, to undertake with its members the contracts of life, disability and sickness insurance specified in the constitution and laws of the Society. The Act of 1913 continues the Society as a body corporate, subject to its existing constitution and laws and although it makes certain provisions of the Insurance Act, 1910, applicable to the Society, still the Society remains a fraternal organization which confines its objects and benefits to its own members.

By s. 4, sub-s. (4), of the constitution and laws of the Society, provision is made for the payment to the beneficiaries of a member in good standing at the time of his decease of an insurance or mortuary benefit to the amount carried by the member.

Sub-s. (5) of s. 4 is as follows:

(5). The insurance or mortuary benefit of a member shall be paid to the member himself, or to the wife or husband of, or to the affianced wife of, or to the affianced husband of, or to the children of, or to the blood relations of, or to persons dependent upon, such member, who may have been designated, as provided in the constitution and laws, by name, as the beneficiary of such member, or, subject to the approval of the Supreme Chief Ranger, to such other beneficiary as may be permitted by the laws of the province, state or country in which the member resides at the time of making the designation of the beneficiary or beneficiaries.

S. 150 provides the manner in which a member may change his beneficiary. Par. (a) of sub-s. (1) of that section provides the procedure, namely:

By filing with his court his application for change of beneficiary on form No. 14, fully filled in, signed by himself and properly executed, setting forth fully and clearly the changes he desires to make; provided that a designation of a beneficiary not in conformity with s. 4, sub-s. (5) shall be null and void from the beginning.

S. 160 deals with the payment of the insurance or mortuary benefit. By sub-s. (3) of that section:

If a member shall have made application for change of beneficiaries in conformity with the provisions of s. 4, sub-s. (5), and s. 150, sub-s. (1), and not repugnant to the laws of the province, state or country in which the member had a fixed place of abode, the benefit may be paid *at the discretion of the Supreme Chief Ranger* to such last designated beneficiary or beneficiaries.

The contention on behalf of Florence Besley is that by s. 15 of the Life Insurance Act of this Province, R.S.M. 1913, c. 99, the effect of the will was to change the beneficiary under the

policy and to make the proceeds of it payable in the manner set out in the will, also that the direction in the will sufficiently satisfied the requirement of s. 15 as being "an instrument in writing attached to or endorsed on the policy or identifying the same by its number or otherwise."

The first question to consider is: Does the Life Insurance Act of the Province of Manitoba apply to the insurance in question in this case? At the time the beneficiary certificate was applied for and issued, Richardson, the insured, and his wife, the beneficiary, were both residing in the Province of Saskatchewan. The law governing the contract of insurance was either that of the Province of Ontario or that of the Province of Saskatchewan. According to the decision in *National Trust Co.* v. *Hughes* (1902), 14 Man. L.R. 41, the contract would be governed by the law of Saskatchewan, but it really makes no difference whether the law of that Province or the law of Ontario is applied, because in neither is there to be found any such provision as is contained in s. 15 of the Manitoba statute. The main ground upon which it is argued that the Manitoba law applies is that by the Manitoba Insurance Act, R.S.M. 1913, c. 98, s. 47, where a company is licensed under that Act, the moneys payable under a life assurance policy shall be payable in this Province; that the insured having become a resident of Manitoba at the time of his death the laws of that Province would govern his life insurance. But under s. 3 of c. 98, that Act does not apply to a company licensed by the Dominion of Canada as is the Independent Order of Foresters. See s. 9 of the Act of incorporation, 3-4 Geo. V., c. 113. In my view it has not been shewn that the law of Manitoba applies in this case. The contract was not made under the law of this Province. It was made either under the law of Saskatchewan or Ontario and under the law of either a trust was created which the insured could not destroy. The endowment was lost and it does not appear that it was ever brought to Manitoba. A mere assignment of an insurance policy might be governed by the law of the country where the insured was residing but he could not change the contract itself. See *Lee* v. *Abdy* (1886), 17 Q.B.D. 309. The change of beneficiary must be effected in accordance with the law of the Province governing the contract. See *Re Baeder & Canadian Order of Chosen Friends* (1916), 28 D.L.R.

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424, 36 O.L.R. 30. This point is particularly referred to in the constitution and laws of the Order: see s. 4, sub-s. (5), above set forth, which applies the law of the Province in which the member resided at the time of designating the beneficiary. There is also the further question, can this Province interfere with a contract of life insurance made by the Independent Order of Foresters? As already pointed out, the constitution and laws of the Society are declared by the Act of incorporation to be those governing the Society and are further declared by the Act to be binding on the Society and every member thereof. Unless the Manitoba statute qualifies the Dominion Act of incorporation, the only way in which a change of beneficiary could be made in an endowment certificate is that provided in the constitution and laws of the Society. S. 4, sub-s. 5, limits the beneficiaries of the members to the person or persons designated by him as such from amongst the relatives or dependents mentioned in the sub-section. If he desires to choose a beneficiary outside the persons or classes mentioned it must be subject to the approval of the Chief Ranger. When a beneficiary is once designated and accepted by the Society, the insurance or mortuary benefit becomes payable to such beneficiary unless a change of beneficiary is made in accordance with the constitution and laws. As against the beneficiary the member himself has no power of disposition over the money payable under the endowment certificate. If the Manitoba statute applies to such insurance and a member of the Society is permitted to change the beneficiary as he pleases and even to divert the insurance to a stranger, as it is contended he may do under s. 15, then the purposes and objects of the Society may be frustrated and a serious change be effected in its constitution and status as a fraternal society. One of the main purposes of the Society is to give aid and benefits to its members through the insurance and mortuary benefit department: Const. & Laws, s. 4. To remove the restrictions placed by the constitution and laws upon the change of beneficiaries and the application of the insurance would be a serious interference with the objects of the Society as incorporated by the Act of the Parliament of Canada. In *Parsons* v. *Citizens Ins. Co. of Canada* (1881), 7 App. Cas. 96, it was held by the Privy Council that a Provincial Legislature might prescribe certain conditions to form part of a fire insurance

policy upon property within the Province, where the policy was issued by a company incorporated under Dominion authority. But it was expressly pointed out in the judgment that the legislation by the Province did not in the cases under consideration assume to interfere with the constitution or status of the corporation; pp. 113-114. S. 15 of the Life Insurance Act would not only interfere with the contract itself, but it would seriously affect the constitution and status of the Order by controlling and abridging its powers.

The powers of Provincial Legislatures in regard to companies incorporated under the authority of the Parliament of Canada, were considered in the recent decision of the Privy Council in *John Deere Plow Co.* v. *Wharton* (1914), 18 D.L.R. 353, [1915] A.C. 330. The Companies Act of British Columbia (R.S.B.C. 1911, c. 39) provided that companies incorporated by the Dominion Parliament should be licensed or registered under that Act as a condition of carrying on business in the Province or maintaining proceedings in the Courts. The John Deere Plow Co. was incorporated under the Companies Act of Canada and was empowered by its charter to carry on business throughout the Dominion. The company was doing business in British Columbia without being licensed or registered. The question for determination was whether the Companies Act of British Columbia was *ultra vires* of the Legislature of the Province. After holding that the Parliament of Canada had power to enact the Dominion Companies Act, Lord Haldane, who delivered the judgment of the Judicial Committee, said as follows, at p. 360 (D.L.R.):

> It is enough for present purposes to say that the Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96; *Colonial Building and Investment Assoc.* v. *Att'y-Gen'l of Quebec* (1883), 9 App. Cas. 157; and *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575.

The Provincial Act was held to be *ultra vires*.

The Ontario Insurance Act was made applicable to benevolent societies: R.S.O. 1897, c. 203, s. 2, sub-s. 27. There is no similar

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provision in the Manitoba statutes. The Ontario decisions, therefore, in respect to insurance in such Societies must be considered with that distinction kept in view. In this Province the decisions for over 20 years have been that beneficiary certificates issued by benevolent or fraternal societies are subject to the laws and regulations of the society issuing the certificate.

In *Leadlay* v. *McGregor* (1896), 11 Man. L.R. 9, a society formed for fraternal and patriotic purposes and having a written constitution, provided a bequeathment fund from which, on proof of the death of a member, a sum of money became payable to the beneficiary of the deceased member. After the issue of the "bequeathment certificate" a change was made in the laws of the society by which the money should be payable to the wife, affianced wife, relative or person dependent on the member as designated in the bequeathment certificate. By his will the member directed his life insurance money to be paid to his executors on certain trusts. He also indorsed on the bequeathment certificate a memorandum revoking the beneficiary named in it and directing payment of the money to his executors. The officers of the Order refused to recognise the change of beneficiary or the direction in the will. Killam, J., held that the member had no interest in the fund raised or to be raised, but merely a power to appoint an object to receive the same which power must be exercised in accordance with the regulations of the society. Many authorities are cited by the Judge in his judgment. I would add to them the later case of *Bennett* v. *Slater* (1899), 1 Q.B. 45.

When *Leadlay* v. *McGregor*, *supra*, was decided there was no provision in the Manitoba statutes similar to that contained in s. 15 of the Life Insurance Act. That section first appeared in c. 17 of the statutes of 1899. The effect of s. 15 in the case of insurance issued by a fraternal society in favour of a beneficiary came up for consideration in *In Re Anderson's Estate* (1906), 16 Man. L.R. 177. In that case the testator, who was a member of the Ancient Order of United Workmen, a Society incorporated under the Charitable Associations Act of Manitoba, held a certificate issued by the Order by which $2,000 was at his death to be paid to the beneficiary designated by him. He had appointed his wife as such beneficiary. By his will he sought to revoke

the appointment of his wife and to direct that the insurance should form part of his general estate. It was held by the full Court of Queen's Bench that the provisions of the Life Insurance Act of this Province did not apply to the insurance in question. The ground for the decision was that if effect were given to the attempted revocation contained in the will the insurance money would become part of the general estate of the deceased, which would be contrary to the constitution and general laws of the Order. This decision was followed by Mathers, J., in *Re Drysdale Estate* (1909), 18 Man. L.R. 644.

But apart from the foregoing, I regard the questions involved in this case as so important to the community at large that I think a further consideration of the Life Insurance Act is desirable, particularly in regard to the effect of s. 15.

The subject of life insurance for the benefit of wives and children has been before the Legislature of the Province at various sessions from an early date. In the Consolidated Statutes of Manitoba, 1880, there was An Act to secure wives and children the benefit of life assurance (c. 66). This Act enabled a husband to insure his life for the benefit of his wife and children and the money payable thereunder was declared to be free from the claims of creditors. In 1883, an Act, c. 44, was passed, the preamble of which is as follows:

> Whereas it is expedient to encourage insurance on the lives of husbands and parents for the benefit of their wives and children and to consolidate and amend the statutes relating to the same; therefore etc.

This recital shewing the policy of the Legislature was repeated in subsequent Acts and revisions until the revision of 1913 when it was omitted. The Act of 1883 gave somewhat fuller powers as to insuring and appropriating policies for the benefit of wives and children and conferred powers very similar to those contained in the later Acts. This Act appears in R.S.M. 1891, c. 88.

A considerable change in the legislation was made by c. 26 of the statutes of 1895. The provisions in this Act relating to appropriation and re-appropriation are similar to those found in R.S.M. 1902, c. 83, ss. 7, 8, 9, and these have been carried into the R.S.M. 1913, c. 99, without any change, the numbers of the sections being the same.

The Act, as it now stands, permits a man to insure his life for the benefit of his wife and children or a father or mother to insure

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his or her life for the benefit of his or her children (s. 2). Whatever a man may do in respect of insurance on his life a woman may do, the provisions relating to insurance upon the life of a man shall be applied to insurance on the life of a woman (s. 6). A policy of life insurance effected by a woman on her life and expressed to be for the benefit of her husband and children or any of them *shall be deemed a trust in favour of* the objects therein named and shall not, so long as any object of the trust remains unperformed, form part of the estate of the deceased or be subject to her debts (s. 5).

By s. 7, if a policy of insurance effected by a husband on his life is expressed to be for the benefit of his wife, or of his wife or children, etc., or has been declared in manner indicated to be for her or their benefit.

Such policy shall inure, and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the intent so expressed, and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors or form part of his estate.

By s. 8 the insured may in the manner pointed out in the section vary a policy, declaration or appropriation previously made and apportion the benefits anew to his wife and children or to one or some of them. He may also do the same thing by his will and if done by will the appropriation made by the will shall prevail over any other made before the date of the will.

S. 9 provides for the case of the death of a beneficiary during the lifetime of the person insured. In that event the insured may declare the share of the deceased shall be for the benefit of such other person or persons as he may name "not being other than the wife and children of the insured or one or more of them."

When no apportionment has been made s. 11 of the Act provides the mode of division of the insurance money amongst wife, children, etc.

The effect of the above sections is that when a policy of insurance has been made or appropriated for the benefit of wife and children or wife or children or any of them, it becomes a vested trust in favour of the beneficiary or beneficiaries and the insured ceases to have any ownership in the money payable under it and it forms no part of his estate. He has, however, a power of appointment over the insurance money amongst a class of

persons who are the beneficiaries of the trust and he may declare what person or persons in this class shall benefit and in what proportions. He has no power under these clauses to appoint the insurance money to any person or persons outside this class. See *Neilson* v. *Trusts Corp. of Ontario* (1894), 24 O.R. 517; *Mingeaud* v. *Packer* (1891), 19 A.R. (Ont.) 290; *In Re Cochrane* (1908), 16 O.L.R. 328.

S. 15 was introduced in 1899 in the following circumstances. The Act as it stood in the Revised Statutes of 1892, c. 88, was amended in 1895 by c. 26 of the statutes of that year by substituting the provisions now found in ss. 7, 8 and 9 of the present Act, in the place of s. 5 of c. 88, R.S.M. 1891. By s. 12 of the last mentioned Act it was provided that the person insured might revoke the benefit of the insurance as to one or more or all of the persons intended to be benefited and to declare that the policy should be for the benefit only of the persons not excluded or for them and others not originally named; *but these others must be persons for whose benefit an insurance might be effected or appropriated under the provisions of the Act.* S. 13 provided how the revocation should be made. The Act of 58-59 Vict. 1895, c. 26, s. 4, repealed the last mentioned ss. 12 and 13 and substituted therefor a new s. 12 which provided that any revocation of any appropriation under the Act might be made in the same manner that an appropriation might be made. This new s. 12 was repealed by c. 25, s. 1 of 61 Vict. 1898 and another s. 12 was introduced very similar to the present s. 15. It contained the first mention of insurance for the benefit of father, mother, brothers or sisters, a class of insurance not under the protection of the Act, and enabled the insurer to "revoke the policy or declaration or appropriation previously made," so that the policy should be in the same condition as if it were made wholly for the benefit of the insurer or his estate or executors. In the following year, 1899, by c. 17, still another s. 12 was enacted which appears as s. 15 in the Revised Statutes of 1902 and 1913. This s. 15 is as follows:

15. If, in case of a policy of insurance heretofore or hereafter effected by a man or woman, it is expressed on the face to be for the benefit of, or has been heretofore or shall be hereafter under this Act appropriated for the benefit of, his wife or her husband, or his wife and children, or her husband and children, or his or her father, mother, sisters and brothers or any one or

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more of them or any other person or persons whomsoever, then the insured may, by an instrument in writing attached to or endorsed on the policy or identifying the same by its number or otherwise, absolutely revoke the benefit or declaration or appropriation previously made and apportion the insurance money, or by like instrument from time to time reapportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, provided that the insured shall not alter or revoke or divert the benefit of any person who is a beneficiary for value.

Now this section does not attempt to repeal ss. 5, 6, 7, 8 and 9. They have all remained in the same statute for 20 years. Ss. 5-9 have been re-enacted from time to time and are the main sections of the Act as it stands to-day. They still provide the scheme of insurance for the benefit of wife and children or husband and children, the trust for the beneficiaries, the freedom from control of the insurer or of his or her creditors. S. 15 purports to enable the insured to revoke the benefit of insurance on his life made or appropriated in favour of any person whomsoever and to divert the insurance to new beneficiaries or to himself or his estate, saving only the rights of a beneficiary for value. If s. 15 applies without qualification to the insurance referred to in the preceding sections of the Act, the trust in favour of wife and children or husband and children is revocable by the insured and he has an absolute disposing power over the insurance money. Does the protection against creditors still remain?

As already shewn, the insured has under ss. 5-9 only a power of appointment over the insurance money amongst a class of persons who are the beneficiaries of the trust and are the persons for whose protection the legislation was enacted. S. 15 purports to give to the insured a greatly extended power and to place life insurance for the benefit of wives and children on much the same plane as that in favour of persons wholly outside the protection theretofore given by the Act. The insured may "divert the insurance money wholly or in part to himself." That would appear to give him power to surrender the policies of insurance, which had hitherto been a trust in favour of his wife and children, and receive from the insurance companies the surrender value and appropriate it to his own use. He may also divert the insurance money to his estate and make it liable for his debts. Questions may arise as to the rights of creditors of the insured where he has exercised his power in favour of a volunteer under

s. 15. The exercise of the power might have the effect of rendering the insurance money liable for his debts. See *Fleming* v. *Buchanan* (1853), 3 DeG. M. & G. 976, 980, 43 E.R. 382, 383; *Re Lawley*, [1902] 2 Ch. 799; *Beyfus* v. *Lawley*, [1903] A.C. 411; 23 Hals., p. 44.

S. 15 of the Life Insurance Act goes far towards destroying the benefits of the Act in so far as the protection of wives and children is concerned. It should be construed with the rest of the Act kept in view and the spirit and purpose of the original Act preserved as far as any reasonable construction of the section will permit. When mention of a will is found in ss. 7 and 8 and not in s. 15, I would find that the omission of the word in the latter was intentional and that the revocation was not intended to be made by will.

Arnold v. *Dom. Trust Co.* (1918), 41 D.L.R. 107, 56 Can. S.C.R. 433. Now even if the expression "instrument in writing," as used in the section includes a will the policy must be identified either by its number or otherwise. This expression was considered in *In Re Cochrane* (1908), 16 O.L.R. 328, heard before a Divisional Court consisting of Boyd, C., Magee and Mabee, JJ. In giving the judgment of the Court, Boyd, C., said, at p. 332:

> The manner of identification of the policy is very explicitly and pointedly provided for. It may be by instrument in writing attached to or endorsed on the policy or apart from actual attachment or endorsement, it may be identified by something equivalent in the way of specific reference by the number of the policy "or otherwise." That would, of course, include reference by date and amount and other means of incorporating one document with the other. Should the words "or otherwise" be extended further to cases where extrinsic evidence is required to complete the identification.

In that case the insured was the holder of a beneficiary certificate in a benevolent society made payable to his wife. In his will he bequeathed "out of my life insurance funds the sum of $200 to my sister and all the rest, residue and remainder of my insurance funds to my daughter." The Chancellor held that this did not sufficiently identify the beneficiary certificate and that it was not permissible to prove by extrinsic evidence that the testator must have referred to it as he had no other policies. The earlier cases of *Re Cheesborough* (1897), 30 O.R. 639, and *Re Harkness* (1904), 8 O.L.R. 720, were distinguished.

In Re Cochrane was followed by Sir W. Meredith, C.J.C.P., in *Re Earl* (1910), 16 O.W.R. 901. In that case there was a beneficiary certificate in the Canadian Home Circle in favour

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of testator's wife. He attempted to change the disposition of the money by his will, referring to the insurance as "the money that shall come from the Home Circle." (See headnote.) This was held not to be sufficient to identify the certificate.

The testator in the case at Bar devises to his executors upon certain trusts all the residue of his estate of every kind "including all stocks, bonds, life insurance or the proceeds of any policy of insurance." The words quoted do not identify any policy of insurance by its number or by something equivalent. There was at least one other policy on his life and there may have been others. The life insurance in the Order of Foresters, and the proceeds of it, belonged to the testator's wife and was not his to dispose of. He did not attempt to revoke the benefit or appropriation in her favour. He may have referred to policies over which he had a disposing power. When giving judgment in the *Cochrane* case, Boyd, C., said, at p. 334:

> Where a trust is clearly and distinctly expressed on the policy itself in favour of one beneficiary, so that it becomes a vested trust for that person, it should not be displaced or altered except by a document of equal evidential force in clearness and distinctness of designation.

In *Arnold* v. *Dominion Trust Co.*, 41 D.L.R. 107, it was held that a bequest to testator's wife in these words, "the first $75,000 collected on account of policies of life insurance," was not a writing identifying the policy by number or otherwise. (See headnote.)

For the reasons above set out I think the devise in the will in question did not deprive the testator's wife of her right to the insurance money, as beneficiary under the policy.

I would answer the first question in the stated case as follows:

The proceeds of the endowment certificate, being the moneys paid into Court, are payable to Elizabeth Richardson, the beneficiary designated by the deceased.

To the second question I would answer: No.

As to the third question, the assessment levied under the provisions of the Act of 1913, c. 113, was not a debt of the deceased. As I understand it, there was a deficiency of "accumulated funds" to meet the Society's obligations upon outstanding mortuary benefit certificates. Power was given to the Society by the Act to make a valuation of the assets applicable to insurance purposes. The "valuation deficiency" was then to be apportioned among

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the members who entered the Society before a certain date in proportion of the amount of the benefit certificate or certificates of each member. See s. 10 and the schedule to the Act which is made a part of it. The deduction from the policy was the amount of assessment chargeable to the deceased and deductible from the money payable under the benefit certificate. This deduction was not a debt of the deceased. He was not bound to keep up the insurance: See *Green* v. *Standard Trusts Co.* (1912), 1 D.L.R. 609, at p. 617, 620, 22 Man. L.R. 397, at pp. 411, 416.

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CAMERON, J.A. (dissenting):—This is a case stated for the opinion of the Court involving the construction of the will of the late Hugh Richardson, and the applicability of the Life Insurance Act, R.S.M., c. 99, to the endowment certificate No. 66713 of the Supreme Court of the Independent Order of Foresters. The facts and the relevant provisions of the Act are fully set out in the judgment of Macdonald, J., who held that the amount payable by the Order should go not to Bessie Richardson, the wife of the deceased, who is named as beneficiary in the certificate, but become part of his estate to be disposed of by the executors in satisfying the claim of Florence Besley, who is made legatee of one-half of the residue of the testator's estate after payment of certain specific devices and bequests. Macdonald, J., held that the disposition made by the will was effective under s. 15 of the Act.

The testator applied for an endowment certificate for $1,000 when a resident of Saskatchewan. It was issued Aug. 1, 1893 and surrendered, and a new certificate issued for $2,000, April 6, 1895, and this is the one in question.

At the time of his death, Nov. 10, 1915, he was a resident of this Province. The head office of the Order at the time of the issue of the certificate was in Toronto, Ontario, and has continued to be so ever since.

The various Acts incorporating, and relating to, the Order were consolidated in the Act of 3-4 Geo. V. 1913, c. 113, assented to May 16, 1913. By s. 10 of this Act it is provided that the powers of the Order shall be exercised in conformity with the provisions thereof.

The objects of the Order are declared to be to unite the members for fraternal and benevolent purposes and to give such aid and

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benefit to them and to those dependent on them as may be provided in the constitution and laws (s. 4).

The constitution and laws of the Order provide by s. 4, sub-s. (5) as follows:

> The insurance or mortuary benefit of a member shall be paid to the member himself, or to the wife or husband of, or to the affianced wife of, or to the affianced husband of, or to the children of, or to the blood relations of, or to persons dependent upon, such member, who may have been designated, as provided in the constitution and laws, by name as the beneficiary of such member, or subject to the approval of the Supreme Chief Ranger, to such other beneficiary as may be permitted by the laws of the province, state or country in which the member resides at the time of making the designation of the beneficiary or beneficiaries.

By s. 150 the method of changing beneficiaries is carefully prescribed:

> (1) Subject to the provisions of this section and of ss. 4, sub-s. (5), and 160, and if not repugnant to the laws of the province, state or country in which the member has a fixed place of abode, a member may at any time while in good standing, except as hereinafter provided, change his beneficiary or beneficiaries in the following manner:
>
> (a) By filing with his Court his application for change of beneficiary on form No. 14, fully filled in, signed by himself and properly executed, setting forth fully and clearly the changes he desires to make, provided that a designation of a beneficiary not in conformity with s. 4, sub-s. (5), shall be null and void from the beginning.

And there are further provisions as to payment of fees, surrender of certificate and approval of the Chief Ranger or Council. These provisions were not complied with in this case.

By s. 160, sub-s. (1) it is provided that 30 days after receipts of proofs of death, etc., the benefits shall be due and payable, and subject to the provisions of other sections (including s. 150) shall be paid to the party or parties entitled to receive the same, and a tender of the cheque of the Order or of a bank draft for the same shall be a sufficient tender. By s. 162 elaborate provisions are made in respect of proofs of death, and by sub-s. (3) upon receipt of all the proofs necessary a cheque or draft is to be drawn payable to the persons legally entitled to receive the benefits. This cheque or draft is by sub-s. (5) to be sent to the recording secretary or other officer of the Court of which the decedent was a member, or such other person as may be determined, to be delivered by such officer or person, in the presence of a witness, to the person or persons legally entitled to receive the same on the surrender of the certificate. If the will is to prevail, the

parties entitled to receive the benefits are the executors who are both residents of Winnipeg.

We have to consider the effect of s. 15 of our Life Insurance Act in its bearing on this case. That section first appeared in our legislation as an amendment to s. 12, c. 88, R.S.M. 1891, in c. 17 of 62-63 Vict. 1899. It is a far-reaching provision not to be found in the statutes of Saskatchewan and Ontario. The question at once arises as to the applicability of our Life Insurance Act to fraternal and benevolent organisations such as this Independent Order of Foresters.

In Cameron on Life Insurance we find the law of Ontario (from legislation of which Province our own has been drawn) dealing with benevolent, provident and friendly societies in respect of their business as insurers fully discussed (pp. 227 *et seq.*). The by-laws, rules and regulations of these societies, as the author points out, usually contain provisions with respect to the method by which, and the persons amongst whom, a change in the beneficiary may be made by a member, p. 232.

By 47 Vict., c. 20, the Ontario Act, to secure to wives and children the benefit of life insurance was amended by adding the following:

> The provisions of this Act shall apply to every lawful contract of insurance now in force or hereafter effected which is based on the expectation of human life, and shall include life insurance on the endowment plan as well as every other.

Provision was also made for change of beneficiaries and varying the appointment amongst them. It was held by Proudfoot, J., in *Re O'Heron* (1886), 11 P.R. (Ont.) 422, that the above c. 20 did not apply to benevolent societies incorporated under the Ontario law. This decision was, however, overruled by the Court of Appeal in *Swift* v. *The Provincial Provident Institution* (1890), 17 A.R. (Ont.) 66, where it was held that the Act in question did apply to insurance and societies incorporated under the Ontario Act. It is to be noted that, though this decision was rendered in 1890, it dealt with a certificate of insurance issued to a member of the institution whose death occurred in 1887. Maclennan, J.A., at p. 75, held that the words: "insurance based on the expectation of human life" (in 47 Vict. 1884, c. 20) just mean *life insurance*, as distinguished from other kinds of insurance, such as fire, marine, accident, etc. Osler, J.A., held that contracts

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of insurance effected by benevolent societies are contracts of mutual life insurance of the benefit of their members. I can see no difference in meaning between the section of the Ontario Act (s. 4, c. 20 of 47 Vict.), in its definition of the words "contract of insurance" and our own s. 15, which uses the all-inclusive words: "a policy of insurance." This phrase as used in the section, means obviously a policy based on the expectation of human life, and includes every kind of life insurance. In the Manitoba Insurance Act, s. 2, sub-s. (*b*), c. 98, R.S.M. 1913, it is enacted that in that Act

> The expression "company" means and includes any corporation, or any society or association, incorporated, or unincorporated, or any partnership or any underwriter, except as provided by s. 3, that undertakes or effects for valuable consideration, or agrees or offers so to undertake or effect, in the Province, any contract of indemnity, guarantee, suretyship, insurance, endowment, tontine or annuity on life, or any like contract which accrues payable on or after the occurrence of some contingent event.

It is difficult to imagine any more inclusive words. It is true the interpretation is, in terms, confined to the Act, c. 98, R.S.M., but this Independent Order of Foresters comes within it, and has been licensed under it since July, 1909.

The amending Act of the Ontario Legislature, expressly making the expressions: "contract of insurance," "policy of insurance" and "policy" in the Ontario Act extend to and include membership, beneficiary and other contracts entered into by any society for fraternal, provident and benevolent purposes, was passed in 1888, 51 Vict., c. 22, ss. 1 and 2, in view of the decision in *Re O'Heron*, but did not affect the decision in *Swift* v. *Provincial Provident Institution*, which was given in 1890, as pointed out.

It was after the last mentioned enactment that *Mingeaud* v. *Packer* (1891), was decided, 21 O.R. 267; 19 A.R. (Ont.) 290. Street, J., the trial Judge, held that the statutory provisions did not affect legal rights otherwise existing, and that the rules of the Ancient Order of United Workmen applied to the policy in question. His decision was based on s. 23 in the amended Ontario Act, R.S.O. 1887, c. 136, declaring that nothing in the Act shall be held to restrict or interfere with the rights of any person to assign a policy for the benefit of his wife or children in any other mode allowed by law, which is substantially the same as our s. 30. But this view was overruled by the Appellate Division, whose

decision was affirmed by a divided Court of Appeal. In the later case of *Re Harrison* (1900), 31 O.R. 314, it was held that the rules and regulations of the Society in so far as they were inconsistent with the provisions of the Act must be held to be modified and controlled by them. *Gillis et al* v. *Young* (1901), 1 O.L.R. 368, involved questions arising out of an endowment policy in the Catholic Order of Foresters, payable to the brother of the member who made a will bequeathing the policy certificate to his wife, but who never surrendered the policy certificate for a new certificate in accordance with the rules of the Society. Boyd, C., says, at p. 374:

> If then the rules of the society and the enabling powers of the statute are in conflict, I am bound by the authorities to say that the by-laws must yield to the superior power of the legislature. The Society has obtained the advantages of Ontario law in the prosecution of its business, and the whole body, as well as all members of that body, must be taken to know the legal effect of such a privilege: *Re Harrison* 31 O.R. 314.

In *Lints* v. *Lints* (1903), 6 O.L.R. 100, it was held that the provision of the by-laws of the Independent Order of Foresters, permitting a diversion to a person not within the class prescribed by the Act, was inoperative and that the statute governed.

As I have already stated, so far as the above Ontario provision (s. 1 of 47 Vict., c. 20) is concerned, it has, in my opinion, no wider meaning than the words "a policy of insurance" used in our s. 15. Nor do I consider the wording of the Ontario ss. 1 and 2, Vict. c. 22, any wider or more inclusive than the words "a policy of insurance." "A policy of insurance" is the most comprehensive phrase conceivable in the relation in which it is used in the Life Insurance Act. This endowment certificate has its peculiar features, but beyond question, in my judgment, it comes within the term, and is, "a policy of insurance," and therefore within s. 15.

Now, in view of the foregoing considerations I am prepared to hold that, while the statutory provisions of Ontario differ to some extent from ours in wording and do not have amongst them our s. 15, nevertheless the reasoning of the Ontario decisions is convincing, and the provisions of our statute therefore override the rules and regulations of the Society. It is no objection that to so hold is to give a power to interfere with a contract to one party to it because that is precisely what is done by ss. 7 and 8,

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as well as by s. 15. If the Order is subject to the laws of this Province, then "the whole body (of the Order) as well as all members of the body must be taken to know the legal effect of such a privilege," as was said by Boyd, C., in *Gillie* v. *Young*, and the certificate is subject to the provisions of our Life Insurance Act.

But in this Province there have been decisions which point to another conclusion. I refer to the judgment of Killam, J., in *Leadlay* v. *McGregor* (1896), 11 Man. L.R. 9, where, however, the statutory provisions before us for consideration were not involved.

In *In Re Anderson Estate* (1906), 16 Man. L.R. 177, it was held by the Court of King's Bench in the judgment of Dubuc, C.J., that a certificate issued by the Grand Lodge of the A.O.U.W. of Manitoba, incorporated under the Act then in force respecting charitable, benevolent and savings associations, was not governed by the Life Insurance Act, R.S.M. 1902, c. 83. He held that the Order was a benevolent institution, and therefore not within the Act, and consequently that the policy was governed by the rules of the Order and not the statute.

Now what are the grounds assigned in *In Re Anderson* for holding a fraternal and benevolent society, such as the Ancient Order of United Workmen, not within the Life Insurance Act? After pointing out the differences between the disposition permitted the insured to dispose of the fund under an ordinary life policy, and that given to members of the lodge, Dubuc, C.J., held (p. 184), that these

> differences go to show that the disposition of the fund secured by the certificate of a member in a benevolent society such as the one in question here, is not to be regulated by the provisions of R.S.M. 1902, c. 83 (now c. 99 R.S.M.)

But no reason is assigned why those differences should effect that result. Whether the powers given the insured are greater or less can, I submit, make no distinction in the application of the statute which is general in its terms and covers all policies of life insurance. And that this is a policy of life insurance, is, to my mind, beyond question.

Later in his judgment the Chief Justice points out that the Ontario Insurance Act has special reference to benevolent societies, but that our statute contains no reference to such. "It being so",

he says, "I do not think its provisions apply to this Grand Lodge of the Ancient Order of United Workmen, which is a benevolent association" (p. 187), the result of this view being that the general laws of the Order prevailed over the statute. In my opinion this reasoning is inconclusive. It is, in effect, stating that a benevolent institution is not within the Act because it is a benevolent institution. No reason, based on principle, or on the wording of the statute, is assigned why a benevolent society, carrying on the business of insurance under its corporate powers, should not be subject to the Act. With every respect for the opinion of the late Chief Justice it does appear to me that his decision amounts to a judicial amendment to the Act, which is not confined in its provisions to policies issued by "ordinary life companies," but extends to and includes all life insurance policies.

This decision was followed in *Re Drysdale* (1909), 18 Man. L.R. 644, by Mathers, J., in respect of a policy in the Canadian Order of Chosen Friends. The other policy before him in the same case, issued by the Woodmen of the World, he held was governed by the Life Insurance Act on the ground that there was nothing in the by-laws or constitution of this association by which the proceeds are payable to any particular class, or by which the proceeds are in any way controlled. It was, however, evidently a benevolent association, and so far as this part of the decision is concerned, it is, as I see it, at variance with the decision in the *Anderson* case, where Dubuc, C.J., held that the provisions of our Life Insurance Act did not apply to the Grand Lodge of the Ancient Order of United Workmen, "which is a benevolent institution," *Re Anderson's Estate, supra*, p. 187, and that, therefore, the constitution and general laws of the Grand Lodge governed, and not the statute.

Cameron in his work on Life Insurance, at p. 248, observes with reference to the judgment in *Re Drysdale*, 18 Man. L.R. 644, that:

> If this distinction is relied upon, it would mean that the Manitoba (Life) Insurance Act, in the opinion of the Judge, would apply to insurance certificates issued by benevolent societies wherever there was no inconsistency between the by-laws, rules and regulations of the society as regards the disposition of the benefit, and that of the Manitoba Insurance Act, but that where there was such inconsistency, the by-laws, rules and regulations would govern.

As stated above, the basis of Dubuc, C.J.'s judgment in the

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Anderson case, was that the Ancient Order of United Workmen was not an insurance company, but a benevolent association, and was not therefore within the Act. But no such exception is to be found in the words of the Act, and I see no reason why that exception should be read into it. One leading purpose of the Act is to protect the insurance fund from creditors, and the necessity for that protection is just as great in the case of these fraternal society policies as in any other. In some of these fraternal organisations, the social features have been subordinated almost altogether to the active business of insurance on a heavy scale. Their certificates or policies have been issued in vast numbers and with varying conditions, and I think it impossible to draw any fundamental distinctions between such certificates and the policies of ordinary life insurance companies.

I find myself entirely unconvinced by the reasoning in *Re Anderson* and *Re Drysdale* (in so far as the decision in that case follows that in *Re Anderson*). I am satisfied that the words in s. 15 are absolute and unequivocal and include such a policy of insurance as this certificate. There is no doubt in my mind that such was the intention of the legislature. If it had intended to exclude benevolent institutions from the operation of the beneficial provisions of the Act, it would surely have said so in unequivocal terms.

The question next arises as to whether the exercise of the power of revocation of the benefit under the certificate is governed by the laws of this Province. The insured at the time of his death was a resident of this Province. The head office of the Order was and is at the City of Toronto in Ontario.

By s. 4, sub-s. (5), of the constitution already referred to, the insurance shall be paid to the prescribed persons who are designated as beneficiaries, or with the approval of the Chief Ranger, to beneficiaries as may be permitted by the laws of the Province in which the number resides at the time of making such designation. By s. 150, also already quoted, a member may, subject to the constitution, and if not repugnant to the laws of the Province where he has a fixed place of abode, change his beneficiary in the manner prescribed.

By ss. 160 and 162 as above set out, the amount of the benefit under the certificate is to be paid to the parties entitled to same,

and the cheque or draft for the amount is to be personally delivered by the proper officer to the beneficiary on surrender of the certificate. It is to be noted that in s. 160 appear, in connection with the provisions as to designation of beneficiaries, the words: "not in conformity with the laws of the Province;" (sub-s. 2) "not repugnant to the laws of the Province" (sub-s. 3) and (sub-s. 5) are "repugnant to the laws of the Province" (sub-s. 4) referring in each case to the Province in which the member had a fixed place of abode.

In view of the foregoing stipulations of the constitution and laws of the Order, made part of the contract of insurance, payment of this certificate and the person to whom it is to be paid are plainly intended to be determined by the laws of the Provin e where the member had his fixed place of abode at the time of his death.

I refer to the judgment of Bain, J., in *National Trust* v. *Hughes* (1902), 14 Man. L.R. 41, where the policy there in question made the moneys under it payable at the head office of the company in Ontario, and contained no such provisions as are set out in the constitution and laws of this Order as parts of the policy before us. Yet Bain, J., held that the right given the insured by the statute to revoke his wife's benefit and divert it to his estate was effectively exercised if exercised according to the law of the domicile of the insured.

Bain, J., in that decision referred to the Manitoba Insurance Act, but does not take its provisions into consideration in arriving at his decision. That Act, now c. 98 R.S.M. defines "company" as above set out. The definition includes any company, association, partnership or underwriter doing in this Province any kind of what may be called ordinary insurance. By s. 3, the provisions of the Act do not apply to companies entering into all such contracts of insurance that are licensed by the Dominion of Canada save those specified. Those specified sections include s. 2 (the interpretation clause), ss. 5 to 21 inclusive, which compel the registration and licensing of companies including licenses of the Dominion of Canada; prescribe the documents to be filed in order to obtain a license, including a power of attorney from the company to the inspector of insurance which shall declare the

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chief agency of the company in this Province; authorise the inspector to receive service of process and declare such service legal and binding on the company; by s. 14 a company taking out a license is to have the same powers and rights as if incorporated by an Act of the Provincial Legislature and other stipulations are set out regulating and controlling such Dominion companies. The effect of these provisions seems to me to be that the Dominion companies receiving a Manitoba license attorn, and subject themselves to, the laws of this Province. The result is as if they were re-incorporated in Manitoba, and it follows that the provisions of the Life Insurance Act apply to and affect Dominion licensed companies that elect to become licensed in this Province.

S. 47 of the Manitoba Insurance Act (R.S.M. c. 98) provides as follows:

> The moneys payable under any policy of life assurance already issued, or that may hereafter be issued by a company that has already obtained, or may hereafter obtain a license or certificate of registration under the provisions of this Act, or any Act for which this Act is substituted, shall, in all cases, be payable in this Province, when the assured resides therein, notwithstanding anything contained in any such policy or the fact that the head office of the company is not within this Province.

It is plain that there is an apparent inconsistency between this section and s. 3. Where repugnancy exists in a statute, it is the general rule that the later enactment rules.

> Where two co-ordinate sections (of a statute) are apparently inconsistent an effort must be made to reconcile them. If this is impossible the later will generally override the earlier.
>
> Hals. XXVII., p. 136.
>
> It is a cardinal principle in the interpretation of a statute, that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other.

Per James, L.J., in *Ebbs* v. *Boulnois* (1875), L.R. 10 Ch. 479, at p. 484. If the two inconsistent enactments cannot be so treated then "the known rule is that the last must prevail," *per* Keating, J., in *Wood* v. *Riley* (1867), L.R. 3 C.P. 26. See Craies' Hardcastle, p. 198, *et seq.*

> In accordance with the well settled principle that the last expression of the legislative will is the law, in the case of conflicting provisions in the same statute . . . the last enacted in point of time prevails. 36 Cyc. 1130.

There is another rule of interpretation which is directly applicable here.

> Where general terms of expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the par-

ticular provisions will be given effect as clearer and more definite expressions of the legislative will.

Ib. 1130 and 1131, now s. 3 of the Manitoba Insurance Act refers to all companies licensed by the Dominion undertaking any of the kinds of insurance, fire, life, guarantee and the others set out in s. 2. Not so with s. 47, which refers only to policies of life insurance issued by companies licensed under the Manitoba Act. The effect is as if s. 47 began with the words: "Notwithstanding anything hereinbefore contained." In my opinion, in view of the foregoing considerations, s. 47 does apply to life policies whenever issued by a company licensed to do business in this Province, as this Order was and is, and makes them payable in this Province, and subject therefore to the provisions of our Life Insurance Act.

I agree with the trial Judge that the endowment certificate in question is sufficiently identified in the will; that the will is effective as an instrument in writing, and that the insured has thereby exercised his statutory power in accordance with the provisions of our Life Insurance Act.

Amongst the numerous authorities to be found, which in my opinion support this conclusion, I refer to *McKibbon* v. *Feegan*, 21 A.R. (Ont.) 87, 96; *Re Cheesborough* (1897), 30 O.R. 639; *Re Harkness* (1904), 8 O.L.R. 720; *Re Watters* (1909), 13 O.W.R. 385; and *Re Roger* (1909), 18 O.L.R. 649, at p. 650 (where it is pointed out that the decisions in *Re Harkness* and *Re Cheesborough* are not affected by that in *Re Cochrane* (1908), 16 O.L.R. 328); *Arnold* v. *Dominion Trusts*, 32 D.L.R. 301, affirmed, 35 D.L.R. 145; *Re Baeder* and *Canadian Order of Chosen Friends* (1916), 28 D.L.R. 424, 36 O.L.R. 30; *Re Monkman* (1918), 46 D.L.R. 701, 42 O.L.R. 363; and *National Trust* v. *Hughes* (1902), 14 Man. L.R. 41, at p. 50.

I would affirm the judgment of the trial Judge and dismiss the appeal.

Haggart, J.A.

HAGGART, J.A.:—The facts relevant to the transaction in question in the legislation affecting the life insurance have been carefully and fully set forth in the reasons of the trial Judge, Macdonald, J., of the Chief Justice and of Cameron, J., whose judgments I have been permitted to peruse.

An attempt to supplement the statements therein given would

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be running the risk of indulging in some repetition, which would not be profitable under the circumstances. I accept their statements as containing all that is necessary in considering the questions we are asked to answer.

Macdonald, J., finds that with respect to the policy of insurance with the Confederation Life Association there was an assignment of all benefit to the wife, and that the proceeds are payable to Elizabeth Richardson as assignee, subject of course to the repayment of the loans made upon it by the insurance company. I would affirm his finding in this respect.

More serious questions present themselves when we come to consider the endowment certificate with the Supreme Court of the Independent Order of Foresters. There the wife is in the original certificate designated as the beneficiary, but the trial Judge holds that the bequest contained in par. 6 of the will of Richardson revoked the benefit conferred by the endowment certificate, and substituted the executors as new beneficiaries. For greater certainty, I will set forth verbatim the text of the bequest in the will, and also the words of s. 15, c. 99, R.S.M. (1913).

Par. 6 containing the bequest is as follows:

6. I give, devise and bequeath unto my said executors all the rest, residue and remainder of my estate, both real and personal of every kind and nature and wheresoever situate including all stocks, bonds, life insurance or the proceeds of any policy of insurance, all moneys on hand or on deposit in any bank or trust company and the interest due or accruing due thereon, for the purpose and upon the trusts following, that is to say:—

(a) To pay one-half thereof as soon as realised, unto the said Florence Besley for her own use absolutely.

(b) And from out of the remaining one-half thereof, my said executors may in their sole and absolute discretion set aside or apart such portion thereof as they see fit and proper, and pay or contribute such part or portion of the same in such manner as at such time or times as they see fit and proper towards the maintenance and support of my wife Elizabeth Richardson, who shall have no right, title, claim, interest or demand upon any part of such moneys, upon my estate, or upon or against my said executors for the same or any part thereof, the sole discretion in the application of such contribution or payment in or towards such support and maintenance being wholly in the discretion of my said executors and only so long as they see fit and proper. If my said executors decide not to contribute or apply any part of said moneys at any time towards such support and maintenance which they shall have power to do, they then may pay over the balance, or whatever may remain of it unto the said Florence Besley, whose receipt therefor shall be an absolute release and discharge to my said executors and estate.

S. 15 of c. 99 R.S.M. 1913, of The Life Insurance Act, reads:

If, in case of a policy of insurance heretofore or hereafter effected by a man or woman, it is expressed on the face to be for the benefit of, or has been heretofore or shall be hereafter under this Act appropriated for the benefit of, his wife or her husband, or his wife and children, or her husband and children, or his or her father, mother, sisters and brothers, or any one or more of them, or any other person or persons whomsoever, then the insured may, by an instrument in writing attached to or endorsed on the policy or identifying the same by its number or otherwise, absolutely revoke the benefit or declaration or appropriation previously made and apportion the insurance money, or by like instrument from time to time reapportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, provided that the insured shall not alter or revoke or divert the benefit of any person who is a beneficiary for value.

With all due respect to the reasoning of the trial Judge and my brother Cameron, I do not think that the bequest made under the circumstances was a transfer or assignment of the insurance moneys mentioned in the certificate, such as was contemplated by the Legislature even under s. 15. I do not think such an indefinite, inconclusive and inchoate document as the bequest in the will of a man who is still alive would transfer that insurance from the wife to the housekeeper. I think it was never intended that s. 15 should have the power that is contended for it.

It is to be observed that the endowment certificate created a trust, designated the fund and named the beneficiary. That bequest in the will should not so alter the whole character of the property that it would divest the wife of the same and become absolutely the property of the executors, and I might say that I do not think it is material or important to consider whether the Insurance Laws of Saskatchewan, Ontario or Manitoba should govern.

I think there should be a direction in the judgment of the Court that the proceeds of this endowment certificate should be paid to the wife.

FULLERTON, J.A.:—The trial Judge has held that s. 15 of the Life Insurance Act (R.S.M., c. 99), enabled the testator to divert the insurance moneys from the beneficiary named in the endowment certificate to the testator's estate. Fullerton, J.A.

His judgment is, of course, based on the assumption that the operation of the will in relation to the endowment certificate is governed by the law of Manitoba.

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Questions as to the applicability of the Life Insurance Act to contracts of the peculiar nature covered by the endowment certificate and as to the effect of s. 15 were very fully discussed at the argument.

My view is that it is not necessary for the determination of this appeal to discuss either of these questions because I think the statute in question has no bearing here, that is, the validity of the attempted revocation is in no way affected by the law of Manitoba.

The endowment certificate reads:

That in consideration of the statement and representations contained in the application for membership . . . . and the provisions of the constitution and laws prescribed from time to time by the Supreme Court of the Independent Order of Foresters (all of which statements, representations and provisions have been assented to by the applicant, and are by the parties hereto, referred to and made part of this contract) . . . . . this endowment certificate is issued by which the Supreme Court of the Independent Order of Foresters agrees to pay and does by these presents agree to pay to brother Hugh Richardson, of Battleford, Sask., on his reaching his seventieth birthday, and on each subsequent birthday an annuity benefit of $200 till the full sum of $2,000 is paid, less any sum paid on account of the total and permanent disability benefit . . . . .

It doth further agree to pay to the widow, or other beneficiary designated . . . . . on due and satisfactory proof of his death, an endowment benefit of $2,000.

The certificate purports to have been executed at the City of Toronto, the headquarters of the Order, on April 6, 1895.

It will be observed that the late Hugh Richardson is described in the certificate as "of Battleford, Sask." The stated case gives no information as to his removal to Winnipeg, nor does it state that he at any time acquired a domicile in Manitoba.

We have then the fact that the contract evidenced by the endowment certificate was executed at Toronto, in the Province of Ontario, on the life of a man residing at Battleford, in the Province of Saskatchewan. How then can the law of Manitoba apply? The only circumstances that can be appealed to in support of this contention that the law of Manitoba applies is that the will was made in Manitoba.

In National Trust v. *Hughes*, 14 Man. L.R. 41, the testator, who lived in Manitoba, had effected an insurance on his life in an Ontario company, which, on the face of the policy, was expressed to be for the benefit of his wife. By his will he absolutely re-

voked the appropriation and directed that the insurance moneys should form part of his estate.

The plaintiffs, the executors and trustees under the will, brought an action for a declaration as to the effect of the clause in the will.

By the law of Ontario, a person who has effected insurance on his life for the benefit of his wife could not divert the benefit of the policy to his estate, while under the law of Manitoba this could be done. Bain, J., held that the law of Manitoba must be applied to the determination of the question as to the right of the assured to make such new disposition. (See headnote.)

The Judge based his decision on the case of *Lee* v. *Abdy* (1886), 17 Q.B.D. 309. In that case a man living in Cape Colony assigned to his wife a policy of life insurance, which he held in an English company. By the law of Cape Colony the assignment was void. The question then was, whether the law of England or the law of Cape Colony applied.

The Court held that the law of Cape Colony applied, basing its decision on the general rule that the validity and incidents of a contract must be determined by the law of the place where it is entered into.

Bain, J., in his judgment in the *Smith* case, admits that the revocation by the insured of his wife's benefit in the policy is a very different thing from a contract of assignment of the policy, but says that: "it was the exercise of a right incident or relating to the policy which belonged to him by the law of the place where he lived."

In view of the recent decisions, both in England and in Ontario, I think the decision in the *Smith* case cannot now be regarded as the law.

The operation of the exercise by will of a power of appointment, created either under an English or under a foreign instrument, depends on the law which governs the operation of the instrument, and not on the law which governs the operation of the will.

Dicey, Conflict of Laws, p. 705, r. 192.

In *Pouey* v. *Hordern*, [1900] 1 Ch. 492, it was held that a domiciled Frenchwoman having, under an English settlement, a special power of appointment by will over funds in England, can exercise the power in such a way as to dispose of the property in a manner inconsistent with her position under the law of France.

Farwell, J., at p. 494, points out that the exercise of the power

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does not involve a disposition of property belonging to the testator. See also *In Re Mégret*, [1901] 1 Ch. 547; *Re Bald* v. *Bald* (1897), 66 L.J. Ch. 524.

In *Re Baeder* and *Canadian Order of Chosen Friends*, 28 D.L.R. 424, 36 O.L.R. 30, the facts were as follows:

An Ontario benevolent society in 1890 issued to "B.," then domiciled in Ontario, a benefit certificate for $2,000 which provided that this sum should, upon his death, be paid to his three children, equally. "B." subsequently changed his residence and domicile to the State of New York, and died there in 1915. The policy or certificate was in force at the time of his death. By his will, made in that State shortly before his death, he provided as follows: "I give, devise and bequeath to my granddaughter, C. W., all my life insurance that I may have and in force at the time of my death." The will was duly executed according to the laws of Ontario and New York.

The contention on behalf of the children was that the law which governed the operation and effect of the will upon the policy was the law of New York, and that according to the law of New York, beneficiaries in an insurance policy cannot be changed by will.

On behalf of the granddaughter it was contended that the policy was governed by the law of Ontario.

The Court, consisting of Meredith, C.J.C.P., Riddell, Lennox and Masten, JJ., unanimously held that the law of Ontario and not the law of New York applied, and that a valid change of beneficiaries had been made by the will.

It is difficult to draw any distinction between a power of appointment and an appointment or declaration respecting the beneficiary in a policy of life insurance, such as the one in question.

In Leadlay v. *McGregor* (1896), 11 Man. L.R. 9, Killam, J., held that a member of an unincorporated society known as The Order of Scottish Clans, who held a certificate of membership entitling the beneficiary named therein to the sum of $2,000, payable at the death of the member, had no interest in the fund raised or to be raised but merely a power to appoint an object to receive the same.

In the light of the above authority, I think there can be no question but that the right and liability of the parties in respect

of the effect of the attempted revocation are governed by the laws of either Ontario or Saskatchewan.

If it were necessary to determine whether the contract in the present case was made in Ontario or Saskatchewan, there would be difficulty in doing so upon the facts set out in the stated case. The law on the point is, however, the same in both Provinces.

The statutory provisions in Ontario are to be found in the Ontario Insurance Act, R.S.O. 1914, c. 183. S. 178, sub-s. (1) is as follows:

> Preferred beneficiaries shall constitute a class and shall include the husband, wife, children, grandchildren and mother of the assured . . . .

S. 178, sub-s. (2), is as follows:

> Where the contract of insurance or declaration provides that the insurance money or part thereof, or the interest thereof, shall be for the benefit of a preferred beneficiary or preferred beneficiaries such contract or declaration shall, subject to the right of the assured to apportion or alter as hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration.

S. 179 provides that the assured

> shall not . . . . . revoke or alter any disposition made under the provisions of this Act in favour of any one or more of the preferred class except in favour of some one or more persons within the preferred class so long as any of the persons of the preferred class in whose favour the contract or declaration is made are living.

The legislation in Saskatchewan with respect to insurance for the benefit of wives and families was copied from Ontario and is to be found in the Saskatchewan Insurance Act (Sask. stats. 1915, c. 15.)

S. 186, sub-s. 1 and 2, correspond with s. 178, sub-s. 1 and 2 of the Ontario Act, and s. 187 with s. 179 of the Ontario Act.

Under the provisions above quoted the declaration in the will in favour of the executor is clearly invalid in so far as it affects the certificate in question. *Appeal allowed.*

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HERDMAN v. MARITIME COAL Co.

Supreme Court of Canada, Davies, C.J., and Idington, Anglin, Brodeur and Mignault, JJ. May 6, 1919.

NEGLIGENCE (§ I B—5)—RAILWAY TRACK—HABITUAL USER BY PUBLIC—STATUTORY PROHIBITION—TRESPASSER—DUTY OF COMPANY.

Section 264, c. 99, R.S.N.S. 1900, enacts that every person not connected with the railway or employed by the company who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars.

Held, that a doctor returning along the track after making a professional call, was a trespasser and the company owed him no duty except not to run him down knowingly or recklessly. This the jury found had not been done and the company was not liable. Mere passiveness of the company in allowing the public to walk along the track, did not make them licensees, for injury to whom the company would be liable.

[*Grand Trunk R. Co.* v. *Anderson* (1898), 28 Can. S.C.R. 541, followed; *Lowery* v. *Walker* [1911], A.C. 10, distinguished; 40 D.L.R. 96, reversed.]

APPEAL by defendant from a decision of the Supreme Court of Nova Scotia (1918), 40 D.L.R. 96, 52 N.S.R. 185, affirming the verdict at the trial in favour of the plaintiff. Reversed.

The facts are sufficiently stated in the above headnote.

Stuart Jenks, K.C., and *A. G. Mackenzie*, K.C., for the appellants.

F. L. Milner, K.C., and *J. A. Hanway* for the respondent.

Davies, C.J.

DAVIES, C.J.:—This is an appeal from the judgment of the Supreme Court of Nova Scotia affirming the judgment of the trial Judge in plaintiff's favour for the damages found by the jury.

The action is one brought under the Fatal Injuries Act of Nova Scotia by the administratrix of the estate of the late Dr. Herdman for the benefit of herself as widow of the deceased and his infant daughter Helen, for damages caused by the negligence of the defendant company and its employees in the operation of one of its trains over the company's railway between River Hebert and Strathcona, two villages along the line of railway about three-quarters of a mile apart, on Feb. 10, 1917, whereby the said Dr. Herdman was killed.

The evidence shewed that the public generally in that neighbourhood had for a period of from 20 to 25 years before the accident habitually walked along the railway track between the said two villages and that this use of the railway by the public was well known to the defendant company's officials and employees. The company never took any steps to interfere with such public user of the road and no prosecution was ever brought against

anyone for such user under the provisions of the Nova Scotia Railway Act which, in s. 264, provided as follows:—

264. Every person, not connected with the railway, or employed by the company, who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars.

This provision of the Act was virtually a dead letter so far as this section of this railway was concerned.

The undisputed facts as I gather them were that the deceased was killed on the evening of Feb. 10, 1917. An engine and tender had left Joggins Mines during the afternoon helping a heavily loaded train out beyond Strathcona. The engine and tender took a side track to permit the loaded train to go by and then backed to Joggins Mines. The whistle was out of order on the return trip and could not be used. Darkness had set in. There were no lights on either the engine or tender. Snow was falling fast and the wind was high and blowing in the direction from Joggins Mines to Strathcona. The fireman gave evidence that the frost on the window prevented him seeing; that he didn't see anything; that he could not see out. The driver gave evidence that he could not see and again that he could not see much, sometimes he could see the tender and sometimes he could not. The snow was resting on the ground unevenly so that in some places the rails were covered and in other places they were bare. It was on this return trip from Strathcona back to Joggins Mines that the deceased was overtaken by the defendant's engine and tender, and killed. The accident occurred between Strathcona and River Hebert. The deceased was a physician residing in the village of River Hebert. On the afternoon in question he had gone out to Strathcona on the loaded train before referred to, to make a professional call, and after making this call he was seen to return to the railroad and start towards River Hebert. He was not seen again alive.

The plaintiff contends that she is entitled to recover because of the habitual and unchecked use by the public of the railroad to the knowledge of the company's servants and employees, and of the facts that the engine which ran down the deceased was not at the time of the accident equipped with either a whistle or with lights, and was running backwards, making it difficult, if not impossible, for the men in the engine cab to observe a man

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on the track owing to the obstruction caused by the tender and that owing to its defective whistle it had not given the usual signal at the railway crossing a short distance from the place of the accident to warn persons on the track.

In my opinion, the evidence in the case amply warranted the several findings of the jury.

The chief defence relied upon by the company was that the deceased in walking on the track as and when he did was, under the section of the statute quoted above by me, a trespasser to whom they did not owe any duty beyond that of not wilfully injuring him.

Apart altogether from the statute I do not entertain any doubt whatever of the liability of the company.

The findings of the jury supported, in my opinion, by ample evidence substantially were that the absence of lights and the defective whistle were the proximate cause of the accident which the deceased, though careless, could not have avoided; that the public habitually travelled along the defendant's railway at the place in question, of which fact the company had notice but never interfered to stop or prevent; that the deceased had no reason to believe an engine would overtake him without blowing a whistle at Pugsley's crossing, and without carrying lights, and that the absence of the whistle and the lights prevented deceased from knowing the engine was coming along; that such an engine without lights and not sounding a whistle at Pugsley's crossing was more likely to kill a foot .passenger at the point where the deceased was killed than an engine with lights which sounded a whistle at Pugsley's crossing, and that the running of such an engine under the circumstances was a careless but not a reckless disregard of human life.

Under these findings upon which I think the case must be determined it seems to me clear that the deceased was not a mere trespasser on the track, but that he was, at the time he was killed, there by the tacit permission and consent of the company and at the lowest was a bare licensee to whom, however, they owed a duty not, indeed, of the same character as that which they owed to a passenger on their train but still a duty clear and defined, namely, not to increase the normal or ordinary risks which the licensee would incur when exercising the permission or license granted to him. In the case of *Gallagher* v. *Humphrey* (1862),

6 L.T. 684, Cockburn, C.J., in delivering the judgment of a very strong Court, stated the law to be as follows, at p. 685:—

I doubt whether on the pleadings and this rule it is competent to enter into the question of negligence, and whether the whole matter does not turn upon the question whether permission was or was not given to the plaintiff to pass along the way. But I should be sorry to decide this case upon that narrow ground. I quite agree that a person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger.

I have not found any case where this statement of the law is either challenged or impugned.

In a later case of *Thatcher* v. *The Great Western Rly. Co.* (1893), 10 Times L.R. 13, Lord Esher M.R., said:—

that if a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former. It was the business of a railway company to carry as passengers persons who came to their stations for the purpose of travelling to various destinations. It was a matter of everyday occurrence that, when persons intending to be passengers came to railway stations, their friends came with them to see them off. The company knew that it was the practice of passengers' friends so to come to their stations, and they permitted them to come. They knew that whenever two persons came to the station it might well be that one of them was not intending to travel, but merely came to see the other off. What duty had the railway company to those persons? No doubt in strict logic they had not the same amount of duty to them as they had to persons who paid them money in consideration of being carried as passengers. But, so far as regarded the taking of means for providing for personal safety, it was impossible to measure the difference between their duty to the one class of persons and their duty to the other. In short, it was their duty to take reasonable care with regard to both. The defendants, therefore, owed the plaintiff the duty to take reasonable care not to do anything to endanger his personal safety. Such duty had been recognized in *Holmes* v. *North-Eastern Railway Co.* (1869), L.R. 4 Ex. 254, and *Watkins* v. *Great Western Railway Co.* (1877), 46 L.J.Q.B. 817.

The case of *Tough* v. *North British Railway Company*, decided by the Court of Session, Scotland, in 1914, consisting of Lords Salvesen, Guthrie, Ormidale and Lord Justice Clerk, approves

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entirely of the judgment in *Thatcher* v. *The Great Western R. Co.*, 10 Times L.R. 13, referred to above and decided that

a person who goes upon premises as a mere licensee is not there at his own risk if he suffers injury through the negligent act of the servants of the owner committed, in the course of their employment, after the licensee has entered the premises. 1913-14 Sess. Cas. 291.

The latest case on this branch of the appeal is that of *Lowery* v. *Walker*, decided by the House of Lords, [1911] A.C. 10, reversing the decisions of the Divisional Court and also of the Court of Appeal.

The material facts in this case were that the defendant, who owned a savage horse which he knew to be dangerous to mankind, put it, without giving any warning, into a field of which he was the occupier and which he knew the public were in the habit of crossing without leave on the way to a railway station. The plaintiff in crossing that field was attacked, bitten and stamped on by the horse. The County Court Judge found as a fact that the defendant was guilty of negligence in putting a horse which he knew to be ferocious in a field which he knew to be habitually crossed by the public and gave judgment accordingly.

The House of Lords, reversing the decisions of the Divisional Court and the Court of Appeal which had held the defendant occupier not liable, held that the effect of the Judge's finding that the plaintiff appellant was in the field without express leave but with the permission of the defendant entitled the plaintiff to recover.

Lord Loreburn, L.C., says, at p. 12:—

I think in substance it amounts to this, that the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal.

The other Law Lords all concurred expressing themselves substantially to the same effect as the Lord Chancellor, viz., that, although the plaintiff was not proved to be in the field as of right, he was one of the public who *habitually* used the field to the occupier's knowledge and without his having taken steps to prevent the user and in those circumstances was liable for the injuries inflicted on the plaintiff by the savage horse.

Applying to this case the principles on which *Lowery* v. *Walker* [1911] A.C. 10, was decided, I cannot see, leaving for the moment the question of the statute aside, how it is possible for the company in this case successfully to argue their non-liability for the death of the deceased doctor. Instead of a savage horse as in the *Lowery* case, *supra*, we have in this case as Ritchie, J., says in his judgment:—

> an engine running on a windy stormy night, backwards, an extra trip, not a regular train, without lights and a defective (in fact, useless) whistle put on the track and set in motion.

The jury have found this constitutes negligence and that the deceased was prevented from knowing that the engine was coming by the absence of the whistle and lights.

If the jury had found that the running backwards under the circumstances of such an engine shewed a reckless disregard of human life, I cannot believe the company would not be held liable. The fact that they found it was only a *careless* disregard of human life, cannot, in my judgment, absolve the company from liability.

Dublin, Wicklow and Wexford Railway Co. v. *Slattery* (1878), 3 App. Cas. 1155, is in some aspects instructive on this appeal. For instance, on the question of notices having been put up forbidding persons to cross the line at a particular point, it was held that these notices having been continually disregarded by the public and the company's servants not having interfered to enforce their observance, the company could not in the case of an injury occurring to anyone crossing the line at that point, set up the existence of the notices by way of answer to an action for damages for such injury.

The English text books on the subject are to the same effect as to the liability and obligations of the railway company to a licensee. See 21 Hals., s. 660 and notes, and Salmond on Law of Torts, pp. 400 to 404.

The decisions of the Courts in the United States, though of course not binding on us, are to the same effect as those English cases to which I have referred with respect to the rights of licensees or persons permitted to use lands or premises of an occupier or owner.

In the case of *Davis* v. *Chicago and North West Rly. Co.*, 58 Wis. 646, 17 N.W. Rep. 406, it was held by the Supreme Court of

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Wisconsin, after citing amongst other authorities that of *Gallagher* v. *Humphrey*, 6 L.T. 684, and quoting Cockburn, C.J.'s judgment in that case with approval, that

where the right of way of a railway company has been in constant use by travellers on foot for more than 20 years, without objection from the company, it is for the jury to say whether the company acquiesced in such user. Such a user, while not establishing a public highway upon the company's right of way, would relieve the persons passing over the same from being treated as trespassers by the company. There is a clear distinction between the care which a railroad company is bound to exercise towards mere trespassers and towards those who are on its right of way by the license of the company, and in case of a long and constant user of such way the company and its servants are charged with notice of it, and cannot neglect precautions to prevent danger to persons travelling thereon. Wilful injury is not the only ground of liability in such a case.

In *Corrigan* v. *Union Sugar Refinery* (1868), 98 Mass. 577, Gray, J., in delivering the judgment of the Supreme Court of that State, said:—

The material question is, whether the keg fell upon the plaintiff's head by reason of the negligence of the defendants' servants. If it did, then whether this was a public or a private way, and whether the plaintiff was passing over it in the exercise of a public right, or upon an express or implied invitation or inducement of the defendants, or by their mere permission, he was rightfully there, and may maintain this action. Even if he was there under a permission which they might at any time revoke and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants, which increased the danger of passing and in fact injured him.

See also to the same effect the judgment of the Court of Appeal, State of New York, *Barry* v. *New York Central & Hudson River Railroad Co.* (1883), 92 N.Y. 289.

From all the cases I have referred to I find the law of England and of Scotland and of many of the United States of America is the same, namely, that while a mere licensee entering upon premises of the owner does so at his own risk with regard to all normal and ordinary risks which he may incur or be subject to on the premises, the licenser, owner or occupier remains liable to him for injuries caused to him by abnormal and extraordinary risks brought about or introduced through the negligence of the licenser or his servants.

Passing now from this branch of the case to the effect of the provisions of the Nova Scotia Railway Act, s. 264, before cited, it will be observed that the section only makes every person not connected with the railway or employed by the company who walks along the track thereof liable to a penalty not exceeding ten dollars.

The section does not intend or purport to deal with the rights or obligations of such person so offending to the company or with those of the company to such person.

Whether such person, being one of the general public, had express or implied authority from the company to walk upon the railway would not matter as affecting his liability for the penalty. If sued for the penalty, proof of such express or limited authority would not be any defence. The section was passed as a matter of public policy and was not intended in any way to interfere with the rights or obligations of the parties to each other in the exercise of a permission by the company to walk on the track.

When the legislature intended to interfere with or take away such civil or private rights they said so in express terms. See ss. 189 and 262(3), the former of which says:—

189. The persons for whose use farm crossings are furnished, shall keep the gates at each side of the railway closed when not in use; and no person, any of whose cattle are killed by any train owing to the non-observance of this section, shall have any right of action against any company in respect to the same being killed.

and the latter of which reads as follows:

262 (3). If the cattle of any person, which are at large contrary to the provision of this section, are killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect to the same being so killed or injured.

The legislature, in the section we are interested in, merely imposed a penalty for walking on the track. It uses no language which can be construed as interfering with the relative legal rights of the offending person and the railway. It simply declares a public policy breach of which gave rise to a penalty.

While therefore, in my judgment, no railway could alter that policy or prevent the attached penalty from being enforced against any offender by any consent it might give, on the other hand, the section carefully abstained from interfering with the private or civil rights or obligations which might arise between the parties by reason of any person walking on the railway track with the permission of the railway.

The penalty for breach of the public policy was absolute whether the railway assented to the breach or not. The obligations of the railway to one to whom it gave permission so to walk were not interfered with or done away with. Could it for a moment be successfully contended that a wilful injury done to such a

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licensee from the railway, by its servants, was without remedy? I certainly think not and that such a result never was intended and equally so do I think it was not intended to take away the civil right from such licensee of suing for damages sustained by the negligence of the company in adding additional dangers and risks to those which the licensee assumed in accepting the license and from which additional dangers and risks he suffered damage. The case of *Davis* v. *North Western Railway Co.*, 58 Wis. 646, above cited by me on the other branch of the case, expressly determines that such a statute making it an offence to walk upon the track does not alter the rule. No authority was cited to us in support of the appellant's contention that the section imposing a penalty merely made a person violating it a trespasser and took from him civil rights which he otherwise would possess as licensee against the company giving him such license.

It seems to me, however, that the language used by the Judicial Committee in the case of *The King* v. *Broad* [1915], A.C. 1110, is an authority to the contrary of appellant's contention. It was there held that s. 191, sub-s. 2 of the Public Works Act, 1908, of New Zealand, suspended during the period therein referred to the absolute right of the public to pass along a highway over a level crossing but *left unaffected the right of those whose did so pass to have reasonable care exercised by the railway authority in using the line.* Lord Robson, who delivered their Lordships' judgment, says, at p. 1115:—

> The language of the sub-section is amply satisfied by holding that on the specified approach of a train the public's absolute right to pass is suspended leaving unaffected the question of other rights if nevertheless persons do pass.

I adopt this language and think it peculiarly applicable to the penalty clause in question.

On the whole I would dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—This is an action by respondent, the widow and administratrix of the late Dr. Herdman, for damages arising from his death alleged to have been caused by the wrongful act or negligence of the appellant.

Deceased on returning from a professional visit to a patient attempted to do so by walking on the railway track of appellant instead of travelling by the common highway, and is found to

have met his death by a locomotive and tender moving backward at the rate of about 10 miles an hour and overtaking and knocking him down.

This occurred after dark in the evening in February, 1917, in the midst of a snowstorm described by some as "an awful storm" and by others as "blustery and very cold."

The locomotive and tender were returning from a short run taken to assist a train up a heavy grade of a mile or more to a station a few miles distant from River Hebert, the home town of deceased, and the station where this ancilliary engine was kept. The case was tried before Drysdale, J., with a jury, who answered ten questions submitted to them, and in answer to the eleventh assessed the damages at $6,000 for which judgment was entered; and that has been maintained by a majority of the Court of Appeal.

The first two questions and answers are as follows:—

1. Was the proximate cause of the accident that killed Dr. Herdman the negligence of the company? If so, state it. What was it? Yes, not having lights and a defective whistle.

2. Notwithstanding such negligence, could Dr. Herdman, by the exercise of reasonable care, have avoided the accident? We think the doctor was careless but could not have avoided the accident.

The accident did not take place at or so near to any crossing at or approaching which there might have been involved the breach of a statutory duty to give warning.

The only statutory duty seems to have been in that regard, to either ring a bell or whistle at certain distances from a highway crossing.

These obligations were fully discharged, as sworn to by the engine driver and fireman in charge, and there is no contradictory evidence on the point.

The whistle was in fact by reason of the frost, as I understand, out of service.

The sole ground of complaint in law, upon which the judgment rests, is that people in the neighbourhood had been habitually using the railway track as so often happens, when inclined to take a shorter way in pursuit of any chance errand; and that no one had been prosecuted for doing so though the evil practice had been of such frequent occurrence that local officials of the appellant might be presumed to have had notice of its existence.

The railway track was fenced in, and not the slightest suggestion was made that it had been conceded as a public highway.

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It is merely the toleration of such an evil practice, as pedestrians in many instances adopted, knowing, as some of them frankly said, they did it at their own risk, or, as many others said, without ever thinking of the consequences, that is relied on.

There was a railway bridge over the river in the vicinity, on which some of them crossed; and as an electric line was carried over it a large printed notice had been posted in 1915, by direction of appellant's superintendent, at each end of it, on which was inscribed a warning:—"Danger, keep off; this means you."

No other notices of warning against trespassing are in evidence.

The statute law of Nova Scotia contains a provision prohibiting the walking on any railway track, and providing for a penalty being imposed upon any such trespassers.

There is not in that Province any provision, such as exists in some Provinces, for punishing in like manner petty trespassers on other property.

It is thus clear that what the deceased, on the occasion in question did, and others had been doing, in the way of walking on the track was illegal and rendered him liable to a penalty.

The appellant relies, and I think rightly, upon the decision of this Court in the case of the *Grand Trunk Railway Co.* v. *Anderson*, 28 Can. S.C.R. 541, and other cases holding that there can be no recovery for damages suffered under such circumstances unless something else, than apparent herein, shewing gross negligence, or wilful misconduct on the part of those concerned on behalf of the railway company.

The trial Judge relied upon the case of *Lowery* v. *Walker*, [1910] 1 K.B. 173, [1911] A.C. 10.

The charge of the trial Judge to the jury was obviously influenced by his view of the said decision and hence some of the findings of the jury.

The Court of Appeal adopt the same view and think it is supported by other cases.

I cannot agree that there is anything in that or other cases relied upon, which in principle is applicable to the undisputed facts in this case, and that they did not present a case which should have been submitted to a jury.

I fail to see the resemblance between a railway company running its engine, in course of its daily and hourly exercise

of right and discharge of duty, and that of a man who has in fact permitted a pathway to be used across his field with no dangerous animals therein, suddenly and without warning rendering the pathway highly dangerous by turning a vicious animal at large therein.

Even assuming all that is alleged to be true, as to the use by pedestrians of appellant's track, to the knowledge of its management, the risk has never been increased or use of the track for what it was built for changed in the slightest.

If the right of way had been out of use for a time and then suddenly and without warning put into active service, some analogy might be found in doing so, to what the *Lowery* case, [1910] 1 K.B. 173, [1911] A.C. 10, presents.

But in fact this engine was running just as it was accustomed to do about the same hour, if not daily, at least on an average every other day in the week.

The distance home for the deceased, where he was going, was shewn to be some 300 feet longer by the railway than by the road.

The circumstances shew that he chose the railway track instead of the highway because the latter was deeply covered with snow and the railway track not so, because the cars and engines were running thereon and brushing aside or crushing down the snow.

It is not for the Courts to impose a new mode of running a railway, or upon those doing so, a new code of regulations for the protection of trespassers.

There are cases such as in evidence in the well known *Slattery* case, 3 App. Cas. 1155, where the station arrangements were such as to mislead, or regulations at crossings, such as in *The King* v. *Broad*, [1915] A.C. 1110, make the conflicting duties of those using the highway and those running the railway often the subject of anxious inquiry, and require a rigorous enforcement of statutory regulations, lest the unwary and accidental trespasser may be caught and a case to submit to a jury arise.

We had such a case in *Garside* v. *Grand Trunk Railway Co.* (1915), 23 D.L.R. 463, affirmed by Can. S.C.R., Dec. 29, 1915, see 9 O.W.N. 494, a year or two ago in which I had no doubt the deceased was technically trespassing upon the unfenced land

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of the railway company, yet we maintained the right of action because of the neglect by those running an engine to observe the statutory duties of giving warning.

It was attempted there to shew that a bar across the highway served same as in the *Broad* case, (1915), A.C. 1110, since reported, took away all right to cross and with it a remedy for killing the pedestrian.

Wherever there is a statutory duty imposed it must be observed. We have no right to create such a duty.

No obligations rested upon the appellant towards the protection of the deceased in the way of lights or whistles.

Of course its servants would have no right to run him down knowingly or recklessly, any more than the defendant in the case of *Davies* v. *Mann* (1842), 10 M. & W. 546, had a right to run down the donkey tethered in the highway, or many a like offender has done since.

Anglin, J.

ANGLIN, J., concurs with the CHIEF JUSTICE.

Brodeur, J.

BRODEUR, J.:—I am of opinion that this appeal should be allowed with costs of this Court and of the Courts below for the reasons given by my brother Idington.

Mignault, J.

MIGNAULT, J.:—This is a case of very considerable difficulty.

The respondent's husband, Dr. W. W. Herdman, who lived at River Hebert, was killed while walking on the track of the appellant company, on the evening of Feb. 10, 1917, between the village of River Hebert and Strathcona, Nova Scotia. The appellant there operates a line of railway which crosses the river on a bridge and goes up by a rather steep grade toward Strathcona and then continues on to a place called Jubilee. On the afternoon in question a regular train left Joggins, the other side of River Hebert, a little after 4.30 p.m., and was hauled, on account of the grade, by two engines, the front one, an old engine, driven by Forrest, the engineer, with Landry as fireman. This front engine was used for getting the train up the grade and at Jubilee it usually returned backwards, tender first, to Joggins. Dr. Herdman, that afternoon, took the train at River Hebert to visit a patient at Strathcona, where he got out, made his visit and then telephoned at 6.30 p.m. to his wife that he would immediately return. The night was a cold and very stormy one, with some snow and a high wind blowing across the railway. Dr. Herdman wore a

raccoon coat and started out pulling up his collar and pushing down his cap over his ears. Unfortunately he chose to return by the railway track, a short cut which, the evidence shews, was very commonly used by men, women and even children in preference to the road which Dr. Herdman could have taken but which probably on such a night would have been a difficult one for a pedestrian to travel on. Later in the evening Dr. Herdman's body was found between the rails a short distance from the railway bridge.

He was killed by Forrest's engine which was returning to Joggins from Jubilee, tender first and without any headlight or any light on the tender. Forrest started from Joggins about 6.15 p.m., and having got his engine under way, shut off the steam and ran down the grade at a moderate speed. His whistle had become disconnected before reaching Jubilee, and he was unable to repair it on account of the escaping steam before he started to return. He therefore could not whistle at Pugsley's crossing, just before Strathcona, but his fireman rang the bell more or less continuously, with however some interruption, the latter says, when he got down from his seat to feed his fire. Both Forrest and Landry say that the storm was so severe that they could not see out of the cab window on account of the frost, and they did not think any one would be on the tracks on such a night. They never saw the victim and did not know that he had been killed until his body was found.

The case was tried before Drysdale, J., and a jury, and the latter have found as follows:—

1. Was the proximate cause of the accident that killed Dr. Herdman the negligence of the company? If so, state it. What was it? Yes, not having lights and a defective whistle.

2. Notwithstanding such negligence, could Dr. Herdman by the exercise of reasonable care have avoided the accident? We think the doctor was careless but could not have avoided the accident.

3. Up to the time that Dr. Herdman was killed did the public habitually travel along the defendant's railroad between the villages of Strathcona and River Hebert? Yes.

4. If so, did the defendant company have notice of it? Yes.

5. Before Dr. Herdman was killed did the defendant company interfere with persons so travelling along the railway? No.

6. Had Dr. Herdman reason to believe that an engine would overtake him without blowing the whistle at Pugsley's crossing and without carrying lights? No.

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7. Was Dr. Herdman prevented from knowing that the engine was coming by the absence of the whistle and lights? Yes.

8. Was an engine running without lights and not sounding a whistle at Pugsley's crossing, more likely to kill a foot passenger at the point where Dr. Herdman was killed than an engine with lights and sounding a whistle at Pugsley's crossing? Yes.

9. Was the running of the engine which killed Dr. Herdman, without lights and without sounding a whistle at Pugsley's crossing a reckless disregard of human life? No, but consider it careless.

10. What amount of damages do you find; and how much do you allow to the widow and how much to the daughter? $6,000, divided as follows: widow $2,500, daughter $3,500.

In accordance with this verdict judgment was entered against the appellant for $6,000, and on an appeal to the Supreme Court of Nova Scotia, this judgment was affirmed by a Court consisting of Russell, Longley and Ritchie, JJ., Longley, J., dissenting. The appellant now appeals to this Court.

The jury having negatived contributory negligence on the part of Dr. Herdman—and I do not think that I should interfere with their finding, whatever doubts I might feel on this point in view of all the circumstances—the appellant can, in my opinion, succeed only if it shews, 1st, that Dr. Herdman was a trespasser on its line, and 2nd, that assuming he was a trespasser, it has discharged any duty it owed to him as such trespasser.

To answer first question regard must be had to the facts found by the jury that up to the time that Dr. Herdman was killed the public habitually travelled along the appellant's railroad between the villages of Strathcona and River Hebert; that the appellant had notice of it and did not interfere with persons so travelling on the railway. Assuming these facts, was Dr. Herdman a trespasser?

S. 264 of c. 99 of the R.S.N.S. 1900, enacts that

> every person, not connected with the railway or employed by the company who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars.

The Courts below realised on the decision of the House of Lords in *Lowery* v. *Walker*, [1911] A.C. 10, which in their opinion is not distinguishable from the present case. There the respondent, without giving any warning, put a savage horse which he knew to be dangerous to mankind, in a field of which he was the occupier and which he knew the public were in the habit of crossing without leave on their way to the railway station. The appellant

in crossing the field was attacked, bitten and stamped on by the horse. The County Court Judge found as a fact that the respondent was guilty of negligence in putting a horse which he knew to be ferocious into a field which he knew to be habitually crossed by the public, and gave judgment for the appellant. This judgment was reversed by the Divisional Court, [1909] 2 K.B. 433, and by the Court of Appeal, [1910] 1 K.B. 173, but the House of Lords set aside both these judgments, holding that the effect of the trial Judge's finding being that the appellant was in the field without express leave but with the permission of the respondent, the appellant was entitled to recover.

In this case their Lordships construed the finding of fact of the trial Judge as meaning that the appellant was in the respondent's field not as a trespasser but with the permission of the respondent, and they applied the law to this finding of fact.

The appellant cites another case, *Grand Trunk Rly. Co.* v. *Barnett* (1911), A.C. 361, where the respondent was undoubtedly a trespasser on the platform of a railway car where he was injured. The case was considered upon this basis by the Judicial Committee, and the respondent's action claiming damages for his injuries was dismissed. Lord Robson, speaking for the Privy Council, held that the obligation of the railway company was merely not to wilfully injure the respondent, that is to say "they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way."

The real difficulty, to my mind, is the statute which I have cited, and I have not been able to convince myself that what the House of Lords decided in *Lowery* v. *Walker*, [1911] A.C. 10, with respect to a field over which, according to the findings of the trial Judge, as construed by the House of Lords, the owner or occupier permitted the public to pass, can be applied to a railway line where the law punishes with a fine "every person not connected with the railway or employed by the company who walks along the track thereof."

If mere passiveness of a railway company could be regarded as a defence against a criminal action for trespass, the statute, which undoubtedly was enacted for the protection of the public as well as of railway companies, would soon become a dead letter.

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Dr. Herdman chose to walk upon the track, as hundreds of people had done before him, probably because he was hurrying to attend a sick call, and his motive was no doubt a good one, but he did so at his own risk and was, in my opinion, a trespasser on the railway. On this point I think *Lowery* v. *Walker, supra*, is clearly distinguishable from the present case and moreover their Lordships there proceeded upon a statement of facts found by the trial Judge, which as construed by them, went further than the facts found in this case by the jury.

When the evidence as to this user by the public of the railway tracks is examined it is seen that two witnesses, Smith and Rector, say they walked on the railway track at their own risk, one, Hibbard, supposed that in doing so he was a trespasser, and McIsaac admits that he did not think he had any right to walk on the track. All these were witnesses for the plaintiff. Other witnesses never considered whether or not they had a right to thus use the railway, but did so because they saw others walking along the tracks. The railway was fenced in and a notice of warning was placed on the railway bridge. All this evidence shews a state of facts materially different from what was found in *Lowery* v. *Walker*, [1911] A.C. 10.

The second question is, assuming that Dr. Herdman was a trespasser on the right of way, did the appellant discharge any duty it owed him not to injure him wilfully, according to the rule laid down by the Privy Council in *Grand Trunk Railway Co.* v. *Barnett* [1911] A.C. 361? In other words, did it "unnecessarily and knowingly increase the normal risk by deliberately placing unexpected dangers in his way?"

The findings of the jury do not justify an affirmative answer to this question, which would involve a reckless disregard of human life. The jury refused to find any such reckless disregard of human life and they would not go any further than to state that the running of the engine without lights and without sounding a whistle at Pugsley's crossing was careless. I therefore must answer this question in the negative.

The case is one where every sympathy may legitimately be felt for the victim of this accident, who, I think, was hurryng to attend to a sick call when he was unfortunately killed. But this sympathy would not justify me in making the appellant

pay the damages in a case where I am convinced no legal liability exists.

The appeal must therefore, in my opinion, be allowed and the plaintiff's action dismissed. The appellant is entitled to its costs here and in the Courts below if it thinks fit to collect them from the respondent. *Appeal allowed with costs.*

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*SOUTHERN SALVAGE Co. Ltd. v. THE SHIP "REGIN."

Exchequer Court of Canada, Drysdale, Loc. J. in Adm. November 30, 1918.

COLLISION (§ I—2)—RULE 16 OF REGULATIONS FOR AVOIDING COLLISIONS AT SEA.

At about 9 o'clock a.m. on June 15, 1917, a collision occurred at the entrance to Halifax Harbour between the ship "Deliverance" and the defendant ship "Regin" in a dense fog. The "Deliverance" was yoked up to the S.S. "Belaine" and was outward bound engaged in mine sweeping in the Harbour, and the "Regin" was coming in.

Held, that inasmuch as the "Deliverance" admittedly heard the fog signals of the "Regin" well forward of her beam and still kept on at her speed into the fog, she violated the provisions of article 16 of the rules of the road and was at fault.

2. That such fault was the proximate cause of the collision and she was wholly to blame therefor.

Statement.

THIS is an action taken by the owners of the "Deliverance" against the "Regin" for damages to the former alleged to be due to improper navigation of the "Regin" and to its negligence.

The plaintiffs in their preliminary act declare they took the following measures to avoid accident:

The course of the "Regin" when first seen appeared as if she were attempting to cross the bows of the "Deliverance" and the engines of the "Deliverance" were ordered full speed astern. Immediately thereafter when it appeared that the "Regin" might pass astern, the engines were ordered full speed ahead. These orders were given in such quick succession that the speed of the "Deliverance" was not affected. The "Regin" on the other hand, violated art. 13 in that she neglected the international signals; the "Deliverance" was mine sweeping and carried the cones, flags, and balls, authorized by the regulations made in that regard; and art. 15 (e) in that she disregarded the signals of the "Deliverance" that she was unable to manoeuvre and ran into the "Deliverance" in foggy weather; and that she came up Halifax Harbour in foggy weather at a high rate of speed; and also art. 16, art. 19,

*Appeal to the Supreme Court was allowed, November 24, 1919, to the extent of declaring the ships equally liable for the collision.

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art. 23, art. 28 in that changing her course to starboard she did not indicate by her whistle that she was so doing; and art. 29; and no lookout was maintained.

Defendant in its preliminary act at No. 12 says: in answer to question "The measures which were taken, and when, to avoid the collision;" having heard, apparently forward of her beam, fog signals of several vessels, the positions of which were not ascertained, the engines were stopped. Shortly after the "Deliverance" was first seen through the fog, there being then danger of collision, not apparently avoidable by the action of the "Deliverance" alone, the engines were put full speed astern and the helm put hard aport. The signals prescribed by the regulations were duly sounded at proper intervals on the steam whistle of the "Regin," to wit: prolonged blasts at intervals of not more than two minutes.

And at 14 says that

The "Deliverance" was at fault because (a) the "Deliverance" and "Regin" were crossing ships within the meaning of art. 19 of the regulations for preventing collisions at sea, and the "Deliverance," having the "Regin" on her own starboard side should have kept out of the way of the "Regin," should have avoided crossing ahead of the "Regin" and should have slackened her speed or stopped and reversed.

(b) The "Deliverance" being bound to keep out of the way improperly starboarded her helm when in sight of the "Regin," thereby directing her course across the bow of the "Regin."

H. Mellish, K.C., for plaintiff; *W. A. Henry*, K.C., for defendant.

The plaintiff alleged the occupation of "Deliverance" at the time; how mine sweeping is done; that the cable connecting the ships has the effect of turning the ship's head towards her companion ship. The object of this sweeping was to secure any mines planted by enemy mine layers.

That the "Deliverance" carried all signals required by the Admiralty to shew the ship's occupation, and that she is not under command.

The defendant, they admit, gave the required fog signals, but they claim she maintained full speed of 8 or 9 knots and did not stop her engines when she heard the signals from the "Deliverance."

They moreover argue that the "Deliverance" being engaged in the special work of mine sweeping with consequent inability to

manoeuvre, she had special privileges, and was not obliged to stop her engines.

Defendant alleges the general facts above given and that the "Deliverance" was going at full speed and maintained the same until immediately before collision. He claims that she violated arts. 16, 19, 22 and 23. These articles are printed below for ready reference as well as 13, 15E.

They moreover allege that if the "Deliverance" had reduced speed earlier, the ships could have located each other in the fog and passed in safety; that defendant gave the fog signals, which were heard by the "Deliverance;" that she reduced speed, having stopped her engines five minutes before seeing the "Deliverance," and having reversed them three minutes before collision.

That the ships were crossing ships within the meaning of art. 19 and it was the duty of the "Deliverance" to keep out of the way. Knowing that she was part of a cumbersome aggregation of apparatus occupying a front of 400 yards it was all the more incumbent upon her to navigate with exceeding caution, especially if, as it would appear was the case, it was desirable to keep vessels from passing over the wire. The officer on her bridge knows for 12 minutes that a steamship is ahead in the fog in such a position that if she is on the proper course up the harbour, she is either dead ahead or she is going to cross his course at a fine angle, and that ordinary prudence, to say nothing of the regulations, would dictate cautious navigation until the position and course of the approaching steamship are ascertained. That the "Deliverance" had the "Regin" on her own starboard side.

A collision being imminent unless the "Regin" took some action to prevent it, the "Regin" was not bound to keep her course and speed under art. 21, but was justified (under the note to that article) in the measures she took to avoid collision.

Finding that the "Deliverance" was going to port so as to cross her bows it is seen that if she keeps her course and speed, the "Regin" will cut into her about amidships, and not having room to go to starboard and clear her, the engines are reversed and the helm put hard-a-starboard to bring the courses more nearly parallel. This manoeuvre was frustrated by the "Deliverance" porting just before the collision.

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It is not pretended that the marks carried by the "Deliverance" were authorised by the International Regulations, and no knowledge of them was brought home to the master of the "Regin." No satisfactory authority for exhibiting the marks was established. Some person, supposed to be a British naval instructor, gave what were apparently verbal instructions to some person unknown, who, presumably, passed them on by word of mouth to Captain Brannen. There is no pretence that these marks were notified to foreign Governments or that Norwegian ship masters, for instance, were bound to know them.

The Judge's reasons for judgment are very short, but he apparently found that the "Regin" stopped and reversed engines as stated by her and that the "Deliverance," notwithstanding that she admitted hearing the fog signals, did not slacken speed nor reverse her engines, and that she violated r. 16 of the rules of the road to avoid collisions at sea and that this act was the proximate cause of the collision.

Drysdale, L.J.A.

DRYSDALE, L.J.A.:—In this case the defendant ship cut down and sank the "Deliverance," a mine sweeper, off Chebucto Head.

The "Deliverance" was, at the time, yoked up to the "Belaine" mine sweeping, and was going out in a dense fog; the "Regin," a Norwegian steamer, was coming in.

I think the "Deliverance" admittedly heard the fog signals of the "Regin" apparently well forward of the beam of the "Deliverance," and when she so heard such signals should have stopped her engines. This she did not do, but kept on at her speed into the fog.

I am compelled to conclude that the "Deliverance" was in fault in directly violating art. 16 of the rules of the road, and I also think that such violation was the proximate cause of the collision.

I find the "Deliverance" solely to blame for the collision and there will be a decree accordingly.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Stuart, Simmons and McCarthy, JJ. October 21, 1919.

COSTS (§ I—10)—ALBERTA RULES—TAXATION—DISCRETION OF JUDGE.

While the general purpose of rule 769 (Alta.) is to provide for a general cleaning up of all costs so that the parties may know exactly where they stand, the rules are merely rules of procedure and the rules generally and rule 769 in particular should not be considered to have so exceedingly stringent a force as to leave the defaulting party absolutely helpless where the delay has been slight. The Court has power either under rule 556 or under the statute giving the Court power to relieve against forfeitures to give relief and allow the costs to be taxed, the length of the delay is a question for the discretion of the Judge.

Statement.

APPEAL by defendant from an order of the Chief Justice extending the time for taxation of the plaintiff's bill of costs. Affirmed.

W. Shewell Morris, for appellant; *P. H. Russell*, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—In 1914 or 1915 there had been some interlocutory orders made in this action in which the plaintiff was given costs against the defendant. Subsequently the plaintiff's action was dismissed with costs, not at a trial but on a summary application. The defendant taxed his costs against the plaintiff some three or four years ago. Recently, within the past few months, the plaintiff made up his bill of costs of the interlocutory orders and applied to the clerk to have them taxed. The clerk refused to do so. Thereupon the plaintiff appealed to the Chief Justice in Chambers, who made an order extending the time for the taxation of those costs until Sept. 15, 1919. From this order the defendant appeals.

The matter depends on r. 769. In substance that rule says that when one party gives notice of taxation and the other party has some costs which he is entitled to set off, such other party shall bring in a bill of such other costs within 7 days after such notice or within such further time as the taxing officer may allow and upon default such other party shall forfeit his right to such other costs and the taxation may proceed accordingly.

The second sub-section gives one party the right to call on the other party to bring in his bill and have it taxed and unless he does so he is to forfeit his right to the costs. The defendant never took advantage of this provision and did not call upon the plaintiff, as he might have done, to bring in his bill.

The contention of the appellant is not only that the failure

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of the plaintiff to bring in his bill on the original taxation worked a forfeiture of all his rights to such costs, but that there was no jurisdiction in the Chief Justice to grant any extension of time even under r. 556, which gives a general power to extend time even after the time fixed has expired.

I think it is true that the general purpose of r. 769 was to provide for a general cleaning up of all costs at the same time so that the parties may know exactly where they stand. But one must remember that the rules are merely rules of procedure. The plaintiff had what was a judgment of the Court for some costs, to be taxed, and we must assume that that judgment was right and meritorious. Apparently, through some oversight of his solicitor or his solicitor's agents and by the absence of his solicitor from the country for a time, he did not comply with the terms of r. 769 or seek at any early date to get relief. The question is whether there is no method by which he can be relieved from the forfeiture of his rights declared by the rule to follow upon his default. Undoubtedly the declaration of forfeiture is a very stringent provision. If there was no power in the Chief Justice to give him relief after 4 years' delay then there would be no power to give relief after a delay of one day. Any distinction between a delay of one day and a delay of 4 years must be entirely a matter of discretion and not of right. I do not think that the rules of Court generally or r. 769 in particular ought to be considered to have so exceedingly stringent a force as to leave the defaulting party absolutely helpless where he has delayed only a day or a week. Indeed I think the enactment of the forfeiture in r. 769 comes very close to, if it does not entirely reach, the nature of substantive legislation and not that of procedure at all, and the subsequent confirmation of the rules by the recent Act of the Legislature seems to me to confirm them, and to be intended to confirm them, simply as rules of procedure.

In these circumstances I think the Chief Justice had power, either under r. 556 or under the statute giving the Court power to relieve against forfeitures, or under both, to give the plaintiff relief and to permit him to tax the costs which had been awarded him and to collect the debt. The delay was undoubtedly a long one, but that was largely a question for the discretion of the Chief Justice and I do not think that we can say he exercised that discretion erroneously.

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Some oral statements were made by appellant's counsel to the effect that the plaintiff had really brought in his bill in the first place, that the clerk had, upon some ground, refused to tax it and that on a reference to a Judge the clerk's ruling had been confirmed. But as these statements were not admitted by respondent's counsel and there is no material before us to confirm them, I cannot see how we can venture to act upon them.

I may add that upon mentioning the matter to the Chief Justice, without explaining the nature of the appellant's contention, it was made plain that the Chief Justice fully appreciated the points which the appellant's counsel was endeavouring to press upon him and which were repeated before us.

The appeal should be dismissed with costs.

Appeal dismissed.

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BELL v. CHARTERED TRUST Co.
CHARTERED TRUST CO. v. BELL and BUISSEY.

Annotated.

Ontario Supreme Court, Logie, J. August 29, 1919.

SPECIFIC PERFORMANCE (§ I B—15)—LEASE—ORAL—PART PERFORMANCE—EQUITIES ARISING—DECREE.

Although an agreement for a 5 year lease is not in writing if there has been a sufficient part performance unequivocally referable to the agreement, and equities have arisen from the Acts of part performance which render it unjust not to decree specific performance, such specific performance will be decreed.

Statement.

MOTION by the plaintiff in the first action to continue an interim injunction.

Upon the return of the motion, it was agreed by all parties that the two actions should be consolidated, the motion turned into a motion for judgment in the consolidated actions, and the motion disposed of upon the material filed upon the original motion.

J. P. Walsh, for Bell and Buissey; *S. King* and *W. Lawr*, for the Chartered Trust Company.

Logie, J.

LOGIE, J., in a written judgment, said that the first action was brought to recover possession of the premises No. 1196 St. Clair avenue, Toronto, from the trust company, assignee for the benefit of creditors of Buissey, and for an injunction restraining the

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company from trespassing upon or carrying on any business in the said premises, and for damages. The second action was brought to have it declared that a lease of the said premises by Bell to Buissey was a valid and subsisting lease, notwithstanding an alleged surrender thereof by Buissey to Bell, and that the lease was surrendered improvidently and by reason of the fraudulent act of Bell, and for an injunction restraining Bell from taking possession of the premises, and for specific performance by Bell of an alleged agreement to execute a lease to Buissey of the said premises for 5 years from Oct. 28, 1918.

It appeared from the affidavits and papers filed that on Oct. 28, 1918, an oral agreement was entered into between Bell and Buissey to lease the premises to Buissey for 5 years from Oct. 28, 1918, at $1,080 per annum. A lease in duplicate was prepared in accordance with this agreement, and one of the documents was handed by Bell to Buissey; but it was never signed by either party. Buissey went into possession, expended $12 in fixtures, and paid rent at $90 per month until July, 1919, when he found himself financially in deep water. He then made an assignment to the trust company for the benefit of his creditors, and signed a surrender of his supposed lease. The trust company entered upon the demised premises; and these two actions were brought.

For Bell, the landlord, it was contended that the tenancy of Buissey was a tenancy at will, duly determined by notice and demand for possession; or, if not, that the surrender was effective.

For the trust company, assignee of Buissey, it was argued that the agreement for the lease, evidenced by the unexecuted instrument, should be specifically performed by the lessor; that the surrender was fraudulent against creditors; and that, in any event, the assignee was a tenant from year to year, and not a tenant at will—if Buissey was a tenant at will, admittedly the assignee was out of Court.

The Judge was of opinion that the agreement for a lease should be enforced, upon the assignee entering into personal covenants with the lessor to observe the conditions and perform the stipulations and provisoes contained in the unexecuted instrument.

Although the agreement was not in writing and the lease was not executed, there had been a sufficient part performance.

unequivocally referable to the agreement, and equities had arisen from the acts of part performance which rendered it unjust not to decree specific performance.

The unexecuted instrument contained a provision that if the lessee should make any assignment for the benefit of creditors the term should at the option of the lessor forthwith become forfeited; but the lessor had taken no proceedings looking towards forfeiture; and, by s. 38 (2) of the Landlord and Tenant Act, R.S.O. 1914, c. 155, the assignee has the right, notwithstanding any provision in the lease, to retain possession for the remainder of the term upon giving notice to the landlord to that effect—the giving of this notice should be a condition precedent to the granting of the relief.

Apart from the statute, the assignee in bankruptcy of the lessee is entitled to a grant of the lease upon entering into personal covenants: *Powell* v. *Lloyd* (1827), 1 Y. & J. 427.

If the surrender was signed before the assignment for the benefit of creditors, the surrender was void against creditors under s. 5 of the Assignments and Preferences Act, R.S.O. 1914, c. 134; if afterwards, it was a nullity.

No hardship would be occasioned and no injustice done by ordering specific performance of the agreement for the lease, with the safeguards provided above.

The first action should be dismissed with costs, upon the plaintiff in the second action carrying out the terms imposed upon it.

In the second action there should be judgment for specific performance of the agreement for the lease, in the terms of the unexecuted instrument, with costs, upon the plaintiff in that action entering into personal covenants as above with the defendant Bell and giving the notice required by s. 38 (2) above.

Should the plaintiff in the second action fail to enter into the covenants and give the notice forthwith, the second action should be dismissed with costs, and there should be judgment for the plaintiff in the first action, as prayed, with costs.

Judgment accordingly.

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Leases required by Law to be made by Deed.

By A. D. ARMOUR, ESQ., of the Ontario Bar.

In considering the effect of a lease required by law to be made by deed, but which is made by parol it is necessary in the first place to bear in mind that a lease itself does not convey any interest in the land. *Lewis* v. *Baker*, [1905] 1 Ch. 46, 74 L.J. Ch. 39; *Lord Llangattock* v. *Watney Combe, Reid & Co., Ltd.*, [1910] 1 K.B. 236. The lessee obtains only an *interesse termini* from the lease, until he has perfected his title by entry. It is the lease combined with his entry into possession which conveys to him his interest in the term granted, and it is only when a lessee has entered under the particular lease in question that he acquires any interest in the land.

Under Statute of Frauds, 29 Car. II. c. 3, s. 2 (now R.S.O. 1914, c. 102, s. 4), a lease or an agreement for a lease, not exceeding the term of three years from the making thereof, the rent upon which, reserved to the landlord during such term, amounts unto two-thirds at the least of the full improved value of the thing demised, is not required to be in writing or under seal. As leases of this description do not present much difficulty, and are not often the subject of litigation, they are not further considered at the present time, and when the word "lease" is hereafter used, it refers only to leases of the kind which would have been required by 29 Car. II., c. 3, to be in writing; that is, leases not exceeding the term of three years upon which the rent reserved does not amount in the whole term to two-thirds of the value of the subject of the lease, and all leases for a term exceeding three years.

By s. 1 of the Statute of Frauds, 29 Car. II. c. 3, (which appeared in R.S.O. 1897, as c. 338, s. 2), it was enacted that:—

"All leases, estates, . . . or terms of years, . . . made or created by . . . parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding."

The purpose of the Statute of Frauds is stated to be for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury, and subornation of perjury. The intention of Parliament therefore was to render such fraudulent practices impossible by making it unlawful to give any evidence of a lease or term of years otherwise than by a written document. It was not open to any witness to explain the nature of the possession of a tenant, because as soon as oral testimony was admitted, the chance of perjury being committed arose; or in other words, it was intended "to prevent matters of importance from resting on the frail testimony of memory alone." Having forbidden the explanation of a tenant's interest by means of oral evidence, Parliament then definitely enacted what that interest should amount to either in law or equity, when the lease was not in writing, namely, a lease or estate at will; and lest the doctrine of consideration should still be held to support a parol lease, it was further enacted that consideration should not have that effect.

By 8-9 Vict. c. 106, s. 3, it was enacted that:—

"A lease required by law to be in writing, of any tenements or hereditа-

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ments . . . made after the said 1st day of October, 1845, shall also be void at law unless made by deed."

This was re-enacted in substantially the same words in Ontario by R.S.O. 1897, c. 119, s. 7 (an Act respecting the law and transfer of property).

The combined effect of the statutes was that a lease must be by deed to be sufficient in law to create the term intended to be granted. But if the lease was not in writing, or was without a seal, the lease was void as to the term, but it was nevertheless to operate so far as to create a tenancy at will. The result was expressed in our own Courts as follows:—

"There is nothing in the subsequent statute enacting that when the Statute of Frauds required a writing signed by the lessor a deed should be requisite, and that the lease should be void if not made by deed, which repeals the words of the Statute of Frauds making the lease in such a case so far effectual as to create a tenancy at will. The later statute is to be read and construed merely as substituting a deed for the signed writing required by the earlier enactment, and the avoidance of the lease has reference only to its nullity as a lease of a term, the tenancy at will arising in such a case is not created by nor is it dependent on the lease, but is a creation of the statute, a statutory consequence of the attempt to create a lease by parol for more than three years, and of the nullity of such a proceeding declared by the statute." *Hobbs* v. *The Ontario Loan & Debenture Co.* (1890), 18 Can. S.C.R. 483, at p. 498.

But estates at will are not regarded with favour by the Courts, and the effect of the statutes has been greatly modified by decisions. It has been held that though a parol lease be for a longer term than three years and so void within the Statute of Frauds, yet if the tenant enters and pays rent, a tenancy from year to year is created, regulated by the provisions of the parol agreement in every respect except the length of the term. *The People* v. *Rickert* (1828), 8 Cow. (N.Y.) 226. The tenant has not a lease, nor a tenancy for the term provided for in the void lease; but a tenancy from year to year, which during that time is determinable by half a year's notice. If he stays to the end of the time, then, by the agreement of both parties, he goes out without notice. Nothing in the terms of stats. 8-9 Vict. c. 106, s. 3, is inconsistent with this. *Cooper Tress* v. *John Savage* (1854), 4 El. & Bl. 36, 119 E.R. 15; *Martin* v. *Smith* (1874), L.R. 9 Exch. 50; 43 L.J. (Ex.) 42.

The equitable rule adopted by the Courts still further neutralized the effect of the later Act. In spite of the provision requiring a lease to be by deed, yet in equity, if there is a document which on its face appears to be an agreement to grant a lease or to be a present demise which fails through not being under seal, unless there is something to be found in the document itself which renders it impossible that specific performance should be granted, the tenant is entitled to ask for specific performance whichever of the alternative views mentioned is applicable to the document. *Parker* v. *Taswell* (1858), 2 DeG. & J. 559, 44 E.R. 1106; 27 L.J. Ch. 812; *Zimbler* v. *Abrahams*, [1903] 1 K.B. 577; and this principle applies to corporations as well as individuals. *Wilson* v. *The West Hartlepool R. Co.* (1865), 2 DeG. J. & S. 475, 46 E.R. 459. It is to be noted that in all these cases the tenant had actually taken possession, and his possession was referable only to the document in dispute. There were also signed documents setting forth the terms of the bargain, from which could be gathered the agreement between the parties, and specific performance granted. The result of the statutes and the equitable rule was that there

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might be two interests in the land under an agreement for a lease or a lease void at law for want of a seal (1) the legal tenancy at will, or from year to year, and (2) the equitable right to a lease under the agreement. But the passing of the Judicature Act in England settled this difficulty, and an agreement for a lease under which possession was taken was held to constitute a lease, in so far, at any rate, as to give the landlord a right of distress. *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9. Jessel, M.R., at p. 14, said:—

"Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted."

The effect of this case was considered in *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, at p. 617, where the doctrine set up in *Walsh* v. *Lonsdale*, *supra*, was said to apply only to a legal right which would have been exercisable had the tenant been possessed of a legal title.

"It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates."

The rule laid down in *Walsh* v. *Lonsdale*, *supra*, was not accepted in *Hobbs* v. *The Ontario Loan & Debenture Co.*, 18 Can. S.C.R. 483. But in 1911, the case of *Rogers* v. *National Drug & Chemical Co.* (1911), 23 O.L.R. 234, was decided, and adopted the rule in *Walsh* v. *Lonsdale*, and granted specific performance of an agreement for a renewal of a five year lease contained in an agreement for the first term of five years to a tenant in possession and paying rent under the agreement. Riddell, J., at p. 237, said:—

"The tenant under an agreement for a lease can be compelled to take on himself the legal estate; and he likewise can compel the landlord to vest him with the legal estate—that is done by an instrument under seal: R.S.O. 1897, c. 119, s. 7. The defendants, then, being before a Court with equitable jurisdiction, must, I think, be considered as though the lease had actually been made."

This judgment was confirmed on appeal by the Court of Appeal (1911), 24 O.L.R. 486. At p. 488, Garrow, J.A., sums up the law as follows:—

"If, however, at law, possession had been taken under the parol demise, and rent paid, the tenant was regarded as a tenant, not at will merely, as described in the Statute of Frauds, but as a tenant from year to year, upon the terms contained in the writing so far as appropriate to such a tenancy; while in equity his rights were much larger, for there the Courts would in a proper case decree specific performance, treating the parol demise, if otherwise sufficient, as an agreement for a lease, with the result that the parties were regarded in equity as landlord and tenant from the time possession was taken: see *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9. And now, under the provisions of s. 58 of the Judicature Act, the equitable rule prevails."

Section 7 of R.S.O. 1897, c. 119, was repealed in 1911 by 1 Geo. V. c. 25, s. 53, but re-enacted in substantially the same words. Since the decision by *Rogers* v. *National Drug Co.*, 23 O.L.R. 234, the Statute of Frauds has been repealed by 3-4 Geo. V. Ont., c. 27 and a new Statute of Frauds had been passed. The recital of the purpose of the statute was omitted, and the provision

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as to the consequence of an attempt to create a lease by parol was not re-enacted. The enactment in its new form is found in 3-4 Geo. V., c. 27, s. 3:—

"Subject to s. 9 of the Conveyancing and Law of Property Act, no lease, estate or interest, . . . or term of years . . . shall . . . be granted . . . unless it be by deed, or note in writing, signed by the party so . . . granting . . . the same, or his agent thereunto lawfully authorised by writing or by act or operation of law."

Section 9 of the Conveyancing and Law of Property Act was a re-enactment of R.S.O. (1897), c. 119, s. 7, to be found in 1 Geo. V. c. 25, but this section was amended by 3-4 Geo. V. c. 18, s. 22, by striking out the words "a lease of land required by law to be in writing," and a new subsection (s. 2(2)) was inserted in the Statute of Frauds enacted in the same year, 3-4 Geo. V. 1913, c. 27: "All leases and terms of years of any messuages, lands tenements or hereditaments shall be void at law unless made by deed." The Statute of Frauds in the present Revised Statutes, c. 102, ss. 2 (2) and 3, is in the same form as the Act of 1913. The reference in s. 3 to the Conveyancing and Law of Property Act does not, of course, refer to the granting of leases. What effect the amendment has upon the decision in *Rogers* v. *National Drug Co.*, *supra*, is not altogether free from doubt. The Act no longer creates a tenancy at will, and, as was pointed out in *Hobbs* v. *The Ontario Loan & Debenture Co.*, *supra*, the avoidance of the lease by the statute as it then stood had reference only to its nullity as a lease of the term; the tenancy at will arising in such a case was not created, nor was it dependent on the lease, but was a creation of the statute. There being no longer any such creature of the statute, and the Courts having uniformly treated that creature as the only modification of a parol lease, it is now arguable that the effect of the statute has been swept away, and a parol lease is good at law. The only alternative seems to be that the lease is void altogether, which would be a reversal of cases like *The People* v. *Rickert*, 8 Cow. (N.Y.) 226, and *Cooper Tress* v. *John Savage*, 4 El. & Bl. 119 E.R. 15. Where, however, the tenant has taken possession on the faith of the parol lease, and has been paid rent, and the circumstances are such as to justify the ordering of specific performance, it is probably safe to say that the Courts will follow the equitable rule and support the lease. There is no greater inconsistency in ordering specific performance of a lease which is declared void by a statute than in ordering specific performance of a lease which another statute declares shall create only a tenancy at will. The effect at law of a parol lease is probably not of importance, because if there were no possession, and no acts done by the tenant on the faith of the lease, he would have no interest in the land for lack of entry, and there would be no equitable grounds for supporting the lease. If entry had been made with the consent or acquiescence of the owner, the equitable rule would prevail. It is just possible that if entry were made without the consent or acquiescence of the owner, there being no equity between the parties, there might be a tenancy from year to year. But possession not being given by the owner, *The People* v. *Rickert*, *supra*, and *Cooper Tress* v. *John Savage*, *supra*, might not apply, and the lease might be void for all purposes. As has been pointed out, the recital as to the intention of the Act has not been included in the present statute. Possibly the inroads made upon the statute by decisions in equity may have led the Legislature to the conclusion that the recital was obsolete. So far, only cases in which signed documents were involved have been dealt with. But the Courts have often granted specific performance of oral agreements

Annotation. for leases, both here and in England. The principle is, that where the tenant has taken possession with the knowledge of the owner, and his possession is referable only to the agreement and it would be a fraud or injustice for either party to the agreement to set up the invalidity of it, then the Court will treat part-performance of the agreement as sufficient to support it. Rawlins, in his book on Specific Performance, points out that the doctrine concerning part-performance, although inconsistent with the Statute of Frauds, appears to be almost, if not quite, coeval with it, and cites *Hollis* v. *Edwards* (1683), 1 Vern. 159, 23 E.R. 385, and *Butcher* v. *Stapely* (1685), 1 Vern. 363, 23 E.R. 524. The essentials for withdrawing a contract from the Statute of Frauds by part-performance are given in Fry's Specific Performance (5th ed.) at p. 291 par. 580:—

"1. The acts of part-performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2. they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; 3. the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4. there must be proper parol evidence of the contract which is let in by the acts of part-performance."

Lester v. *Foxcroft* (1700), Colles 108, 1.E.R. 205, is a case where the plaintiff took possession of certain lands under an oral agreement for a building lease, tore down buildings on the land, erected others and leased them in his own name. Before a lease was executed, the reversioner died, and his executors denied the contract and any knowledge of it, and pleaded the Statute of Frauds. Upon appeal, their Lordships directed the execution of a lease in the terms agreed upon, and that the tenant and his assigns should in the meantime hold and enjoy the same under the covenants and agreements in the said intended lease contained. In *Morphett* v. *Jones* (1818), 1 Swan. 172, 36 E.R. 344, there was an oral agreement for a lease for 21 years. After the agreement had been made the owner wrote a letter to the tenant "I hereby authorise you to enter the undermentioned lands as tenant, on Wednesday the 11th instant, being Old Michaelmas Day." The tenant entered into possession and paid rent, on the faith of having a lease, expending large sums in repairs and improvements. The landlord subsequently desiring to sell the lands demanded possession, denied a lease, and claimed the benefit of the Statute of Frauds. Specific performance was decreed. Sir Thomas Plumer, M.R., at p. 181, stated the law to be:—

"In order to amount to part-performance, an act must be unequivocally referable to the agreement; and the ground on which Courts of equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it never existed. That is the principle, but the acts must be referable to the contract. Between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing; but admission into possession having unequivocal reference to contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms."

And see *Pain* v. *Coombs* (1857), 1 DeG. & J. 34, 44 E.R. 634, *Miller* v.

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Finlay (1862), 5 L.T. (N.S.) 510. Even though the tenant takes possession without the consent of the owner, yet if the owner afterwards acquiesce, the possession may amount to sufficient part-performance to take the case out of the statute. *Gregory* v. *Mighell* (1811), 18 Ves. 328, 34 E.R. 341. The following is an extract from the judgment, 18 Ves., at p. 333, and 34 E.R., at p. 343:—

"It is said, however, that the possession was taken without the defendant's consent; and consequently is not to be considered as a possession under the agreement. The plaintiff had no other title to possess the land; and therefore his possession is *primâ facie* to be referred to the agreement. As to the defendant's allegation that it was without consent, besides that it seems to be disproved by Gregory and Philcox, I do not conceive that the defendant is now at liberty to say, it was a possession, that had no reference to the agreement; as he has permitted the plaintiff to remain in possession, and to make expenditure upon the land for 8 years, before he brought an ejectment. He must have known that the expenditure was made upon the faith of the agreement; and I cannot now permit him to turn round, and say, the plaintiff has been possessing merely as a trespasser; as he must be, if his possession is not to be referred to the agreement."

Furthermore, possession is part-performance both by and against the stranger and the owner. *Wilson* v. *The West Hartlepool R. Co.*, 2 DeG. J. & S. 475, 485, 46 E.R. 459, 463, Russell, J., refers to *Nunn* v. *Fabian* (1865), 1 Ch. App. 35, in his Canadian notes to Fry's Specific Performance (5th ed., p. 318*f*) as probably the case that goes farthest in the direction of recognising acts of part-performance as sufficient to let in parol evidence of the contract. In that case the tenant was in possession under a lease from year to year, and remained in under an oral agreement for a lease for 21 years, at an increased rental, and the part-performance relied on was the payment of the increased rent. The plaintiff was in possession and paid his rent from May, 1862, and the defendants did nothing to disturb his possession until October, 1863. Specific performance was ordered. *Nunn* v. *Fabian* was followed in Ontario in *Butler* v. *Church* (1869), 16 Gr. 205. In that case a tenant remained in possession after the termination of his lease under a parol agreement to purchase the land. He ceased to work the farm on shares, and to deliver produce of the farm as he had theretofore done by way of rent; and thenceforth made payments on account of the agreed purchase money partly in cash, partly in work, and partly in farm produce, and thenceforth also dealt with the land as his own; using it and making improvements upon it as an owner would do. He was held entitled to specific performance of the contract for sale. The reasoning in this case would apply equally well to a contract for a lease. The tenant's continued possession, coupled with acts inconsistent with the former tenancy, was held sufficient part-performance to let in parol evidence of a contract of sale. Spragge, V.-C., at p. 210, says:—

"The occupier was in possession in a different character; it was in substance a new possession though without the formality of giving up the one possession and being put into possession in a new character: but, being in possession in a character not referable to his former tenancy, it was open to him, I apprehend, to shew how and in what character he was in possession."

Township of King v. *Beamish* (1916), 30 D.L.R. 116, 36 O.L.R. 325, was a case of an oral agreement between a municipality and the owner of land, by which the latter agreed to lease the land to the former for the term of 8 years, with the right during the term to remove the gravel in the land. The engineer of the municipality entered and removed gravel from the land, continuing to

Annotation. do so until the then requirements of the municipality were satisfied. Rent does not appear from the report to have been paid. A lease was prepared and tendered to the owner for execution but he refused to execute it. The municipality thereupon brought an action for specific performance and succeeded. This case also followed *Wilson* v. *West Hartlepool R. Co.*, *supra*, and decided that possession taken by a corporation was sufficient part-performance in spite of the fact that there is no assent to the terms of the agreement under the seal of the corporation; at p. 121, 30 D.L.R. and p. 331, 36 D.L.R., Meredith, C.J.O., distinguishes between the pedal possession required to oust the title of the true owner under the Statute of Limitations, and the possession sufficient to exclude the operation of the Statute of Frauds. In the latter case:

"Such a possession as the subject matter of the contract admits of is sufficient, *e.g.*, in the case of vacant land, entry upon it for the purpose of taking possession with the consent of the vendor is sufficient, although the purchaser does not remain upon the land but goes upon it only when he has occasion to do so."

The most recent case in this connection is *Bell* v. *Chartered Trust Co.*, and *Chartered Trust Co.* v. *Bell and Buissey* (1919), 17 O.W.N. 24, reversed by 17 O.W.N. 88 (and reported above). A. agreed orally to lease land to B. for 5 years, the rent being agreed upon. A lease in duplicate was prepared in accordance with this agreement, and one part was handed to B., but it was never signed by either party. B. went into possession and paid rent by the month for nearly a year, and then made an assignment for the benefit of his creditors, and signed a surrender of the lease. The assignee went into possession, and upon the landlord bringing an action for recovery of the land, brought an action for a declaration that the lease was valid and subsisting, and for specific performance. Specific performance was ordered in the terms of the unexecuted instrument, upon the assignee entering into personal covenants. *Powell* v. *Lloyd* (1827), 1 Y. & J. 427, and giving the notice required by R.S.O. c. 155, s. 38 (2). As to the alleged surrender, if it was signed before the assignment it was void against creditors under s. 5 of the Assignments and Preferences Act, R.S.O. 1914, c. 134; if afterwards it was a nullity.

To recapitulate, in England a parol lease or an agreement for a lease, in writing, results in a tenancy at will, unless there has been entry and payment of rent, and there are equitable grounds for ordering specific performance, when the lease or agreement will be enforced as if it were a valid lease. If there are no such equitable grounds it will operate as a lease from year to year. The same result follows in Ontario, except perhaps in the case of entry without the consent or acquiescence of the owner, when it is equally arguable that the lease is either good or totally void, or a lease from year to year. An oral lease or agreement for a lease will be specifically enforced both in England and Ontario where entry has been made with reference only to the lease or agreement, and it would be sanctioning a fraud to permit the Statute of Frauds to be pleaded.

Since the above annotation was written, the judgment in *Bell* v. *Chartered Trust Co.* and *Chartered Trust Co.* v. *Bell and Buissey* has been reversed, but on the sole ground that the surrender of the lease was valid. The surrender being good, it was considered unnecessary to deal with the other points involved. Consequently the case is still an authority for the proposition that part-performance is sometimes sufficient to take a parol lease out of the Statute of Frauds.

*JACOBSEN v. THE SHIP "FORT MORGAN."

CAN.

Exchequer Court of Canada, Drysdale, Loc. J. in Adm. March 29, 1919.

Ex. C.

SEAMEN (§ I—2)—CONTRACT OF HIRE—LAW OF THE FLAG—IMPROPER DISCHARGE—NORWEGIAN MARITIME CODE; ADMIRALTY ACT, 1861, s. 10 AND ss. 9 AND 12.

Held:—1. That s. 10 of the Admiralty Court Act, 24 Vict. (Imp.) 1861, which extends the jurisdiction to "any claim by a seaman of any ship" permits the application by the Court of the law of the country of the litigants.

2. That a contract or engagement between a Norwegian owner and a Norwegian master for services to be rendered on a Norwegian ship, registered in Norway, although verbally made in New York, U.S.A., is governed by the law of Norway.

3. That where a change in destination of a ship is made, the crew can legally refuse to continue on terms of existing contract.

4. That in such event, where the new terms asked are not accepted by the owner, members of the crew are entitled to legal notice before being discharged.

Statement.

THIS is an action by the master of S.S. "Fort Morgan" for back salary due at date of discharge and damages for wrongful dismissal.

The plaintiff claimed that he left New York in July, 1918, under orders from his owners to proceed to Halifax, N.S., and thence to the West Indies. At that time his remuneration was fixed at $343.75 per month. The vessel arrived in Halifax and offers of charters to the West Indies were made and declined. On August 8 the owners notified the plaintiff that the vessel was to proceed to St. John's, Newfoundland, and there to load a cargo for Italy or Greece. The master declined to go into the war zone unless his salary was raised to an amount greater than the wages of the chief engineer. The owners refused to give the master what he asked, and sent a new master and crew, upon whose arrival on August 24, the master left the ship and returned to New York and rendered his account to the owners. And it is for the balance of his account, plus 3 months' wages and the cost of his return to Norway, that this action is brought.

The defendant claimed that the plaintiff was the master of the ship "Fort Morgan" from January, 1918, to a date between Aug. 15 and Aug. 30, 1918. His contract was a verbal one made with Frederic Anderson, the ship's agent in New York.

In the latter part of July, 1918, the ship reached Halifax; and about Aug. 6, 1918, plaintiff received a charter-party from

*This case has been appealed to the Supreme Court of Canada and is still pending.

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Anderson in New York. This charter-party was from St. John's, Nfld., to Italy or Greece with a cargo of fish. The crew except a sailor, two mates, the chief engineer and plaintiff refused to go. The master reported to Anderson that he wanted $450 but not less than the engineer. Anderson refused to pay $450, but, however, he sent a schedule of wages shewing an increase to plaintiff for the transatlantic voyage.

Anderson offered the master $400. He had been receiving $343.75 per month; a new crew was put on the vessel as plaintiff refused to sail without $450 a month, and plaintiff left the boat.

Plaintiff is a Norwegian; and the defendant ship is registered at Grimstadt, Norway.

Perkins, for plaintiff; *Butler*, for defendant.

Drysdale, L.J.A.

DRYSDALE, L.J.A.:—The plaintiff, master of defendant ship, came to Halifax with a view to a West India charter re a salary of $343.75 per month. After remaining here the owners chartered the ship for the war zone and offered the captain and crew an increase of wages provided they agreed to go to Italy. The plaintiff refused the wages and was discharged here without notice. Under the English law the plaintiff would be entitled to compensation for such damages.

The plaintiff is a Norwegian and the defendant ship is owned by a Norwegian and registered in Norway, and I think such compensation should be fixed by analogy to the Norwegian Maritime Code.

In the event of a discharge under the circumstances here, such code fixes the compensation at 3 months' salary and the price of transport to Norway. This the plaintiff is entitled to, and I refer the account to the registrar to be made up on this basis.

The registrar having reported the sum of $1,888.85 to be due to the plaintiff, and the said report having been filed herein on March 9, 1919.

The Judge pronounced in favor of the plaintiff's claim for the said sum of $1,888.85 and costs, including the costs of the reference, and condemned the ship and her owner and his bail in the said sum of $1,888.85 and the said costs to be taxed.

Judgment accordingly.

SILZER v. HUDSON.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

ANIMALS (§ I—26)—OPEN WELLS ACT—OPEN WELL ON PREMISES—DUTY TO FENCE—WANT OF KNOWLEDGE.

The duty imposed by the Open Wells Act (Sask.), to fence an open well, is an absolute one, and want of knowledge of the well is no defence to an action for damages to an animal which while lawfully at large falls into the well.

An agent's knowledge of an open well on premises occupied by him will be imputed to the principal.

[*Baldrey* v. *Fenton* (1914), 20 D.L.R. 677; *Watson* v. *Guillaume* (1918), 42 D.L.R. 380, followed.]

Statement.

APPEAL by defendant from the trial judgment in an action for damages for injuries to a horse which, while lawfully at large, fell into an open well. Affirmed.

J. E. Doerr, for appellant; *A. G. Mackinnon*, for respondent.

The judgment of the Court was delivered by

Newlands, J.A.

NEWLANDS, J.A.:—This is an action for damages to plaintiff's horse, which was lawfully at large, from falling into an open well on defendant's premises.

Baldrey v. *Fenton* (1914), 20 D.L.R. 677, 7 S.L.R. 203, and *Watson* v. *Guillaume* (1918), 42 D.L.R. 380, 11 S.L.R. 348, decide that in a case like the present defendant is liable.

Defendant, however, raises the defence that the having of an open well upon his premises is only evidence of negligence, and he may rebut same by proving that he did not know that it was there.

There are two answers to this objection. (1) The trial Judge has found that defendant's son, who managed his land in question, knew of the open well. This son being an agent of defendant and having knowledge, his knowledge must be imputed to defendant; and (2), a statutory duty is imposed on defendant to fence an open well on his premises which is dangerous to stock. This duty being an absolute one, defendant cannot rid himself of his liability by pleading want of knowledge.

In *Kearney* v. *London, Brighton & South Coast R. Co.* (1871), L.R. 6, Q.B. 759, 24 L.T. 913, the defendants were held liable because a brick fell out from a bridge on plaintiff who was passing, and the Court on appeal held that the defendants were under a common law liability to keep the bridge in safe condition for the public using the highway to pass under it. (See headnote.) I

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take it that in this case the defendants had no knowledge that a brick was liable to fall from the bridge and injure a person passing under it. Such knowledge would have been evidence of negligence, and the contention was that there was no evidence of negligence on defendants' part. Now if in that case the defendants were guilty of negligence, because under a common law liability, so in this case defendant must be guilty of negligence, because he is under a statutory liability.

The appeal must therefore be dismissed with costs.

Appeal dismissed.

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Ex. C.

THE KING v. FONTAINE.

Exchequer Court of Canada, Audette, J. October 29, 1919.

EXPROPRIATION (§ IV A—192)—PROSPECTIVE VALUE—SECOND INVASION—ELEMENTS OF DAMAGE—BENEFITS DUE TO EXPROPRIATION—QUANTUM OF DAMAGES.

Held, that property used as a farm in proximity to a village, but with only a prospect that at some distant date, some parts might be sold as building lots, will be classed as farming lands, and be valued as such, and not as building lots; such prospect being too distant. *The King* v. *Trudel* (1914), 19 D.L.R. 270, 49 Can. S.C.R. 501, referred to.

2. That in a case of second expropriation, where the property has already adjusted itself to conditions created by the first invasion, the owner of property is entitled to other and different damages due to such second expropriation.

3. That where by second expropriation a railway takes a strip of land for a railway yard on each side of the right of way first taken, the extra inconvenience and delay due to longer crossing and to the more extensive use of the property as a yard, are elements of the damages to be allowed him.

4. That the benefits accruing to the remaining part of the property by the expropriation and to the use to be made of the land taken, will be taken into consideration in fixing the quantum of damages due an owner.

[*The King* v. *Trudel* (1914), 19 D.L.R. 270, 49 Can. S.C.R. 501.]

Statement.

THIS is an information exhibited by the Attorney-General of Canada, alleging that the Crown has expropriated certain lands for the purposes of a Government Railway yard near Quebec city and praying to have same valued by this Court.

C. V. Darveau, K.C., and *L. G. Belley*, K.C., for plaintiff; *A. Bernier*, K.C., and *V. A. de Billy*, for defendants.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada whereby it appears that certain lands were taken and expropriated by the Crown, under the provisions of the Expropriation Act, R.S.C. 1906, c. 143, for the purposes of the Intercolonial Railway, a public work of Canada.

by depositing, on Aug. 24, 1915, a plan and description of the said lands, in the office of the Registrar of Deeds for the City of Levis, in the Province of Quebec.

The total area of land taken is 1.801 square arpents, for which the Crown offers for the land and for all damages resulting from the expropriation, the sum of $566 and the undertaking hereinafter mentioned. The defendants claim the sum of $2,450.

The title is admitted.

The lands expropriated form part of a farm, as stated in par. 7 and 8 of the statement of defence, which was before the expropriation of August, 1916, crossed by the main line or track of the Intercolonial Railway, running across the farm, and upon which the owners had the usual farm crossing. However, for the purposes of establishing a railway yard at the *locus in quo*, the plaintiff, in August, 1916, by a second invasion, expropriated a strip of land on both sides of the right of way respectively, and adjoining the same, namely: on the south an area of 0.555 of an arpent, and on the north an area of 1.246 arpents,—in all 1.801 square arpents.

The Crown has given and filed an undertaking, reading as follows:

Report of the Committee of the Privy Council approved by His Excellency the Governor-General on Nov. 29, 1918.

The Committee of the Privy Council have had before them a report, dated Nov. 25, 1918, from the Minister of Railways and Canals representing that by an order-in-council of Feb. 27, 1917, authority was given for the settlement of a number of claims for lands expropriated for the purposes of the Chaudiere Junction Yard of the Canadian Government Railways on the basis of an appraisement made of the parcels by the Right-of-Way and Lease Agent of the Department of Railways and Canals.

By a further order-in-council of Dec. 11, 1917, it was explained that in estimating the amounts of compensation to be paid to the several proprietors, regard was had to the fact that by reason of the expropriation they were deprived of certain private crossings which had theretofore existed over the right-of-way of the Intercolonial Railway and by which they had access to and from the several portions of their respective farms; and that in substitution for these crossings it was proposed to provide a roadway along both sides of the properties expropriated and to maintain a private crossing at one end thereof, all as shewn upon an attached plan. To give effect to this arrangement, the Attorney-General of Canada was given authority to give each of the several proprietors an undertaking in the following form or to the like effect:—

The Attorney-General on behalf of His Majesty, being thereunto duly authorised by order-in-council of Dec. 11, 1917, hereby undertakes to grant to the defendant, his heirs, successors and assigns, a right-of-way on, over and

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upon the two strips of land marked respectively "Proposed roadway" upon the plan attached hereto, to and from the respective portions of his property situate on either side of the Intercolonial Railway Yard at Chaudiere Junction, by means of the private crossing marked "A" upon the plan, or by the public road marked "B" thereon (as the case may be) and that His Majesty will, as may be reasonably required, execute such conveyance or assurance if any, as may be necessary in order to give full effect to this consent or undertaking.

That two additional parcels of land at this point were, in August, 1916, expropriated for the purpose of extending the railway yard, and the Right-of-Way and Lease Agent of the Department of Railways and Canals has furnished valuations of the same, as follows:—

Owner	Area	Land Value	Damages	Total Compensation
Pierre Lambert	0.753	$150	$77.00	$277.00
Abraham Couture	0.653	130	76.40	206.40

The Minister, on the advice of the Acting Deputy Minister of the Dept. of Railways and Canals, recommends that authority be given for tendering to these two claimants the amounts above set out, with interest in each case at the rate of 5% per annum from the date of expropriation to the date of payment, and if accepted, for payment of the same upon the receipt of proper deeds of conveyance and release; failing acceptance the cases to be referred to the Exchequer Court of Canada for adjudication; in each case, an undertaking to be given in the same form or to the like effect as in the cases covered by the above mentioned orders-in-council, in respect of the proposed roadways referred to.

The Committee concur in the foregoing recommendation, and submit the same for approval.

(Sgd.) RODOLPHE BOUDREAULT,
Clerk of the Privy Council.

The Honourable,
The Minister of Railways and Canals.

The Attorney-General on behalf of His Majesty undertakes to maintain proposed roadways above mentioned.

(Sgd.) C. V. DARVEAU,
Of Counsel for the Attorney-General of Canada.

This undertaking is made with the object of giving a crossing to these farmers and thereby decrease in a measure the damages which obviously flow from the deprivation of a crossing to the southern part of their farms, the buildings being on the northern side thereof.

By the undertaking the Crown has made and will maintain a road, taken out of the lands expropriated and belonging to the plaintiff, running on the northern side parallel to the railway to the end of the railway-yard, where the defendants have a crossing, over three tracks, or six rails, and two gates to open and close

at that place. Thence travelling from east to west on a parallel road on the south, similar to the road on the north, he comes to the gate opening on the southern part of his farm. The distance to travel for one trip is of a distance of eleven and two-thirds arpents in length. Therefore, for the round trip, going and coming, he has to travel about 23 arpents and open 4 gates, instead of 2 as formerly.

To this element of damage there is another one represented by the farmers as being very serious in that the shunting and the obstruction of cars at the crossing, occasions serious, numerous, and at times long delays in their numerous trips from the northern to the southern parts of the farm.

Some complaint has also been set up in respect of the embankment which has been raised and by the obstruction of the cars in the yard, which obstruct the view of the southern part of the farm from the northern part thereof. Mention has also been made that the surface waters flood the roadway on the northern side of the right of way, and at places spread on the southern part of the northern parcel of the farm; but, from actual observation, when viewing the premises and from the evidence, it is obvious that the farm ditches have not been kept and are not in good order, and maintained, and when these two parallel roads are maintained by the Crown, I would reckon the surface waters, which are not of any greater volume than before the 1916 expropriation, will be well taken care of, especially if the farmers themselves attend to their own boundary ditches.

Here follows a summary of the evidence.

On behalf of the owners, Pierre Fontaine valued the farm before the expropriation at $12,000, and since at $10,000. He, however, values the land taken at $500 an arpent or $900.50 for the land taken and the damages at $2,000.

Michel Lemieux values the land expropriated at the rate of $600 an arpent, or $1,080.60, and the damages at $2,000 or more, as he says.

E. Malouin values the land taken at the rate of $700 or $1,360 for the 1.801 arpents and the damages at from $2,500 to $3,000.

J. E. Plante values the land taken at $650 to $700, which at $675 would represent $1,215.67, and the damages at $2,500 to $3,000.

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Edmond Cantin values the land taken at $1,000, and the damages at $2,000 to $2,500.

On behalf of the Crown Edmond Giroux values the land taken at $100 an arpent, or $180, and the damages at $464.10. Alfred Couture, at $150, for the land taken or $270.15 and the damages at $600. J. A. Dumontier, at the rate of $100 for the land taken or $180, and feels unable to place a valuation upon the damages. Louis Jobin also places the value of the land taken at $180, and the damages at $500, and Joseph G. Couture estimates the land taken at $180, and the damages at $220.

Now these farms are composed of soil of an average quality, and the exploitation of the same is of an equal standard. It is contended on behalf of the defendants that as their lands are in the neighbourhood of Charny, which keeps developing towards the east, they will ultimately be sold as building lots. While there is a prospect that some parts or portions of these farms will at some distant date be sold as such, I am forced to find that they are actually in the class of farming lands, with the possibility and ever the probability of some portions being sold in building lots in the future—but these lots, and especially on the Fontaine farm, will be first taken up as building lots on the extreme northern end thereof and that this prospective capability of the farms for building lots on the south is at too distant a future to class the farm as building lots. There is a large quantity of land available for building lots, if at all in demand, on the northern part of the farm for years to come before the south can be taken.

The prospective potentialities of the lands should be taken into account, but it is only the existing value of such advantages at the date of the expropriation that falls to be determined. *The King* v. *Trudel* (1914), 19 D.L.R. 270, 49 Can. S.C.R. 501.

Then one must not overlook the important fact that this expropriation is in the nature of a second invasion. That is, a railway was already running across the farm severing it in two, and that they had to cross a railway; but with only one track instead of a railway yard with three tracks for the Fontaine owners, who at the date of the present expropriation had to suffer all the inconvenience flowing from an ordinary expropriation.

The Crown having been asked by me, at trial, to give particulars of the amount of $566 offered by the information, counsel at Bar

stated that the plaintiff was offering for the land taken at the rate of $200 or $360.20, and for the damages, $205.80, representing the total of $566.00.

The plaintiff might at any time have placed a second and a third track on their right of way, their property, under the first expropriation, without paying any further damages. Then the fact of the establishment of a large railway yard, from the increase in the labor employment, there will result in a benefit to the community at large residing in that neighbourhood, by increasing the population of Charny and creating, at a future date, a demand for building lots on the northern extremity of the farm and thus enhancing the value of this property.

Accompanied by counsel I have had the advantage of viewing the *locus in quo* and the premises in question, and after weighing the evidence, oral and documentary, and taking all the circumstances into consideration, making a fair allowance for the delays occasioned in crossing, I have come to the conclusion to allow for the land taken $360.20, or at the rate of $200 an arpent, and for the damages the sum of $800, and to direct that judgment be entered, as follows, no allowance being made for compulsory taking, the amount allowed being already sufficient:

1st. The lands expropriated herein are declared vested in the Crown as of August 24, 1916.

2nd. The compensation for the lands taken and for all damages, past, present and future, resulting from the present expropriation is hereby fixed at the sum of $1,160.20 with interest thereon from Aug. 24, 1916, to the date hereof.

3rd. The defendants are entitled to the due performance and the execution of the works mentioned in the undertaking above recited.

4th. The defendants are also entitled upon giving to the Crown a good and sufficient title, free from all mortgages, hypothecs and incumbrances, to recover from and be paid by the plaintiff the said sum of $1,160.20, with interest as above mentioned.

5th. The defendants are also entitled to their costs.

Judgment accordingly.

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S. C.

McNICOL v. P. BURNS AND Co., Ltd. and HODSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 24, 1919.

APPEAL (§ VII J—437)—JURY—VERDICT—OMISSION TO CONSIDER ELEMENTS OF CASE—INSTRUCTIONS—PRESUMPTION.

The Court will not interfere with the verdict of a jury on the ground of inadequacy of damages awarded, unless the Court is satisfied that the jury has omitted to consider some elements of the plaintiff's case. The fact that the Court might have awarded a greater sum is not of itself sufficient reason for disturbing their finding, but if the damages are unreasonably small the Court is entitled to conclude that the jury has failed to consider all the material elements bearing on the issue. The Court must presume that the jury understood the plain obvious meaning of their verdict.

[*Phillips* v. *The South Western R. Co.* (1879), 4 Q.B.D. 406, and 5 Q.B.D. 78, followed.]

Statement. APPEAL by plaintiff from the judgment of Walsh, J., in an action for damages for injuries which caused the death of the plaintiff's husband. Affirmed.

A. McL. Sinclair, for appellant; *A. H. Clarke*, K.C., for respondents.

Harvey, C.J. HARVEY, C.J., concurred with Simmons, J.

Stuart, J. STUART, J.:—There was some fear expressed by counsel that the jury may have been led to believe that they were at liberty to award different amounts of damages against the two respective defendants. The Judge called the jury back to correct that and in doing so stated specifically that he did not mean that they could give one amount against one defendant and another amount against the other. He said that they must give the same amount against both.

Afterwards the jury returned and asked a question which seems to me to shew that they understood perfectly well what had been told them as far as it went but that they wanted to know something else. They said:—

> My Lord, if damages are assessed would the amount awarded be a total amount or would each of the defendants be liable for the amount stated?

Now that is not at all the question which had been discussed before. I think, the jury understood quite well that they could not give one amount against one defendant and another amount against the other, but they wanted to know evidently whether, when they acted according to this and gave the same amount against both, each of the defendants would have to pay the amount awarded against each, so that if the defendants were both good

financially the plaintiff would get the amount twice or would she only get it once.

That was by no means the question which had been discussed before, yet the Judge in answering them assumed that they were asking about the original question for he said:

> That is exactly what I recalled you in for before to tell you that you should not make any distinction between the defendants with respect to the damages. If you find the defendants liable your verdict will be for so much against the defendants.

Then the jury persisted and began to question the Court still and said: "Individually or . . ." when the Judge interrupted them. The beginning of the question shews again that what they wanted to know was whether the plaintiff could collect what was given as damages from each defendant individually or whether having got it once from one she could not get it again from the other.

To their second attempt to obtain enlightenment they were told again only this: "It is not necessary to make any separation between the defendants at all."

Now I have very grave doubt whether the jury ever got any answer to their question because "separation" comes too near in meaning to "distinction" to make anything rest upon the use of the former word. Indeed I think they did not get an answer because the trial Judge himself, as his words shew, simply thought he was reiterating his former explanation.

In these circumstances, I confess, I have some difficulty in concluding, when the jury returned a verdict saying: "We find the defendants guilty of negligence and award damages to the amount of $2450," that they understood the legal effect of it. Of course, we understand it quite well. But they had been asking specifically what the effect of such a verdict would be; they had asked "would that be the total amount or would each defendant be liable for it?" Of course, in a sense, each defendant is liable for it but what they plainly wanted to know was: "If one pays the amount will the other be liable then also to pay the same amount, or is the amount we award the total amount that the plaintiff can get altogether?" That question, it seems to me, was never plainly answered, and in the uncertainty I confess that I do not know for certain whether the jury meant to give $4900 or $2450.

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Stuart, J.

Neither amount is so absurd as to make it certain that they could not have meant it. I think the plaintiff was entitled to have the jury given an answer to the very relevant question which they asked, and the fact that her counsel did not object to the way the matter was left seems to me to make no difference. The probability is that he did not see the point of the jury's difficulty any more than the trial Judge did.

These are the doubts which have weighed on my mind very heavily in considering the verdict, and the extremely conservative estimate made of the damages, at least in comparison with what we know juries frequently give for the loss of a husband, has increased my doubt whether all the jury understood clearly the way the matter stood about which they enquired from the trial Judge.

On the other hand, I quite appreciate the strength of the argument adopted by the other members of the Court. It does from another angle look as if the jury must have concluded that they had nothing to do with any difference, distinction or separation between the defendants but were to say how much damages the plaintiff had suffered and upon whom legal liability for damages rested. That is the way they put their answer or verdict.

As the verdict is not so small as to be utterly perverse and unreasonable, and, as it is not clear that the jury understood the direction of the Judge in a wrong sense so as to shew a clear miscarriage of justice, I think, though, with much hesitation, that the appeal should be dismissed with costs.

Simmons, J.

SIMMONS, J.:—Plaintiff sued as administratrix of her late husband for damages arising out of the death of her husband who was killed in a collision with a motor truck belonging to the defendant P. Burns & Co. Ltd. and operated by the defendant Hodson.

The action was tried by Walsh, J., and a jury, and a verdict was rendered against the defendants for $2450 damages.

The plaintiff appeals on the ground of inadequacy of damages. Plaintiff also claims that the charge of the trial Judge left the jury in doubt as to the question of liability of both defendants. The second objection has a direct relation to the first.

After the jury retired, counsel for the plaintiff asked the

trial Judge to give the jury specific instructions in regard to the joint liability of the defendants in the following terms:—

I think you should tell the jury that having regard to the decision of our own Court their judgment should be a general verdict against the defendants. Your Lordship, on opening, left the impression that they might have to separate them or that they could quite properly bring in a verdict for one sum against the P. Burns Co. Ltd. and another against Hodson.

The Court: I will correct that.

Then followed a discussion between the trial Judge and Mr. Sinclair as to the applications of ss. 12, 19 and 33 of the Motor Vehicle Act, 2-3 Geo. V., 1911-12, c. 6, in regard to the shifting of the onus to the defendants.

Then the trial Judge continued: "Then on the point raised by counsel for plaintiff this is the way it is put in 'Smith,'" reading: . . . The Court then recalled the jury and addressed them as follows:—

It is feared that because of what I said as to the distinction between Hodson and the company, you might find a verdict *for one amount against one of them*, and a *verdict* for *another amount against* the *other*. *I do not mean that at all*. I think if you find a verdict against the defendants the verdict will have to be of the same amount as a verdict against both defendants for a certain set amount. It is always hard to talk on these legal subjects to a layman. We often have very much difficulty in understanding them ourselves. But it has been pointed out to me that what I said at the opening of my remarks is hardly right in view of s. 33. You will remember I endeavored to explain to you that in my opinion it was only when there had been a violation of any of the provisions of the Act, that the owner of the motor vehicle was brought within this s. 33 which throws the onus of proof upon him that the loss or damage did not arise from his negligence or the negligence of the driver. In view of the argument that has been presented to me, I think that is wrong. S. 33 provides that where any loss or damage is sustained by any person, by a motor vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle. So that if it has been shewn here that this damage occurred through or was incurred or sustained by a motor vehicle owned by P. Burns & Co. Ltd., I think that they are in the same position as Hodson of shewing that it did not occur through their negligence.

The jury returned and requested to be allowed to address a question to the Court.

My Lord, if damages are assessed, would the amount awarded be a total amount or would each of the defendants be liable for the amount stated? The Court: That is exactly what I recalled you in for before, to tell you that you should not make any distinction between the defendants with respect to the damages. If you find the defendants liable, your verdict will be for so much against the defendants.

The Jury: Individually or . . . The Court: It is not necessary to make any separation between the defendants at all.

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Counsel for plaintiff apparently considered that the explanation given by the Court as to the common liability of defendants was satisfactory.

The jury then retired and returned delivering the following verdict:—

We find the defendants guilty of negligence and award damages to the amount of $2,450.

The Court: I will enter judgment for the plaintiff against the defendants for $2,450 and costs.

The verdict of the jury would seem to indicate that their intention was to express their verdict in terms which were entirely free from ambiguity or doubt. The plain ordinary meaning and intent of their verdict was an award of damages as and by way of compensation in the total sum of $2450, and for which sum both defendants were liable.

In order to lay a foundation for disturbing the verdict on this branch of the case, it would be necessary to assume that the jury did not know or appreciate the plain meaning and intent of their own words. This would be equivalent to an attempt by the Court to interfere with the functions of the jury, as the Court must presume that the jury understood the obvious meaning of their own expression.

On the first branch of the appeal, namely, the inadequacy of damages, the Court will not interfere with the verdict unless the Court is satisfied that the jury has omitted to consider some elements of the plaintiff's case. The fact that we might have taken a different view and might have awarded a greater sum is not of itself sufficient reason for disturbing their finding. But if the damages are unreasonably small, the Court would be entitled to arrive at the conclusion that the jury must have failed to consider all the material elements which had a bearing upon the issue. *Phillips* v. *The South Western R. Co.* (1879), 4 Q.B.D. 406, and 5 Q.B.D. 78.

The deceased was 41 years of age at the date of the accident, and came to Canada from Scotland. In 1912 he was married to the plaintiff. The deceased was then earning $100 per month and "all found" in the employment of Foley, Welsh & Stewart, contractors at Vancouver. In 1917 he came to Calgary and secured employment with the Hudson's Bay Co. at $85 per month in addition to certain advantages by way of discount on goods

and supplies purchased from his employers. There were no children. At the time of his death he had $2300 in savings deposit in a bank. He owned a house and lot in Vancouver which brought a rental of $7 per month. The amount of taxes and insurance and cost of keeping same in repairs does not appear. Both husband and wife had the right to issue cheques on the savings account in the bank.

There are many circumstances which a jury are entitled to consider in estimating the amount which the wife should receive to recompense her for the pecuniary loss arising out of the death of her husband.

The probable earning period of her husband immediately preceding the moment of his death, the probable period of her own life, the liability of either to have his or her life terminated by accident, disease or otherwise, are no doubt material to the issue.

But these are not the only considerations. Under present conditions a jury would properly look at a salary of $85 per month from this viewpoint, namely: in what condition of life would this salary support two people. The cost of necessities of life, food, clothing and rent, as these exist to-day, might materially affect their minds. The age of the plaintiff and her chances of remarriage and her independent earning power would affect the issue.

Then again, the relative position of men and women in recent times in regard to their respective earning powers would be material. The work which she necessarily performed in the way of housekeeping for her husband is also material.

Common knowledge which the jury would almost surely have in regard to the high salaries offered to competent housekeepers of the age of the plaintiff might also be taken into consideration.

I am of the opinion that having in view all these material considerations, it is impossible to conclude that the jury have failed to consider all the material elements which should have been entertained by them.

I would therefore dismiss the appeal with costs.

Simmons, J.

McCARTHY, J., concurred with McCarthy, J.

McCarthy, J.

Appeal dismissed.

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Ex. C.

*THE KING v. BARRETT.

Exchequer Court of Canada, Cassels, J. March 17, 1919.

EXPROPRIATION (§ III C—135)—VALUATION OF RIGHT OF WAY—COMMON LANE—DAMAGE AND DEPRECIATION DUE TO SEVERANCE.

Held, 1. That the *rights* of the owners of the "fee" in a piece of land between two properties, used as a lane way, and over which the neighbor has an absolute right of way, is in effect only a right of way, and no more valuable than the rights of the owner of the right of way, and will be valued as such.

2. (a) That the value to be paid for in expropriation is the value *to the owner* as it existed at the date of taking, and *not* the value *to the taker*.

(b) That the value to the owner consists in all advantages the land possesses, to be determined as at the time of taking.

3. Between the westerly line of the expropriated property, and the buildings on the land adjoining, which buildings and land are also the property of the defendants, there is a strip of land, 10 feet wide, left vacant.

Held, that, in as much as, when the property comes into the market, the buildings, now very old, will have to be torn down (if it is to be used in any practical manner), and the ten feet can be sold with the rest no damage or depreciation is suffered by reason of the severance of the ten feet and of their being left vacant.

Statement.

This is an information exhibited by the Attorney-General of Canada, for the expropriation of lands in the City of Ottawa to be used as a site for the public building now known as the Hunter Building.

N. G. Larmonth, for plaintiff; *R. G. Code*, K.C., for defendants.

On February 7, 1918, notice of expropriating certain properties in the City of Ottawa to become the site of a departmental building (now known as the Hunter Building) was registered in the Registry Office for the Registry Division of the City of Ottawa.

The property expropriated comprised lots Nos. 11, 12 and 13 on the north side of Albert St,. lot No. 11 and the westerly half of lot No. 12 on the south side of Queen St. in the City of Ottawa.

The property in question in this appeal is a portion of lot No. 11 on the north side of Albert St., namely, the westerly twenty feet eleven and one-twenty-fourth inches. The easterly nine feet of the defendants' land was subject to a right of way in common to the respective owners of the land held by the defendants and the Loyal Orange Lodge, who were the owners of the remainder of said lot No. 11. The fee in this nine-foot right-of-way was vested in the defendants subject to the rights of the Loyal Orange Lodge. On the defendants' land there was situate a house and this house was partly on the land of the defendants in question

*This case has been appealed to the Supreme Court and is still pending.

in this case, and partly on the adjoining lot No. 10 on the north side of Albert St., which was also owned by the defendants. The dividing line between lots Nos. 10 and 11 practically divided the house in question in half, approximately 10 feet 5 inches of the house extending over on to said lot No. 10. An information on behalf of His Majesty The King was filed in the Exchequer Court of Canada on Oct. 18, 1918, claiming that the lands of the defendants should be declared vested in His Majesty The King and the amount of compensation to be paid to the defendants declared by the said Exchequer Court of Canada. An application was made at the trial to add as parties the executors of the estate of Esther Slater, who held a mortgage on the property owned by the defendants. At a later date, namely, April 17, 1919, an order was made by Cassels, J., directing that Robert N. Slater and Sir A. Percy Sherwood, executors of the estate of Esther Slater, deceased, be added as defendants in this action.

The Court allowed the sum of $9,264.85 to wit:—

Full value of house	$2,500.00
Right of way, $100 per foot	900.00
Balance of lot, 11 feet 1-24 inches at $400 per foot	4,768.05
Allowance for damage to party wall	280.00
	$8,448.05
10% on $8,168.05	816.80
	$9,264.85

Plaintiff argued as to right of way that the defendants are the owners of the fee in the nine-foot right-of-way, being the easterly 9 feet of the defendants' land, and the adjoining owners, the Loyal Orange Lodge, have an absolute right of way with the defendants over the said easterly 9 feet. This virtually makes the said right of way of no more value to the defendants than to the adjoining owners (the Loyal Orange Lodge).

That no evidence had been submitted on behalf of the defendants to shew that the right-of-way in question had any connection whatever or served any purpose for the benefit of the adjoining lot No. 10, owned by the defendants. Therefore the right of way can only be considered as being a benefit to the property of the Loyal Orange Lodge, and to the small portion of lot 11 owned by the defendants.

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THE KING v. BARRETT.

The compensation due to Barretts for the right of way is the value to Barrett as it existed at the date of the expropriation.

As regards the injurious affection to 10 feet 5 inches of land adjoining lands expropriated, no damage can result to the adjoining property owned by the Barretts. The Barretts are the owners lot No. 10, which was not expropriated by the Crown, and on lot 10 stood what were formerly residences with an extension built out to the street line, and the whole place used as an automobile supply place. The Barretts were also the owners of the westerly twenty feet eleven and one-twenty-fourth inches of lot No. 11 expropriated by the Crown immediately east of lot No. 10, and as shewn by the evidence, there was a house constructed on this portion of lot 11 some distance back from the street and 10 feet 5 inches of this house extended over on to lot No. 10. The Crown expropriated lot No. 11, with the result that the house, which was constructed on a portion of both lots, Nos. 10 and 11, would be cut in half, and it is admitted that the Crown would have to pay the full value of this house. Lot No. 10 was not expropriated, and the buildings standing entirely upon that lot were not interfered with by the expropriation.

Defendants argued that, as to the lane way this easement and license gives no rights whatever to the owner or owners of the dominant tenement other than a right-of-way over the land for the purposes of access to such dominant tenement, together with such incidental rights as may be reasonably necessary, as entry to make repairs for the due enjoyment of the easement. This easement and license is by the grant restricted, leaving the owner of the servient tenement free to make all other possible uses of the land which, in the exercise thereof, do not interfere with the right of entry to the lands of the dominant tenement by the lane thus provided and it follows that defendants as owners of the fee simple could excavate a subway or cellar under the right-of-way and use the same for their purposes, and this being done, as it could readily be done, so as not to interfere with the free passage of the owners of the dominant tenement over the right-of-way, defendants would be acting within their rights and could not be enjoined.

Likewise, defendants could not be enjoined from building over the right-of-way, so long as the reasonable enjoyment thereof

by the owners of the easement was undisturbed. Building contractors in these days of steel construction, it is submitted, would find little difficulty in bridging the 9 feet over the right-of-way and using the space above as a portion of any structure erected on the adjoining lands of the defendants.

That weight should also be given the fact, as adduced in evidence, that defendants during all the years while the easement has been in existence paid all carrying charges, taxes, local improvements, etc., and as a consequence in the opinion of the witnesses the value as found should be in the proportion of $100.00 to the Orange Lodge and $300.00 to defendants.

Then as to damages for severance and injurious affection to 10′ 5″ left vacant by reason of the removal of the buildings. It is argued that the injury, by reason of this narrow strip left vacant, is very serious because it is too narrow to be useful for commercial purposes or any purpose.

That the building adjoining is permanent and suitable to the location for some years at least. The main and rear buildings were built when solidity of foundations and walls were features of construction, thus rendering the premises with the new erection in front extending towards the street line quite suitable for its present purposes as a shop and factory for automobile supplies and repairs thereto.

Five cases were tried together and therefore the reasons for judgment handed down affecting all cases is printed here as follows:

Cassels, J.

CASSELS, J.:—These five cases relating to properties expropriated on Queen St., Albert St., and O'Connor St. in the City of Ottawa for the site of the new Government buildings erected on the premises, were tried before me on Feb. 4, 1919, and subsequent days.

In none of the cases had the Crown made a tender of any particular sum which they were willing to pay, but the matter was left to the Exechequer Court to arrive at the compensation which should be paid by the Government. I objected to this course of procedure. The Expropriation Act requires the Crown to state in the information the sums of money which they were willing to pay to the owner whose land was being taken. Subsequently each information was amended, stating the specific

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sum which the Crown was willing to pay in respect of the particular property in question.

At the opening of the cases I suggested that as most of the lands were in the same locality, and to a certain extent form part of the one block, that evidence applicable to all the cases should be taken, counsel for the various parties being at liberty to cross-examine any particular witness, and then any evidence solely applicable to one case should be taken separately in connection with that case. Counsel did not see their way to adopt my suggestion. However, later on as the evidence developed and the various counsel thought that the evidence in the first case might assist their clients, they one and all came to my view, and it was eventually agreed that all the evidence taken in regard to any one of the 5 cases should be held so far as applicable as if given in each of the cases. This has had the result of shortening the trials. I propose to deal with each case separately.

Before, however, passing on each case separately I may say that it is difficult to arrive at a satisfactory conclusion by reason of the fact that since the beginning of the war in August, 1914, there have been no sales of land in this particular neighborhood which would form an accurate guide in arriving at a satisfactory conclusion. The experts, however, have given their views, and they are a class of experts upon whose testimony I think reliance can be placed, although there may be a difference of opinion as to their method of arriving at their ideas of value.

Nichols, in his valuable book on Eminent Domain, 2nd ed., vol. 1, p. 663, states as follows:

> The productive value of land, or the value of the land to its owner based on the income he is able to derive from his use of it is not the measure of compensation and is not material except so far as it throws light upon the market value. In other words, what is sometimes called the value in use is everywhere repudiated as the test.

In the cases before me, in many instances, the lands are valued at figures which, if the land is to be made available to realize a satisfactory return, the buildings thereon would have no market value, as clearly if the land were to be utilized these buildings would have to be torn down in order to give place to a building suitable to the site. This applies to some of the properties in question. At the same time, to some extent, the rentals received from the buildings are of value as assisting the owners in carrying

the properties, such as the payment of taxes, etc. In most of the cases the value will be what might be termed a demolition value. It would be manifestly unfair to allow the owner of the land a price for the land which could only be obtained if the owner contemplated a demolition of the existing buildings and the erection of buildings suitable to the site from which a proper return could be made.

Nichols (on p. 694) puts it in this way:

> The cost of removing buildings upon land taken for the public use is not allowed as an additional element of damages, but as an effort to reduce the damages. In the ordinary case the cost of removing the buildings is almost if not quite equal to the value of the materials, and the owner is entitled to recover the full value of the buildings. He is not, however, entitled to have the buildings valued as they stand on the land as separate items additional to the market value of the land, nor on the other hand, is the condemning party entitled to have the buildings valued apart from the land, merely as for purposes of removal. The proper measure is the market value of the land with the buildings upon it, and the owner therefore receives nothing for the buildings unless they increase the market value of the land. Accordingly, evidence of the structural value of the buildings is not admissible as an independent test of value. When, however, it is shewn that the character of the buildings is well adapted to the location, the structural cost of the buildings, after making proper deductions for depreciation by wear and tear, is a reasonable test of the amount by which the buildings enhance the market value of the property. As in other cases of determining market value, not only the character and condition of the building, but also the uses to which it might be put, are matters for consideration.

For these propositions, Nichols cites American authorities, and it seems to me that it is common sense. I mention these remarks, as when I come to deal with the particular cases they will be found to be in point.

Nearly all the witnesses agree that in arriving at the question of value, it must be considered that it may take some considerable time, probably years, before the lands in question could be utilized by the erection of buildings suitable to the location to return revenue, and the parties to these actions must bear in mind that any allowance made to them for the premises expropriated is based upon a cash purchase. It is needless to remark that it is surprising how taxes and loss of interest for a year or two would deduct from the value.

Two of the properties in question, namely, in the *Burns* case and the *Sutherland* case, are properties situate on Queen St. in the City of Ottawa. They are between O'Connor and Bank Sts.

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and on the south side of Queen St. I will deal first with the case of *The King* v. *Burns*.

I held over the reasons for judgment in this case by reason of the fact that the property in question was mortgaged with other properties to Robert Nicholas Slater, and Sir Arthur Percy Sherwood, executors of the estate of Esther Slater. I thought the mortgagees should be parties defendant to these proceedings in respect to their mortgage interest.

Since the trial the mortgagees have agreed to be added as parties defendant and to be bound by all the proceedings in the action, including the evidence taken, to the same extent as if they had been originally parties, and an order was made (a consent being filed on April 22, 1919), adding them as parties.

No tender was made by the Crown, but at the trial they amended their petition by offering the sum of $8,600.

The land expropriated is property lying immediately west of the land expropriated from the Loyal Orange Lodge, whose property was expropriated. Altogether Barretts own the fee in eleven feet and eleven and one-twenty-fourth inches. In addition to that, they have the right to the lane on the east side of the property and on the west side of the Loyal Orange Lodge. While technically the fee in this lane is in the Barretts, it is held in trust for the property owned by the Loyal Orange Lodge. The Barretts and the Loyal Orange Lodge have equal rights in this lane.

I allowed to the Loyal Orange Lodge $100 for the 9 feet. I think that $400 a foot for the eleven and eleven one-twenty-fourth inches would be full compensation for the value of the land expropriated. I think that if another $100 a foot for the 9 feet is also allowed the Barretts, it would be full compensation for the value of their interest in this land.

In my opinion, the 9 feet dedicated as a lane, having regard to the fact that it could not be built upon either by the owners of the property expropriated or by the owners of the property vested in the Loyal Orange Lodge, is not worth at the time of the expropriation more than $200 a foot, and if the Barretts get one-half and the Loyal Orange Lodge the other half, they are receiving full compensation.

On the property expropriated from the Barretts there is a very old house in a very bad state of repair. It would have to be torn down were the property to be utilized in order to bring in a return on the value of the land. While in one sense it should be valued on a demolition basis, nevertheless, rent was being received which helped to carry the property. A feature in connection with this house is the fact that it extends further westward on land not expropriated by the present proceeding. It is conceded by the Crown that by reason of the tearing down of a considerable portion of this house the balance is absolutely valueless and should be paid for. I think if the Barretts are allowed the sum mentioned by Fitzgerald of $2,500, they receive everything they could reasonably expect to receive.

Another question arises but not of very much moment. It is said that the removal of this house leaves exposed what would be a party wall between the house and the building owned by Barrett on the west. There seems to be a consensus of opinion among counsel that a reasonable allowance should be made for protecting this wall. I think the sum of $280, mentioned by Christie, is not unreasonable.

It is conceded that between the westerly line of the expropriated property and the buildings adjoining, there will be a strip of land left vacant somewhere in the neighbourhood of 10 feet, and a claim was made for the depreciation of this 10 feet. The property immediately adjoining is owned by the Barretts and when it comes into the market the buildings on that property will have to be torn down if it is to be used in any practical manner. I do not think any sum should be allowed in respect of this piece of land.

In all there will be allowed the sum of $4,768.05 for the eleven feet and eleven and one-twenty-fourth inches; and additional sum of $900 for the interest of the Barretts in the lane in question; and the further sum of $2,500, the value of the house. These sums amount to the sum of $8,168.05—and to this amount 10% should be added. The further sum of $280 should be added as mentioned above for the party wall.

On this amount of $9,264.85, interest should run from the date of the expropriation.

The defendants are entitled to the costs of this proceeding.

Judgment accordingly.

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McLEAN v. TOWN OF MACLEOD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 21, 1919.

TAXES (§ III E—140)—ARREARS FOR MORE THAN SIX YEARS—RECOVERY—STATUTE OF LIMITATIONS.

The Statute of Limitations is no defence to an action to recover arrears of taxes which have been in arrears more than six years, the action being in respect of a liability created by statute the period of limitation is that applicable to an action upon a specialty.

[*Pipestone* v. *Hunter* (1916), 28 D.L.R. 776, 28 Man. L.R. 570; *The Cork and Brandon R. Co.* v. *Goode* (1853), 13 C.B. 826, 138 E.R. 1427, followed.]

Statement.

APPEAL by defendant from the judgment of a District Court Judge, in an action to recover arrears of taxes. Affirmed.

W. M. Campbell, K.C., for appellant; *T. B. Martin*, for respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from a judgment of McNeill, J., in favour of the plaintiff for arrears of taxes. Some of the taxes had been in arrear for more than six years and the Statute of Limitations was set up as a defence.

The trial Judge held that our ordinance limiting the right to bring an action upon a simple contract debt to six years in much the same terms as the statute of James I. did not apply, since this is not an "action of debt grounded upon a contract without specialty."

The same point was decided by Mathers, C.J.K.B., in the same way in *Pipestone* v. *Hunter* (1916), 28 D.L.R. 776, 28 Man. L.R. 570.

I agree with him that the question is concluded by the decision in *The Cork & Brandon R. Co.* v. *Goode* (1853), 13 C.B. 826, 138 E.R. 1427. In that case the action was for calls upon shares, the liability for which was imposed by statute. It was held that the plea that the action was founded upon a contract, without specialty, and did not accrue within six years was bad and that the period of limitation was that of a specialty. At p. 835, 13 C.B., and p. 1431, 138 E.R., Jervis, C.J., said:—

> This, therefore, is an action brought in respect of a liability created by statute, and therefore is an action founded upon the statute, and the plea which relies upon the six years' limitation, is no answer to it.

And Maule, J.:—

> I think it manifestly appears that this is an action of debt, and upon the statute, and therefore an action upon a specialty.

The other Judges concurred.

I would dismiss the appeal with costs. *Appeal dismissed.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 21, 1919.

COSTS (§ II—32)—ALBERTA RULES—TAXATION—POWERS OF DISTRICT JUDGE—SUPREME COURT JUDGE.

Rule 17 of the rules of procedure and tariffs of costs does not give to a District Court Judge the power to increase the amount of costs by directing them to be taxed on a higher scale or by directing that rule 27 shall not apply. Under rule 21 this power is only given to the Supreme Court or a Judge thereof; this does not apply to District Court Judges acting as Local Judges of the Supreme Court.

Statement.

APPEAL from a District Court Judge in an action for a declaration of lien. Reversed.

Coleman and *Warner*, for appellants; *Broomfield & Co.*, for respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The action was begun against one McHugh for a declaration of a lien in respect of work done for the appellant Coleman. Subsequently the appellant was added as a defendant and a claim made against him for the amount of the plaintiff's claim. He put in a defence and counterclaimed for damages for defective work. The action was tried, both the issue between the plaintiff and the defendant Coleman, and the issue between the plaintiff and the defendant McHugh in which Coleman had no interest. In the result the trial Judge found that the plaintiff's claim was proved but that the defendant Coleman was entitled to an allowance on his counterclaim which he deducted from the claim, but notwithstanding that he directed that the counterclaim be dismissed with costs. He directed that judgment be entered for the plaintiff for the amount due him less the deduction, but made no reference to costs. He also found in favour of the plaintiff as against the defendant McHugh, declaring a lien.

Formal judgment was entered on March 24, a month after the reasons were given, in favour of the plaintiff for $206.46 and interest and costs of the action, also dismissing the counterclaim with costs and declaring a lien. Neither the reasons nor the formal judgment made any reference to the costs of the issue in respect to the lien, but the formal judgment did provide that upon the defendant, McHugh, paying into Court the amount for which the defendant, Coleman, was liable, the lien should be discharged.

The costs were taxed upon the same day as the judgment was

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entered, and, upon the taxation, the plaintiff produced an order, or fiat, signed by the trial Judge and dated the same day, directing that upon the taxation of the plaintiff's costs the clerk allow them to be taxed under scale 2, column C., which evidently meant as it was treated, column 2 of the Tariff of Costs which is Schedule C to the Rules, and that r. 27 should not apply.

The result of the taxation was that the plaintiff was allowed $501.20 for costs, of which $389.05, or nearly twice the amount of the judgment, was for fees.

This appeal is against the whole judgment, including the direction as to the scale of costs, but the only two grounds raised are that the defendant, Coleman, was never properly made a defendant, because there were proceedings before he came in of which he was ignorant, and the other that the direction as to costs, made on March 24, was invalid as being an order made *ex parte* and also without jurisdiction.

As to the first ground, we intimated on the argument that we considered it untenable since the appellant had defended and submitted himself to the Court, and if he had taken the trouble to search he could have ascertained what he did not know. R. 17 of the Rules of Costs provides that the costs are in the discretion of the Court or Judge, which, of course, has long been the law, and it also provides that if he fails to make any direction the costs shall follow the event. The result, therefore, of his failure to give any direction that the plaintiff should have the costs of his action against the defendant, Coleman, would mean that as he had succeeded he should have them. The formal judgment, therefore, in awarding them, is not incorrect. Perhaps if it had been properly raised, the dismissal of the counterclaim with costs could have been questioned, since the counterclaim was in fact allowed to some extent at least, the allowance to the defendant not being attributable to anything else, and while costs may be withheld from a successful party, to require him to pay the costs scarcely seems to be within the discretion of a trial Judge. However, there is no ground of appeal which will cover this and it was not, at least directly, raised in the argument and I do not think it should be considered now.

The costs of the claim as against Coleman, however, clearly, are only the costs of the issue between the plaintiff and him.

A glance over the bill of costs as taxed, which was presented to us in the argument, shews that no regard whatever was paid to this, and that there were allowed against him costs which had nothing to do with the issue in which he was concerned.

It also shews that the taxing officer paid absolutely no regard to the provisions of r. 21 of the Rules of Costs, which provides that the costs shall be in his discretion up to the limit of the column applicable, for in every single instance he has allowed the maximum. I fear that there are other taxing officers who similarly fail to discharge the responsibility which the rule places upon them of themselves deciding whether each particular item of charge in a bill of costs is entitled to the maximum or something less. Whether this is through misunderstanding of the meaning of the rule, or through a desire to be complaisant and generous, or a disinclination to investigate, the result is that the rule is not given effect to and an injustice is done to the party who has to pay the costs. This is not a matter, however, which can be dealt with here, but is a matter for an appeal from taxation, but I merely call attention to it here with the hope of causing some more regard to be paid to the rule than in some cases has been the case heretofore.

The serious question involved in this appeal is that concerned with the trial Judge's order as to scale and amount of costs. This, I think, is quite properly treated as a part of his final judgment as far at least as this appeal is concerned. It was made, however, upon a special application, and under the rules an application must be on notice unless mischief might result from delay, or the Judge is satisfied that no notice is necessary (r. 209). In a case such as this it is clear that no mischief would result from the delay necessary to give notice, and it is difficult to see how it could be considered so unimportant as not to need notice. But the objection goes farther and maintains that the District Court Judge has no authority to give any such direction.

To determine this, it is necessary to consider some of the provisions respecting costs. S. 34 of the District Courts Act, 7 Ed. VII. 1907, Alta., c. 4, provides, in respect to proceedings in the District Court in much the same terms as s. 24 of the Supreme Court Act, 7 Ed. VII., Alta., 1907, c. 3, that the Lieutenant-Governor in Council may make rules of procedure including the

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matter of costs. The present rules of procedure and tariffs of costs are made under the authority of both these sections, and apply therefore to proceedings in both Courts.

Some years ago there was a tariff of costs consisting of two scales, one for the District Court and one for the Supreme Court. Before 1911-12 the jurisdiction of the District Court was limited to $400. By the statutes of that session the limit was raised to $600, and by an amendment to s. 37 of the District Court Act it was provided that in actions in the District Court, by reason of its increased jurisdiction, the costs should be the same as if they were in the Supreme Court.

This explains the reason for the limitation of column 1, of the present tariff, to "$400, the limit" of the original District Court jurisdiction. Column 2 applies in accordance with the provisions of the statute to Supreme Court actions up to $1000 and to District Court actions involving more than $400.

Rule 27 of the Rules of Costs provides that in actions for a money demand only, the total costs excluding disbursements shall not exceed certain percentages of the amount recovered (if payable to the plaintiff) or claimed (if payable to the defendant). In other actions the percentage is to be based on the maximum amount specified in the tariff under the column applicable.

The result would be that in the present case, since as far as the defendant Coleman is concerned there is nothing more than a money demand, he having no concern with the question of the mechanic's lien, the maximum amount of the costs recoverable would be 50% of $100 and 15% of $106.46, the remainder of the judgment recovered, or $65.96 instead of $389.05 as taxed. This is certainly a very substantial difference. R. 27 shews a clear intention that the maximum costs should bear some relation to the amount involved, and that they should be substantially less than the judgment, and the general tariff fixes smaller fees for the cases having less amounts involved. There must, therefore, be some clear justification in order to support an act which so completely destroys the effect of both these intentions. It is contended that r. 17 of the Rules of Costs authorizes the direction. The first part of the rule is, as I have already mentioned, simply a declaration of the well known rule that the trial Judge has discretion to say who shall pay costs. The latter part, which

speaks of the scales to be applied, clearly has reference to cases where costs are payable to more than one person, and is limited to that. The rule, however, does say that the amount of the costs shall be in the discretion of the Court or Judge, and also that a gross sum may be awarded in lieu of or in addition to taxed costs. The question is, did the rule intend that the Judge could increase the costs to any sum he thought fit, or apply any column of the tariff in his discretion? There is nothing whatever about the amount of costs in any of the former rules or in either the English or Ontario rules, referred to at the foot of r. 17, and those rules also begin with the words:—"Subject to the rules, etc.," while r. 17 begins with the words:—"Notwithstanding anything contained in r. 18 to 33. This shews that whatever it intends, that intention is not to be interfered with by the provisions of the following rules, but it by no means intends that the following rules may not be considered to ascertain what its real intention is R. 21 is the rule that deals with the details of the various columns of the tariff, and the proviso to the first clause deals with increases from one column to another and for the authorisation of increased costs by the Court or Judge, but only the Supreme Court or a Judge thereof is given power to make the increases, the words being:—

> Provided that the Supreme Court, or a Judge thereof, may in any case allow such increased charges as the special skill shewn, or labour done, or the importance or urgency of the matter in controversy directly, or indirectly, justifies.

That quite clearly and expressly permits a Supreme Court Judge to increase a particular item or a general scale, but no such authority is given to a District Court Judge, and it is difficult to understand why this should be so, unless it was intended that the authority so given should be exercised only by Supreme Court Judges.

If r. 17 authorizes the same thing then this provision of r. 21 is unnecessary and inconsistent by reason of its limitation to a Supreme Court Judge.

It does not seem reasonable to give a construction which would lead to such a result. Rules 28 and 29 are general, applying to all Judges, and they provide for the Judge dealing with the amount of the costs, and the division without, however, any suggestion of increasing them, but rather of dividing or diminishing them.

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These are illustrative of the Judge's exercise of a discretion as to the amount as provided for in r. 17. I am of opinion then that having regard to the other rules, r. 17 is not intended to give to the Court or a Judge the power to increase the amount of costs by directing them to be taxed on a higher scale, or by directing that r. 27 should not apply, and that the only authority for this is to be found in r. 21, under which the power is given only to the Supreme Court or a Judge thereof, and, I may add, though not necessary for this case, to the Supreme Court and its Judges as such, and not to District Court Judges acting as Local Judges of the Supreme Court.

The appeal should, therefore, be allowed with costs, and the judgment, as far as it applies to costs, set aside.

It seems reasonably clear that the taxed fees under column 1. would require to be limited by r. 27, and, we think, therefore that to avoid any further costs or other question, the amount of costs should be fixed at $65.96 for fees, and $114.15 for disbursements, as taxed, making a total of $180.11, for which amount of costs there will be judgment. *Appeal allowed.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 24, 1919.

SPECIFIC PERFORMANCE (§ I E—35)—SALE OF LAND—DOUBTFUL TITLE—WAIVER BY PURCHASER—DISCRETION OF COURT.

Where the title to land is doubtful the Court will refuse specific performance of a contract to purchase, unless the purchaser has by his conduct waived his ordinary equitable right to a good title; acts of ownership do not necessarily constitute such a waiver, if satisfactorily explained and the Court may in its discretion allow the purchaser to repudiate notwithstanding such acts.

[*Krom* v. *Kaiser* (1915), 21 D.L.R. 700, 8 Alta. L.R. 287, referred to.]

Statement.

APPEAL by defendant from the trial judgment in an action on a land purchase contract. Reversed.

R. A. Smith, for appellant.

W. S. Ball, for respondent.

The judgment of the Court was delivered by

McCarthy, J.

McCARTHY, J.:—The question raised by this appeal arises from the purchase of a ranch in Southern Alberta, and the question is was the defendant, the appellant, entitled to repudiate the contract under the circumstances disclosed by the evidence? This depends on the taking of possession by the defendant under the agreement and on what was done.

On June 13, 1918, the defendant with one Pilling, an officer of a real estate company who had an option for the purchase of the plaintiff's ranch, called at the Bank of Montreal at Lethbridge and had a conversation with its manager regarding the purchase by the defendant of the plaintiff's ranch. The bank manager drew up a memorandum as follows:—

June 13th, 1918.

The Manager,
Bank of Montreal,
Lethbridge, Alberta.

Pilling Land Co. Ltd. hereby agrees to have documents executed and lodged as per agreement.

Dear Sir:

I beg to hand you herewith the sum of $8,000 ck. to be used as a first payment in purchasing the 2500 acres, more or less, of the farm and ranch property of W. D. Whitney known as the Whitney Ranch. The purchase price is $26 per acre.

Documents and agreement of sale and other documents will be lodged in the bank to be held in escrow and you are hereby authorised to have the bank's solicitors approve these documents on my behalf and at my expense.

In the event of the transaction being quite regular the $8,000 cash mentioned above may be paid over to the Pilling Land Co. Ltd.

The terms of the purchase are approximately as follows: $8,000 cash,

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$7,000 note: H.B. due January 1, 1919, and the balance in six equal annual payments to be made on January 1, beginning with the year 1920.

It is also to be stipulated that I may have the privilege of paying up in full under the contract at any time without notice or bonus of interest.

It is understood that all deferred payments bear 6% per annum interest unless the transaction is fully closed out on or before June 23, 1919.

All the moneys are to be returned to me.

Yours truly,

HENRY BELDER.

Apparently the date June 23, 1919, should have been 1918.

The Pilling Company's option was in part as follows:—

Agreement dated April 23, 1918, between W. D. Whitney and the Pilling Land Co. Ltd., whereby the Pilling Land Co. Ltd. obtained an option to purchase, irrevocable until August 23, 1918, of the following lands (here description of lands given) $5,000 on the acceptance of this option, $10,000 on September 23, 1918, balance by six equal annual payments or half crop until land is paid for at 6%.

Subsequently the agreement upon which the action was brought was executed by the defendant in the plaintiff's solicitor's office.—

Agreement dated June 13, 1918, and made between W. D. Whitney as vendor and Henry Belder as purchaser, being an agreement for the sale and purchase of the lands following, namely: (here description of lands given).

At the price of $62,400 of which $7,000 was payable by promissory note maturing January 1, 1919, with interest at 6% and the balance by eight successive annual payments of $6,018.75 each on January 1, in each year, commencing January 1, 1920, with interest at 6%.

On the following day the memorandum and the agreement and a copy of the escrow letter were handed to a member of the bank's firm of solicitors by the bank manager and a letter of explanation to the solicitors was written by him in part as follows:—

You will note that the sum of $8,000 is held by this bank covering the cash payment in connection with the sale and we would ask you to kindly approve all these documents protecting Belder wherever necessary and until you can recommend it no money will be paid out by this bank in connection with the transaction.

Full details regarding how the transaction is to be completed should be arranged by you.

The agreement was subsequently left by the defendant's solicitor with the plaintiff's solicitor and certain alterations proposed by the former were inserted in the agreement.

A correspondence commenced between the solicitors which lasted till August 13, 1919, at which time the defendant's solicitors by letter to the plaintiff's solicitor stated:—

In view of the fact that all matters were to be completed on or before June 23, 1918, he has decided to call the purchase of this land off as far as he is concerned . . . Therefore as far as our client is concerned this is to inform you that the sale and purchase is at an end.

But in the meantime the defendant had gone into possession on June 22, 1918, and did not finally give up possession until about October 22, 1918—ran considerable stock and did considerable fencing on the place, and up until August 13, 1918, negotiations were going on about the title.

On July 2, 1918, defendant's solicitors notified the plaintiff's solicitors by letter: "that if the titles are not put in shape shortly it will be necessary to call the deal off."

The difficulty between the parties seems to have been that the plaintiff was unable to make title to two of the parcels mentioned in the agreement of sale, one of them being his homestead for which he had not obtained the patent and the other had gone back to the Crown for non-payment of taxes.

It is to be observed that the title to the two parcels in question was not obtained by the vendor, plaintiff, until September 3, 1918, and December 11, 1918.

It is also to be observed that the agreement of sale provided for the immediate possession by the purchaser after execution of the agreement. The circumstances surrounding the taking of possession as related by the defendant may be gathered from his evidence taken at the trial as follows:—

4. Q. Now you told us you went into possession on the 22nd June you went on to his land. A. Yes.

5. Q. Did Mr. Whitney move off? A. Why yes, he moved off, I think, the next week.

6. Q. Did he move everything? A. No, not machinery, that is for some time.

7. Q. What did he move besides himself? A. Why his household goods.

8. Q. And what about the farming goods, when were they moved? A. Well, part of them was taken off later on, they were there for a month or so I guess or more, he had some chickens there, I guess they were there for a month or six weeks, and he had some hogs there for a couple of weeks.

9. Q. And his cattle, when were they moved off? A. I don't think he had any cattle, he had some horses there a portion of the time.

1. Q. When were they taken away? A. The horses?

2. Q. Yes. A. There were some of his horses there the day I moved off.

3. Q. Now do you remember the date in August when you instructed Mr. McArthur to call the deal off? A. No, I don't remember that date but I think it was after the middle I think, I haven't got that date somehow.

4. Q. Well, after giving Mr. McArthur instructions what did you do, did you stay on the place? A. No, I think it was in the latter part of the week that I gave Mr. McArthur instructions and I started to move the fore part of the next week and when I got home I was sick.

5. Q. You commenced to move from the Whitney place, where were you moving to? A. Why east of Cardston.

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6. Q. And what did you move when you started to move. A. Why we had some feed wagons there and I didn't take any furniture the first time because we never brought up but one load when we found out how things were, we never brought up but just one load, and I went back once after some feed for the horses, we expected to go to plowing but under the conditions didn't do no plowing.

7. Q. Well then, when you found there was some difficulty in regard to the title and so forth you didn't move any stuff on but some feed. A. A little feed, yes.

1. Q. Where did you leave the rest of your farming and household effects? A. Why, down east of Cardston.

2. Q. That is your previous farm? A. Yes.

3. Q. So immediately after giving Mr. McArthur instructions to call the deal off you commenced to move your belongings to the old place? A. Yes.

4. Q. And on arriving with the first load I think you said you were taken sick? A. Yes, I was in pretty bad shape, couldn't get back for some time.

5. Q. About how long were you sick? A. Well, I was under treatment with one doctor there for two months, the French doctor in Cardston. I have got the receipts here.

which is uncontradicted.

The acts of ownership relied on by the plaintiff as constituting a waiver by the defendant are that he had two men doing fencing for one month and had his own stock on the place. There is, however, a distinction with regard to acts of ownership. Some acts may be destructive and others acts of preservation. Under the circumstances of this case it can hardly be said that the property was not in such a condition that it could not be delivered back to the plaintiff in the condition it was in on June 13. With regard to the question of waiver by taking possession, *O'Keefe* v. *Taylor* (1851), 2 Gr. 305, the remarks of the Chancellor at p. 307, might be usefully referred to:—

> The question here is, therefore, whether the plaintiff has by his conduct, subsequent to the contract, waived his right to investigate the title. In my opinion, great injustice would follow from an indiscriminate application of English cases upon this doctrine, to the materially different circumstances of this country; but upon their strict application, the plaintiff here has not, I think, waived his right to a reference. The Master of the Rolls, in *Burroughs* v. *Oakley* (1819), 3 Swan. 159, 36 E.R. 815, designates the right of the vendee to a good title, as "his ordinary equitable right:" and so carefully does this Court guard that right, that where the title is doubtful, it is not in the habit of determining that question, but refuses specific performance. Now, whether that right has, or has not, been waived, is in each case a question of fact. Before the vendor can be exempted from the ordinary duty of deducing a good title he must bring himself within the exception; the Court must see clearly that such exemption is the result of the agreement of the parties; or, if not the result of express agreement, it must be fully satisfied under the evidence, that the vendee intended to waive, and in fact did waive his ordinary and equitable

right to a good title. Where possession has been taken by the vendee, not under the contract, or by permission of the vendor, but forcibly, that has been regarded not as a waiver of any particular objection to the title, because that step may have been taken before the delivery of an abstract and without any knowledge of the subject, but rather as such an assumption of the right of property by the vendee, irrespective of the state of the title, as amounts to a declaration on his part that nothing more remains to be done but the execution of the conveyance, and a reference has been refused upon that principle—treating the conduct of the vendee as an acceptance of the vendor's title: *Calcraft* v. *Roebuck* (1790), 1 Ves. 221, 30 E.R. 311. On the other hand, where possession has been taken by the vendee with a knowledge of particular defects in the title, the Court has frequently been satisfied by that and other circumstances that the vendee had waived such defects, and specific performance has been decreed upon that ground without a reference. But where the contract itself provides for the interim possession of the vendee, without impairing his right to call for a good title; or where, the contract being silent upon the subject, possession is taken prematurely by consent of both parties, without any information as to the title, and before the time appointed for the completion of the contract, and without any stipulation as to the waiver of the vendor's right to have a good title deduced, in such cases the application of the ordinary rule about taking possession becomes obviously impossible.

Also at p. 309:—

It is argued, however, that the intendment of waiver, if not fairly deducible from the mere possession, does nevertheless follow from the dealing of the vendee with the property in question during his possession. But upon that subject the general rule is, that acts of ownership, after an authorised possession, are unimportant. As was observed by the Master of the Rolls in *Burroughs* v. *Oakley*, *supra*, the same principle applies to acts of ownership; "for what could be the purpose or advantage of taking possession except to act as owner?"

Referring back for the moment to the meeting in the office of the plaintiff's solicitor on the evening of June 13, it is apparent that there were present there the plaintiff and the defendant, the real estate agent Pilling, and the plaintiff's solicitor and the manager of the bank. Upon that occasion the agreement apparently was executed only by the defendant and it was thereupon handed to the manager of the bank who, subsequently, delivered the same to the bank's solicitors under the circumstances above set out. The agreement was thereafter taken by the bank's solicitors to the solicitor of the plaintiff to have some alterations inserted. There is no evidence of the cheque ever having been demanded, or the note.

It is further contended by the plaintiff that the signing of a caveat by the defendant is an element in ascertaining whether or not there was a waiver on his part but from all that appears from

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the evidence there is nothing to shew that the defendant knew that the caveat was being filed. His instructions to the solicitors are set forth in the letter from the manager of the bank to them, nor does it appear from the evidence that the solicitor, who attempted to file the caveat, was not aware that title could not be made by the defendant to the parcels contained in the agreement for sale and it is a reasonable conclusion, I think, to be arrived at that, when the solicitor was advised that the caveat could not be filed by reason of the title to certain of the parcels not being in the plaintiff, that that was the first intimation that he had as to the state of the title.

Under the circumstances, therefore, I am of the opinion that the acts of ownership exercised by the defendant over the property are satisfactorily explained and do not constitute a waiver, that under the circumstances he was entitled to repudiate, that there was no unnecessary delay and from the evidence it does not appear that the letter from the defendant's solicitor to the plaintiff's solicitor of August 13, cancelling the agreement, was ever answered, that the defendant proceeded to remove his chattels from the premises shortly thereafter. *Vide Krom* v. *Kaiser*, (1915), 21 D.L.R. 700, 8 Alta. L.R. 287, reversing 18 D.L.R. 226.

I am, therefore, of the opinion that he was entitled to repudiate the contract and I would allow the appeal with costs and dismiss the action with costs.

The defendant is, of course, entitled to the return of the $8,000 paid into the bank. *Appeal allowed.*

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BESANA AND HANGO v. ALTHOUSE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont, and Elwood, JJ.A. October 22, 1919.

ANIMALS (§ I C—26)—DIFFERENT OWNERS—ONE HERD BOY—TRESPASS—DAMAGE—LIABILITY—JOINT TORT FEASORS.

Where several owners put their animals in charge of one herd boy, and such animals stray onto land and destroy grain, the owners are liable as joint tort feasors. The damage sustained should be based upon the value of the grain at the time of the injury.

Statement.

APPEAL by defendants from the judgment of the District Court Judge in an action for damages for grain destroyed by animals under the charge of a herd boy. Varied.

P. H. Gordon, for appellants.

L. McK. Robinson, for respondent.

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HAULTAIN, C.J.S. and LAMONT, J.A., concurred with ELWOOD J.A.

ELWOOD, J.A.:—In this action the facts are that 75 animals belonging to one of the appellants and 25 animals belonging to the other appellant, both in charge of a herd boy, strayed upon the land belonging to the respondent and destroyed a quantity of wheat and oats.

At the trial, a by-law of the municipality in which the land in question is situate, prohibiting the running at large of animals on the date of the trespass by the appellants' cattle, was tendered, but it was rejected on the ground that it was not properly proven in that it was not certified to be a true copy by the secretary and a member of the council, as required by s. 165 of the Rural Municipality Act, Sask. stats. 1917, c. 14.

I am of the opinion that under s. 11 of the Evidence Act, R.S. Sask. 1909, c. 60, this by-law was properly proven, as it purports to be certified under the seal of the corporation and the hand of the secretary-treasurer.

It was contended on behalf of the appellants that the appellants were not joint tort feasors, and that the damage should not have been assessed against them jointly, but that each should only be responsible for the damage done by his own animals.

The evidence shews that the animals at the time of the damage were in the charge of a hired man. There is nothing to shew who hired the man, but I think that I am justified in assuming that this man was hired by the appellants jointly, and, that being so, the appellants, in my opinion, are liable as joint tort feasors.

It was also objected that the District Court Judge erred in the amount of damages which he allowed, (1) as to the quantity of grain that he found had been damaged, and (2) as to the value which he put thereon.

As to the wheat, there was evidence which, in my opinion, justified the District Court Judge in coming to the conclusion which he came to as to the number of bushels of wheat damaged. So far as the oats are concerned, I also think that he was justified in coming to the conclusion which he came to as to the number of bushels he found damaged, and I would not disturb his finding in that respect. So far as the price allowed for the wheat, I am of the opinion that the damage sustained should be based upon

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the value of the wheat at the time of the injury. See Sedgwick on Damages, vol. 3, par. 937, and cases therein referred to, and 10 Hals., par. 629.

The District Court Judge has put the value of the wheat at the price given by Dawson on November 1. He should, in my opinion, have put it at the price on September 20, namely, $1.31. From this however should be deducted the cost of hauling the wheat to market. He has not done this. So far as the value placed upon the oats is concerned, that also was taken to be the value on November 1. The evidence shews that the respondent did not intend to sell the oats, that he wished to keep them for feed, and I therefore think that he was entitled to have a like quantity of oats delivered to him at his farm. Dawson says that on September 20 oats were worth 39 cents a bushel at Asquith, and that the price at Handel should be the same. There is nothing, however, to shew what the cost to the respondent would be of going to Handel and obtaining the oats and bringing them back home. He would be entitled to have that added to the 39 cents. From the amount allowed to him on the oats, however, he should be charged with the cost of threshing, namely, 6c. per bushel. He should not, however, be charged with the cost of threshing the wheat, because the evidence shews that it cost the respondent more to thresh the wheat, on account of its damaged condition, than it would have cost him had the wheat not been damaged.

As the evidence before us does not contain any information as to the cost of either marketing the wheat or going for the oats, I would refer the matter back to the District Court Judge to assess the damages; the respondent to be allowed for the quantity of wheat and oats already found by the District Court Judge, the wheat at $1.31 a bushel, less the cost of marketing the same, and the oats at 39c. a bushel, less 6c. a bushel for threshing, plus the cost of going for the oats.

If the total amount of damages so found is not greater than the amount paid into Court by the appellants, the appellants to have their costs of the action subsequent to the payment into Court, and the respondent to have his costs of the action up to and including the payment into Court. If the damages are greater than the amount paid into Court, the respondent to have his costs

of the action. The appellants are entitled to the costs of this appeal.

NEWLANDS, J.A.:—I concur excepting that I am of opinion that defendants are not joint tort feasors under the evidence. The judgment should therefore be against them in the same proportion as their cattle were, that is, 75 and 25.

Judgment varied.

THE KING v. HANSON. Ex parte DUNSTER.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 19, 1919.

CERTIORARI (§ I A—4)—MILITARY SERVICE ACT, N.B.—CONVICTION—REVIEW—CRIMINAL CODE—APPEAL.

Certiorari will not lie in New Brunswick to remove a conviction under the Military Service Act (1917, 7-8 Geo. V. c. 19, Dom.), unless there are exceptional circumstances, because a review is provided by s. 749 of the Criminal Code which provides for an appeal by either the prosecutor or complainant to a County Court Judge.

[*The King* v. *O'Brien, ex parte Theriault* (1917), 45 N.B.R. 275, followed.]

Statement.

AN ORDER *nisi*, returnable before the Appeal Court, was granted by Barry, J., to quash a conviction had before N. A. Hanson, Justice of the Peace for Victoria County, against the applicant Dunster, under the Military Service Act.

F. R. Taylor, K.C., shews cause against the order *nisi*.

P. J. Hughes, in support of rule.

The judgment of the Court was delivered by

Hazen, C.J.

HAZEN, C.J.:—The defendant Dunster, who was a member of Class 1 under the Military Service Act, 7-8 Geo. V. 1917 c. 19, a class called out on active service by proclamation, was convicted before Nelson A. Hanson, one of His Majesty's Justices of the Peace for the County of Victoria, for having without reasonable excuse failed to report as required by such Act and proclamation. A rule *nisi* to quash the conviction was granted by Barry, J., returnable at the June term of this Court.

Counsel who appeared to shew cause against the rule contended that it should be discharged, as a review was provided for in Part XV., s. 749 of the Criminal Code, R.S.C. 1906, c. 146, and that in such cases *certiorari* should not be granted unless under exceptional circumstances, and that in this case there were no circumstances of such an exceptional character as would justify

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THE KING v. HANSON, EX PARTE DUNSTER.

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the granting of the rule. The section of the Criminal Code referred to enacts that

> Unless it is otherwise provided in any special Act under which a conviction takes place, or an order is made by a Justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal . . . (c) in the Provinces of . . . New Brunswick . . . to the County Court of the district or county where the cause of the information or complaint arose.

This Court has held in the case of the *King* v. *O'Brien, Ex parte Theriault* (1917), 45 N.B.R. 275, following the decision of Allen, C.J., in *Ex parte Young* (1893), 32 N.B.R. 178, that where there is a review a *certiorari* should not be granted unless under exceptional circumstances, and in the case of *The King* v. *O'Brien, Ex parte Doucet* (1915), 43 N.B.R. 361, 24 Can. Cr. Cas. 347, the decision was to the same effect, viz., that where the right of appeal from a summary conviction was not taken advantage of and it appeared from the return of an order *nisi* to quash the conviction removed by *certiorari* that there were no exceptional circumstances in the case, no *certiorari* should issue.

In this case, in my opinion, there are no exceptional circumstances that would justify the Court in granting the rule, and it is not claimed that there was any want of jurisdiction in the Magistrate to make the conviction. I therefore see no reason for interfering with the conviction.

Rule nisi to quash discharged.

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McLEAN v. BRETT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 22, 1919.

ANIMALS (§ I C—26)—TRESPASSING—ENTIRE ANIMALS ORDINANCE (ALTA.) —DAMAGE—LIABILITY OF OWNER—LAWFUL FENCE.

The owner of an animal which is prohibited from being at large by the Entire Animals Ordinance (Alta.), is liable for any damage such animal may do while trespassing. The absence of a lawful fence within the meaning of the Fence Ordinance, enclosing the premises where the trespass is committed, is no defence to an action for damages.

Statement.

APPEAL from the judgment of Jackson, J., in an action for damages. Reversed.

P. H. Russell, for appellant; *C. F. Harris*, for respondent.

The judgment of the Court was delivered by

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McLEAN v. BRETT.

Stuart, J.

STUART, J.:—This is an appeal by the plaintiff, a farmer, from a judgment of a County Court Judge dismissing the plaintiff's action against a neighboring farmer for damages alleged to have resulted from the defendant's bull getting into the plaintiff's field and covering a thoroughbred heifer of the plaintiff's. The plaintiff alleged that the bull was not thoroughbred and that in any case he did not desire to have his heifer served by such an animal or at the particular time in question.

The evidence was fairly conclusive that the plaintiff's premises were not enclosed by a lawful fence within the meaning of the Fence Ordinance, Cons. Ord. Alta., 1911, c. 77, and the trial Judge held, following *Bolton* v. *MacDonald* (1894), 3 Terr. L.R. 269, that s. 2 of the ordinance prevented the recovery of damages. That section says:—

> No action for damages caused by domestic animals shall be maintained, nor shall domestic animals be liable to be distrained for causing damage to property unless the same be surrounded by a lawful fence.

The point raised is, I imagine, one of very great importance to farmers generally, and it is desirable that the legal rights of parties in the relative situation of the plaintiff and defendant here should, if possible, be clearly determined.

The first thing that strikes one upon looking at the ordinances is that there are a number of enactments dealing with the general subject of fences, pounds and animals at large. These are the Fence Ord., c. 77, the Entire Animal Ord., c. 78, the Pound District Ord., c. 79, the Stray Animals Ord., c. 80, the Herd Ord., c. 81, and an Act for Restraining Dangerous and Mischievous Animals, and possibly one or two others.

Now there does not appear in any of these enactments any provision directly in so many words permitting animals to run at large, although the provisions of the Herd Ordinance may perhaps be held as, impliedly at least, permitting animals to run at large at certain times and in certain places.

We have no evidence before us as to the existence at the place where the events in question took place of any pound district or herd district, and the case must be dealt with, for the present at least, upon the assumption that there was no district of either kind in existence.

Even if the proper implication to be made from the ordinances referred to and from the non-existence of any such districts were

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that animals generally were by law permitted to run at large as to which there might still be room for argument, it is to be especially noted that by a specific ordinance, viz.: the Entire Animals Ord., c. 78, a bull of the age of the one in question here is not permitted to run at large. Section 4 of that ordinance says:—

Except as hereinafter provided no bull 9 months old or upward shall be permitted to run at large in any part of the territories at any time.

Then by a special clause the Minister is given power to declare, by a notice published in the *Gazette*, that bulls may run at large in any district described in the notice, between certain dates. As there was no evidence of such a notice or declaration having been given or made, we must assume that the absolute prohibition of the section applied.

From a very early date the Fence Ordinance was found side by side with special ordinances in regard to bulls, stallions and estrays. See c. 12, 13 and 14 of 1888. In Craies' Hardcastle's Statute Law, 2nd ed., p. 137, it is said:—

Where Acts of Parliament are *in pari materiâ* the rule as laid down by the twelve Judges in *Palmer's* case (1784), 1 Leach C.C. (4th ed.), 355, is that such acts "are to be taken together as forming one system and as interpreting and enforcing each other."

I think, therefore, that the expression "domestic animals" as used in s. 2 of the Fence Ordinance above quoted, ought not to be treated as applying to bulls because these animals are specially dealt with and are wholly prohibited from being at large. Section 2 must obviously be confined to such animals as are at least not specially prohibited from being at large at all.

In 3 Corpus Juris, p. 130, it is said:—

The obligation to fence in order to prevent animals from trespassing applies only to domestic animals of ordinary disposition. The common law is still in force as to unruly cattle that will not be restrained by ordinary fences. Moreover, the duty to fence applies only to animals which are rightfully on the adjoining ground, and the absence or insufficiency of a fence is no defence where the trespassing animals were wrongfully on the land from which they entered.

Three old English cases and a number of American cases, some from the Western States where conditions are probably the same as here, are cited for the last statement.

Now it is not necessary to worry about the problem as to what would be the legal position in this country of ordinary domestic animals, other than stallions and bulls, with respect to their being rightfully or wrongfully at large because we have the specific

prohibition against bulls being at large. And as that prohibiting ordinance has existed in some form for many years and still stands side by side with the Fence Ord. and, as they deal with the same general subject, the two should certainly be read together.

If we look at the Stray Animals Ord., we find that bulls and stallions are especially excepted from its provisions, in s. 3.

Upon the whole, therefore, I think we ought to consider that bulls and stallions have been especially dealt with by a statute relating to them particularly, and as they are wholly prohibited from being at large, it follows that the defendant ought not to be allowed to take advantage of the special defence as to defective fences provided for in s. 2 of the Fence Ord.

It was suggested that, there being a special penalty provided in the Entire Animals Ord. it would follow that there would be no other remedy. But, I think, there is nothing in this contention. In any case the penalty is not imposed merely for disobedience to the prohibition. In s. 5 the penalty is not for allowing the bull to be at large but for not taking him away after the notice and for not paying expenses, while in s. 12 similarly the penalty is for not taking the animal away after notice from a Justice of the Peace, so that there really is no other remedy provided at all for breach of the prohibition.

The consequence is that the defendant's animal was illegally at large, that he trespassed upon the plaintiff's land, that his owner cannot rely on the defence of the absence of a lawful fence and therefore that he is liable for any damage which he may have done.

It seems to me that the defendant must be held to have known that a bull will naturally seek to cover any heifer or cow which he can reach, and I think, that his covering the heifer of another owner, on that owner's property and against the owner's will, is a trespass for which the owner of the bull is liable.

The plaintiff's heifer was thoroughbred and registered, and he had a thoroughbred registered bull to which he intended to breed the heifer. He said that either a heifer or a bull calf from these two would be worth $300 while the calf which was in fact born was worth only $50. In the statement of claim the value of a proper calf is put only at $250. The defendant offered the plaintiff $75 for the calf which was doubtless on the condition that all

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other claims should be waived. One witness said that any well bred calf was worth $225. There was little, if any, evidence to contradict the plaintiff's estimate of his damages. Upon the evidence there was no room for any doubt that the calf which was born was the offspring of the defendant's bull.

In estimating damages the Court must be rather more careful not to allow an excessive amount than not to allow enough.

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.

Upon the whole, therefore, I think the sum of $150 is a reasonable amount to allow.

I have had some doubt about the propriety of allowing damages for the loss of a prospective calf which was anticipated as a result of a breeding intended but wrongfully prevented. But, it seems to me that the business of breeding of animals has now become so well understood and thoroughly regulated a matter that such damages ought not to be considered as too remote, at any rate in a case where the heifer was clearly not barren, where she did, after copulation, produce a calf, and where the owner had on his farm a capable bull of his own to which he intended to breed her.

I would therefore allow the appeal with costs, and direct judgment to be entered for the plaintiff for $150 damages and costs of the action upon the appropriate scale.

Appeal allowed.

CAN.

Ex. C.

PATTERSON, CHANDLER AND STEPHEN, Ltd. v. THE "SENATOR JANSEN."

(Annotated.)

Exchequer Court of Canada, Martin, L.J., in Adm. August 22, 1919.

TOWAGE (§ I—1)—RESPONSIBILITY OF TUG—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

The tug "Senator Jansen," with a scow in tow, lashed diagonally to her port bow, was floating down Fraser River with the tide and while going through a drawbridge (85 feet in width) the scow struck a projecting boom stick, tearing off a stern plank. Scow and cargo were lost. The "Senator Jansen" was properly navigated.

Held.—That the master of the "Senator Jansen," being thoroughly familiar with the situation, and the set of the tides and currents, and knowing that these would inevitably bring his port side against the bridge, creating a dangerous, if not a necessarily fatal situation, was guilty of negligence in not lashing the tow to the starboard side and thus avoiding the possibility of accident.

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2. Where, even if the scow in such a case had been wholly sound, the direct consequences of the accident could not have been avoided, the fact of the scow being unseaworthy will not constitute contributory negligence on her part, and will not relieve the tug of any responsibility—for damage due to her own negligence.

[See annotation following this case, also annotation on "Towage," 4 D.L.R. 13.]

Statement.

THIS is an action by the plaintiffs, owners of the tow, to recover from the defendant the value of the scow and cargo, alleged to have been lost by reason of the negligence of the master and crew of the tug defendant; (1) because she was unskillfully navigated—and (2) because she took the risk of lashing the tow to her port side, when the other side would have offered no risks whatever.

W. E. Burns, and *H. B. Robinson*, for plaintiff; *C. B. Macneill*, K.C., for defendant.

Martin, L.J.A.

MARTIN, L.J.A.:—In this action the plaintiff company sues to recover the value of a scow, $2,000, and the loss of certain granite blocks laden thereon, and the cost of salving other blocks from the bed of the Fraser River. The claim arises out of the fact that on July 9, 1918, about 6.30 p.m., the said scow, laden with 225 tons of granite blocks, was being taken by the stern wheel steam tug "Senator Jansen" (reg. tons 93.27; length 125 ft.; R. B. Tipping, Master), through the north passage of the drawbridge across the Fraser River, connecting the City of Westminster with Lulu Island, and in so doing the scow (length 66 ft. 8 in., width 26 ft., depth 6-7 ft.), which was lashed diagonally across the port bow of the tug, struck a corner boom stick of the west approach to the drawbridge and one of her stern planks was knocked out which caused her to quickly fill with water and take such a list that the cargo slid overboard and the scow was with some difficulty beached, and eventually became a total loss.

The said northern passage of the drawbridge is 85 ft. in width and there was formerly along the whole of the south side of it a permanent approach structure of piles with planks, along which tugs with scows would slide with the drift of the tide, which method of going through the passage in the state of tide in question, 2½ to 3 knots, is clearly open to no objection and no fault could be found with that course in ordinary circumstances. It appears, however, that at some time in the month preceding the accident, the downstream, *i.e.*, western portion of the said approach, had been carried away and a temporary arrangement provided of four

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boom sticks and three groups of piles. Of these boom sticks only two need be considered, one of them—the long sheer-boom marked "A" on Ex. 10 being 40 to 50 ft. long and running out to the pile marked "X" and a shorter one marked "B" fastened to the end of "A" and connecting at an angle with the second group of piles at the apex of the boom structure. This short corner boom "B," which the bridge-keeper described as being from 14 to 16 ft. long and about the thickness of a telephone pole (though the defendant's witness, the tug-master, described it as heavier), projected out an appreciable distance beyond the line of sheer-boom "A", as well shown on Ex. 10, and the effect of this was that when the scow, after scraping along the sheer boom, came to the projecting corner boom, the end of it (which the master of the tug described as being square), struck a stern plank (which I have reason to doubt was a sound one) in the scow at its spiked end and knocked it out, causing the scow to quickly fill as aforesaid.

Two grounds of complaint are set forward against the tug: the first being that she was badly navigated, but in the true sense of that expression I have no difficulty in finding that such was not the case, for no fault can be found in the manner in which she approached the bridge or took advantage of the tide to stop her engines and drift through the passage, and in ordinary circumstances all would have gone well. But the second ground of complaint is that it was negligent, in the circumstances of the projecting corner boom stick and set of the tide thereupon, for the master to have gone through the passage with the scow on the port bow of the tug which was next to that corner boom which, it is submitted, obviously created a dangerous situation. It is clear from the evidence of the defence that at the season of the year, with freshets, tugs drifting as here with said tide would expect to hit the sheer-boom and also that since the solid approach had been broken the tide sets more strongly towards and under the boom sticks; the tug's master says he knows the locality very well, having taken scows through it (the bridge) "a couple of hundred times," and he knew of the change since the damage to the approach "some time before that" and, "weeks anyway" (as he expresses it), and the position of the temporary booms at the time as set out in Ex. 10, so he was, as he admits, "quite familiar"

with the situation and the boom sticks, and their being fastened together by a five-eighths wire.

He thus describes the accident:—

A. As I was passing through, the corner of the scow hooked on to this boom stick that was sticking out there.

Q. Now which boom stick. Look at Exhibit 10, that photograph, and state which boom stick? A. That there one.

Q. That is the one marked B? A. Yes.

Q. Well, what part of the scow? A. This point there.

Q. Yes. What part of the scow hit the end of that boom stick? A. The side of her touched it and went along it as she got to the stern of it, and she pulled a plank out of the stern, to the boom stick B, which did the damage.

Q. Have you looked at it since? A. Yes.

Q. What kind of end is there on it? A. Square end, cut off square.

Q. Cut off square? A. Yes.

Q. It is not tapered like? A. No.

Q. Like ordinary piles? A. No.

And again:—

Q. This boom stick that is marked B always stuck out like that, did it? A. Sometimes it did and sometimes it didn't.

Q. You knew that? A. Yes.

Q. So that you knew that sometimes—at some times the end of the boom stick was sticking out like that? A. Yes.

Q. Sometimes not much, I suppose, all depending upon the current? A. Depending upon the way the current hit it.

Q. Dependent on what? Speak up. A. Depending the way the current hit it.

Q. It might change one way or the other? A. Yes.

Q. But at any rate you knew it was quite possible and probable for that to be out like that? A. Yes.

And

Q. You could see the boom stick perfectly plain could you not? A. Yes.

Q. You saw it? A. Yes sir.

Q. Saw how it projected out? A. Well, I couldn't say that it just projected out then. The current might have dragged it out.

Q. Well, but you saw at the time? A. Yes.

Q. How it projected out? A. Yes, it projected out.

Q. Did it not strike you at all that if you struck it on edge it might do you some damage? A. Well, it might have struck me that way, but I couldn't very well help touching it.

Q. You couldn't very well help touching it? A. Not very well, no, the tide pulls that way.

Q. And what happened, take this as the stern board, what happened, as I understand you is that that boom stick B hit that just about there? A. Yes sir.

Q. Just where it was nailed on or spiked on to the sides? A. Yes.

Q. And the whole weight of the scow and its cargo and that boat was centered or concentrated at that point? A. Yes.

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He thus describes the corner boom stick B:—

Q. Yes, but that is a small pile—a small boom stick. A. I don't know it is so small, it is anywhere between—

Q. Well, the evidence is to that effect. A. Well, I say it is anywhere between 16 and 22 inches.

Q. In depth? A. Yes.

Q. Do you swear to that? A. Yes.

Q. Did you measure it? A. No, I never measured it, but I seen it was floating there, it was floating 8 inches out of the water at that time, and there would be over half of it in the water, that would make it 16 inches, then you have got to allow for what you lose—the balance that was in the water, would be about 22 inches.

Q. Well, the evidence here, by Gregory, I think it was, that it was a small boom stick. A. Well—

Q. About like a telephone pole? A. Yes, well a telephone pole wouldn't hold nothing there.

Q. Well, but that is the evidence. A. Yes, but I seen—

Q. And the only reason you would have for denying that would be your inference. He has sworn it. A. I have seen it, seen the end of it where it was swung in, and I figured it was altogether between 16 to 22 inches.

Q. 16 to 22 inches? A. Yes.

Q. Half of it is above the water? A. No, not half of it is above the water.

Q. Well, how much was above the water? A. Well, it is just according to how much it was waterlogged. It might have been three inches.

Q. Well I mean at the time you saw it. A. Well, about six inches.

And he admits that he knew of the opening between the ends of the two boom sticks and gives that as a reason why a fender could not have been used to protect the scow from contact with the projecting stick B. So it really comes to this, that from his own evidence the master of the tug knew of the set of the tide which would inevitably bring the scow against the corner of the boom stick obviously creating a situation of danger, because though he might be fortunate enough to slide by yet the probability of a contact between the end of it and the end of a plank in the scow could not prudently be left out of consideration, despite which he continued on his course thereby courting danger which might easily have been avoided by the simple expedient of lashing the scow to the other, starboard, side away from the boom where it would be in a perfectly safe position. I am quite unable to see, after a lengthy and careful consideration of the whole matter, how the master can be exonerated from a lack of that degree of negligence which should be used by a reasonably prudent man. I find it indeed difficult to account for his conduct which, the more one considers the case, appears to be rash. A number of authori-

ties were cited, all of which I have carefully examined, and many others, and these which are of most service are the federal decisions in similar cases in the United States, where the general circumstances of navigation of this class more closely approach those in our country than do those in England. I shall only refer to a few of them which are in point. Thus, in *The T. J. Schuyler* v. *The Isaac H. Tillyer* (1889), 41 Fed. Rep. 477, it is said, at p. 478:—

While the tug did not stipulate for the absolute safety of the schooner, yet she was bound to meet such requirements of her service as would enable her to render it with safety to the schooner. She must know the depth of the water in the channel; the obstructions which exist in it, the state of the tides; the proper time of entering upon her service; and, generally, all conditions which are essential to the safe performance of her undertaking. If she failed in any of these requirements, or in the exercise of adequate skill or care, she is justly subject to an imputation of negligence. Was the tug derelict in any of these respects? She might have started when the tide was at a higher stage than it was when she began her movement up the river, and thus, with deeper water, have insured the safety of her tow. When she approached the pier of the bridge she might and rightly ought to have kept further away from it, for which there was ample room, and thus have avoided the risk of collision with it, or with the obstruction under the surface of the water.

And in the *Westerly* (1918), 249 Fed. Rep. 938, at p. 940, it is said:—

The tug had the burden of excusing the failure in performance of her undertaking to tow the canal boat safely through a presumably safe and well-marked channel: *Boston, Cape Cod, etc., Co.* v. *Staples, etc., Co.* (1917), 246 Fed. Rep. 549, 552 C.C.A. It would be a sufficient excuse if the grounding was in fact caused by an obstruction in the channel over which there was not water enough for the canal boat, because her master would have been justified in believing that no such obstruction was to be found there, but it was for the tug to shew the existence of such an obstruction, and therefore to shew that she had the canal boat in the middle of the dredged channel when she grounded, and not outside of it or on its edge.

And in the *Lake Drummond Canal Co.* v. *John L. Roper Lumber Co.* (1918), 252 Fed. Rep. 796, a very similar case to this, respecting a vessel attached to a tug and passing along the side of a lock and a projecting snag, the Court said, at p. 799:—

It should be remembered, as we have stated, that the captain of the tug saw, or could have seen, that the gate had not fully entered the recess prepared for it, but that it was jutting out, so as to obstruct the passage intended for vessels entering the lock. With this projection staring him in the face, the captain of the tug did not take the precaution to stop his engines until after the barge had come in violent contact with the gate.

And on the question of presumption, in the case of the *Allegheny* (1918), 252 Fed. Rep. 6, it was said, at p. 8:—

This collision could not have occurred without the fault of some one, and, the lighters being without fault, it follows the fault is presumptively that of

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EX. C.

PATTERSON, CHANDLER AND STEPHEN, LTD. v. THE "SENATOR JANSEN."

Martin, L.J.A.

the tug, which was in exclusive control, unless she has shewn the collision was the result of inevitable accident, or was caused by some agency other than the tug or tow. The *W. G. Mason* (1905), 142 Fed. Rep. 915, 74 C.C.A. 83, and cases there cited.

Applying the foregoing principles to the facts before me, I can only come to the conclusion that a case of negligence has been established against the tug and therefore the plaintiff is entitled to judgment. From the evidence so far adduced on damages, the fair value of the scow would, I think, be $2,000, and the cost of the missing granite and of salving the balance could well be allowed at the sum claimed—$703.75, making a total of $2,703.75, and there is no reason why interest should not be charged from the date of damage at the legal rate but bearing in mind that it is the established practice of this Court to refer questions of damage to the Registrar, assisted by merchants if necessary, I should be prepared to adopt that course if the defendants wish it, because, relying upon that practice, they may have wished to produce more evidence of the amount of loss than was given before me, although their counsel did not so state. They will be given, therefore, one week within which to apply for a reference if desired.

A question arose as to the unseaworthiness of the scow, but I am satisfied that she was in a fair condition to perform the work undertaken, though it is not strictly necessary to pass upon this point because even if she had been wholly sound the direct consequences of the knocked-off plank could not have been avoided.

Judgment accordingly.

Annotation.

ANNOTATION.

Towage—The Duty of a Tug to its Tow.

By H. B. ROBINSON, of the British Columbia Bar.

An agreement to tow imposes on those in charge of the tug, the duty of exercising a certain degree of skill and care with regard to everything connected with the towage services.

The highest degree of skill and care is not required however, the tug being neither a common carrier nor an insurer, but reasonable care and skill—the care and skill that prudent navigators employ in such services, must be exercised in everything done. Proper skill and caution in performing towage services must be understood as such skill and caution as persons of ordinary prudence duly qualified for the business of towage, and exercising an honest care of the interests confided to them ordinarily use. See *Miller* v. *The Eastern Railway*, 17 Fed. Case 9567.

A contract for towage requires from the tug that degree of care and skill which prudent navigators usually employ. See *The "Adelia,"* Fed. Case No.

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79. In the first place, a tug offered for services, must be properly equipped, see *The "Minnehaha,"* 15 Moo. P.C. 133, and of sufficient capacity and power to perform the services undertaken. See *The "Zouave,"* 122 Fed. 890—but when the contract is made for the service of a specified tug, there is no warranty that the tug is fit for the purpose for which she is supplied. See *Robertson* v. *The Amazon Tug Co.*, (1881), 7 Q.B.D. 598.

A tug should furnish safe and suitable appliances for the services to be performed. For instance, a tug should be equipped with a hawser of sufficient strength to hold her tow in any weather ordinarily to be anticipated, and for any injury resulting from unfitness, in this respect, the tug is liable. See *The "Nettie,"* 170 Fed. 526. In this case the evidence shewed that the hawser was a spliced hawser and parted at least twice when its strength was tested, and the Court held that it was not a suitable and safe appliance for the services required, taking into account especially the damage liable to arise from encountering heavy seas in Pamlico Sound. But the fact that a hawser broke under a stress to which it was subjected, does not go to shew want of capacity to resist such stress as it should have been ordinarily exposed to. See *The "Ashbourne,"* 112 Fed. 687. And the tug will not be liable as between the tug and the tow for the condition and strength of the hawser furnished by the tow, when it was not shewn that it parted through the negligence of the tug. See *The "Echo,"* 8 Fed. Case No. 4263.

A tug must carry proper lights, see *The Montreal Harbor Commissioners* v. *The "Universe,"* (1906), 10 Can. Ex. 352. And must carry a sufficient complement of officers. See *The "Tebo"* v. *Jordan*, 67 Hun. (N.Y.) 392.

A tug whose master alone acts as captain and engineer is not properly manned. See *The "Victor,"* Brown Adm. 449. It must carry proper lookouts and neglect to do so is a fault of the gravest character. See *The "Morton,"* 1 Brown Adm. 137, unless the presence of one would not have availed to prevent the disaster. See *The "Nettie Quill,"* 124 Fed. 667—*The "Prince Arthur"* v. *"Florence,"* (1896), 5 Can. Ex. 218.

The crew must be familiar with the channels, shoals, currents and state of the tide. See *The "Margaret,"* 94 U.S. 494.

It is further the duty of the tug to employ such rate of speed only as is reasonably safe for the tow considering her character and condition. See *The "Delta,"* 125 Fed. 133.

Ordinarily it is the duty of the tug properly to make up the tow, but when the tow takes control of some of the work, it must see that what it does is properly executed, and the tow must see that it is securely fastened to the tug, when the tow assumes the looking after of the fastenings. See *Pederson* v. *John D. Spreckles*, 87 Fed. Rep. 938. In this case it was held, that on the preponderance of the evidence that in towing a schooner it is not good seamanship when the line is passed through the breast chock to make it fast to the pawl bitt as this brings it at such an angle as to put a great and uneven pressure on the chock and a heavy strain on the line, that if passed through the breast chock the line should be fastened to the windlass bitt and that the best method is to have as straight a lead as possible. With the exception of steering the tow, working the pump, and handling the end of the tow line, the tug is responsible for the navigation of both vessels. See *The "Merrimac,"* 2 U.S. Sawyer 586.

A tug contracting to carry a tow to its destination must do so expeditiously

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in the most direct and customary route, exercising care and skill in doing so. See *Phillips* v. *The "Sarah,"* (D.C.) 38 Fed. 252.

It is the duty of the tug to keep watch and see that the tow is following so as to keep inside the channel. See *N. & W. No. 2*, 102 Fed. 921.

The master of the tug should always watch his tow when in a dangerous locality to see that his directions are obeyed. See *The "Jane McCrea,"* 121 Fed. 932. In this case, the master of a steamer having contracted to tow a schooner from her wharf beyond the end of which her stern projected about one-third her length, undertook to swing her round at the stern, there being a reef about her length astern of her, directed the captain of the schooner to cast off all her lines except her stern lines, after which he started her backward, being himself in the pilot house where he could not watch her movements.

The captain of the schooner cast off all her lines and she moved backwards until she grounded on the reef. The steamer was held liable.

It is the duty of the tug at the end of the voyage to stay by the tow as long as anything remains to be done, affecting the safety of the tow. See *A. M. Ball*, 43 Fed. 170.

When the tow is sunk in a collision without any fault on the part of the tug, the latter's obligation is at an end, otherwise she is under an obligation to mark the wreck by light, so to prevent injury to other vessels thereby. See *The "Swan,"* 23 Fed. Case No. 13667. In a case of danger, it is the duty of the tug to protect the tow either by slowing, stopping or sounding. See *The "Armstrong,"* Brown Adm. 130. Or by lying by until the wind subsides. See *The "Mohler,"* 21 Wall. 230. But she is not obliged to lie by the tow where she would endanger herself. See *The "Mosher,"* 4 Biss. 274. A tug is not to be held liable for the loss of a tow, merely because her master in an emergency did not do precisely what, after the event, others may think would have been best. If he acted with an honest intent to do his duty and exercised the reasonable discretion of an experienced master, the tug should be exonerated. See *The "Hercules,"* 73 Fed. 255.

When circumstances are evenly balanced, which indicate a choice of action in time of danger, the master's decision in the matter of navigating the vessel is conclusive, and although he may err in judgment, it is not negligent if he be competent. See *Vance* v. *The Wilhelm*, 47 Fed. 89. And further, hypercritical scrutiny into the conduct of the navigation after the event of the disaster, and in the light of that which has happened, is not the test of negligence but present judgment is to be tested by the circumstances as they appear to the master at the time he was called upon to act and not as they appear to the Court after the more critical scrutiny than the master could have given them. See *Vance* v. *The Wilhelm*, 47 Fed. 89. As above stated, where the tow grounds, it is ordinarily the tug's duty to remain with her after grounding, and attempt to put her into a positionof security, see *The M. D. Wheeler*, 100 Fed. Rep. 859, unless in doing so the tug is endangered. See *The Tug "Mosher,"* 4 Biss. (U.S.) 274.

It is the duty of the vessel in tow in frequented waters to have the tow rope fast in such a way that it may be slipped or cut to avoid collision. See *Jane Beacon*, 27 W.R. 35. In a case of towage where no directions are given by those aboard the tow, the tug is responsible for the directions of her course, but the master and other persons in charge of the tow, are not justified in allowing the tug to continue unchecked upon a course which will lead the vessels into danger. See *The "Altair,"* 66 L.J. Ad., 42.

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A tug is held to a high degree of diligence in endeavouring to save a tow which has gone adrift, as to abandon it, is to commit it to almost certain loss when the sea is rough. See *Atkinson* v. *Scully*, 246 Fed. 463.

Tugs in attendance at the launching of a vessel in narrow channels should be dressed with flags, and should give warning to approaching vessels that a launching is about to take place. See *The George Roper*, 5 Asp. M.C. 134. It is the duty of a tug taking in tow a canal boat which has but one man on board to see that the tow line is sufficient and securely fastened. It cannot escape liability for damage arising from the insufficient securing of the line of the tow by delegating such duty to the master of the boat. A tug was held liable for injuries to the tow for collision with a moored vessel caused by the towing line slipping off her cleat on the tow, and permitting her to be carried against the other vessel, on the ground that the line was not securely fastened or became loose as the result of previous collision due to the fault of the tug. See *The "Lyndhurst,"* 129 Fed. 843.

To exonerate a tug from liability for the loss of the tow for grounding, resulting from disarrangement of the tug's steering gear which rendered her unmanageable, it is not enough to shew that the defect was not due to her fault but to inevitable accident, but she must further shew, that thereafter, the injury could not have been prevented by the exercise of ordinary care and skill, and such care and skill are not shewn where it appears that the trouble arose from the loosening of a pin which held the tiller which could have been discovered and fastened in time to have prevented the grounding, and that no examination was made until afterwards, and nothing was done except to reverse her engines. See *The "Acme,"* 123 Fed. 814. A tug during stormy weather took her tow to a proper place where she could safely out-ride the storm, and left her moored to other scows and in charge of her master. During the storm, the tow, although having knowledge of the dangers and ample opportunity, took no measure to extend lines of her own to the breakwater to which the other scows were moored, or to assist in strengthening her lines, in consequence of which, such lines parted and she was held liable for resulting injury to the other scows. It was held, that there was no ground for placing such liability upon the tug which was not charged with the duty of seeing her tow was equipped with proper lines, or that she made proper use of them. See *No. 6, H.* 108 Fed. 429. It is the duty of a tug to tow her tow by the usual channel courses. The tug having gone considerably to the west of the usual course, and having deviated from the sailing directions, thereby ran her tow upon a rock previously unknown to navigation. It was held, that the tug was liable. See *The "Nathan Hale,"* 91 Fed. 682.

Alleged defects in the hawser are not sufficient to charge a tug with negligence when it appears that the hawser did not break until the tug was sinking, and therefore was free from any defects which contributed to the disaster. See *The "Ivanhoe,"* 84 Fed. 500. A tug was held at fault for the grounding of a loaded ice barge on a bar in a creek, causing her injury by straining, on the ground, that the tug should have exercised more care and made sure that there was sufficient water over the bar at that stage of the tide before venturing across. See *E. D. Haley*, 195 Fed. 168. In making up a tow, vessels of heavy draught should be placed behind those of lighter draught. *See O'Brien* v. *The New York Transp. Co.*, 31 Fed. 494. Soundings should be made when there is doubt as to the depth of the water. See *"Zouave,"* Brown Adm. 110.

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Cross current between piers of bridges which span rivers somewhat diagonally, are not infrequent, and as they are not always apparent to the casual observer, it is important that master mariners should know of their existence and something of their force in order that they may steer their tugs properly through such a passage. See *The "Lady Pike,"* 21 Wall. (U.S.) 1. Even under the control of the tow, the tug must act reasonably and execute any reasonable manoeuvre without waiting for the orders of the tow, and must give due warning to the tow of impending danger. See *The "Sinquasi"* (1880), 5 P.D. 241, and must render to the tow the benefit of any local knowledge and experience possessed exclusively by the tug. See *The "Duke of Manchester,"* (1846), 2 W.R. 470. It is the duty of the tug to carry out the directions received from the ship. See *Spaight* v. *Tedcastle,* (1881), 6 App. Cas. 217.

It is the duty of those aboard the vessel in tow, to give general directions to the master of the tug as to the towage, but the master of the tug should exercise his discretion as to the proper manoeuvres to be employed, especially when he is more competent to form an opinion on the point, than the master of the tow. See *The "Isca,"* (1886), 12 P.D. 34. It is the duty of those in charge of a tow, which is being towed with a long hawser by night at sea, to direct the movements of the tug, the circumstances being different to towing by day in a river. See *The "Stormcock,"* (1885), 5 Asp. M.C. 470.

If the tug be under the influence of a rudder of a ship, the former must look to it. Her master undertaking to tow the vessel in safety has the right to assume all the authority necessary for that purpose. The command and care of the vessel towed should be subject to his control, whilst she is carried by his boat, or her rudder should be in the hands of one of his own men. The vessel thus towed is to be regarded as property carried for hire, in which her crew had no lawful agency. See *Smith* v. *Pierce,* 1 La. (O.S.) 349.

Undoubtedly it is the duty of the tug to see the line is securely fastened, no matter what mode is adopted and so as to hold in all the emergencies which might happen whether ordinary or extraordinary, and the fact that the line did not hold is the best evidence that this duty was not fulfilled. "I know of no safer rule than to hold tugs responsible *primâ facie* in all cases for injuries resulting from the tow line so giving away from its fastenings upon the tug. An expert testimony shews that a line can be fastened so that it cannot slip." See *The "Sweepstakes,"* Brown Adm. 509.

The tug is bound to know the nature of the bottom of the stream and the depth of the water in which it is employed. See *"Effie J. Simmons,"* 6 Fed. (D.C.) 639, and further, a tug undertaking to tow a vessel is bound to know the proper and customary waterways and channels; the depth of the water; and nature and formation of the bottom; whether in its natural state or changed by excavations, and is responsible for any neglect to observe and be guided by these conditions. See *The "Henry Chapel,"* 10 Fed. (D.C.) 777. It is the duty of the captain of the tug when he sees the tow sheering directly into danger to warn her against it. See *"The Atlas,"* 12 Fed. (D.C.) 798. The duty of a tug not to injure the tow, does not arise out of a towage contract, but is imposed by law, and she is liable in admiralty for negligent navigation. See *The "Brooklyn,"* 2 Ben. 547.

The master of a tug was held to have failed in his duty who did not make his usual examination of the tow to ascertain her actual condition, but relied on the assurance of the master of the tow that everything was all right. In such a case the consequences of the tow would have appeared on examina-

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tion. See *"The Favorite,"* 50 Fed. Rep. 569. As above stated, the captain of a tug is under the duty to observe weather conditions, and to exercise ordinary prudence as to the conditions of her voyage, having in view the qualities of the tug and the character of the tow.

A tug which undertook to tow around Cape Cod, a small lighter with a five-foot side and blunt flat bow, and obviously not designed for sea services, was held at fault and liable for loss of the tow for proceeding over the shoals towards Vineyard in the face of a choppy sea, and a 25-mile wind, instead of lying by for better weather conditions. See *"William H. Yerkes, Jr."*, 214 Fed. 881.

It is no part of the duty of the tug to take precautions against the sheering of a tow, but if the tow sheered in consequence of the manoeuvring of the tug and then sustained damages, the tug is liable. See *The Tug "Stranger,"* Amer. Case reported in 1 Asp. M.C. 19. In going through narrow channels, when any sheering on the part of the tow would be dangerous, it is the duty of the tug to see that the tow is following in the wake of the tug. See *Gildersleeve v. N.Y., N.H. & H.R. Co.*, 82 Fed. 763. A towing company is bound to know not only what appears upon general charts as obstructions, but whatever is known to persons in the habit of navigating the water in question. And if the towing vessel negligently strikes an obstruction, the presence of which is well known or may reasonably be expected, the towed vessel may recover damages against the tow boat. In the *"Nettie Quill"* case, 124 Fed. 667, the Court laid down the principle that a steamer engaged in towing a barge is not liable for any injury caused by reason of the striking of a log which formed an obstruction in the channel of the river, but was not shewn to have been there for any length of time and its presence was unknown to any officer of the steamer, and at the time of the injury, which was at night, the mate who was in charge of the vessel was properly stationed and acting as look-out. But if a tug master is unfamiliar with the channel, the failure to either take a pilot or inquire from a person competent to give him information, renders the tug liable to the tow for an injury for striking on a log, the existence of which was known to navigators familiar with the vicinity. See *"The Mable S."*, 113 Fed. 971. Of course it is not the duty of the tug to know unascertained obstacles in the regular channel. *Powell* v. *The "Willie,"* 2 Fed. Rep. 95.

It has been held that a pilot navigating a narrow, crowded tidal stream, crossed by many bridges, is sufficiently occupied in avoiding visible perils, and should not be charged with fault because he is unaware of submerged projecting bolt heads in the piling of an abutment, which except in case of an unforeseen emergency should not cause injury to the tow. *The "Harlem River,"* No. 2, 180 Fed. 100.

In order to bring a canal boat into her proper position alongside of a bridge, it was necessary to swing her round with her head to the west against the bridge. This was done by slowly rendering her hawser, but when she got around, so that her starboard came against the spile next to that at her stern, a brace or piece of timber running diagonally from spile to spile across the bridge at that point, projecting beyond the spile beneath the surface of the water, pierced her side and she began to leak and sank. Those in charge of the tug had no knowledge of the obstacle. Held that the tug was not liable. *Powell* v. *The "Willie," supra.*

A tug having three tows in a single line covering altogether about 3,000 feet, is bound to exercise extreme care in navigating the ocean at night to

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avoid collision, and may be required by conditions to maintain a look-out aft as well as the regular look-out in the bow. Such a tug will be held at fault for a collision of one of the tows with a sailing vessel crossing, which might have been, but was not seen in time for the tug to have passed her. See *The "Samuel Dillaway,"* 98 Fed. 138.

The master of a tug must make an examination of the tow to ascertain her condition before undertaking to tow her. When a scow in tow of a tug careened over and lost overboard her deck-load of brick, and the leaking and the unseaworthiness of the scow was the cause of the accident, but the master of the tug had not made the usual examination to ascertain her condition before undertaking to tow her, it was held, that the tow and the tug were both at fault, and the owner of the scow should recover against the tug but half of her loss. See *Brand* v. *The "Favorite,"* 50 Fed. 569.

A tug boat in undertaking to tow a boat over a bar, the conditions of which are unknown to the tow, is bound to ascertain her draught, and not attempt to tow her if the water is not sufficient. But when a tow is taken as usual in a long course of dealing, the requirements of which as to draught are well known to the tow, and the master of the tug had no reason to suppose that the tow was loaded deeper than usual, and took her out to the best water and the tow in consequence of her unusual draught grounded, it was held, that the tug was not liable. See *King* v. *The "Harry & Fred,"* 49 Fed. 681.

In the making up of a tow the duty rests upon the tug to see that it is properly made up, and that proper lights are used, and where the tow consisting of a number of vessels was being made up in the Hudson River at a time when there were dangerous floats of ice being carried down on an ebb tide, the allowing of one of the tows to project beyond the others, and swing because of the absence of breast lines, in consequence of which she was struck by the ice and after being beached by the tugs, sank, it was held to be the fault of the tugs and for which they are liable. See *The "Edwin Terry,"* 162 Fed. 309.

When the propriety of the general course to be taken by the tow from one point to another depends largely upon the season of the year, the state of the weather, and the velocity of the wind, the possibility of a storm, and the proximity of a harbor of refuge, the choice of route is usually with the discretion of the master of the tug, and he will not be held in fault although the Court may be of the opinion that the disaster which followed would not have occurred if he had taken another course. See *James P. Donaldson*, 19 Fed. 264.

A tug is not responsible for injuries to its tow caused by inevitable accident, and an inevitable accident in such a case has been defined to mean an accident which occurs when both parties have endeavoured by every means in their power with due care and caution, and a proper display of nautical skill to prevent the occurrence of the accident, and when the evidence shews that it occurred in spite of everthing that nautical skill care and precaution could do. See *The Mabey and Cooper*, 14 Wall (U.S.) 204.

Undertaking tows of great length, the tug is bound at her own peril to take precautions by dividing the tow, or getting other help as may be necessary to prevent the tows swinging far out of line. See *O'Brien* v. *The New York Transportation Co.*, 31 Fed. 494.

A vessel using hawsers of great length in towing through narrow channels is bound to use great caution, and must be held responsible for any accident

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that is caused directly from the unnecessary length of the tow, and must follow such course so as not to impede navigation more than would be the case if shorter tow lines were in use, unless outstanding conditions of storm or danger exist, and the care of the tug must be measured by the conditions which exist. See *The "Domingo De Larrinaga,"* 172 Fed. 264. Deeply laden boats with open decks, should not be placed in the front tier, but in the inside under the protection of the other boats. See *"Ganoga,"* 130 Fed. 399. A steamer taken in tow by a tug to be moved out of her landing berth, is responsible for the proper fastening of the lines to her own bitts, and where in such a case the tow was injured by coming in contact with a pier by reason of the unsecured fastening of one of the lines which shifted on the bitt, the tug is not responsible for the injury. See *The "H.B. Moore, Jr."*, 155 Fed. 380. A tug is bound to furnish the tow line as part of the contract of towage in the absence of the usage of custom to the contrary. See *"The Merrimac,"* 17 Fed. Case No. 9478.

[See also annotation 4 D.L.R., page 13, on Towage.]

McCANN v. THE KING.

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Ex. C.

Exchequer Court of Canada, Audette, J. November 8, 1919.

RAILWAYS (§ II D—35)—GOVERNMENT RAILWAY ACT, FENCING—DAMAGES—NEGLIGENCE—EVIDENCE, WEIGHING OF—PROXIMATE CAUSE.

Where a person approaching a level railway crossing, which he had frequently crossed before and the dangers of which were known to him, does so without proper caution and care, and is struck by an oncoming train, his own actions being the sole and proximate cause of the accident, his claim for damages cannot be maintained.

That it does not become the duty of the Crown to fence, under ss. 22 and 23 of the Government Railway Act, until asked to do so by adjoining proprietors. *Viger* v. *The King* (1908), 11 Can. Ex. 328, referred to.

That in order to succeed in an action for damages against the Crown, under sub-s. f, s. 20, Exchequer Court Act, as amended by 9 & 10 Edw. VII., c. 19, proof must be made that an officer or servant of the Crown has been guilty of negligence whilst acting within the scope of his duties, which negligence was the cause of the accident.

Statement.

THIS is a case brought by a petition of right seeking to recover the sum of $3,550.00 for damages arising out of an accident on the Intercolonial Railway.

G. H. V. Belyea, K.C., and *W. M. Ryan*, for suppliant; *Fred. R. Taylor*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—The suppliant by his petition of right, seeks to recover the sum of $3,550.00, for damages arising out of an accident on the Intercolonial Railway, a public work of Canada.

On September 15, 1917, between the hours of 10.30 and 11.30 in the forenoon, of a fine bright day, the suppliant, who is a hack-driver in the City of St. John, N.B., was driving a closed coach, with glass windows back and front, on a return trip from the Catholic cemetery near St. John, with passengers who had attended

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a funeral there. He was himself sitting on the box six feet from the ground, and was travelling from east to west, on Brussels Street, in the City of St. John, N.B., which street is separated from the City Road by Haymarket Square, which is crossed by a spur or branch line of the Intercolonial Railway, as more particularly shewn on plan, Exhibit No. 1.

At the time of the accident the suppliant had as passengers in his coach, Messrs. Hunt, Rolston, Massey and two boys; but unfortunately none of these were heard as witnesses.

The suppliant testified that on the day of the accident, he did not see the train travelling on Marsh Street, thence across the Square, and that he did not hear any ringing of the bell and sounding of the whistle. He swears that he saw the train for the first time when he was on the track at Brussels Street when his horses and front wheels were on the track, and that his attention was first attracted to the train by one of two men, who he says were on the top of the last box-car, and that one of them called to him "Look out Pat," and further that he did not see any flagman at the crossing. This train was working reversely, with 15 cars behind the engine and one in front, and the suppliant's coach was struck on one of the hind wheels and smashed, when he and the passengers were injured. Hence the institution of the present action.

To succeed in such an action, the suppliant must bring his case within the provisions of sub-s. (f) of s. 20, of the Exchequer Court Act, R.S.C. 1906, c. 140, as amended by 9-10 Edw. VII. 1910, ch. 19. In other words there must be, 1st a public work; 2nd an officer or servant of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and, 3rd, the accident must result from such negligence.

The first requirement has been duly satisfied; but has there been any negligence on behalf of an officer or servant of the Crown as contemplated by the statute?

There is, indeed, conflicting evidence with respect to the flagman, the ringing of the bell and sounding of the whistle; but, such evidence must be approached with due allowance for the difference between the mental habits of persons in taking cognizance of what is happening in their immediate vicinity, for instance, one person may have apprehended perfectly a portion of the phenomena surrounding him at a given time and yet have

been insensible to the rest. One witness may answer that he did not hear the bell and whistle of a locomotive although both were sounded and he was near enough to hear them both, the psychological reason being that his attention was engrossed in some other fact. In such a case the evidence of another witness who did see the flagman, hear the bell, etc., must be taken in preference to the negative evidence. Indeed, in estimating the value of evidence one must not lose sight of the rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negatibus;* because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed. *Lefeunteum* v. *Beaudoin* (1897), 28 Can. S.C.R. 89.

The presence of a flagman is denied by the suppliant, and most of his witnesses, yet the policeman called on his behalf saw the flagman signalling on City Road and waving his hands. That is one step towards establishing the presence of a flagman, and that is amply corroborated by the crew of the train, and by one who was in Cogger's store, who saw him running ahead of the train, through Haymarket Square, and who even recognized Breen as such flagman. Witness Hunter says he actually saw Breen giving signals at both streets, and Breen himself testifies to the same effect. Now the policeman says he did not see the flagman on Brussels Street, but he said that at that time there was a good deal of traffic, and therefore his attention must have been otherwise engaged.

The same thing may be said with respect to the bell and the whistle. Some of the witnesses for the suppliant heard the sounding of two long and two short blasts; but, that has been denied by the suppliant himself and some of his witnesses. It is now well known that the ringing of the bell is mostly always done automatically, and the crew testified to its being rung.

Now, coming to the evidence of the respondent, it is established by Flagman Breen, that on the day of the accident, he flagged City Road and that he also flagged Brussells Street. After explaining how he flagged at City Road, he said that he then ran through the square to Brussells Street, where he stopped McCann's coach which was then about a length east of the track, and that

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after stopping the coach he stopped two little children on the southern sidewalk. After protecting these children, he turned around and saw that McCann had disregarded his warning and was on the track, his horses about going over, when the train was coming pretty close to him.

Then coming to this part of the evidence respecting the words "Look out Pat," so often referred to in the evidence, and that the suppliant endeavoured to establish as coming from the lips of the man on the top of the last car, I must find that this was denied and cannot be otherwise explained than from the reasonable conjecture that it came from some of the occupants of the coach driven by the suppliant who realizing the danger of their position called out to him to be careful, and being known to them, they called to him by his name.

The suppliant contends the respondent or his officers or servants were negligent in that:—1. The crossing was not fenced; 2. That there being no fence at this level crossing, there was an obligation upon the Crown, under s. 33, of the Government Railway Act, R.S.C. 1906, c. 36, to have an employee stationed at the intersection of the railroad with City Road and the extension on Brussells Street. 3. That notwithstanding s. 34 of that Act, there was transgression of the rule as to speed in a thickly-peopled community. 4. That there was no protection afforded by the presence of a man in rear of the car, when the train was moved reversely; and 5. There were the omissions of sounding the whistle and ringing the bell at a crossing.

As to the first charge of negligence, I may say, following the decision in *Re Viger* v. *The King* (1908), 11 Can. Ex. 328, that there being no evidence establishing that the Crown was ever asked to fence in the *locus in quo*, there is no duty cast upon it to fence under ss. 22 or 23 of the Government Railway Act. In other words the statute does not in the present instance impose upon the Crown the duty of fencing such a place as a public square in the centre of a city.

With respect to the second charge of negligence, it will be sufficient to state that s. 33 of the said Act only contemplates the case of two railways intersecting one another, and is not at all apposite to the present state of affairs.

Coming to the third charge, I must find it answered by what has been said with respect to the first one, and that is, no fence being required there was no restriction as to speed. And further that under the evidence it cannot be found that the train was proceeding at an excessive speed.

Then the fourth objection is answered by the evidence of the suppliant, which placed two men on the rear car and that of the respondent which placed one. And it was further established that the man on the rear of the car applied the emergency brakes just as soon as he saw the suppliant on the track, and he contended that at that time McCann had his head turned towards the south.

The last charge is that of the failure to comply with the requirements of s. 37 of the Government Railway Act, which says that:

> The bell shall be rung or the whistle sounded at the distance of at least eighty rods from every place where the railway crosses any highway, and shall be kept ringing or be sounded at short intervals, until the engine has crossed such highway.

This section provides for the ringing of the bell or the sounding of the whistle, but not for both. It is clearly in evidence on behalf of both parties that the whistles were sounded at one and at two separate intervals respectively, and it is further established by the respondent's evidence that the bell was ringing the whole time. This evidence that the bell was ringing the whole time can practically be given only by the crew, as given in the present case. Yet, if that evidence were challenged and if I were to conclude that the bell was not ringing at the time of the accident, a fact I cannot find under the evidence—I must also find that such failure was not the proximate cause of the accident, it was not the *injuria dans locum injuria*. Indeed the proximate cause of the accident is the want of caution and care in approaching the crossing by McCann, and his determination to take his chances in going over the crossing, after he had been ordered to stop, and while the flagman was attending to other members of the public for their protection.

Moreover, while there are imperative statutory duties cast upon a railway operated under legislative authority, there are also duties cast upon the public travelling over railway crossings. A person cannot with perfect immunity approach a railway crossing without a reasonable amount of caution—especially is that so, when that crossing is well known and has often been travelled

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over by the party complaining about it. This crossing is in no sense in the nature of a concealed trap. According to witness Murdock heard on behalf of the suppliant, there would be no difficulty for a person travelling east to west on Brussells Street, to see a train backing, travelling on the Square.

Clearly, as it was said in *B.C. Electric Railway Co. Ltd.* v. *Loach* (1915), 23 D.L.R. 4; [1916] 1 A.C. 719, if the suppliant had not got on the track—whether or not we accept the evidence that he was warned off by the flagman, and that he did so with absolute disregard to warning, the question which suggests itself is did he approach it and did he get there with ordinary care and diligence on his own part, as it was incumbent upon him to do?

As stated in the *McAlpine* case, 13 D.L.R. 618 at 623; [1913] A.C. 838:

> There is no such rule of law in England as that if a person about to cross a line of railway looks both ways on approaching the track, he need necessarily not look again just before crossing it.

Yet I cannot dispel from my mind that the suppliant should have been more careful and diligent in approaching and taking the track. He knew that crossing, having often travelled over it, and under the circumstances, must it not be expected from a person exercising ordinary care and prudence to look before venturing upon the track? The greater the danger, the greater should be the care and prudence. By taking the track as he did he was the sole and proximate cause of the accident. The omission to do the things which he ought to have done, and his doing the things he should not have done, constitute the negligence which determined the accident. He was the victim of his own negligence and carelessness. *Parent* v. *The King* (1910), 13 Can. Ex. 93; *Brillant* v. *The King* (1914), 15 Can. Ex. 42; *Cantin* v. *The King* (1915), 18 Can. Ex. 95; *Andreas* v. *C.P.R.* (1905), 37 Can. S.C.R. 1; *Morrison* v. *The Dominion Iron & Steel Co.* (1911), 45 N.S.R. 466; and *Villeneuve* v. *C.P.R.* (1902), 2 Can. Ry. Cas. 360.

Therefore, under the circumstances and under the evidence adduced, I am unable to find any negligence on behalf of an officer or servant of the Crown, acting within the scope of his duties to which, under the provisions of s. 20 of the Exchequer Court Act, should be attributed the cause of the accident. The suppliant has failed to prove his case, and there will be judgment declaring that he is not entitled to any portion of the relief sought by the petition of right. *Judgment accordingly.*

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SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 22, 1919.

BROKERS (§ II B—12)—SPECIAL AGENCY—GENERAL AGENCY—SUFFICIENCY OF BROKER'S SERVICES.

The listing of lands for sale for a period of two months constitutes a contract of special and not general agency, and such contract is not converted into one of general agency by the addition of a clause to give ten days' notice of withdrawal or increase or decrease in price. The agent not having performed the special contract cannot recover.

[*Toulmin* v. *Millar* (1887), 58 L.T. 96, distinguished; *Chappell et al.* v. *Peters* (1913), 9 D.L.R. 584, 6 S.L.R. 16, followed.]

Statement.

APPEAL from the judgment at the trial in an action to recover commission on the sale of land. Affirmed.

Russell Hartney, for appellant; *H. F. Thomson*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurs with Newlands, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—This is an action for a commission on the sale of land.

The trial Judge held that no purchaser was found ready, willing and able to purchase according to the listing, and gave judgment for defendant.

The facts are that defendant listed with plaintiff three-quarters of a section of land at $35 per acre, of which $6,000 was to be paid in cash. The agreement provided that the price included the crop then on the land, and continued:—

> I hereby agree to place the above described land with C. D. Fitchell for sale for the next two months and thereafter to give it ten clear days' notice in writing of withdrawal or increase or decrease in price, its commission to be $1.00 per acre.

The agreement was dated April 18, 1918.

The plaintiff brought one James McKinlay and his father to see the land, but they could not purchase because they could not raise the amount of cash defendant wanted. Subsequently, in November, after the crop was taken off and sold by the defendant, James McKinlay bought the land from the defendant for $30 per acre on a small cash payment.

It is admitted that defendant never gave plaintiff any notice in writing as provided for by the contract.

Upon these facts the plaintiff claims that, as defendant had never withdrawn the listing of the land from him, he was still defendant's agent, and, as defendant sold the land to a party introduced by him, he is entitled to the agreed commission.

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This case does not come within the principle laid down by Lord Watson in *Toulmin* v. *Millar* (1887), 58 L.T. 96, where he said:

> When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations.

Here the price of $35 per acre is not fixed as a price at which the defendant was willing to negotiate for the sale of his property, it was a specific price which plaintiff was to get in order to earn his commission, and that price was fixed for two months; thereafter the defendant could either withdraw, increase or decrease it. It is obvious that this later provision of the contract was put in because the crop was to be sold with the land, and that its condition at the end of two months would influence the defendant in making a new price. No new price was ever fixed for the land, so that, even if plaintiff's agency was continued over the two months, he had to obtain a purchaser at $35 per acre in order to earn his commission. But no matter what construction is to be put upon these words providing for the notice in writing, it is obvious that the agency terminated on the sale of the crop by defendant, because thereafter it was impossible for plaintiff to sell the land and crop.

I am of the opinion that this case is similar to cases like *Chappel et al.* v. *Peters* (1913), 9 D.L.R. 584, 6 S.L.R. 16, where a net price was given to the agent and he was to earn his commission by getting a larger price. I can see no difference in an owner saying "I will sell at $34 net to me" or "I will sell at $35 per acre and give you $1 per acre as commission."

The conclusion I have come to in this case is that the contract was a special and not a general agency; that in order to earn his commission the plaintiff had to obtain a purchaser for defendant's land and crop at $35 per acre, and, as he did not do this, he did not earn his commission.

As has been said in other cases, the defendant is not to be prevented from selling his land because the purchaser introduced will not pay a price sufficient to pay the agent a commission.

I would dismiss the appeal with costs.

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LAMONT, J.A.:—In my opinion the listing of lands for sale for a period of two months constitutes a contract of special and not of general agency, and such contract is not converted into one of general agency by the addition of a clause to give ten days' notice of withdrawal or increase or decrease in price. The plaintiff not having performed the special contract cannot recover. The appeal should be dismissed.

Lamont, J.A.

ELWOOD, J.A., concurs with NEWLANDS, J.A.

Elwood, J.A.

Appeal dismissed.

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ALTA.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Simmons and McCarthy, JJ. October 24, 1919.

MORTGAGE (§ VI A—70)—LAND TITLES ACT, ALTA.—FORECLOSURE—EXTINGUISHMENT OF DEBT—EXPRESS APPLICATION—EXECUTION FOR BALANCE—INTENTION.

An amendment to the Alberta Land Titles Act in 1919 provides that an order for foreclosure whether made by a Court or Judge or by the registrar shall operate as a full satisfaction of the debt secured by the mortgage. An order made upon an express application to be permitted to purchase for a certain agreed amount and for a vesting order and for leave to issue execution for the balance due, and where this is clearly intended to be granted by the order made, is not within this amendment. [*Mutual Life Assur. Co.* v. *Douglas* (1918), 44 D.L.R. 115, reversing (1918), 39 D.L.R. 601, distinguished.]

APPEAL from the judgment of Stuart, J. Reversed.

Statement.

H. P. O. Savary, for appellants; *H. W. McLean*, for respondent, Sayre; *W. P. Taylor*, for respondent, Gilfoy.

HARVEY, C.J.:—In 1913 the defendants borrowed from the plaintiffs $12,000 and gave as security a mortgage on certain lands in the City of Calgary which were presumably deemed to be sufficient security for the amount of the loan. The defendants covenanted to repay the said sum and interest. Default occurred, and in 1918 the plaintiffs brought action to enforce the security. An order *nisi* was made and in due course a sale was ordered by the Master. The defendants had solicitors representing them, and the plaintiffs' solicitors settled the condition of sale in consultation with them. The solicitors for one of the defendants insisted upon the reserve bid being made equal to the amount of the plaintiffs' claim which was $20,200, and this was done.

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No bid whatever was received for the property and the affidavits of value which had been filed indicated that the value of the property did not exceed $6,500.

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The plaintiffs then applied not for the usual order of foreclosure, but to be allowed to purchase the property at the price of $6,500 and to issue execution for the difference between the amount of their claim and that sum.

It does not appear by evidence that any objection was taken to this, nor is any evidence adduced to shew that the valuations were insufficient. The Master made an order permitting the plaintiffs to become the purchasers at the price of $6,500 and confirming the sale to them at the price of $6,500, foreclosing the defendants and all persons claiming under them of "all right, title or equity of redemption" in the lands, and vesting the lands in the plaintiffs free from all encumbrances subsequent to the mortgage. The order also declared the amount of the plaintiffs' claim to be $20,564.31, and gave liberty to the plaintiffs to issue execution against the defendants for that amount less the $6,500 realized by the sale, viz.: $14,064.31.

The plaintiffs registered the order and received a certificate of title for the land. Four days after they had done this the defendants gave notice of appeal from that portion of the order which permitted the issue of execution. The appeal was heard by Stuart, J., who allowed it with costs, and the plaintiffs now appeal.

When the mortgage was given, the ordinary rights of mortgagees which had existed for centuries still existed. They might proceed on default, upon their mortgage security, or upon the covenant, or upon both, but since that time there have been many changes. We have gone through a long war, and during its progress our legislature like many others has deemed it wise, in order that any person might freely put himself at the service of the country in its time of need, to pass various moratorium or delaying statutes, so that debtors and their families should not be unduly or unnecessarily harassed or disturbed, and the rights of the mortgagees as well as of other creditors have been interfered with.

It may be that now that the need for this interference has to a considerable extent passed away, a return may soon be made to former conditions, but in the meantime we have to deal with the law as it now stands.

In 6 Geo. V. 1916 c. 3, s. 15, an amendment to The Land Titles Act, 6 Ed. VII. 1906, Alta., c. 24, was passed, which provided

that even if a mortgagee obtained a judgment on the personal covenant, he could not have execution until a sale had been made or foreclosure ordered, and then only for the amount of the debt remaining unsatisfied.

In 9 Geo. V. 1919, c. 37, an amendment of a somewhat different character was passed, which has a most important bearing in this case because it was upon it that the Judge rested his decision. It provides that an order for foreclosure whether made by a Court or Judge, or by the registrar, shall operate as a full satisfaction of the debt secured by the mortgage.

In *Crown Life Ins. Co.* v. *Clark* (1915), 25 D.L.R. 519, 9 Alta. L.R. 97, this Division held that it was not proper practice to allow a mortgagee having the conduct of a public auction sale to bid at such sale. It was pointed out that the Judges had prescribed a practice in mortgage proceedings in 1908, and it was there indicated that this should not be permitted. It was also indicated that the mortgagee was entitled, if he wished, to have the reserve bid fixed at an amount which would cover his claim. In the present case as I have stated, it was one of the mortgagors who insisted on this.

That decision was before the amendment of 1916, and while that amendment does not seem to call for any modification of what was there decided, it does seem to call for consideration as to the mortgagee's right to become a purchaser.

If we take the present case as an example, and I dare say it is more or less typical, we find that the defendants, who borrowed $12,000, which now amounts, with interest and costs, to over $20,000, are able to satisfy their debt by turning over to the plaintiff land which is worth on the evidence not a third of the amount against it, and which, so far as it has been possible to ascertain, no one else wants at any price by virtue of the judgment appealed from.

The plaintiffs say that they have no objection to the whole order being set aside and any further precautions taken, but that they do not want to accept this land in satisfaction for their debt, and that they do want something to be done so that they can obtain what is due them. They say that they have no doubt of their ability to recover the amount of their claim if they are given the right to resort to the personal liability.

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As, I understand, the judgment appealed from does not maintain that the mortgagees may not buy if proper precautions and safeguards are taken, but maintains that the order permitting the sale is in reality a foreclosure order within the meaning of the amendment of 1919, and therefore extinguishes the debt. The order was made upon the express application to be permitted to purchase for $6,500 and for a vesting order, and for leave to issue execution for the balance due.

The order quite clearly intends to grant that. The term of it which declares that the defendants are foreclosed of and from all right, title or equity of redemption in and to the said mortgaged lands, is quite unnecessary for the purpose intended; indeed, as was pointed out by the Judge and also by this Division in *Douglas* v. *Mutual Life Assur. Co.* (1918), 38 D.L.R. 459, 13 Alta. L.R. 18, (reversed by 39 D.L.R. 601), the expression is not really appropriate to our system in any case. If then this order must be treated as a foreclosure order, it is not because it was intended as such unless a foreclosure order within the amendment includes every order by which the mortgagee becomes the owner of the land, which would mean, of course, that he cannot become the purchaser in the ordinary sense.

I agree with everything the Judge has said about the need of providing all proper safeguards before permitting the mortgagee to purchase, but if he may be permitted to become the purchaser then an order which so declares is within the jurisdiction of the Court, and it is only a question of whether the proper safeguards have been taken, and it is clear from the authorities as the Judge points out that he may become the purchaser in a proper case. Is it necessary then to interpret the 1919 amendment in such a way as to take away this established right?

In *Thomson* v. *Clanmorris*, [1900] 1 Ch. 718, at p. 725, Lindley, M.R., said:—

> In construing s. 3 of the Act of 1833, as indeed in construing any other statutory enactment, regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided.

In *Douglas* v. *Mutual Life Assur. Co.*, *supra*, the mortgagee had taken a final order of foreclosure under s. 62a which provides that if a sale cannot be effected after all the acts prescribed have been done, the registrar may make an order for foreclosure which

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shall vest the land in the mortgagee. Power is given to sell by auction or by private sale approved by the registrar, and for an amount less than the reserve bid. Nothing is said about the right of the mortgagee to buy but I see no reason, at present, why the principles applicable to sales in the Court should not apply, and if a sale were made to a mortgagee proceeding under that section and not in Court, it seems quite clear that there could be no order for foreclosure so called whatever, and that the 1919 amendment therefore would not stand in the way of the mortgagee pursuing his remedy for the deficiency. Are proceedings in Court to be less beneficial? Ever since what has been known as a final order of foreclosure, *i.e.*, one in which the mortgagee's equity to redeem has been foreclosed without any regard or reference to value or price, has existed it has been held that the mortgagee could still pursue his right on the covenant even after taking a final order of foreclosure, but if he did so it opened the foreclosure as it was called. Whether that rule applied under our system of land titles and mortgages came up for decision for the first time in *Douglas* v. *Mutual Life Assur. Co., supra.* This Division held that it did not, but that upon taking such a final order for foreclosure the mortgagee's rights on the covenant were gone, the debt being extinguished. The Supreme Court of Canada reversed our decision on Oct. 8, 1918, 44 D.L.R. 115, 57 Can. S.C.R. 243. In March following, at the next session of the Alberta Legislature, the 1919 amendment referred to was passed.

It seems abundantly clear that it was intended to declare the law for this Province to be henceforth what the Provincial Court had held it to be, and what the Supreme Court of Canada declared it was not.

If that is all that was intended, the order for foreclosure of the 1919 amendment need not be extended to include anything but such an order for foreclosure as was in contemplation in that case.

If it be limited to that, while it does take away a right which long existed but was seldom exercised, it does not deprive the mortgagee of any substantial benefit for he need not take the final order of foreclosure unless he is satisfied of the sufficiency of the value of the land. If, however, it is to be extended to every case where the title is vested in the mortgagee, it may deprive him of very substantial benefits.

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There are many cases where creditors—banks for instance, which cannot loan on real estate—take mortgages as security for existing debts upon lands which, while the best security obtainable, are known to be worth less than the amount of the debt. By virtue of the moratorium legislation of 1916 the creditor then must sell the land before he can take any further step to realize. The present case shews, and we are well aware of the fact, that the real estate market in parts of this Province is such that it is difficult to sell land for its fair value, even if in some cases it can be said to have any real marketable value. Now there are two courses open to the mortgagee if he wants to proceed, viz.: he may insist on having the land sold at whatever price it will bring no matter what the sacrifice, though what we have seen with reference to tax sales in some of our cities and towns leaves doubt whether there may not be many cases in which no purchaser can be found at any price. The other method would be for him to take the land himself to protect both himself and the debtor, but if he can only take it in full satisfaction he would in many cases be worse off than if he had no mortgage.

I see no necessity of construing the amendment in such a way as to bring about such a result where there is a perfectly reasonable and apparent construction which will avoid it.

I am of the opinion, then, that the order in question in this action was not one which came within the amendment of 1919, it clearly never having been intended as an order for the purpose of simply foreclosing all the mortgagors' interests and vesting the land in the mortgagees and that consequently the provision for issuing execution is a perfectly proper term of the order.

Whether, however, the order for sale to the mortgagees should be allowed to stand involves other considerations. The Judge intimated that there should have been an offer to sell by tender. This is somewhat in line with what the Legislature has thought wise to authorize in the case of proceedings before the registrar, for s. 62a provides that if a sale cannot be made at a public auction the registrar may (though not must) require the land to be advertised for private sale.

It is, of course, apparent that all such proceedings involve expense and that that expense must ultimately fall upon the mortgagor if he is financially able to meet it but in the meantime must

be borne by the mortgagee. When the mortgagor is not before the Court or the registrar, as is usually the case, it is the duty of the Court or registrar to be careful of his interest. Where, however, he is represented as in the present case, it may be assumed that his representatives will indicate any particular course they think should be adopted. Counsel for the defendants in their factum state that they opposed the granting of the order asked for and contended that the property should be put up for sale at a lower reserve bid.

In this regard it is to be noted that the reserve bid was fixed as it was at their request, and while it is possible, it appears by no means probable, that a sale could have been made or probably could now be made at a lower reserve bid if such bid were made higher than the amount which the land is worth according to the evidence, and the mortgagee ought not to be compelled to allow the land to be sold for less than they themselves are willing to give, nor does there seem any ground upon which it could be for the advantage of the defendants that they should. Speaking generally, I am disposed to agree with the Judge appealed from that an offer for sale by tender, the expense of which would not be great, might result in something beneficial though a sale at public auction had proved abortive. The defendants, however, did not ask that any such course be adopted, and under the circumstances I do not think the Master was wrong in not directing it. But, as I have said, the plaintiffs, while quite satisfied with the order made, offer no objection to any reasonable opportunity being given to the defendants to have a sale made that will realize more than the amount they are willing to credit provided no prejudicial delay results. The value of the property is, however, so much below the amount of the plaintiffs' claim that any further expense should be borne immediately by the defendants as was the expense of the sale which was ordered.

I would, therefore, allow the appeal with costs and restore the order of the Master subject to this qualification that, if within two weeks the defendants file a demand for an offer of the land for sale by tender and deposit in Court such sum as the Master may fix as sufficient to cover the expense involved by such offer, and interest during the time of delay, the property shall be put up for sale by tender.

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Harvey, C.J.

The plaintiffs and the defendants may have leave to tender and if there should be any tender received for an amount higher than $6,500 and than the plaintiffs' tender and accepted and payment made in accordance therewith, the land shall be transferred by the plaintiffs to the successful tenderer. If the plaintiffs' tender should be higher than $6,500, and not be exceeded by any other tender, credit should be given for the amount of such tender, instead of $6,500.

Simmons, J.

SIMMONS, J.:—The facts are set out in the judgment of the Chief Justice.

I am not able to apply s. 62(b), as enacted by c. 37, s. 4, Alta. stats. 1919, to the order made by the Master in Chambers.

Once it is conceded that under proper supervision by the Court and with the necessary safeguards interpolated that a mortgagee may purchase, it follows that a method of carrying out this procedure must exist, or should exist.

On account of the statutory amendments of 1916, 1917 and 1919, there has arisen a good deal of doubt and confusion as to this procedure.

It is not necessary to extend the application of s. 62(a) to the order made by the Master, as the order was never intended to be "an order for foreclosure." See *Douglas* v. *Mutual Life* (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243.

The order of the Master provided for a sale under the direction of the Court.

Leave was then given by the Master for the mortgagee to purchase at a valuation of $6,500 and the same was carried out. It was not necessary to insert in the vesting order that the mortgagors' right, title and interest was foreclosed and these words may be treated as surplusage. The order was a vesting order pursuant to sale and the addition of this provision did not alter it.

I would, therefore, allow the appeal with costs and I concur in the disposition made by the Chief Justice as to any application by defendant to have the order revised.

McCarthy, J.

MCCARTHY, J. (dissenting):—The plaintiff company in this action, the appellants, on July 9, 1913, loaned to the defendants the sum of $12,000 and took as security a mortgage executed by both defendants on certain real estate in the City of Calgary.

On January 28, 1918, an action was commenced against the defendant Sayre to realize upon the mortgage.

On November 14, 1918, a similar action was commenced against the defendant Gilfoy.

These actions were subsequently consolidated, the reasons for the separate actions being, that the defendant Gilfoy was protected by the Volunteers and Reservists Relief Act, 6 Geo. V. 1916, Alta. c. 6.

These actions were not defended, and on June 21, 1918, an order *nisi* was obtained in the *Sayre* case and a similar order with regard to Gilfoy was obtained on December 4, 1918.

By order of the Master in Chambers, dated March 7, 1919, a sale by public auction was directed to be held on May 10, 1919.

No bids on the property were received at the sale. The plaintiffs thereafter and on May 28, 1919, obtained an order permitting them to purchase the mortgaged premises for the sum of $6,500, which price was supported by affidavits of valuation.

The reserved bid at the abortive sale was fixed at the amount of the plaintiff's claim, viz.: $20,200.

By c. 37, 9 Geo. V. 1919, Alta., s. 4, an Act to amend the Land Titles Act (assented to April 17, 1919, operative on May 17, 1919), s. 62(b), provides:—

> The effect of an order for foreclosure of a mortgage or encumbrance heretofore or hereafter made by any Court or Judge or by any registrar shall be to vest the title of the land affected thereby in the mortgagee or encumbrancee free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance, and shall from and after the date of the passing of this section operate as full satisfaction of the debt secured by such mortgage or encumbrance. Such mortgagee or encumbrancee shall be deemed a transferee of the land and become the owner thereof and be entitled to receive a certificate of title for the same.

It is to be observed that s. 62(b) above referred to, was assented to on April 17, 1919, the abortive sale took place on May 10, —s. 62(b) became operative on May 17, and the order of the Master issued on May 28. The order of the Master further provides this:

> It is ordered that the sale of the lands and premises . . . to the plaintiffs for the price or sum of $6,500 be and the same is hereby approved and affirmed. It is further ordered that the payment into Court by the plaintiffs of the sum of $6,500 the purchase price of the said lands be and the same is hereby dispensed with. It is further ordered that the defendants . . . do hereby stand absolutely and irrevocably barred and foreclosed of and from all right, title or equity of redemption in and to the mortgaged lands . . .

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And it is further ordered that the said lands (describing them) be vested in the plaintiffs . . . for an estate in fee simple . . . and that the registrar . . . do cancel the present certificate of title and issue a new certificate of title in the name of (the plaintiffs).

From the order of the Master, the plaintiffs appealed to a Judge in Chambers, Stuart, J.

In this appeal with regret I come to the conclusion that the plaintiffs' attempt to realize the balance due under their mortgage is an evasion of the provisions of s. 62(b) of the Land Titles Act, as amended by 9 Geo. V. 1919, c. 37, s. 4.

There is nothing laudable in the position of the defendants; they obtained the loan which they promised to repay and, whilst proceedings were pending to enforce the claim against them, an amendment to the Land Titles Act is passed, which in effect provides that foreclosure shall operate as full satisfaction of the debt secured by mortgage.

The property having depreciated greatly in value the defendants claim the protection of the amendment to evade payment of the balance of the money they owed the plaintiffs under the mortgage.

At the time the money was loaned to them both the lenders and the borrowers knew and expected that the latter would be liable under the covenants contained in the mortgage to repay the full amount of the money loaned, that was the situation when the money was loaned and it was upon that understanding the money was advanced.

To give full effect to the amendment can have only the effect to embarrass investors and drive capital out of the country.

Unless the proceedings taken by the plaintiffs can be deemed to have been taken prior to the passing of s. 62(b), I think the judgment of Stuart, J., was right and must be sustained: I cannot come to any other conclusion than that the wording of the section means that when the plaintiff takes foreclosure his personal remedy is gone. I am at a loss to see how the Legislature could have expressed it in plainer language. In *McBratney* v. *McBratney* (1919), 48 D.L.R. 29, at p. 36, I stated my view of the authorities on the construction of a statute in part as follows:—

> Having reference to the sections above referred to the meaning appears to me to be plain, and we must obey the directions of the Legislature, no matter what dissatisfaction it may create in any quarter anywhere. Strictly speaking there is no place for interpretation or construction except where the words of a

statute admit of two meanings. "Where the language of an Act is clear and explicit we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature," *Warburton* v. *Loveland* (1831), 2 Dow & Cl. 480, at 489, 6 E.R. 806, at 809. In other words, if the language used by the Legislature is precise and unambiguous, a Court of law at the present day has only to expound the words in their natural and ordinary sense. The intention of the Legislature is not to be speculated on.

In the argument before us, it was contended by the appellants that the order of the Master, of March 28, 1919, referred to above, was not an order for foreclosure but an order permitting the appellants to buy, but what does the order say:—

It is further ordered that the defendants . . . do hereby stand absolutely and irrevocably barred and foreclosed of and from all right title or equity of redemption in and to the mortgaged lands.

The position then of the plaintiffs is that "we will not take foreclosure because under s. 62(b), that will operate as full satisfaction of the debt, but we will evade the section which became operative a few days prior to the taking out of the order"; if that was their intention they did not use very apt words in the order and clearly it is an attempt to evade the statute or, as was once said by a Judge in England: "An attempt to drive a coach and four through a statute." I do not think it is competent for the plaintiffs to say under the circumstances they did not foreclose, they purchased.

In Stroud's Judicial Dictionary, at p. 744, it says:—

FORECLOSURE.

"A foreclosure," said Lord Hardwicke, "is considered as a new purchase of the land." "The mortgage being foreclosed," said Sir William Grant, "the estate becomes absolutely his" (*i.e.*, the mortgagee's). "By the order made in the foreclosure suit," said Sir L. Shadwell, "he (the mortgagee) became the absolute owner": *Casborne* v. *Scarfe* (1739), 1 Atk. 603, 26 E.R. 377; 2 White & Tud. L.C. 6; *Silberschildt* v. *Schiott* (1814), 2 Ves. & B. 45, 35 E.R. 396; *Le Gros* v. *Cockerell* (1832), 5 Sim. 384, 58 E.R. 380 (*per* Selborne, C., *Heath* v. *Pugh* (1881), 50 L.J.Q.B. 473, 6 Q.B.D. 345; affirmed (1882), 51 L.J.Q.B. 367, 7 App. Cas. 235).

V. DECREE: CONVEYANCE.

Vh. Coote, c. 78; Fisher, 476 *et seq.*; 5 Encyc. 406-412.

With regard to the fact that the proceedings to realize under the mortgage were commenced at a time antecedent to the passing of the amendment. The words "heretofore or hereafter made" of the amending statute to my opinion are conclusive. That the section by express words leads to the result in this case that if the mortgagees take the mortgaged property they cannot

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have any more. The only question remaining therefore is: Is the order in question an order for foreclosure? I think it is and it is more. It bars all the defendant's rights.

If either party to this appeal had asked that the whole order be set aside I would have acquiesced because the plaintiffs doubtless will say that we would never have purchased if we thought we could not have proceeded for the balance of the mortgage moneys. If the whole order were set aside the plaintiffs would still be the mortgagees and could then elect whether they preferred a sale to a third party and preserve their rights to proceed for the balance or foreclosure and lose their rights under the covenant. Neither party however asks this.

For the reasons stated and the objections to the practice in the Master's office as pointed out in the judgment of Stuart, J., *inter alia*, a sale by the Court without some public announcement, I would dismiss the appeal with costs.

Appeal allowed.

SASK.

C. A.

BROWN v. PATCHELL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Elwood, JJ.A. October 22, 1919.

BROKERS (§ II B—12)—SALE OF LAND—COMMISSION AGREEMENT—SUFFICIENCY OF BROKER'S SERVICES.

An agent is not entitled to commission under an agreement to get a purchaser for lands at a certain price per acre, where he introduces a party who has previously negotiated with the owner for a trade which is subsequently completed.

Statement.

APPEAL from the judgment at the trial in an action for commission. Affirmed.

L. McK Robinson, for appellants; *T. D. Brown*, K.C., for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with Newlands, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—This is an action for commission. Plaintiffs claim that defendant agreed to pay them $1.00 per acre, if they obtained a purchaser for him who would purchase his land at $35 per acre. They claim they obtained a purchaser, to whom defendant afterwards traded this land, and that, therefore, they are entitled to the commission agreed upon.

The trial Judge found that plaintiffs had introduced the party who afterwards acquired the defendant's land in a trade, and he

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allowed them $80 commission, instead of the $160 claimed, as he thought that sufficient for plaintiffs' services. From this judgment plaintiffs appeal, claiming the whole commission due, and defendant cross-appeals on the ground that plaintiffs are not entitled to anything, because the party they introduced did not purchase the land.

Plaintiffs' evidence shews that their agreement was to get a purchaser for defendant at $35 per acre, and that their commission was to be $1 per acre. In order to earn this commission they would have had to carry out their contract, *i.e.*, obtain a purchaser at the price agreed upon. They did not do this, but introduced a party who took the land in a trade. This would not be a performance of their contract. The plaintiff never introduced a party who would purchase, and defendant was aware before plaintiff had anything to do with the land that the proposed purchaser would trade with him for this land.

I would therefore allow the cross-appeal, and dismiss the appeal with costs.

Elwood, J.A.

ELWOOD, J.A.:—I concur in the result arrived at by my brother Newlands in this matter. The plaintiffs did not bring a purchaser who was willing to purchase at the price demanded by the defendant for the land. He at one time expressed a willingness to purchase at a lower price, and signed a document to that effect, but the evidence convinces me that he was not willing to conclude the purchase even at that price. Prior to any negotiations between the plaintiffs and defendant, this prospective purchaser, whose name was Hummell, had discussed with the defendant the trade of the land which subsequently was consummated. At that time they could not agree upon the amount which Hummell should pay on the trade. Subsequently to the negotiations between the plaintiffs, the defendant and Hummell, Hummell undoubtedly decided not to purchase, and it was then that Hummell and the defendant came to terms on the amount that should be paid by Hummell on a trade, and the trade was consummated. Under these circumstances, I am of the opinion that the plaintiffs are not entitled to anything in connection with the matter.

The appeal should be dismissed, with costs, and the cross-appeal allowed with costs.

Appeal dismissed and cross-appeal allowed.

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Ex. C.

S.S. "CONISTON" v. FRANK WALROD.

Exchequer Court of Canada, Audette, J. October 28, 1919.

COLLISION (§ I A—3)—TUG AND TOW—STEAMSHIP—NARROW CHANNEL—RULES OF ROAD—LIGHTS.

A steamship was coming up the St. Lawrence River in ballast, at a great speed, and approaching a tug and tow in the bend of the channel changed her course with the intention of passing them starboard to starboard, contrary to art. 25 of the Rules of the Road. Thereupon the master of the tug ported his helm in an endeavour to avoid a collision. The steamer then tried to manoeuvre herself into position and collided with two barges at the head of the tow.

Held, the collision resulted from the steamer's failure, "when safe and practicable, to keep to the starboard side of the fair-way or mid-channel," as required by art. 25; even if the pilot of the steamer believed the tug and tow coming down the wrong side of the channel, good seamanship required him to stop or slow up, which he failed to do; that no blame could be imputed to the tug. The length of the tow and the absence of regulation lights on the barges cannot be said to have contributed to the collision when it occurred at the head of the tow.

Statement.

APPEAL by the defendant from the judgment of the Deputy Local Judge in Admiralty, Quebec Admiralty District, Mr. Justice Maclennan, 45 D.L.R. 518, rendered on February 20, 1918, which judgment found the S.S. "Coniston" guilty of negligence and found that the collision was the result of the failure, by the "Coniston," to observe the provisions of article 25 of the Collision Regulations and also finding that there was no blame imputable to the plaintiff and ordering that the damages be assessed. Affirmed.

A. W. Atwater, K.C., and *L. Beauregard*, for appellant; *Peers Davidson*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—This is an appeal from the judgment of the Deputy Local Judge of the Quebec Admiralty District, sitting at Montreal, and bearing date February 20, 1918, in a case of damages arising out of a collision which occurred at one of the curves in the narrow ship-channel of the River St. Lawrence, on Lake St. Peter, between Montreal and Three Rivers.

As already said, in such cases when sitting, as a single Judge, in an Admiralty appeal from the judgment of the trial Judge, while I might with some diffidence feel obliged to differ in matters of law and practice, yet as regards pure questions of fact, I ought not to interfere with the judgment below, unless being clearly satisfied in my own mind that the decision is clearly erroneous. *The Queen* v. *Armour* (1899), 31 Can. S.C.R. 499; *Montreal Gas Co.* v. *St. Laurent* (1896), 26 Can. S.C.R. 176; *Weller* v. *McDonald-McMillan Co.* (1910), 43 Can. S.C.R. 85; *McGreevy* v. *The Queen*

(1886), 14 Can. S.C.R. 735; *Arpin* v. *The Queen* (1886), 14 Can. S.C.R. 736; and Coutlee's Digest, S.C., vol. 1, p. 93 *et seq.*

The Picton case (1879), 4 Can. S.C.R. 648, is further authority for the proposition that when a disputed fact, involving nautical questions with respect to what action should have been taken immediately before the collision, is raised on appeal, that the decree of the Court below should not be reversed merely upon a question of testimony. Indeed, the hearing upon the appeal is but a re-hearing of the case, and while there is no presumption that the judgment in the Court below is right, it cannot, however, be overlooked that the learned Judge of first instance has had an opportunity of hearing and seeing the witnesses and testing their credit by their demeanour under examination: *Rickmann* v. *Thierry* (1896), 14 R.P.C. 105.

On the hearing of the appeal I had the advantage of the assistance, as Nautical Assessor, of Captain Demers, the Dominion Wreck Commissioner, a gentleman of large experience in nautical matters and whose opinion, I am pleased to say—to use his own words—coincides with mine.

Close on to midnight, on June 18, 1917, the steamer "Coniston," light, in water ballast, was steaming up Lake St. Peter, at full steam. She is a steel vessel of 337 feet in length, 47 feet beam, 2,273 net tonnage, single screw, triple expansion, drawing light 8.6 forward, and 13.6 aft, as stated by Captain Hill. She is said to steer easily.

The weather was fine—a splendid night, dark, but with clear atmosphere. The lights were plainly visible, and a slight south-south west breeze was blowing. According to Superintendent Weir, there was, at the time of the accident, in the *locus in quo* a current of about three miles an hour, which between Curves Numbers 1 and 2 tends to the south; and there was a breeze of 3 to 4 miles which would have absolutely no effect on loaded barges, as it would take a very strong breeze to have any effect upon them.

Pilot Mayrand, who was in charge of the bridge and of the navigation of the "Coniston," testifies that his vessel on the night of the accident was drawing slightly over 14 feet, and that they were going up the river against the current, at a speed of 9 or 10 miles an hour. Trattles, the chief officer, says that when they first saw the tug "Virginia" and her tow, they were at about

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three or four miles distant and that, *of course*, he knew it was a tow, as he saw the several lights of the barges. The pilot says when he first saw the "Virginia's" green light with two mast lights, and the barges shewing their lights, he also knew at once it was a tow, and he adds when he saw these lights he was in the fair-way of the channel.

The average width of the channel in the locality in question is about 450 feet.

This green light he saw appeared on his port side—the "Virginia" being in the upper reach of the curve and the "Coniston" on the lower reach. The pilot says he was at about 1½ miles when for the first time he saw the "Virginia's" green light and kept up at full speed all along. After seeing the green light he proceeded for ¾ to 1 mile without changing his course, having all that time the "Virginia's" green light in sight. At 2,500 to 3,000 feet the "Coniston" blew two blasts, and the pilot says he advanced 700 or 800 feet before the "Virginia" in answer blew one blast, when, he says (both vessels having continued to go ahead)—he was at about two lengths of his ship from the tug and still going full speed, his vessel being then (p. 68) more on the south than in the centre of the channel—at about 100 odd feet of the south line of the channel. The pilot further contends that the "Virginia" gave one blast immediately after shewing her red light, when they were at 800 to 900 feet apart and his vessel kept forging ahead full speed.

The "Coniston" answered the "Virginia's" one blast by one blast when they were 400 to 500 feet apart and when, the pilot says, he realized the collision *was inevitable*. He then ordered his wheel hard-a-port (he having a right hand propeller), slow, stop, and full speed astern, and the collision took place, not end on, but the "Coniston" struck with a slanting or glancing blow the barges that were then on her port side.

The "Coniston," however, omitted, as required by art. 28, to indicate, by "three short blasts," her engines were going full speed astern.

The pilot said: "Q. Dans quelle partie avez vous frappe avec votre batiment? A. Un peu en arriere de la joue."

The tug's green light was at all times seen by the "Coniston" before the latter took the curve, and it was when she was out of

or beyond this curve, No. 2, she first saw, as she should, the "Virginia's" red light. The "Virginia's" green light was narrowing on the "Coniston's" port bow, as the latter was travelling in this curve.

The collision took place at about 100 feet from buoy No. 85, L. which is at the head of the curve and on the right or starboard side of the channel going down the St. Lawrence. The collision occurred on the south of the fair-way, or on the right side of the channel going down the river.

After the collision the "Coniston" righted herself, went to starboard and proceeded ahead, without more ado, and without ascertaining or enquiring if she could be of any help or assistance to the sinking or damaged barges.

Before leaving the "Coniston" on this question, it will be well to refer again to the Chief Officer Trattles' evidence with respect to the course followed by the "Coniston" immediately before the accident and regarding the place of the accident. This witness states that when the pilot ordered two blasts, the "Coniston" was in the middle of the channel, and immediately after giving these two blasts, the "Coniston" starboarded her helm a little, altering her head to port at the very outside half a point and then steadied. They continued heading a little to the south, and they kept at that at the command "steady." And then he adds when the tug blew one blast she was on our starboard side between two or three points (pp. 36 and 37). This starboarding of the helm between the time the "Coniston" gave the two blasts and the collision is also corroborated by wheelsman Baay, pp. 41-43.

Having thus followed in a general manner the course of the "Coniston" while manoeuvring in the lower reach of Curve No. 2, as shewn on the chart filed as Exhibit No. 1, let us now in a similar manner, follow the course pursued by the tug and her dead tow in the upper reach, between Curves No. 1 and No. 2.

The tug "Virginia" is 115 feet in length, about 24 feet beam and has a draught of 11½ feet. By means of a hawser of 200 to 250 feet in length she was towing sixteen canal barges, lashed two by two, with bridles attached to the two front barges—the succeeding tiers stood about 15 feet apart from the tier ahead. The first five rows, of ten barges, were under cargo, and the three last rows, of six, were light—unloaded. It was a dead tow, the barges

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being under the entire control of the tug, as they had no means of propelling themselves. The barges were of an average length of 100 feet, more or less.

The tug was displaying her red and green side lights and two white mast head lights indicating she had a tow.

The Captain of the "Virginia" says he sighted the white light of the "Coniston" at a distance of about a couple of miles.

The crew of the "Virginia" swear they did not hear the two blasts of the "Coniston," which the latter's crew swear they did give. The wind was blowing the sound in a different direction from which the "Virginia" stood at the time. The "Coniston" did not have a siren, but an ordinary whistle which might have been, at the time, filled with water from the steam, as she was going up full speed. However, there is not much turning upon this point.

Leaving buoy No. 97, after Curve No. 1, the current throws to the south of the channel and on that account it is said to be difficult to clear it, and the captain of the "Virginia" says that, at that spot, he passed right in the middle of the channel, between the red buoy No. 100 and buoy No. 97, and the tug passed about 50 feet from the red buoy to counteract the current which was throwing them on No. 97. After passing there he came back to the centre of the channel. At that spot in going through this manoeuvre they actually describe a half circle. The more they go down the less effect has the current.

Half way between the two curves, the tow was absolutely straight, says the captain, and the current was shoving us to the south in a decreasing strength. Then, he says, when he saw the "Coniston" at buoy No. 91, he moved to the south (right.) When the "Virginia" was opposite buoy No. 85, the captain says the "Coniston" was at about 1,000 feet, and he contends it was at that distance, when he was 50 feet away from buoy No. 85, tug and tow, all in a straight line parallel with the direction of channel, on the south side of the fair-way that he blew one blast.

Up to this time both vessels had been travelling *green* to *red*, that is the "Coniston" exhibiting her red and the tug her green, and looking over the chart on account of the course of the channel it could not have been otherwise, until one of the vessels got into or passed Curve No. 2.

The Captain of the "Virginia" contends that, when at about 1,000 feet from the other vessel, and 50 feet from buoy No. 85, and suddenly seeing the green light of the "Coniston," he blew one blast and went three points or more to starboard, and at that time he affirms the "Coniston" was on the south side of the channel.

The "Coniston" answered at once by one blast the one blast of the tug. Immediately after this blast the "Coniston" shutting her green shewed her red light, when the "Coniston" and the "Virginia" became abreast about 250 feet below buoy No. 85, and passed one another, and when the "Coniston" came in collision with the barges, they were abreast of buoy No. 85 upon which the steamer shoved them, damaging the buoy which passed underneath some of the barges.

As a result of the collision one berge was sunk, and the plaintiff's barges damaged.

After the collision the "Virginia" pulled in some of her hawser, went half speed, came up towards the barges to ascertain if there were any loss of life and to give help.

It is perhaps opportune at this juncture, to compare the conduct of the captain of the "Virginia" after the accident with the conduct of the captain of the "Coniston," who after the accident, steamed to starboard, cleared the barges that he had brought together in a tangle, and steamed up channel. The "Coniston" did not, contrary to her duty, stand by and assist all in her power the stricken vessels. And, as said by Todd & Whall, Practical Seamanship:—

> If it so happens that the stricken vessel can be kept afloat, it is the duty of the other vessel to tow and assist her into a place of safety. In all cases of collision, one vessel must stand by the other as long as necessary and it is punishable by law if one vessel forsakes the other, besides being cowardly in the extreme.

See now upon this question the Canada Shipping Act, R.S.C. 1906, c. 113, s. 920, as amended by 4-5 Geo. V. 1914, c. 13, s. 5, sub-s. 2.

Now, having gone so far let us ascertain the cause of the collision.

Having already found that the ship-channel at the place in question is a narrow channel, art. 25 of the International Rules of the Road must *primâ facie* apply. This rule reads, as follows:

> Article 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.

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The "Coniston" from the very time she sighted the tug and tow either kept in the middle of the channel or to the left or port side of the same, contrary to and in violation of art. 25, which imperatively directed her to keep to the right or starboard side of the channel. Both vessels up to the time the "Coniston" was taking the Curve No. 2, when they were about 800 to 1,000 feet apart, were travelling red to green.

Moreover, assuming both vessels had kept their courses, it is only when the ascending vessel had turned into the upper reach moving to the south, that the descending vessel would normally see the red of the ascending vessel—unless some unusual course followed by the ascending vessel could have disclosed her green. The ascending vessel should also see the green light of the descending vessel up to that point.

What are the reasons assigned by the "Coniston" for having departed from the imperative directions of art. 25, from the time she gave her two blasts? Why was she travelling on the wrong side of the channel at full speed at such a place, with a tug, impeded by her dead tow, coming down the channel with the current on her proper course? See art. 29.

The wind prevailing on the night of the accident, as established by the evidence, was such as it would be wasting time to discuss its slight effect on the tow, especially its effect on the second tier of the loaded barges. The same may be said with respect to the current as having any bearing on the cause of the accident, save, however, the fact that the tug, trammelled by her tow, was coming down with the current.

The pilot's excuse for having departed from the obligations prescribed by art. 25, as for keeping to the left of the channel instead of the right—(if it is to be taken seriously or as a last straw to which he holds in attempting to excuse his lubberly manoeuvring)—is that when on the lower reach, some distance away, the tug and tow appeared to him to be on the north of the channel in the upper reach of Curve No. 2. Is it not evident that the "Coniston," the ascending vessel, looking across the curve would be quite unable to ascertain with any satisfactory degree of certitude whether the down vessel ("Virginia" and tow) was on the north more than the south of the fair-way—inasmuch as he was not looking directly up the channel? At p. 30 of his evidence

the pilot also makes the double statement that he *did not and did* take the wind into consideration.

However, the pilot testifies he became quite anxious in his course between the time of the two blasts and the one blast. And he might well be; yet, he still proceeded at full speed (a quelques pieds de la ligne sud du chenal) at a few feet from the southern line of the channel, well knowing, in good and prudent seamanship, the descending vessel, hampered with a tow, coming with the current, was entitled to consideration. Had he stopped below the curve—had he slackened to slow, as good seamanship required of him under the circumstances, the accident would have been avoided. He was guilty of a most lubberly manoeuvre under the circumstances. See art. 29.

The "Coniston" departed from a course imperatively defined by art. 25, and still aggravated her error by proceeding at full speed—in a curve, where navigation is necessarily intricate, in face of a tug and dead tow coming down with the current, at night and on her proper course, instead of either stopping, keeping her course to starboard or at least reducing her speed, which he only did when, as her pilot himself said, the collision had become inevitable, and made no allowance for the tug's encumbered condition.

I find that the "Coniston" placed herself, by a lubberly manoeuvre, in a false position, and that she is at fault for such manoeuvring, wanting in good seamanship, and displaying a glaring want of ordinary care and precaution.

I will cite here, although decided under the Great Lakes Rules, the case of *Bonham* v. *The "Honoreva"* (1916), 32 D.L.R. 196, 54 Can. S.C.R. 51, which is enlightening upon the general principles.

We must not overlook that the tug and its dead tow were coming down on the right side of the channel, with the current and encumbered with her tow.

See the case of *The Montreal Transportation Co. Ltd.* v. *S.S. "Norwalk" et al.* (1909), 37 Que. S.C. 97; 12 Can. Ex. 434, although decided under the Great Lakes Rules.

It was held, among other things, in the case of *Earl of Lonsdale* (1878), Cook's Adm. 153, affirmed by the Judicial Committee of the Privy Council, that where a steamship was ascending the River St. Lawrence, and before entering a narrow and difficult

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channel, had observed a tug approaching with a tow of vessels behind her, but did not stop or slacken speed—a collision taking place—that the steamer was to blame, and that the fact of the tug not porting until immediately before the collision, did not amount to contributory negligence. See also *Tucker* v. *The Ship "Tecumseh"* (1905), 10 Can. Ex. 44.

A steamer with a ship in tow is in a different situation from a steamer unincumbered." *The "Independence"* (1861), 4 L.T. 563, see headnote; see also *Bonham* v. *The "Honoreva"* 32 D.L.R. 196, 54 Can. S.C.R. 51:

And in the case of *"The Talabot"* (1890), 6 Asp. M.C. 602, it was held that:—

When two steamships going in opposite directions, in the Schelt, sighted one another, one above a point and the other below it in the river, and if both kept on they would meet at the point, that it was the duty of the steamer navigating against the tide to wait until the other steamer had passed clear.

And again in *"The Ezardian,"* [1911] P. 92:—

Although there is no positive rule with regard to navigation of the narrow deep-water channel in the neighbourhood of Whitton gas float No. 3 in the Upper Humber, the practice, based on good seamanship, requires that those in charge of a steamship, proceeding against the flood tide, should avoid meeting another vessel at the gas float, and should, therefore, wait until the vessel proceeding with the tide has rounded the bend.

And obedience to the rules of the road is not exacted as strictly in the case of a tug and tow as when a single vessel is concerned.

Ontario Gravel Freighting Co. v. *Ships "A. L. Smith" and "Chinook"* (1914), 22 D.L.R. 488; 15 Can. Ex. 111.

Moreover, Lord Alverston, in the case of the *Kaiser Wilhelm der Grosse* (1907), 76 L.J. 138, at p. 140, says:—

I am disposed to think that art. 25, in providing that a vessel shall keep to its starboard side of the channel, lays down a rule which is to be obeyed not merely by one vessel as regards another; but, *so far as practicable*, absolutely and in all circumstances. See also Smith, Rules of the Road, 222.

Indeed in no case more than the present, in face of this tug and dead tow, coming down with the current, at night and in a curve—should this imperative duty have been adhered to—it being as art. 25 says, quite "safe and practicable" to adhere to the course and pass red to red.

In the case of *"The Clydach"* (1884), 5 Asp. M.C. 336, wherein the facts disclosed a practice had originated in meeting green to green in passing through a narrow channel, which resulted in a collision with a vessel not aware of such practice, and that adhered

to the rules of the road;—it was held to be a clear case, because it was a direct violation of art. 25. And Butt, J., in that case, says:—

What was his duty under these circumstances? His imperative duty was to keep to the starboard side of the channel. *There is only one way in which he could excuse his departure from following that course, i.e., by shewing that under the circumstances it was not safe and practicable,* for him to obey the rule.

There is no such evidence in the present case, quite to the contrary. See also "*The Leverington*" (1886), 11 P.D. 117, and our art. 19.

The obligation of keeping to the proper side of a narrow channel, in the St. Lawrence, was again affirmed in the case of *Turret S.S. Co.* v. *Jenks*, C.R. [1907] A.C. 472 at 496. As a result of the "Coniston" disregarding art. 25, she placed the tug and tow in considerable difficulty, while the tug had the right to expect that if the "Coniston" kept her proper course, she would keep clear. The tug proceeded, as she had a right to proceed, upon the fair belief that the "Coniston" was going to perform the proper manœuvre as required by art. 25.

Again, the case of *Bryde* v. *S.S.* "*Montcalm*," 14 D.L.R. 46, C.R. [1913] A.C. 472, is further authority for the proposition that:

When a ship commits a breach of the rule as to keeping the proper side of narrow channel, but alleges that a collision would not have occurred had the other ship not been guilty of negligence in taking steps which would have averted such collision, the burden of proving such allegation is on the ship primarily at fault and can only be discharged by clear and plain evidence.

And no such evidence exists in this case.

See also *Bonham* v. *The* "*Honorera*," 32 D.L.R. 196, 54 Can. S.C.R. 51.

Considering that the two blasts were given at quite a distance with a whistle and not a siren, with the wind against it, and that the crew of the tug, a comparatively small vessel, were close to the engine and with the noise of the engine, of the exhaust, and the churning of the water, I find the two blasts of the "Coniston" if of any importance, were not heard by the "Virginia."

I further find as against the assertion of the pilot of the "Coniston" or any of her crew, that the tug and tow were on the upper reach on the north side of the fair-way for some length of time immediately preceding the accident. And further, I must, on that fact, accept the evidence of the several members of the crew of the "Virginia" that they were on the south or starboard side of the fair-way, confirmed as it is by the very fact that the collision

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actually took place on the south side of the channel, near buoy No. 85, upon which most of the barges passed. The buoy was put out of commission, extinguished, damaged and afterwards repaired.

I further find that there was no justification for the "Coniston" to depart, under the circumstances, from the rule of the road, so well and clearly defined in art. 25, and that through her lubberly manoeuvre finding herself transgressing art. 25, and being out of her course, having abandoned the safe course prescribed by the rules, she had *at her own risk to right* herself back to her proper place in the channel. *The "Glengariff"* (1905), 10 Asp. M.C. 103; [1905] P. 106, and *Union S.S. Co.* v. *The "Wakena"* (1917), 35 D.L.R. 644, reversed on appeal, 37 D.L.R. 579; 16 Can. Ex. 397.

Now, on behalf of the "Coniston" it is contended and much stress is laid upon it, that when two vessels are green to green they are bound to continue that course. While it is quite true indeed that when two steamers are passing on opposite courses that each must hold her course so as to pass clear of each other green to green, that rule does not apply to a case like the one under consideration. That would apply to two vessels travelling in the open for some time green to green, thus preventing them from becoming crossing vessels before they could come red to red. In the present case the vessels had been travelling for quite a while, until they were at 800 to 1,000 feet from one another, and when the "Coniston" had taken the curve, green to red, not green to green.

The pilot of the "Coniston" (p. 24) admits that before entering the curve he was still seeing the tug's green light, a green light that was expected to change to red in taking the contours of the curve. The "Coniston" shewing her red light took the curve before the tug, and before the accident. It was when (p. 31) the "Coniston" was at the head of the curve that she saw the red light for the first time. All of this is consistent with the physical contours of the curve. Witness Lemay (p. 83) contends that at all times the "Coniston" had plenty of space to pass to the north, and that the collision took place because she tried to do so too late and when she was close to the southern line of the channel, where she should not be.

Had both vessels kept to their proper courses, both had the right to expect to come red to red after the curve, and it is only

the mismanagement and want of good seamanship of the "Coniston" that brought them for a moment green to green, when the one blast was given by the "Virginia," that had no reason to expect a green, but was looking, in due course, for a red light.

The rule of green to green propounded at bar by counsel for the appellant does not apply to a case of this kind.

A number of other charges are made by appellant.

The appellant charges there was negligence in the fact that the rudders of the barges were lashed and not used when towed. It is abundantly proven that it is absolutely and clearly impracticable to use the rudders in a case of this kind.

Todd & Whall, *supra*, at p. 263, states:—

Towing with two ropes or a *bridle*, there is no necessity for any person to be on her, as she will require no tendering. It is the towing with one rope that has drowned many a good seaman.

In the present case there was a bridle, as admitted by counsel, on the bow of each of the two front barges of the first tier.

The appellant further charges that the tug should have had three white lights on her mast-head, instead of two. Furthermore, that the tug should have had a tow of only ten barges instead of sixteen—notwithstanding the obvious fact that the collision took place, in the present case, with the second tier of barges.

It is further contended that, under the Rules of the Road, each barge, besides her white light, should have carried a red and a green light. While the rule cited justifies this contention and that such course would necessarily produce great confusion and puzzle navigators and that it is in evidence—although not by any means overriding the rule—that these barges from time immemorial have never travelled, in a tow, otherwise than without such green and red lights; such departure, it is unhesitatingly found, did not in any manner whatsoever contribute to the accident. The pilot of the "Coniston" and some of her crew on the bridge, had ascertained from quite a distance, that it was a tug and tow that were coming down in the upper reach. In the case of the *C.P.R.* v. *S.S. "Storstad"* (1915), 40 D.L.R. 600 at p. 607; 17 Can. Ex. 160 at p. 170, the late Dunlop, J., states:—

A manoeuvre is wrong if it creates a risk of collision. The test, therefore, is whether this manoeuvre created a risk of collision. A further test is again if it did create a risk of collision, did it contribute to the disaster in question? If a given manoeuvre creates a risk of collision, it would be a breach of the rule, and if it creates a risk of collision which contributed to the collision or

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caused it, then it would be a fault. As is well known, there is a difference between the English law and our law that used to exist and which has been very recently abolished. All the English jurisprudence is under the old law. In England, formerly, a breach of the rules was presumed to have contributed to the collision or caused it, unless the contrary was proved. Whilst, in our law, the plaintiff has to prove the breach of the rule, and also that it caused or contributed to the collision.

Obviously all these charges, as above set forth, are foreign to the decision of the present case, inasmuch as they had absolutely nothing to do with the cause of the accident. In fact, they did not, either directly or indirectly, contribute to the cause of the collision.

> To render a ship liable to be deemed in fault for an infringement of the rules . . . the infringement must be one having some possible connection with the collision in question; mere infringement, which by no possibility could have anything to do with the collision, will not render the ship liable.

The "Fanny M. Carvill" (1875), 32 L.T. 646; *The Barque "Birgitte"* (1904), 9 Can. Ex. 339; *The "Englishman"* (1877), 3 P.D. 18; *The "Duke of Buccleuch,"* [1891] A.C. 310.

The wrong and initial manoeuvre of the "Coniston" in departing without good cause or reason from art. 25, and wrongfully starboarding in a narrow channel, obviously created the risk which caused the accident and therefore she was at fault in so doing. She was the vessel that destroyed the safe position, as required by art. 25, and moreover, even at the critical time, when the collision became inevitable, she was still at full speed, shewing no effort to check that speed only until after the accident had become inevitable, art. 29.

It was quite "*safe and practical*" (art. 25.) for the "Coniston" to keep her course to the right.

The accident resulted from the departure, by the "Coniston," for no sound or good reason, or justification, from the imperative provisions of art. 25—maintaining that lubberly course and at full speed up to the time the accident became inevitable—the whole after having sighted for quite a while, and on the approach of a tug, encumbered by its dead tow, descending the current in due course, on her proper side of a narrow channel.

I find the "Coniston" was solely at fault and to blame for the accident and the appeal is dismissed with costs.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. October 21, 1919.

VENDOR AND PURCHASER (§ III—39)—ASSIGNMENT OF AGREEMENT—POSSESSION—CANCELLATION OF ORIGINAL AGREEMENT—LIABILITY TO ORIGINAL OWNER FOR RENT.

Where a party goes into possession of land under an assignment of an agreement for sale, the original agreement through which he claims being subsequently cancelled the property reverting to the original owner, he is liable to the original owner for rent from the time of the termination of the agreement through which he claims. The fact that he was not made a party to the proceedings is immaterial if he had in fact notice of the proceedings and could have intervened if he had seen fit.

Statement.

APPEAL by defendants from the judgment of Jennison, J. Affirmed.

Coleman and *Warner*, for appellant; *J. W. Moyer*, for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The plaintiff in 1913 sold a house and lot under an instalment agreement to one Martin. Martin assigned the agreement to his wife, and in 1916 his wife assigned the agreement to the defendant Jennie Currie. The vendor, Waters, was mentioned as a party to this last assignment but in fact did not execute it or know anything of it at the time it was executed by the others, but later on he became aware that the defendants, husband and wife, were in possession.

On February 11, 1918, Waters took proceedings against Martin under the agreement of sale. The Curries were not made parties to that action, but, on April 25, 1918, the Master made an order *nisi* shewing that $4,792.69 was due upon the agreement, giving Martin and all subsequent encumbrancers and persons claiming under him a period of 3 months from the service of the order on them within which the money should be paid, and granting the vendor the right upon default to apply for an order cancelling the agreement and foreclosing the defendant and all persons claiming under him. The order provided that it should be served upon all subsequent encumbrancers and all persons appearing to have any interest, and it reserved liberty to any of them to apply as they might be advised. This order was personally served on the defendants on June 27 and 28, 1918. They made no application of any kind to the Court and made no payment. They had of course made payments to the Martins.

On November 22, 1918, Waters obtained a final order from the

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Master determining the agreement of sale, relieving Martin from any further obligation under it, and forfeiting all payments that Martin had made. This latter was no doubt rested upon a consideration of the then value of the property compared with the amounts still unpaid on the purchase price. As no one had entered an appearance or made any demand for notice, this order was made *ex parte*. Throughout the proceedings neither in the claim for relief, nor in the order *nisi* nor in the final order was any reference made to possession.

On November 29, 1918, the solicitors for Waters wrote a letter to each of the defendants in identical terms in which they notified them of the order cancelling the agreement and enclosing a copy of it, and informed them that the property now belonged absolutely to Waters, and they proceeded then to say:—

> Therefore our client Alexander Waters has instructed us to advise you the premises must be vacated by you at once. In the alternative, if you want to remain in the premises you will be required to pay a rental of $40 per month in advance, beginning December 1, 1918.

On the receipt of these letters, the defendants handed them to their solicitors who replied in a letter which raised some objections to the form of the foreclosure proceedings, complained particularly that Mrs. Currie was not a party to them and suggested that as she had possession she should have been a party. They also referred to an agreement Mrs. Currie had made with certain mortgagees of the property by which she had covenanted with them to pay the mortgage money due under a mortgage which had been originally given by Waters and subject to which the purchase and assignments had been made. To this plaintiff's solicitors made some reply, not in evidence, and on December 6, defendants' solicitors again wrote objecting that Mr. and Mrs. Currie had not been made parties to the proceedings. Then the defendants remained in possession without paying any rent. On January 29, 1919, the plaintiff gave them a landlord's one month's notice to quit which was not complied with. On March 6, 1919, the plaintiff sued the defendants in the District Court for $120 as 3 months' rent.

Jennison, Dist. Ct. Judge, gave the plaintiff judgment against both defendants for the amount claimed and costs and the defendants appeal.

The defendant Jennie Currie admitted that the only reason

they got out of the house, which they did only two weeks before the trial on May 15, 1919, was because she had bought another house and had intended to rent the premises in question but that Waters had got a tenant in too quickly for her.

The defendants were served in June with the order *nisi*, and it told them they had liberty to intervene if they saw fit. They did not do so, and it was only when they were asked to leave that they went to their solicitor. He then, I think unfortunately, began raising untenable objections. No order for possession was ever made or asked for, and under r. 47 it would only be in such a case that it would be necessary to join the defendants. But when the original agreement, through which the defendants claimed, was cancelled, the plaintiff vendor became entitled to possession. The property was absolutely his. The defendants had no right to possession any longer. They were given their choice of getting out or paying rent, and in the face of this they remained in the house.

It would be strange if the plaintiff were without a remedy in such a case. The only possible objection to raising an implied agreement to pay rent lies in the fact that Mrs. Currie, through her solicitor, attempted to suggest the existence of some remaining legal rights on her part, and it might be said that her action in staying in the house should be referred to the assertion of these rights and not to any implied agreement. But where the claim of right is so entirely groundless I doubt if anything should be rested upon it. Why she should be permitted to cling to the property on the ground of not having been made a party when she had been given over 4 months' notice of what was likely to happen and had made no move whatever to protect any rights she might have had, is something which I confess I am unable to understand. I think the cases of *Markey* v. *Coote* (1876), I.R. 10, C.L. 149, and *Howard* v. *Shaw* (1841), 8 M. & W. 118, 151 E.R. 973, are entirely applicable, and that whether on an implied contract to pay rent or for use and occupation or as damages for trespass, the defendant Jennie Currie ought to pay the sum awarded against her.

With respect to her husband the defendant John Currie, I think the evidence is quite clear that he had as much to do with the property as his wife had. In his examination for discovery, when

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he was asked about the property the following questions and answers appear:—

Q. Well, how did you get possession? A. I bought it.

Q. From whom? A. From Martin.

Q. Was it Morris Martin? A. Now I could not tell you the name right off, it seems to me it was Alex. Martin. I think both of them were interested in that, both him and his wife.

Q. And did you buy it? A. Yes.

Q. And how did you buy it? A. We traded so much property and cash and agreement for sale.

From this and from their solicitors' letters it is abundantly clear that the husband and wife were jointly interested in the purchase from the Martins and that they were really acting as joint owners. I therefore see no reason why the husband should be relieved from payment of the rent.

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

Appeal dismissed.

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HUTTON v. TORONTO R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. May 19, 1919.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION ACT (ONT.)—INJURY—ELECTION UNDER—ACTION BY EMPLOYEE IN OWN NAME—VALIDITY—SUBROGATION.

An employee who is injured in the course of his employment and elects under the Ontario Workmen's Compensation Act, 4 Geo. V., c. 25, s. 9, to claim, and has received compensation from the Workmen's Compensation Board, may notwithstanding such election sue the tort-feasor in his own name, provided he does nothing to prejudice the person subrogated. The only right given to the Board by the election is that of subrogation, which may be enforced although the original claim has been pressed to a recovery.

[Effect of subrogation and the practice in enforcing it considered.]

Statement.

AN appeal by the defendants from the judgment of LATCHFORD, J., at the trial, upon the findings of a jury, in favour of the plaintiff, for the recovery of $2,500 and costs, in an action for damages for injury to the plaintiff by reason of a collision of a waggon, which he was driving in a public highway in the city of Toronto, with a street-car of the defendants; the plaintiff alleging that the collision was caused by the negligence of the defendants' employees in charge of the car. Affirmed.

It appeared that, before action, the plaintiff had elected, under the Workmen's Compensation Act, 4 Geo. V. ch. 25, sec. 9 (3), to claim compensation from the Workmen's Compensation Board, and had received compensation from the Board—the injury to

him having occurred in the course of his employment, i.e., while driving a waggon for his employers, the Canada Bread Company of Toronto.

H. H. Dewart, K.C., and *G. S. Hodgson*, for the appellants.

William Proudfoot, K.C., for the respondent.

The judgment of the Court was read by

HODGINS, J.A.:—Appeal by the defendants from the judgment at the trial before Latchford, J., and a jury. A verdict was found for the respondent for $2,500, and certain questions answered as follows:— Hodgins, J.A.

"1. Was the accident to the plaintiff caused by the negligence of the defendants? A. Yes.

"2. If so, in what did such negligence consist? A. Street-car running too fast.

"3. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

"4. If so, in what did such want of reasonable care consist? A. ——

"5. What damages has the plaintiff sustained by reason of the accident? A. $2,500."

Two points were argued before us:—

First, it appearing that, before action was brought, the respondent had elected, under the Workmen's Compensation Act, 4 Geo. V. ch. 25, sec. 9, sub-sec. 3, to claim compensation from the Workmen's Compensation Board, and had received compensation from that source, whether the present action was maintainable in the name of the respondent, and on his own initiative.

Secondly, whether there was any evidence to justify the finding that the negligence consisted in the street-car running too fast

The last point was disposed of at the hearing adversely to the appellants, leaving only the other ground for decision.

The appellants failed to set up the effect of sec. 9, sub-sec. 3, until the trial, when they did so, by leave, after the jury had been discharged.

Their added plea is as follows:—

"The defendants say that the plaintiff expressly elected to claim compensation for his injuries under the provisions of Part I. of the Workmen's Compensation Act, 4 Geo. V. ch. 25, and amend-

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ing Acts, and has expressly released and forgone all right of action against the defendants in respect of the said injuries; and that the plaintiff's claim against the defendants is barred by the provisions of the said Act."

It seems that on the 12th May, 1918, the respondent had executed a document worded as follows:—

"Form No. 36 Claim No. 74310

"Sec.

"The Workmen's Compensation Act.

"(Ontario 4 Geo. V. ch. 35)

"Election to claim under Part I. of the Act.

"Whereas on or about April 17, 1918, I, Alexander Hutton, employed by Canada Bread Company of Toronto, received injuries by accident arising out of and in the course of my employment as follows: compound fracture of the leg. And whereas it is alleged that such accident and injuries were caused by the negligence or wrongful act or breach of duty of some person or persons other than my said employer. Now therefore I, the said claimant, do hereby elect to claim compensation for said injuries under the provision of Part I. of the Workmen's Compensation Act (4 Geo. V. ch. 25, Ont. Stats.), and I hereby forego any and all my right or rights of action whatsoever against such third party or parties in respect of such accident and injuries, it being understood that by this election the Workmen's Compensation Board is subrogated to all my rights, rights of action, and remedies which otherwise I would have against such third party or parties in respect of said accident and injuries.

"In witness whereof I have hereunto set my hand and seal at Toronto in the County of York the 12th day of May, 1918.

"Signed sealed and delivered in presence of "(Witness) "Fred. Cotterell — Alex. Hutton (Seal). (claimant)

"I certify this to be a true copy of election to claim under Part I. of the Act, filed with the Workmen's Compensation Board.

"R. W. Davies,

"Assistant Secretary" (Seal).

The writ in this action was issued on the 20th June, 1918, and the case tried on the 3rd and 4th December, 1918. Judgment was settled on the 18th December, 1918, pursuant to the verdict

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of the jury, and notice of appeal was given on the day following. On the 8th January, 1919, the following notice was served by the respondent on the appellants' solicitors:—

"Take notice that the Workmen's Compensation Board has appointed Friday the 10th day of January, 1919, at the hour of 11 o'clock in the forenoon, in the board-room at the Normal School Buildings, Toronto, to hear the application on behalf of the plaintiff for a consent by the Board ratifying all proceedings that have been taken or may hereafter be taken in this action by or on behalf of the plaintiff.

"Dated at Toronto this 8th day of January, 1919."

Pursuant thereto, the Workmen's Compensation Board consented and agreed as set forth in the following document, of which only a copy is found among the papers used on the appeal. It is as follows:—

"The Workmen's Compensation Act

"Ontario.

"Present Samuel Price, Chairman,
" " George A. Kingston, Commissioner } Thursday the 16th day of February, 1919.

"In the matter of claim 74319—Alexander Hutton.

"And in the matter of an action in the Supreme Court of Ontario between Alexander Hutton, plaintiff, and the Toronto Railway Company, defendants.

"Upon the application of the plaintiff, made unto the Workmen's Compensation Board on Tuesday the 14th day of January, 1919; and upon hearing counsel for both parties:—

"The Workmen's Compensation Board hereby consents and agrees that, for the purposes of the said action, the said plaintiff be permitted to withdraw his election to claim compensation from the said Board, and for the said purposes the said Board hereby releases and assigns to the said plaintiff, as from the date of the said election, all its rights and title to proceed against the said defendants for the cause of action involved therein, provided that, in the event of the said plaintiff's action failing by reason of the right to bring such action being vested in the said Board and not in the said plaintiff, the said Board is to be entitled to bring such action as it would have been entitled to bring if this consent had not been given.

(Seal) "N. B. Wormwith, Secretary.

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"I certify the foregoing to be a true copy of a consent of the Workmen's Compensation Board bearing date Thursday the 16th day of February, 1919."

"N.B. Wormwith, Secretary, Workmen's Compensation Board."

The appeal was argued on the 24th March, 1919.

On the argument I was under the impression that to permit the respondent, after election, to sue the tort-feasor would or might result in embarrassment, and promote instead of preventing litigation.

Further consideration has brought me to the conclusion that these difficulties are inseparable from the situation created by the right of subrogation, and that the objection of the appellants cannot, on that ground, be given effect to. Sub-sections 1, 2, and 3 of sec. 9 of 4 Geo. V. ch. 25, are as follows:—

"(1) Where an accident happens to a workman in the course of his employment under such circumstances as entitle him or his dependants to an action against some person other than his employer the workman or his dependants if entitled to compensation under this Part may claim such compensation or may bring such action.

"(2) If an action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependants are entitled under this Part the difference between the amount recovered and collected and the amount of such compensation shall be payable as compensation to such workman or his dependants.

"(3) If the workman or his dependants elect to claim compensation under this Part the employer, if he is individually liable to pay it, and the Board if the compensation is payable out of the accident fund shall be subrogated to the rights of the workman or his dependants and may maintain an action in his or their names against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund."

These provisions differ from those regarding the Board and the employer, by which the right of action is taken away and the compensation substituted (secs. 13 and 15). Under sec. 9 both compensation and action are regarded as being within the right of the workman (sub-sec. 2), and the effect of an election is not to

release the wrongdoer but to subrogate the Board to the rights of the workman and enable it to maintain an action in his name for the benefit of the accident fund.

Subrogation is not an assignment of the workman's right of action, but it is a legal fiction whereby the Board becomes entitled to everything that that right of action. And, by sec. 9, there is given statutory authority to sue in the workman's name. This latter provision adds nothing to the rights arising out of subrogation, because, having become entitled to everything produced by the right of action, the Courts have always allowed the person subrogated to use the name of the other to realise and get in the proceeds.

It is subject to this essential element in subrogation that the words in exhibit 4—"I hereby forego any and all of my right or rights of action whatsoever against such third party or parties"—must be read. Indeed they are immediately followed and controlled by the recognition of the statutory right of subrogation to which the election is subject. The effect of subrogation and the practice in enforcing it may be seen by reference to the following cases:—

In *Mason* v. *Sainsbury* (1782), 3 Doug. (K.B.) 61, 99 E.R. 538, twice argued, an action on the Riot Act, brought in the insured's name by the insurance company, for damage to his house during the riots, it was held that the Hundred, which by the Act was made liable in damages, could not set up the receipt by the plaintiff of the insurance money as a bar. It was argued that, having two remedies, he had selected that which was most proper. The decision affirmed the right of recovery, and that there was no satisfaction of which the defendants could take advantage. This case was followed in *Yates* v. *Whyte* (1838), 4 Bing. (N.C.) 272, 132 E.R. 793, and in *Simpson* v. *Thomson* (1877), 3 App. Cas. 279. See also *The Charlotte*, [1908] P. 206.

In *Commercial Union Assurance Co.* v. *Lister* (1874), 9 Ch. App. 483, the defendant was insured for £33,000, and the loss by a gas explosion was £50,000. The loss, it was said, was caused by the negligence of the Corporation of Halifax, by whom the gas was supplied. The defendant began an action against the corporation, and the present action was brought by the insurance company, praying for a declaration that they were entitled to the

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benefit of any right of action vested in the defendant, and for an injunction preventing the plaintiff suing except for the whole amount of damage. Sir G. Jessel, M.R., in discussing the case, says (p. 484, note):—

". . . the insurance company or companies is or are willing to pay the amount of the insurance, and they say that, having paid that amount (they pay of course by way of indemnity), if the assured obtains from the Corporation of Halifax a sum larger than the difference between the amount of the insurance and the amount of the loss, he is a trustee for that excess for the insurance company or companies—a proposition which I take to be indisputable. But then they want to go further, and they assert that in such a case the insured person, though entitled to bring an action for the loss he has sustained, is not entitled to be master of that action; and they assert that, though he is bringing it *bonâ fide*, and is acting *bonâ fide*, he is not entitled to compromise that action, or to do anything else, without their assent. I can find no ground whatever for such a suggestion. He is entitled to bring an action against the corporation for the injury to himself. He is entitled, and is bound, and has agreed, as there is one cause of action, to bring the action for the whole loss to himself, including that part of the loss against which he is indemnified by the insurance companies; and he is not entitled to compromise that action otherwise than *bonâ fide*."

On appeal Sir W. M. James, L.J., in delivering the judgment of the Court, said (pp. 486, 487):—

"The defendant has undertaken to sue for the whole amount; which means that he must sue for the whole amount whatever that amount may be. If I were to put him under any restriction about compromising, or anything of that kind, it would be determining the whole case, and deciding that he is a trustee for the insurance companies. That, however, is a matter not to be determined on this interlocutory application, and I cannot now say that he is a trustee in such a way that he is to be deprived of his own free action with respect to a matter in which he is personally and very largely interested. Then the Master of the Rolls, in the course of his judgment, threw out an observation that if the defendant compromises, he must compromise *bonâ fide*; but what that is the Master of the Rolls has not determined, and I do not

determine. Mr. Lister is by this order left free to go on with and to conduct this action. If he does anything in the conduct of the action inconsistent with his duty, whatever that duty may be (which will have to be determined at the hearing of the cause), he will have to make good any loss thereby incurred. If he does nothing else but that which he is clearly entitled to do, having regard to the position he is in, and to the position of the other parties, then he will be liable to nothing. At present he is himself *dominus litis*, subject to a liability to answer in this Court for anything which, upon the hearing of the cause, should be shewn to be a breach of some equitable obligation or a violation of some equitable duty which has been cast upon him by reason of the circumstances of the case."

That case deals with the same element mentioned by the late Chancellor in *National Fire Insurance Co.* v. *McLaren* (1886), 12 O.R. 682. He says, at p. 687:—

"The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other, of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company. In the case in hand the plaintiffs are in some sense sureties, by way of contrast with the wrongdoers, who are primarily liable, just as the defendant may be in some sense a trustee for the insurers of any such overplus. But it appears to me to be a begging of the question to assert that he is a trustee from the time of payment by the insurers."

The extent to which the right of subrogation goes is seen in *King* v. *Victoria Insurance Co.*, [1896] A.C. 250, where, the claim of the assured having been settled by the insurance company, the defend-

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ant who caused the loss, on being sued by the insurance company, set up that the loss was not within the terms of the policy and so not recoverable against him. Lord Hobhouse, in delivering the judgment, said (pp. 254, 255):—

"To their Lordships it seems a very startling proposition to say that when insurers and insured have settled a claim of loss between themselves, a third party who caused the loss may insist on ripping up the settlement, and on putting in a plea for the insurers which they did not think it right to put in for themselves; and all for the purpose of availing himself of a highly technical rule of law which has no bearing upon his own wrongful act. It is not alleged that there was anything but perfect good faith in the claim made by the bank and satisfied by the insurance company. It is not alleged that the question of negligence has not been as fully and fairly tried in this action as it could have been in an action by the bank; or that the government has been in any way prejudiced by the form of the action. But it is claimed as a matter of positive law that, in order to sue for damage done to insured goods, insurers must shew that if they had disputed their liability the claim of the insured must have been made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid, by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel as it is startling; at least Mr. Cohen was unable to furnish any authority for it, and they know of none. Yet it is difficult to suppose that such cases have not frequently occurred."

Applying the principles involved in these cases to the present action, what is there to prevent the rights of a person entitled to compensation being worked out either before or after election as he may prefer, always subject to the right of the Board, which, if there has been an election, can claim the proceeds of the action recovered or collected? The election is to be made within three months after the accident, and it gives the Board, when made, the right, if it so desires, to enforce the workman's cause of action. It also carries with it subrogation, which is consistent with the bringing of an action by the workman, but changes the

ownership and destination of the proceeds. If the action is brought after election, and that election cannot be set up by the tort-feasor, what wrong is perpetrated or injury done if the Board and the workman act upon it or revoke and abandon it? I can see none. I think sub-sec. 2, under which recovery would often be made long after election, points strongly to this conclusion. Another consideration is this. All claims for compensation are to be determined by the Board. A claim may be made within 6 months or thereafter if allowed by the Board. If the workman has to elect, in the sense that he is finally either upon the Board or upon the wrongdoer, he may be compelled to act without knowledge of what the Board will do and the amount which it will finally allow. It would seem to be more in accordance with the intention of the Act to allow this election to be made provisionally in order to save the claim of the workman, preserving at the same time to the Board its right to the proceeds recovered or to intervene in any settlement. If the election once made is final (and assuming that the words "may claim compensation" in sec. 9, sub-sec. 1, mean exactly the same thing as "elect to claim" in sub-sec. 3, as to which compare sec. 20 and sec. 21), its only effect would be to entitle and often compel the Board to bring the action in the name of the workman; whereas, if the election is revocable, no injustice can ensue, for the right of action is the workman's, and either he or the Board can always enforce it. There is another aspect of this question which seems to point in the same direction. By the Act, the basis of compensation is fixed, but a jury is not bound by any such rigid scale. Why, in case of an accident, should the workman not be able to try his luck if he so desires without losing the right to come to the Board if he gets no more than it would give him? The Board would not suffer, for in that event it would be entitled to the benefit of any verdict recovered.

It may have been the intention of the Act to leave the workman free to sue notwithstanding election in case his loss is more severe than would be made good by compensation under the statute, the provision as to subrogation enuring meantime to the benefit of the Board. No settlement or renunciation of rights can of course affect the person subrogated, where that doctrine becomes operative: *West of England Fire Insurance Co.* v. *Isaacs*, [1896]

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2 Q.B. 377, [1897] 1 Q.B. 226; *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K.B. 753.

The case of *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639, differs upon a clear point from this case. The Act in question there provided that in case of injury by a person other than the employer, "the workman may, at his option, proceed either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both."

There is no such provision in the Ontario Act, but the contrary. That an action does not divest the right to compensation is evident from sub-sec. 2; and that under sub-sec. 3 the proceeds of an action brought by the assured belong to the Board, or that the Board may itself bring one, is equally clear. But nowhere is there any statutory bar to such a proceeding as was taken in the present case, and its propriety must therefore be judged wholly on the wording of the statute.

I draw attention, as a valuable guide in construing our statute, to the words of Romer, L.J., in the case I have just discussed. He says at p. 651:—

"In the first place, I may point out that under sec. 6 it cannot I think, be said that a workman must necessarily be held to have exercised the option given to him as against his employers, or as against the stranger liable, merely because he has taken some proceedings either at law against the stranger or under the Act as against the employer. Whether the proceedings would in fact be such as to bind the workman must depend upon the circumstances of each case, including a consideration of what has resulted from the proceedings, and whether or not any injury will result if the proceedings are held not to irrevocably bind the workman.

"Further, I should like to say, for myself, that in dealing with any particular case I should try and look at it as a matter of substance, and decide it on the substance rather than on matters of form. I will further add that, as at present advised, though it is not necessary for me to express a final opinion on the point for the determination of this case, I am disposed to think that proceedings by a workman against his employer for compensation should not be held to irrevocably bind the workman in the exercise of the option given him by sec. 6 unless those proceedings

have resulted in some compensation, as such, being paid to and received by the workman in such a manner so as to bind both parties."

I base my judgment upon the fact that the only right given to the Board by the election is that of subrogation (with of course the added power to sue in the Board's own name). It is undoubted that that right has never prevented the enforcement by the person possessed of the cause of action in his own name, and it is equally undoubted that once the right of subrogation has arisen he can do nothing to prejudice the person subrogated. That right can be enforced at any time, whether the original claim is one *in fieri* or has been pressed to a recovery—and all the inconveniences and difficulties suggested by the appellants arise from and flow out of this peculiar fiction and from that alone. By it there is no interference with the original right—it is that which is enforced. And there is nothing, once subrogation arises, that can be done by the claimant to divest the person subrogated of his due. But there is the possibility of double litigation, of settlements not agreed to by the original claimant and by the person subrogated, and of suit by the original claimant after election, as here. But these are all covered, either by actual decision or in principle, by the cases I have mentioned.

The situation created by the election spoken of in the statute and its consequences casts no additional burden upon the wrongdoer, nor one which differs in any way from that which he has brought on himself by his wrongful act. He has no concern with the dealings of the Board and the claimant; and, unless he is prejudiced, he has no right to complain. In this case the respondent's cause of action is not divested: it exists still in him, but, if enforced by him, it must be for the benefit of the Board if he has signed an election.

The meaning and effect of subrogation received explicit attention from the Court of Appeal (Brett, Cotton, and Bowen, L.JJ.) in *Castellain* v. *Preston* (1883), 11 Q.B.D. 380.

The definition, taken from the judgment of Brett, L.J., is thus stated in the head-note:—

"According to the doctrine of subrogation, as between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in con-

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tract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished."

This was followed in *Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation Limited*, [1907] 2 K.B. 814, by Pickford, J.

The American view is well summarised by the late Mr. Justice Burbidge in *The Queen* v. *O'Bryan* (1900), 7 Can. Ex. 19.

It will be observed from the definition given in the leading case that the right may be exercised in the case of a tort, after the remedy has been insisted upon just as well as before its enforcement. But I think the artificial documents procured after verdict are not sufficient to change the situation created by the statute. After the election and while it stands, whether tentative or final, the Board is subrogated to the respondent's rights and claims. That is the position to-day, and the Board cannot divest itself of the position of trustee of the amount recovered for the accident fund, without effective action on its part, having regard to its duties and responsibilities as a Board. If, on considering the whole situation, it chooses to hand over to the respondent the amount of the judgment, no doubt it can do so, or deal with it as the statute gives it power. But the dismissal of the appeal should be preceded by a direction that the amount of the judgment should be paid to the Board, to be dealt with by it in due course. Balancing the conveniences and inconveniences of the situation, and looking at the omission of any peremptory restriction upon the injured workman pursuing both remedies, particularly where, as here, he has the consent or has obtained the subsequent ratification or approval of the Board, I think the objection made by the appellants must fail. The appeal should be dismissed.

Appeal dismissed with costs.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Simmons and McCarthy, JJ. October 25, 1919.

HIGHWAYS (§ IV—147f)—POLE IN STREET—GUY WIRE—INJURY TO HORSEMAN—LIABILITY—MUNICIPAL ORDINANCE—TIME FOR BRINGING ACTION.

An action against a town municipality in Alberta for injuries sustained by the plaintiff's horse coming in contact with a guy-wire attached to an electric light pole on a highway in the municipality must be brought under the Municipal Ordinance (C.O.N.W.T. 1898, c. 70, s. 87), and is barred if not brought within six months after the damages have been sustained.

[*Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, distinguished; 46 D.L.R. 179, reversed.]

Statement.

APPEAL from the judgment of Stuart, J. (1919), 46 D.L.R. 179, in an action to recover damages for injuries received on a highway. Reversed.

Z. W. Jacobs, for appellant; *Hogg* and *Jamieson*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from a judgment of Stuart, J. (1919), 46 D.L.R. 179, after a trial without a jury.

The plaintiff is a rancher and was driving cattle through the town of Cardston along a highway upon which there is a bridge several hundred feet in length crossing Lee's creek. The southern approach to the bridge is an earth embankment which is about 6½ feet high where it joins the bridge. Some of the cattle went along the side of the road below the bridge instead of going up the approach. When the plaintiff saw this he drove his horse, on which he was riding, down the side of the embankment to drive out these animals. His horse ran into a guy wire supporting an electric light pole and he was thrown off and injured. This action was brought to recover damages for such injury. It was nearly dark at the time of the accident and the plaintiff did not see the wire.

Along the side of this road the defendants have erected poles for, and on which are attached, their electric light wires. There is a long stretch without a pole where the wires cross the stream and, to strengthen the last pole before the stream, the guy wire in question is stretched from near the top of the pole and in line with the line of poles to a point about 25 feet back of the pole where it is fastened to the ground. This wire is not opposite the embankment but farther on opposite a portion of the bridge. The line of poles is about 7½ feet from the outside boundary of the street

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and not on any portion of the highway where the public need to or ordinarily do travel. The trial Judge states in his judgment that the construction of the electric light system as a part of which this pole and wire were erected, was admittedly under the authority of c. 37 of 7 Edw. VII., 1907, Alta. The correctness of this is questioned but for the present I will assume it to be correct and that s. 20 of that Act applies.

That section provides 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.

The trial Judge held that by reason of that section the defendants were liable, regardless of any question of negligence and he bases his conclusion upon the decision in *Raffan* v. *Can. Western Natural Gas Co.* (1914), 18 D.L.R. 13, 7 Alta. L.R. 459, in which this Division had to consider a similar provision of another statute. Our decision was sustained upon appeal to the Supreme Court of Canada. The decision of that Court is not to be found in its official reports, probably because it largely accepted the reasoning of this Court. In that case the defence set up was that the defendants had statutory authority for their works and, therefore, could not be liable in the absence of negligence and the jury negatived negligence. We held that, as the Act in that case, as in this, provided that the works should be constructed "so as not to endanger the public health or safety," if they had failed in that, and the work did endanger the public health or safety, they were, in that respect without statutory authority, though it was not intended thereby to hold, as the present Chief Justice of the Supreme Court of Canada, in his dissenting judgment, seemed to think, that anything was beyond the legislative authority, except such action as endangered the public health or safety.

It did not, of course, follow from that that it was not necessary to prove negligence but in the circumstances of that case it was held that the rule in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, applied and that negligence was immaterial. We rested our judgment on two English decisions, the latest of which was *Charing Cross West End and City Electricity Supply Co. Ltd.* v. *London Hydraulic Power Co.*, [1914] 3 K.B. 772, 111 L.T. 198. In the *Raffan* case, *supra*, and in both English cases, what

did the damage, as in *Rylands* v. *Fletcher*, was a dangerous, active agency, water, gas or electricity.

In the *Charing Cross* case, Kennedy, L.J., at p. 784 says:

I concur in his (*i.e.*, Lord Sumner's) opinion that *Midwood* v. *Manchester Corporation*, [1905] 2 K.B. 597, 21 T.L.R. 667, is a case which governs us and that the principle applicable in *Midwood* v. *Manchester Corp.*, and in the present case is the principle of *Rylands* v. *Fletcher*,

and Bray, J., the third Appellate Judge, at p. 785 says:—

The head note of *Rylands* v. *Fletcher*, *supra*, as reported in the House of Lords, is this, and I may say that I have looked through the speeches of the Lord Chancellor and the other learned Lords, and it is abundantly justified by what is said there. "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned" . . . It seems to me it does not matter whether it is upon his land; if he has a right, as the defendants have here, to occupy the land for a certain purpose, namely, for these pipes, it is equally his for the purpose of testing this principle. Therefore I think that *Rylands* v. *Fletcher*, *supra*, applies, and, if it applies, then the defendants undoubtedly have brought upon their land, or land which they are permitted to occupy, something which would not have naturally come upon it and which is in itself dangerous and probably mischievous if not kept under proper control.

It seems to me perfectly clear that the erection of an inanimate thing, such as a pole or wire, is something substantially different from the bringing on the land of something which requires to be kept under control and which, if not, by its own action, may escape and cause injury and that, therefore, the principle of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, can have no application to this case.

It is necessary, then, to consider upon what ground liability can be imposed upon the defendants. If this construction did endanger public health or safety, which is a question of fact, upon which at present I express no opinion, then the defendants cannot excuse themselves by the statute but the statute does not say they are liable for damages caused.

There is no doubt that they had the right to construct the works for the lighting system and to be liable in so doing they must surely be liable, if liable at all, only on the ground that they have neglected or otherwise failed in some duty they owed to the public who were entitled to use the place as a highway and

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that seems to me to bring it within the provisions of s. 87 of the Municipal Ordinance, C.O.N.W.T. 1898, c. 70, which declares the duty of the defendants in respect to highways. That section provides that:—

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 six months after the damages have been sustained.

The trial Judge was of opinion that the term "other works" used in the section must be restricted to the class of works specified and he considered that the section had reference to the actual physical condition of the road bed and that the "works" must be taken to refer to something having relation to that.

With much respect I cannot agree with that interpretation. The trial Judge must have overlooked the use of the word "sewers" in the section which, of course, are something below the surface and have nothing whatever to do with the use by the public of the surface as a highway. Any class which would include them with sidewalks, etc., would, it seems to me, quite clearly include poles and other erections placed on or above the surface for some public purpose. If I am wrong in this I fail to find any ground upon which the defendants can be held liable. If I am right the action is barred, as the trial Judge quite clearly points out.

It then becomes unnecessary to consider the other questions which would arise if the right of action still continued.

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

Simmons, J.

SIMMONS, J.:—The plaintiff brought an action against the municipality of the Town of Cardston for damages arising out of injuries received by the plaintiff through the collision of plaintiff's saddle horse with a guy wire attached to an electric light pole on the main street of the municipality. The plaintiff was thrown from his horse and received severe bodily injuries.

The plaintiff alleges negligence in the erection and maintenance of the pole and wire.

The particulars of negligence alleged are:—

(a) That the municipality placed said pole upon a portion of the public highway which was and is frequently travelled by the public and which the public had a right to use, and

(b) That it ran a guy wire from the said pole to the highway needlessly, loosely, and in an improper direction, and

(c) That it failed to surround the said guy wire with a guard constructed of wood or other suitable material.

The municipality denies negligence in construction and maintenance, and also pleads s. 87 of the Municipal Ordinance, C.O.N.W.T. 1898, c. 70, which imposes limits of six months within which actions for damages must be brought for failure to keep in repair all sidewalks, crossings, sewers, culverts and approach grades and other works made or done by the municipality.

The town was incorporated in 1901, N.W.T. c. 43, which provided that

> Except as hereinafter specially provided the provisions of the Municipal Ordinance and amendments thereto are hereby incorporated with and declared to form part of this Ordinance in so far as the same are applicable to town municipalities.

On March 15, 1907, the Act incorporating the town was amended by c. 37 of 1907, Alta. Prior to March 15, 1907, the town passed a by-law providing for the issue of $30,000 in debentures to establish a waterworks and electric light system in the municipality.

Mark Spencer, a member of the municipal council in 1907 and chairman of the public works and property committee, says that legal steps were taken in 1906 to take a vote upon the debenture by-law, and construction began in that year and was completed in 1907.

Then the Act of 1907 was passed and is declared to be an Act to amend c. 43 of 1901.

The trial Judge held that the electric light system including the pole and wire in question was constructed under authority of this Act. The Act itself declares so, sec. 3. S. 20 of the Act of 1907 also provides 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.*

The trial Judge held that the electric light system did not come within the provisions of s. 87 of the Municipal Ordinance. He concluded that *other works* under the *ejusdem generis* rule did not include an electric light system such as this one.

With much respect I cannot agree with this conclusion.

His attention, apparently, was not directed to sub-s. 58 of s. 95 of the Municipal Ordinance, C.O.N.W.T., 1898, c. 70, which authorised the town municipality to pass the by-law authorising the

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building, erecting or buying or leasing, controlling, and operating telephone plant, electric light and power plant.

It is true that s. 3 of c. 37 of 1907, Alta., says that the council may make by-laws and regulations for the general maintenance or management of the works constructed or *maintained under this Act*.

But s. 39 validates a by-law previously passed authorising the issue of debentures and corrects the date of maturity of same.

Similarly, s. 35 refers to works and lands acquired under this Act.

All these provisions of the Act of 1907 must be read and applied under the limitations of c. 43, N.W.T., 1901, and where the provisions of the Act of 1907 merely re-enact powers which were already possessed by the municipality, s. 87, would apply.

It might be argued that where the Act of 1907 specifically provided for giving the municipality powers which the municipality did not already possess, that there was room for the application of the principle adopted by the trial Judge.

The municipal corporation, however, had the power under sub-s. 58 of s. 95, to pass by-laws providing for the powers generally included in the Act of 1907 in so far as these are powers incidental to the construction and operation of such an undertaking. It may be that sections such as 20, 25 and 32 extended the powers of the municipality, but this fact of itself does not detract from the application of sub-s. 58 of s. 95, N.W.T., c. 70. S. 87 of said Act does not purport to describe powers delegated to the municipality. It prescribes liabilities and a limitation of action in regard thereto.

The works that the municipality, under the Municipal Ordinance, c. 70, was authorised to construct included electric light, telephone, highways, roads, sewers, streets, bridges, alleys, byways, halls, lock-ups, weigh-houses, public markets, gas or water pipes, grist mills, elevators, hospitals, industrial farms and parks.

The trial Judge draws an inference that since the city was constructing the lighting system as a commercial enterprise for supplying light to the residents of the municipality, in addition to lighting the streets, that it is not included in "*other works*." Sewers are, however, extended to private houses and rates levied for the maintenance of the same, although they are constructed

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to carry off surplus water from streets in addition to draining the sewage from private houses, and I cannot arrive at the conclusion that electric light works are not included. *Cosgrove* v. *Partington* (1900), 17 T.L.R. 39.

The term "keep in repair" has been interpreted in our Court, in *Lusk* v. *City of Calgary* (1916), 28 D.L.R. 392, and was held to include the duty and obligation "to initiate such improvements," as owing to the nature of the locality, the amount of travel and the expense involved, might reasonably be demanded, *per* Stuart, J. (concurred in by Scott, J., and Beck, J.).

It might very well be that duties and obligations arising during actual construction, that is to say in the carrying on the work, would be within s. 20 of 1907, but would not be included in the term "keep in repair;" but where the alleged defect is one that *enters into* and *continues to exist* as a material part of the structure or work, then I am of the opinion that it clearly comes within the natural and ordinary meaning of the term "keep in repair."

The result of this would be that the alleged failure to construct the work in a proper manner, having regard to the obligation "not to endanger the public health or safety" comes within s. 87, and the limitation therein is applicable.

I would, therefore, allow the appeal with costs, and dismiss plaintiff's action with costs.

McCarthy, J.

McCARTHY, J. (dissenting):—The defendant in this case, the appellant, appeals from the judgment of Stuart, J. (1919), 46 D.L.R. 179, in favour of the plaintiff for $10,000.

The action was brought to recover damages for personal injuries sustained by plaintiff on the roadway within the boundaries of the municipality of the town of Cardston. The facts are clearly stated in the judgment of the Chief Justice, and it is unnecessary for me to repeat them here. The trial Judge held that the defendants were liable under s. 20, 7 Edw. VII. 1907, Alta., c. 37, which section provides:—

> 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.

The appellants contend that the plaintiff's action is brought under s. 87 of the Municipal Ordinance, which provides:—

> Every municipality shall keep in repair all sidewalks, crossings, sewers, culverts and approaches, grades and other works made or done by its council

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and in default shall be responsible for all damages sustained by any person by reason of such default but the action must be brought within six months after the damages have been sustained.

The accident happened on Oct. 2, 1917, and the action was not commenced until Sept. 13, 1918.

The defendants therefore contend that it was not brought within the six months. The trial Judge held that the section did not apply for the reasons stated in his judgment.

In the result I think he was right. There is a very old case, *Rowe* v. *The Corporation of Leeds and Grenville* (1863), 13 U.C.C.P. at p. 515, the headnote of which is as follows:—

Defendants, a road company, for the purpose of repairing their road, placed on the side thereof heaps of gravel, etc., and took no precautions to prevent parties passing along the road from running against these heaps, in consequence whereof plaintiff, driving at night, ran against one of them and upset and broke his waggon, and this action was brought against defendants to recover damages occasioned to plaintiff in respect of the premises. The defendants pleaded that the action was not brought within three months from the time alleged damage occurred, according to Con. Stats. U.C., c. 54, s. 337.

On demurrer the plea was held bad, as the action was not based on the neglect of the defendants to keep the road in repair, but upon the positive commission of the act above referred to, namely, heaping up gravel and neglecting to afford sufficient notice of protection to the public against the damage.

The defendants in their pleadings alleged that the action had not been brought within three months next after the alleged damages were sustained according to a statute in that behalf to which pleadings the plaintiff demurred. On the argument of the demurrer it was contended that the section applied only to damages arising from want of reparation to the road and not from a positive act or commission by heaping up gravel on the highways and leaving it without sufficient notice to the public for protection against danger. The judgment of the Court was delivered by Wilson, J., and at p. 518, he says:

Now, the only defence to this is, that the action should have been brought within three months from the happening of the damage; but this protection arising under the section of the Municipal Act before referred to, does not apply to the cause of action set forth in this record.

For the same reasons it seems to me that the limitation within which time the action must be brought does not apply to the first section. The action does not arise from want of reparation to the road but by a positive act of commission in attaching the guy wire to the pole against which the plaintiff came in contact and was injured.

This case was decided in 1883, but it is to be observed that it is commented upon in Meredith and Wilkinson, Canadian Municipal Manual, 1917, at p. 633, and the decision is not quarreled with although other cases are cited there which are difficult to reconcile.

True it is that s. 20, c. 37, 1907, Alta. Stats., does not attach any liability in terms if the defendants have failed to comply with the provisions of that section but it seems to me that they cannot escape liability on that account. *Vide, Couch* v. *Steele* (1854), 3 El. & Bl. 402, 118 E.R. 1193. As a broad general proposition that when every statutory duty is created any person who can shew that he has sustained injuries for the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed.

I would therefore be inclined to agree with the judgment of the trial Judge, and dismiss the appeal were it not for the fact that I think that the damages allowed were excessive.

Whilst I realise that this judgment cannot be an effective judgment, I however express the opinion that certain items appearing in the particulars of damage delivered before the trial are not properly chargeable against the defendants in this action. The particulars of damage delivered by plaintiff relating to the expenditure entailed in connection with these injuries amounted to $2,882.80.

The trial Judge in his judgment under the heading for the legitimate expenses to which he was put allows him $2,500. It is to be observed that the particulars of expenditure under this heading for which the defendants are held liable include:—

Paid for transportation for himself and wife from Cardston to California and return	$390.00
Paid for meals on journey	45.00
House rent in California	155.00
Paid for taxicabs driving to and from various physicians	100.00
Paid for transportation for himself and wife from Cardston to Mayo's Hospital, Rochester, Minnesota, and return, and for medical services while there	500.00
Estimated amount of expense of actual living expenses over the usual living expenses occasioned by plaintiff's attendance on physicians abroad, accompanied by his family, who of necessity accompanied him	1,147.80

The evidence, I think, shews clearly that the plaintiff was receiving proper medical treatment in Lethbridge, and I can see

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no good reason why he should take his wife and family to California and charge that up against the defendant. It was not necessary to go to California for any medical treatment and there is no evidence of such a trip being advised by any medical practitioner, nor was he advised that his trip to Rochester was necessary, and it was not found there that he had not received proper medical and surgical treatment at home. There is also evidence to shew that plaintiff neglected for a considerable time to obtain treatment, and his condition naturally would be impaired thereby.

In other words, the plaintiff is entitled in an action of this character to the expenses reasonably incurred, not necessarily paid in consequence of his injury, and I do not see that the above items can be characterized as reasonable under the circumstances.

For these reasons, I think there should be a reduction of the judgment of the amounts unreasonably incurred. The items to which I have referred amount in the aggregate to $2,337.80, and I would place the reduction to be made from these at the sum of $2,000, and I think that judgment should be reduced to that amount.

There was no jury in the case and a reduction is in accordance with the practice adopted heretofore by this Court, *Vide, Thomas* v. *Board of Trustees of West Calgary School Dis.* (1919), 45 D.L.R. 76. *Appeal allowed.*

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 22, 1919.

MORTGAGE (§ VI A—70)—FORECLOSURE—COVENANT—EXTINGUISHMENT OF DEBT — SUBSEQUENT MORTGAGE — SAME MORTGAGEE — LIABILITY UNDER.

A mortgagee who has foreclosed and subsequently sold the property cannot sue on the covenant for payment, but the wiping out of the indebtedness on the first mortgage does not deprive him of his right as mortgagee of a later mortgage to proceed on the covenant in such mortgage.

[*Mutual Life Assce. Co.* v. *Douglas* (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243; *Burrell* v. *Smith* (1869), L.R. 7 Eq. 299; *Worthington* v. *Abbatt*, [1910] 1 Ch. 588; *Beatty* v. *Bailey* (1912), 3 D.L.R. 831, 26 O.L.R. 145, referred to.]

Statement.

APPEAL by defendant from the judgment of Brown, C.J.K.B., in an action for a declaration that plaintiff be discharged from further liability under certain mortgages. Reversed.

W. A. Doherty, for appellant; *V. R. Smith*, for respondent.

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HAULTAIN, C.J.S.:—The plaintiff purchased from the defendant a property known as the Kamsack Hotel, and as security for the payment of $8,150, the balance of the purchase money, transferred to him two mortgages made in favour of the plaintiff by one John D. Yandt and registered against certain hotel property in the town of Redvers. These two mortgages were respectively for $7,000 and $2,150, but at the time of the transfer the total amount due under them was $8,150. The evidence does not disclose in what proportion this amount was secured by the two mortgages. The mortgage for the larger amount was the first mortgage, and the mortgage of $2,150 was the third mortgage registered against the Redvers property, there being an intermediate mortgage for $2,500, made to E. L. Drewry Ltd., *et al.*

In the agreement made between the parties on the sale of the Kamsack property it was provided as follows:—

> The purchaser is to give the vendor a second real estate mortgage on the Kamsack Hotel property above described subject only to the mortgage to the Northern Trust Co. for $9,000. This mortgage is to be held by the vendor collateral only to the two said mortgages on the King's Hotel, Redvers, and is to fall due on the days and times and in the manner provided in the said two mortgages with interest at the same rate as provided therein and provided that upon payment of the said two mortgages either by the mortgagor therein or by any other person the purchaser hereunder shall be entitled to a discharge of this collateral mortgage.

In pursuance of this agreement a mortgage for $8,150 was made by the plaintiff in favour of the defendant on the Kamsack property and was duly registered. This mortgage contains the following clause:—

> Provided and it is hereby agreed and understood that this mortgage is collateral to two other certain indentures of mortgage dated May 29, 1913, and made between John D. Yandt of Winnipeg in Manitoba, gentleman, as mortgagor and the said Charles Isman as mortgagee, and that payment in full or in part by the said John D. Yandt under the said two mortgages shall constitute payment in full or in part of this mortgage, and that upon payment of the said mortgages either by the mortgagor therein or by any other person the mortgagor herein shall be entitled to a discharge of this mortgage, and upon default in payment by the said John D. Yandt under the said mortgages and in the event of the mortgagor herein making the payment in full under the said mortgage to the said Jacob Sinnott as provided therein, he shall be entitled to a re-assignment of the said mortgages and to a discharge of this mortgage.

Default was made in payment of the Redvers mortgages by Yandt, and sale proceedings were taken in the Land Titles Office by the defendant under the $7,000 mortgage. A reserved bid

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of $6,389 was fixed by the registrar, that amount representing the total amount due under the mortgage and costs. The sale having proved abortive, foreclosure proceedings followed and a final order of foreclosure was issued on May 23, 1916, and title granted to the defendant on the same day. The defendant mortgaged the property to the Northern Trust Co. for $3,000 in November, 1916. Some time in February, 1917, the plaintiff transferred the property to Holstein & Way for $4,000, *i.e.*, for $1,000 cash and the assumption of the Northern Trust Company's mortgage for $3,000. This amount of $4,000 was credited to the plaintiff as being paid on the first mortgage of $7,000. No further amount has been paid on either of the two mortgages.

On the foregoing state of facts the plaintiff brought this action, and asked for the following relief:—

(a) A declaration that the mortgages which were transferred to the defendant covering the said King's Hotel premises are fully paid and satisfied and that the plaintiff be discharged from all further liability thereunder.

(b) A declaration that the mortgage made by the plaintiff in favour of the defendant and registered against the said Kamsack Hotel premises is fully paid and satisfied by virtue of the said foreclosure proceedings and alienation of title and that the plaintiff is discharged from all further liability thereunder.

(c) A declaration that the said mortgage against the said Kamsack Hotel premises is a cloud on the title against which the said mortgage is registered and for an order that the defendant execute a proper discharge of the said mortgage within a time to be fixed by this honourable Court, and in default, that the Registrar of the Yorkton Land Registration District be directed to remove the memorandum of the said mortgage from the title to the said land.

(d) For the purposes aforesaid, that all directions may be given, accounts had and taken.

(e) Such further and other relief as the nature of the case may require.

The Chief Justice of the King's Bench on the trial of the action (1919), 12 S.L.R. 115, gave judgment in favour of the plaintiff, and found that the mortgage in question had been wholly discharged and that the plaintiff was entitled to have the mortgage removed from the title. From this judgment the defendant appeals.

By the express terms of the agreement between the parties and of the mortgage in question, the plaintiff is only entitled to a discharge of the mortgage upon payment in full of the Redvers mortgages by Yandt, or, in default of payment by Yandt, upon payment in full by the plaintiff of the collateral mortgage in question.

At first sight it would seem that neither of these conditions has been fulfilled. But the plaintiff contends and the trial Judge has found, that the defendant by foreclosing the first mortgage and subsequently transferring the property has wiped out the entire indebtedness not only on the first mortgage, but also on the third mortgage, and, consequently, has no further claim on the mortgage on the Kamsack property, which was only collateral to them.

There is no doubt that a mortgagee who has foreclosed and subsequently sold the property cannot sue on the covenant for payment. *Worthington & Co.* v. *Abbott*, [1910] 1 Ch. 588, 598. See also 21 Hals. 271, and cases cited in note (u).

The application of this principle might involve an interesting question as to the amount of credit the plaintiff is entitled to in respect of the mortgage which has been foreclosed. But I do not think that that question arises in the present action.

I cannot agree with the finding that "the wiping out" of the indebtedness on the first mortgage (if that is the result) has also the effect of wiping out the indebtedness on the third mortgage. It is quite true that the mortgagee in both cases is the same person. In England, where the doctrine of tacking would be applicable, it would have been the duty of the mortgagee to tack if he was in a position to do so, and if he did not tack, but foreclosed on his first mortgage and then put it out of his power to reconvey, he would probably lose his right to enforce the covenant in the later security on the principle above stated. But even in England the right to tack is based on the subsequent mortgagee having no notice of an intervening equity at the time he advanced his money. In this case there was, of course, notice of an intervening registered mortgage. As I have already said, the mortgagee in this case was the same person in both first and third mortgages. But that does not seem to me to make any difference. If the earlier mortgage had been held and foreclosed by anybody else, the mortgagee under the later mortgage would not have been deprived of his right to proceed on the covenant by reason of the foreclosure of the earlier mortgage. In *Re Burrell, Burrell* v. *Smith* (1869), L.R. 7 Eq. 399; *Beatty* v. *Bailey* (1912), 3 D.L.R. 831, 26 O.L.R. 145.

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To adapt the language of Boyd, C., in *Beatty* v. *Bailey*, *supra*, to the present case, the inability of the defendant *qua* third mortgagee to reconvey does not bar the right of action on the covenant, if such inability arises from any default of the mortgagor Yandt. Yandt's duty was to pay off the first mortgage and so prevent foreclosure. The right of the defendant as first mortgagee was quite independent of and paramount to his right as third mortgagee, and the result of his exercise of that right, in consequence of Yandt's default, should not be available to Yandt as a defence to an action for an entirely distinct debt. For these reasons the third mortgage cannot be held to have been paid, and the plaintiff is therefore not entitled to have the Kamsack mortgage removed.

The appeal is, therefore, allowed with costs, and the judgment below will be set aside and the action dismissed, with costs.

Newlands, J.A.

NEWLANDS, J.A.:—The plaintiff purchased from the defendant the Kamsack Hotel. As part payment he transferred to him two mortgages on the King's Hotel, Redvers. These mortgages were a first and third mortgage made by John D. Yandt to the plaintiff for the sums of $7,000 and $2,150 respectively. Collateral to these two mortgages the plaintiff gave the defendant a second mortgage on the Kamsack Hotel. This mortgage contained the following provision:—

> Provided and it is hereby agreed and understood that this mortgage is collateral to two other certain indentures of mortgage dated May 29, 1913, and made between John D. Yandt of Winnipeg in Manitoba, gentleman, as mortgagor and the said Charles Isman as mortgagee, and that payment in full or in part by the said John D. Yandt under the said two mortgages shall constitute payment in full or in part of this mortgage, and that upon payment of the said mortgages either by the mortgagor therein or by any other person the mortgagor herein shall be entitled to a discharge of this mortgage, and upon default in payment by the said John D. Yandt under the said mortgage and in the event of the mortgagor herein making the payment in full under the said mortgage to the said Jacob Sinnott as provided therein, he shall be entitled to a re-assignment of the said mortgages and to a discharge of this mortgage.

Yandt did not pay either of the mortgages assigned by plaintiff to defendant. Defendant then took proceedings in the Land Titles Office for a sale of the said King's Hotel under the first mortgage, but, not being able to find a purchaser, he foreclosed under that Act. After the completion of the foreclosure proceedings and the issue of a certificate of title to him, he first mortgaged and afterwards sold the said premises and a certificate of title therefor was issued to his purchaser.

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The plaintiff now brings this action for a declaration that the mortgages on the King's Hotel transferred by him to the defendant, have been paid; a declaration that the mortgage given by plaintiff to defendant on the Kan sack Hotel has been paid and satisfied by the foreclosure and sale of the King's Hotel, and, finally, to have said mortgage removed from his certificate of title as being a doubt upon his title.

Some argument was made before us as to the effect of a foreclosure under the Land Titles Act, 1906, c. 24. It has been settled by the case of *Mutual Life Assnce. Co. of Canada* v. *Douglas* (1918), 44 D.L.R. 115, 57 Can. S.C.R. 243, that foreclosure under that Act means the same as foreclosure by an action in Court. It is also a well settled proposition of law that, after a foreclosure order and the sale of the property to a third person, the mortgagee can no longer recover on the personal covenant of the mortgagor to pay, he having put it out of his power to return the mortgaged property to the mortgagor upon payment by him of the mortgage debt.

It is equally well settled that the foreclosure by a first mortgagee does not affect the right of a subsequent mortgagee to recover on the personal covenant in his mortgage, even though the first mortgagee has disposed of the property to a third person after foreclosure. In *Re Burrell, Burrell* v. *Smith* (1869), L.R. 7 Eq. 399; *Worthington* v. *Abbott*, [1910] 1 Ch. 588; *Beatty* v. *Bailey*, 3 D.L.R. 831, 26 O.L.R. 145.

But the plaintiff says the third mortgage in this case was held by the defendant, and as he foreclosed the first mortgage he also foreclosed the third mortgage and, having done so, his subsequent sale of the property—which put it out of his power to return it to the mortgagor—prevents him from recovering on the personal covenant of the mortgagor in either mortgage.

I cannot agree with this proposition. The defendant could not have foreclosed under the third mortgage except subject to the second mortgage. In order to get his rights under his first mortgage he had to foreclose under it, and thereby free the title he would obtain under the proceedings from the second mortgage, and this, necessarily, freed it from the third mortgage also, because there is no such thing as tacking under the Land Titles Act. It is true he would be a consenting party to the wiping off the title

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of both the second and third mortgages, and he would take title under the foreclosure proceedings "free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer, or any person claiming through or under him subsequent to the mortgagee," the mortgagee being in this case the first mortgagee.

This objection was taken in the case of *Worthington & Co.* v. *Abbott*, *supra*, the subsequent mortgagee in that case having consented to the order. Eve, J., there held that this did not affect his right to sue on the covenant.

Now if defendant can still sue on the covenant in his third mortgage on the King's Hotel, it cannot be considered as paid, and it was only in the event of both mortgages being paid that he was to be entitled to have the mortgage to defendant on the Kamsack Hotel removed.

The plaintiff has, therefore, failed to make out his case for a removal of the mortgage from his certificate of title, and his action should have been dismissed with costs.

I would therefore allow the appeal with costs.

Lamont, J.A.

LAMONT, J. A., concurs with the Chief Justice.

Elwood, J.A.

ELWOOD, J. A.:—In this matter I have had the privilege of perusing the judgments of the Chief Justice and my brother Newlands, and I quite concur in the conclusions they have reached.

On the argument before us it was contended by the respondent that, when the appellant obtained the title to the land under the order for foreclosure of the first mortgage, his claim under the third mortgage merged in the title so acquired.

I do not think that this contention is well founded. In the first place, merger is a question of intention, and, from the circumstances of the case, it is quite apparent that the appellant never intended to have his claim under the third mortgage merged through the foreclosure proceedings; and secondly, at the time that the appellant acquired title under the foreclosure proceedings, his third mortgage, so far as it affected the land, ceased to exist. The order for foreclosure, under which the appellant subsequently acquired the title to the land, provided that the title to be issued to him should be freed from all subsequent claims, including the third mortgage. There could only be a merger if the appellant held at the same time the title to the fee, and his claim against the

land under the mortgage. That condition never existed, for the reasons I have stated above.

I agree that this appeal must be allowed with costs, and the respondent's action dismissed, with costs.

Appeal allowed.

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LEAVITT v. SPAIDAL.

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Ontario Supreme Court, Clute J. June 2, 1919.

INSURANCE (§ IV B—170)— WILL—INEFFECTIVE—CHANGE OF BENEFICIARIES—INSURANCE ACT, ONT.—IDENTIFICATION OF BENEFIT—RENEWAL STATEMENT—NEW DESIGNATION.

A document although ineffective as a will may be a sufficient instrument in writing under the Insurance Act (R.S.O. 1914, c. 183, s. 171), to constitute the persons named therein beneficiaries of a mortuary benefit payable by a benefit association if it sufficiently identifies the mortuary benefit and is within the powers given by the Act, but a subsequent application for renewal in the benefit association which states that the benefit is "payable to my estate" is sufficient to annul the previous designation.

[*In re Jansen* (1906), 12 O.L.R. 63, distinguished; *Re Baeder and Canadian Order of Chosen Friends* (1916), 28 D.L.R. 424; *Re Monkman* v. *Canadian Order of Chosen Friends*, 46 D.L.R. 701; see also *Re Cole* (1916), 29 D.L.R. 492.]

Statement.

MOTION by the plaintiff for judgment in the action, upon a special case stated, under Rule 126, to determine the question whether the plaintiff, the administrator of the estate of William H. Leavitt, deceased, or the defendants, was or were entitled to a sum of money in the hands of the Treasurer of the Province of Quebec.

J. A. Macintosh, for the plaintiff.

J. A. Hutcheson, K.C., for the defendant D. M. Spaidal and for the Official Guardian, representing the infant defendants.

Clute, J.

CLUTE, J.:—The intestate William H. Leavitt died on the 8th March, 1918, having at the time of his death and for some years prior thereto a fixed place of residence in the township of Faraday, in the county of Hastings, Ontario.

The plaintiff is the administrator of the estate, and is also sole heir and beneficiary of the deceased.

The said William H. Leavitt, at the time of his death and for many years prior thereto, was an associate member of the Dominion Commercial Travellers' Association, incorporated by Dominion Act in the year 1880, and by the terms of his membership a mortuary benefit of $1,200 was payable to his estate.

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Proof of claim was duly made, and accepted as sufficient, of the death of the said William H. Leavitt, and the liability of the association to pay $1,200 was admitted, but the association declined to pay the plaintiff by reason of a claim made by the defendant D. M. Spaidal on behalf of his children, the infant defendants.

It appears that prior to the death of the intestate he drew his own will, but he did not have it executed in accordance with the Wills Act, and it is invalid as a testamentary document: he named the defendant Spaidal as the executor of the will, the clause of which relating to this case is as follows:—

"I appoint D. M. Spaidal, Brockville, sole executor, to pay debts and sell ranch and collect all accounts and insurance. The proceeds to be divided between his children" (the defendant's) "and the children of Fred Tisdale of 216 Rusholme road, Toronto."

The will is dated the 28th September, 1915, and signed "William H. Leavitt." No witnesses. There are added some further gifts on the 29th September, 1915, the addition being also signed "William H. Leavitt," but not witnessed. The document was not communicated by the intestate in his own lifetime to the said association or to the defendants or any of them. It was entered in a day-book, which was found among the personal effects of the deceased at his residence in Faraday. It is stated in the case that, after the death of Melicia Leavitt, wife of the said William H. Leavitt, the latter said to the defendant D. M. Spaidal that it was his wife's wish that the infant defendants should share in his estate, and in such conversation mentioned his insurance, and referred to it as his "Travellers' insurance."

It was admitted in argument that he had no other insurance. The wife of the intestate predeceased him, on the 14th September, 1914.

The membership of the said William H. Leavitt in the said association was renewed annually in the month of January in each year, by the said William H. Leavitt signing, upon a form of the said association, an application for renewal, and forwarding the same to the association, accompanied by the renewal premium of $10 for the current year; and on or about the 2nd January, 1918, the said association received from the said Leavitt a renewal application in writing signed by him (a true copy of which forms

part of the case), by which he requested the association to pay the mortuary benefit, payable by reason of his membership, to his estate. The words are, "Benefit in case of death payable to my estate."

Owing to the claim made by the defendants, the association paid the $1,200 into the office of the Provincial Treasurer of the Province of Quebec, where it remains awaiting the determination of the respective claims of the plaintiff and the defendants. The said money is subject to a tax or charge of $24.

The question submitted is, whether the plaintiff as against the defendants is entitled to receive the said mortuary benefit so paid to the Provincial Treasurer of Quebec, and it is agreed that, upon the determination of the said question, the Court shall give judgment declaring which of the parties to this action is entitled to receive the same, the Court to dispose of the question of costs.

The plaintiff relies on *In re Jansen* (1906), 12 O.L.R. 63, where it was held that a will invalidly executed is not an "instrument in writing" effectual to vary the benefit of an insurance certificate. Falconbridge, C.J.K.B., said: "The deceased did not intend to execute an instrument in writing to transfer the benefits of the policy *inter vivos*. His intention was to make a will, and he failed to make a valid one. I am therefore of opinion that the paper in question is not an instrument in writing which is effectual to vary the benefit of the certificate."

The *Jansen* case was decided under the Insurance Act, R.S.O. 1897, ch. 203, sec. 160, sub-sec. 1, which makes provision whereby the assured may vary the benefit or beneficiary; and the question is, whether the amendment made by the Ontario Insurance Act, 2 Geo. V. ch. 33, sec. 171, and sec. 2 (19), renders that decision no longer applicable to cases like the present under the amended law. See *Re Monkman and Canadian Order of Chosen Friends* (1918), 46 D.L.R. 701, at p. 703, 42 O.L.R. 363, at p. 366, and *Re Baeder and Canadian Order of Chosen Friends* (1916), 28 D.L.R. 424, 36 O.L.R. 30.

Section 160, under which the *Jansen* case was decided, provides that the assured may, by an instrument in writing attached to or endorsed on or identifying the policy by its number or otherwise, vary a policy or declaration or an apportionment previously made, so as to restrict or extend, transfer or limit, the benefits of

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the policy to the wife alone, children alone, or one or more of them, or to the mother, etc., etc., and may, from time to time, by instrument in writing attached to or endorsed on the policy, or referring to the same, alter the apportionment as he deems proper. He also may by his will make or alter the apportionment of the insurance money; and an apportionment made or altered by his will shall prevail over any other made before the date of the will: sub-sec. 1.

Under 2 Geo. V. ch. 33,* sec. 171, sub-sec. 3: "The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it or by an instrument in writing, including a will, otherwise in any way identifying the contract, and may by the contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, but not so as to alter or divert the benefit of any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself, or to his estate."

Sub-section 4 (new) provides that: "Where the instrument by which a declaration is made is a will such declaration as against a subsequent declaration shall be deemed to have been made at the date of the will and not at the death of the testator."

Sub-section 5 (new) provides: "Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration."

The last sub-section has reference to the case of the preferred class.

Sections 178 to 182 are applicable to preferred beneficiaries.

*The provisions of 2 Geo. V. ch. 33 quoted will be found, in the same words, in the Ontario Insurance Act, R.S.O. 1914, ch. 183.

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who constitute a class, and include husband, wife, children, grandchildren, and mother of the assured.

I am of opinion that the amendment to the Act is such as to make the will signed by the intestate effective to constitute the defendants named therein beneficiaries, although the will was ineffective as such, not having been witnessed.

Section 2 (19): "'Declaration' shall include any mode of designating in writing a beneficiary or of apportioning or reapportioning insurance money among beneficiaries" (new); and sec. 171, sub-sec. 3, provides that the assured may designate the beneficiary by an instrument in writing, including a will.

The testator wrote the will by his own hand and signed it. He there described the insurance simply by the word "insurance." His membership of the Travellers' Association, it is admitted, is all the insurance he had. This simple description, there being no other insurance, is, I think, sufficient. See sec. 171, sub-sec. 5.

The will is dated the 28th September, 1915, and was effective, I think, under the statute, to designate the infant defendants as the beneficiaries.

A further question, however, remains—as to the effect of the renewal application made in January, 1918, without which the certificate lapsed. There it is stated that the "benefit in case of death (is) payable to my estate." If the previous declaration made by will continued effective to death, the insurance would form no part of the estate. The question is, did the application for renewal annul the declaration previously made to the infant defendants by making the insurance "payable to my estate?"

Sub-section 3 of sec. 171 expressly provides that the assured may alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate. This is precisely what he has done, and I am unable to give effect to the argument of counsel for the defendants that, although it was again diverted to become part of his estate, the instrument called a will of the 28th September, 1915, is still effective to designate the beneficiaries. I think that was disposed of by the renewal, and the effect of the statement in the renewal is to make the insurance money part of his estate.

I direct judgment in favour of the plaintiff, declaring that the plaintiff, as administrator of the estate of the late William H.

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Leavitt, is entitled to receive the said insurance moneys, less 82½ tax, for which I do not think the defendants should be held responsible. The contest was reasonable and proper, and the payment of the insurance money to the Provincial Treasurer was proper, and it cannot be fairly said, I think, that the defendants were in any way responsible for the tax thereon imposed or for the money having been paid into the treasury. That was incident to the proceedings, and a necessary incidental expense.

Having regard to the peculiar circumstances of this case, all parties should have their costs out of the fund, the administrator as between solicitor and client.

I may also refer to the following authorities: *Krch* v. *Moses* (1892), 22 O.R. 307; *In re Cochrane* (1908), 16 O.L.R. 328; *Re Rutherford* (1917), 40 O.L.R. 266; *Re Beam* (1911), 3 O.W.N. 138; *Re McGregor* (1909), 18 Man. L.R. 432; Laverty's Insurance Law (1911), pp. 98, 99, 100; the Insurance Act, R.S.O. 1914, ch. 183; *Re Hewitt and Hewitt* (1918), 43 D.L.R. 716, 43 O.L.R. 286.

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LETHBRIDGE BREWING & MALTING COMPANY, Ltd. v. WEBSTER

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 22, 1919.

CONTRACTS (§ I D—55)—SALE OF GOODS—AGREEMENT TO "STAND ITS SHARE OF LOSS"—AMBIGUITY—UNENFORCEABLE.

In an action for the balance due for goods sold and delivered to a firm of wholesale liquor dealers, the Court held that an alleged agreement that if prohibition hit the country the plaintiff would "stand its share of the loss" was so ambiguous and uncertain as to be unenforceable.

Statement.

APPEAL from the trial judgment in an action to recover the balance due for goods sold and delivered to a wholesale liquor firm. Reversed.

L. M. Johnstone, K.C., for appellant; *J. A. Allan*, K.C., for respondents.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This is an action for the balance due for goods sold and delivered by the plaintiff to the defendant Bertin and the deceased George William Webster, who were partners in business as wholesale liquor dealers in Swift Current.

The following findings of the trial Judge are material to this appeal. Bertin was the manager of the firm. In the year 1907 one Sick, the president and general manager of the plaintiff

arranged with Bertin to have the firm of Bertin & Webster handle the plaintiff's goods in Swift Current for that district, handling only the plaintiff's products and devoting themselves only to the plaintiff's lines in their wholesale liquor business. At this time the plaintiffs had agencies at Moose Jaw and Weyburn. These were operated on a straight commission agency, the agent received a straight percentage on sales, and accounts were made out in the name of the plaintiff company, who assumed all responsibility for collecting and losses in connection with sales. With Bertin & Webster a different arrangement was made. In the discussion between Bertin and Sick, Bertin raised the question as to carrying the retailers' accounts, that would be the hotel men's accounts, as the plaintiff wanted Bertin & Webster to become directly responsible for the payment of goods ordered and to look after their own collections. Bertin raised the question that no such responsibility was undertaken by the agents in Moose Jaw or Weyburn branches, and that, in the event of prohibition legislation becoming general, the loss occasioned by the inability of the hotel men to meet their accounts would fall not on the plaintiff but on Bertin & Webster. Sick stated that there was no danger and that "if prohibition hit the country, the plaintiff would stand their share of the loss."

On July 1, 1915, prohibition came into force, and thereafter the hotels were unable to sell intoxicating liquor. The firm of Bertin & Webster, in consequence, claim to have sustained a loss of at least $25,000, by reason of the inability of the hotel men to meet their accounts.

Bertin gave evidence at the trial, and in the course of his evidence the following question was put by the trial Judge to Bertin, and the following answer was given:—

His Lordship: That was not the question. In any discussion you ever had with Sick did he in any way indicate what he meant or what you both meant when you used the words "share of the loss?" A. No, we never had a discussion on that point.

It is quite clear from the evidence that there was never any discussion as to what was meant by "share of loss," that the matter was apparently never discussed between the parties until after July, 1915, in fact, until after this action was commenced.

The trial Judge admits a difficulty in construing, as he puts it, "this rather indefinite undertaking." He says:—

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Bertin now says that he would understand the plaintiff would stand one-half of the loss occasioned by failure of the hotel men to meet their accounts to Bertin & Webster.

The trial Judge however states that he, the trial Judge, thinks the meaning of the engagement to be, that the plaintiff company would stand the share of loss which would represent the manufacturers' price but not the addition to that price added by the wholesalers, and that, on this basis, the loss would be practically borne on a ratio of 100 by the plaintiff to 15 by the defendants. The trial Judge, however, stated that counsel for the defendants intimated that they would abandon any claim to charge the plaintiff with any proportion of the loss over and above the one-half claimed in the pleadings, and, accordingly, the trial Judge directed that the plaintiff was bound to bear one-half of the loss sustained by the firm of Bertin & Webster on the accounts of licensed hotelkeepers, respecting sales by them of goods of the plaintiff's manufacture attributable to the legislation of this Province prohibiting the sale of intoxicating liquors, which came into force on July 1, 1915, and directing a reference to ascertain the amount of such loss.

A number of questions were raised on this appeal, but, in view of the conclusion I have come to, it is not necessary that I should deal with all of them.

I wish to remark, in passing, that I am quite convinced that the conversation which Bertin says took place with Sick never took place in 1907, and was, therefore, not one of the causes that induced the defendants to undertake to handle the plaintiff's goods. The first local option legislation passed by the Province of Saskatchewan was c. 14, 8 Edw. VII. 1908, Sask., assented to in June, 1908. It is quite true that there was old territorial legislation in force in 1907, but I am quite confident that in the Province of Saskatchewan in 1907 there were no districts in which local option was in force, and yet in his evidence Bertin says there were two districts in which it was in force, and it was because of his fear of its spreading that he hesitated to undertake to handle the goods. It was long after 1907 that the fear of prohibition became a matter for consideration by the hotel men. However, I doubt if I can take judicial notice of the fact that local option was not in force in the Province of Saskatchewan in 1907, and

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whether it was or was not in force does not affect the decision which I have come to.

It was contended by the appellant that the alleged agreement by Sick that the plaintiff would stand its share of the loss was too vague and uncertain, and therefore void and unenforceable.

On the argument before us, a very considerable time was taken up by counsel suggesting various constructions to be put upon the promise which Sick is alleged to have made. It is unnecessary, I think, that I should go into these constructions in detail, but the argument served at least the purpose of shewing that what the parties intended by Sick's statement was, at least, uncertain. The judgment of the trial Judge to my mind shews that conclusively. He says that the defendants contend that the proper construction is that each should bear one-half of the loss; he thinks the proper construction is that the plaintiff should bear the loss in the proportion of 100 to 15.

The evidence shews that there was no discussion of what was meant by "our share of the loss."

In *Falck* v. *Williams*, [1900] A.C. 176, at p. 181, I find the following:—

> It is not for their Lordships to determine what is the true construction of Buch's telegram. It was the duty of the appellant as plaintiff to make out that the construction which he put upon it was the true one. In that he must fail if the message was ambiguous as their Lordships hold it to be. If the respondent had been maintaining his construction as plaintiff he would equally have failed.

The above remarks might be applied to the case at Bar. I am of the opinion that the alleged statement by Sick, that if prohibition "hit the country" the plaintiff would "stand its share of the loss," is so ambiguous or uncertain in its meaning as to be unenforceable.

I would, therefore, allow the appeal with costs. The reference which the trial Judge directed to ascertain the amount due the plaintiff on the accounts sued on will be had, and the plaintiff will be entitled to judgment against the defendants for the amount so found due and the costs of the action.

On such reference the defendants of course will not be allowed to set off anything with respect to their claim for loss sustained by virtue of the coming into force of prohibition legislation on July 1, 1915.

Appeal allowed.

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E. D. and B. C. RAILWAY Co. v. McPHERSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Simmons and McCarthy, JJ. October 10, 1919.

TRIAL (§ IIB—46)—INJURIES CAUSING DEATH—DAMAGES—NEGLIGENCE OF EMPLOYER—SUFFICIENCY OF EVIDENCE TO GO TO JURY.

In an action claiming damages for the death of an employee caused by the negligence of the employer, if there is evidence on which negligence can be inferred, such evidence should be submitted to the jury. It is for the jury to say whether in fact negligence should or should not be inferred. *Held*, that the evidence was properly submitted to the jury, and that there was sufficient evidence to warrant the jury in finding negligence on the part of the defendants which caused the accident.

Statement.

APPEAL by defendants from judgment of Stuart, J., in an action for damages. Affirmed.

H. H. Parlee, K.C., and *H. C. Macdonald*, for appellant; *D. Campbell* and *H. A. Friedman*, for respondent.

Harvey, C.J.

HARVEY, C.J. (dissenting):—The plaintiff sues as the personal representative of her deceased husband who was killed in an accident while in the employ of the defendants. The defendant had for several years been employed in different places as a locomotive fireman or engineer and at the time of his death and for about two months prior thereto had been acting as engineer in charge of a small yard engine called a dinky engine in and about the defendants' yards in Edmonton. On the day of the accident he was driving his engine backwards hauling behind it an empty car and behind that a crane. No one saw the accident but no one responding to the signals to the engine which was travelling about 4 miles an hour the man in charge of the crane ran forward and stopped the engine. Deceased was then found on the track, his body having been passed over by the engine and cars. He was unconscious and died almost immediately. At the trial the jury awarded the plaintiff $5,000 damages and against the verdict and judgment the defendants appeal.

After a very careful perusal of the evidence given at the trial I am unable to satisfy myself that there is any evidence from which a jury would be warranted in finding negligence on the part of the defendants which can be properly considered as occasioning the accident.

The particulars of negligence as alleged in the statement of claim are summarized in the plaintiff's factum as follows:—

(a) In failing to provide a safe place for the deceased to perform his work in.

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(b) In failing to employ a locomotive fireman upon the dinky engine.

(c) In failing to equip the dinky engine with hand rails, grab irons, and other safe devices for the protection of the deceased.

All the argument was confined to particulars (a) and (c). The evidence was that the deck of the cab was only 26 inches in width behind the boiler with an open door at the back. There was evidence that some of the planks of the floor were of unequal width but there was nothing to warrant the inference that that difference in length affected the danger. There was no evidence whatever that the engine was in any way defective and there was no suggestion that the defendants had failed to comply with any statutory requirement. It was suggested however both by the evidence and in argument that if the floor of the cab had been wider or there had been certain protective railings there would have been less risk of accident. It was however stated by the witnesses who gave this evidence that they never saw an engine so equipped with such devices and that "this engine was very common for its class, in construction." One of the witnesses said about this engine that after the accident the defendants put it out of service and the other witness who gave evidence on the question of negligence said that he "believed the officers of the company suggested putting one (*i.e.*, a protective railing) on."

Those statements would no doubt have an effect on the minds of the jury but it is clear they do not constitute evidence of negligence. Coleridge, L.C.J., in *Beever* v. *Hanson Dale & Co.* (1890), 25 L.J.N.C. 132, said at p. 133:—

> Now a perfectly humane man naturally makes it physically impossible that a particular accident, which has once happened can happen again, by fencing or covering, or, at any rate, making safe the particular thing from which it arose. That, however, is no evidence of, and I protest its being put forward as evidence of, negligence.

The foregoing seems to apply also with much force to the suggestions of the witness of what occur to him after the event of methods of preventing the recurrence of such an accident. They do not in my opinion constitute evidence of negligence. Negligence is the failure to do something which a reasonably prudent person before the accident would do. The engine in question was not manufactured by the defendants but was procured by them presumably in the ordinary way for the purposes for which it could be used and the evidence for the plaintiff shews as I have stated that it was a common one of its kind. That seems

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to establish that it did not lack any of the essentials which a reasonably prudent person would supply. Certainly I think it establishes an absence of any evidence of the contrary.

A railway company is an insurer against accident only under the Compensation Act and now that it has been made an insurer in that way there is no reason to strain the principles of the law of negligence to make its liability greater than is fixed by statute. It is bound to provide its employees with machinery reasonably safe but the work about a railway is necessarily of a more or less hazardous nature and accidents will happen without any negligence and for such cases our Legislature has deemed wise to make the employer liable as well as for those in which he is at fault but to establish liability beyond the latter there must be evidence to shew not that every precaution which can be conceived of after the accident has not been taken, but that some precaution, which a reasonably prudent person before the accident would take, has not been taken.

In my opinion there is no evidence to warrant such a conclusion in this case, even assuming that the evidence warrants any reasonable inference as to the real cause of the accident.

It is suggested by the plaintiff's chief witness that the deceased may have stepped on a piece of coal and lost his balance. If that were so it would be his act and not the defendants' that would be responsible for the coal being there to be stepped on, and therefore for the accident. But even if the engine was not reasonably safe for the purposes for which it was used it appears to me that applying the reasoning of the very recent case of *C.P. R. Co.* v. *Frechette* (1915), 22 D.L.R. 356, [1915] A.C. 871, the defendants cannot be held liable.

In that case the deceased with a knowledge of the risks involved undertook a hazardous work and it was held that the maxim *volenti non fit injuria* applied. At p. 364 (D.L.R.), it is stated that:—

> If, however, a person with full knowledge and appreciation of the risk and danger attending a certain act, voluntarily does that act it must be assumed that he voluntarily incurred the attendant risk and danger and the maxim *volenti non fit injuria* directly applied.

The deceased in the present case had had years of experience in a locomotive engine and when he took charge of this engine it was as far as the evidence indicates in the same condition as

at the time of the accident. If to him with a knowledge gained from experience of the work in the cab of an engine, there was no indication of any special risk or danger how can it be said that there was any failure to provide a reasonably safe engine? If on the other hand there was an apparent special risk his undertaking the work and carrying it on for 2 months would seem to constitute a voluntary acceptance of the risk. I would, therefore, allow the appeal with costs and dismiss the action with costs.

The statement of claim claims alternatively $1,800 under the Compensation Act. It is admitted by counsel for defendants that they are liable for that amount and as there is no question to be determined on that issue that amount should be awarded. As apparently the defendants never questioned their liability for compensation I think they should be entitled to deduct their costs of the action and the appeal from the amount awarded.

SIMMONS, J.:—The plaintiff is the widow and administratrix of one John McPherson, an engineer in the employment of defendant company at the date of his death, and she claims damages at law against the defendant on her behalf and on behalf of her children.

She alleges negligence in that the defendant did not provide a safe place for said deceased to perform his work, and failure to provide a fireman to assist the deceased, and failure to provide hand rails and grab-irons or other safety devices whereby the said McPherson might have prevented his falling from the engine which he was operating.

The action was tried by Stuart, J., and a jury, and damages were given to the plaintiff.

Defendants denied negligence and also alleged contributory negligence against the said McPherson.

The issues are three in number. The first one is this: Did the defendant company furnish a reasonably safe place in which the deceased could perform his work? The second is: Did the failure of the company to perform this duty cause the death of the deceased? The third is: Did the deceased appreciate the risk of his employment and voluntarily accept it?

If the first proposition is answered in the negative and the second in the affirmative the plaintiff will succeed unless the defendant establish the third proposition, as no issue of con-

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tributory negligence arises. The onus is upon the plaintiff to establish propositions one and two.

McPherson was operating a locomotive railway engine attached to two cars, on one of which was a crane. In operating the engine McPherson was under the control and direction of the operator of the crane, whose name was Frechette. While the engine was moving the cars at about 4 miles an hour Frechette gave him the signal to stop. The engine did not stop and the crane operator got off from his car and went forward to the engine and found no one in the cab. He shut off the steam and brought the engine to a stand and then went back and found McPherson lying between the tracks at a point corresponding with the location of the engine when he signalled McPherson to stop. When he entered the cab the water glass was broken and steam was escaping so as to fill the cab with steam. The crane had travelled to a point about 30 paces from where McPherson lay, when Frechette stopped the train.

No one saw McPherson fall from the engine. An iron poker which hung on the outside of the engine cab on the right side was lying on the ground close to McPherson and evidently fell to the ground about the time McPherson fell from the cab. McPherson had been operating the engine about two months. The engine did not have a coal tender and the doorway at the centre of the cab opened into space directly over the buffer and draw-bar casting.

There was a small coal bunker in the interior of the left side of the cab. The floor of the cab, commonly known as the deck, extended about 2½ feet back from the boiler head and was about 3½ feet wide. The crane car was equipped with its own propelling power but at the time of the accident this power was out of commission and the engine in question was used to move the crane car.

The engine was moving north in a reverse position with the cab-door opening towards the north and the flat car and the crane car were drawn along the track by the engine, which was coupled at its front to the flat car next to it.

It is obvious that if the engineer stepped backward or outward at the cab-door he would find himself stepping into empty space and would probably fall to the ground in front of the engine unless he could save himself by grabbing at some support.

The attachment of a coal tender to the engine of a railway locomotive provides a continuous floor or deck from the engine back through the cab-door in the direction of the tender. On such an engine it would be impossible for the engineer to fall to the ground when he stepped back through the cab-door. He would step on to the floor of the tender which practically formed a continuous deck, or floor, from engine to tender. The whole issue as to negligence or absence of negligence seems to me to be confined to this feature of the engine in question.

His physical duties involved considerable movement on his part as he performed the work of both fireman and engineer, and he would also have to apply his attention to several duties at about the same moment. He would be required to keep a look-out at his cab window for switch signals; to listen for signals by whistle or otherwise from Frechette; to keep a look-out for other trains upon the tracks; to observe his steam pressure; water pressure; and the condition of his fire to generate steam.

If these are the duties performed in the ordinary course of employment by either a railway engineer or fireman upon an engine of standard construction and use it would generally involve the conclusion that the defendant company had performed its obligations to furnish a reasonably safe condition. The employment of either a railway engineer or fireman cannot have the element of danger eliminated from it.

The duty of the defendant company must be considered with this in view. The company must, however, do what is reasonable under the circumstances to lessen or minimize the danger.

The engine was a small one of the obsolete type known as a "dinky engine." There was not any material difference in its construction from that of an ordinary engine which would make it a dangerous engine to operate. The cab was smaller, but the engine was smaller in all its parts than a modern railway engine. If any dangerous feature existed it was due to the fact that no tender was attached.

It must be obvious that the engine in question, as it was operated without a tender attached, would create a condition involving extraordinary care upon the part of the operator, as a misstep on his part would probably cause him to fall to the ground on the tracks directly in front of the engine when it was travelling cab-end forward.

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There is evidence that grab-irons at the side of the door and a railing at the cab door would have minimized the danger and indeed this would seem to be a very natural conclusion. To this is superadded another unusual feature, namely, that he was called upon to perform the double duties of fireman and engineer.

Under these circumstances I have no difficulty in coming to the conclusion that the trial Judge was right in leaving this question to the jury.

The second question does present some difficulty since no one saw the accident. The jury was entitled to consider the probabilities as to the breaking of the water glass or gauge immediately before or after the accident. These structures break frequently and the one in question might have broken after the deceased fell to the ground but the very short time which elapsed between the accident and the discovery of the broken gauge would incline the balance in an appreciable degree in favour of the conclusion that it happened at or immediately before the accident.

The deceased was in good health and spirits a short time before the accident. A few moments before the accident he was seen to rise from his seat in the cab. This he would be required to do from time to time in the performance of his duties. He fell to the ground between the rails and must have emerged by the cab door.

The breaking of the glass would cause a sudden outburst of heated steam and scalding water. In the ordinary occurrences of everyday life the defendant would probably be startled into making a sudden movement backward to escape from it.

It is true other theories might have caused the deceased to fall from his engine. He might have been affected suddenly with heart failure. Such a theory would be a pure conjecture because there is no evidence of the deceased having such an ailment.

In the present case, granted the jury might properly conclude the steam gauge burst immediately before the accident, we have an occurrence so closely connected in time and application with the sudden separation of the deceased from the engine as to justify a jury of six practical men in the conclusion that it caused the accident.

The third issue is one on which the onus is upon the defendant. The difficulties surrounding this issue were fully appreciated by

the trial Judge, and unless the defendant is entitled to say that the evidence is conclusive against the plaintiff upon this issue it cannot complain of the manner in which the trial Judge gave it to the jury.

It is admitted that there is no direct evidence that the plaintiff knew and appreciated the nature and degree of the risk when he contracted with the defendant. The evidence does establish pretty well that after he had entered upon this particular employment he would fully appreciate the risk. But although this may raise a strong presumption against the deceased it is not conclusive against him, otherwise a great many workmen would be faced with the alternative of refusing to continue in a dangerous employment after they discovered the risk or of accepting the risk. The former alternative might involve his inability to support himself and those depending upon him.

In dealing with this presumption it must not be forgotten that the information which the deceased might have given is lost.

The defendant gives no direct evidence. The controversy as to whether the presumption should be conclusive against the plaintiff is close to the line. Unless the deceased had become fairly familiar with the work in the defendant's railway yards, probably he would not know that an engine of the style of the one in question would be assigned to him. The case does not furnish evidence of such a familiarity. If such evidence existed the defendant would probably have adduced it.

I am of the opinion that where the inferences are necessarily to be drawn by implication from the conduct of the parties that a very clear and unequivocal case would have to be made against the deceased before a trial Judge would be justified in withdrawing from the jury a question of this nature. It may very well be that a jury of six men coming in close contact with the conduct of men in the ordinary affairs of life are able to appreciate the motives, impulses and actions arising thereout quite as accurately, at least, as a Judge, who of necessity does not come in such close contact with these matters.

I have therefore arrived at the conclusion that the question of *volens* in this particular case was properly left to the jury and I would therefore dismiss the appeal.

McCarthy, J.

McCARTHY, J.:—This is an appeal by the defendants from the verdict of a jury in an action for damages for negligence. The

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facts are clearly set out in the judgment of my brother Simmons, and it is unnecessary for me to repeat them here.

The difficult question arises as to "the functions of a Judge and jury in actions of negligence." The late husband of the plaintiff was an employee of the defendant railway company as a locomotive engineer, and was found dead upon the track close to the locomotive that he was operating. Unfortunately there is no direct evidence of the cause of the unfortunate accident. In Phipson's Law of Evidence, 5th ed., p. 7, the result of the authorities seems to be summarized:—

> FUNCTIONS OF JUDGE AND JURY, LAW AND FACT. In jury trials, matters of *law* are determinable by the Judge, matters of *fact* by the jury; *Ad quæstionem facti non respondent judices, ad quæstionem juris non respondent juratores.* . . . Whether there is *any* evidence, therefore, is for the Judge; but whether there is *sufficient* evidence is for the jury. Thus, in actions of negligence, it is for the former to say whether from any given state of facts negligence can be inferred and for the latter to find whether it *ought* to be inferred.

The authorities are hard to reconcile but are collected in *Beck* v. *Canadian Northern Railway Co.* (1910), 2 Alta. L.R., p. 549, referred to in (1910), 47 Can. S.C.R. at p. 397, and *Can. Colored Cotton Mills Co.* v. *Kervin, et al.* (1899), 29 Can. S.C.R. 478.

But after a perusal of the evidence I cannot conclude that there was no evidence of negligence to go to the jury, although I doubt very much if I had been a juror I would have come to their conclusion. But we cannot usurp the functions of a jury and under the circumstances to my mind there is nothing else to be done than to dismiss the appeal with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, J.A., Middleton, J., and Ferguson, J.A. June 23, 1919.

MUNICIPAL CORPORATIONS (§ II C—115)—MUNICIPAL ACT (ONT.)—ERECTION AND MAINTENANCE OF WEIGHING MACHINES—CITIES, TOWNS AND VILLAGES—INTERPRETATION ACT,

Section 582 of the Municipal Act, Ont. (3 Edw. VII., c. 19) provides that the councils of townships, cities, towns and villages may pass by-laws "for erecting and maintaining weighing machines in villages or other convenient places, and charging fees for the use thereof . . ."

Held, that the section conferred upon the councils of cities power to do what the section provides for, otherwise it would be necessary to read out of the section the words "or other convenient places." To limit the right of cities and towns to erecting and maintaining weighing machines in villages would be absurd. But the councils of cities, towns and villages have power to erect weighing machines and to appoint weigh masters independently of the above section, derived from s. 580. See also ss. 326 and 537.

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It was unnecessary to decide whether the provisions of the by-law authorising the imposition of fees for weighing ceased to be in force when s. 582, the authority by virtue of which the by-law was passed, assuming that that was the only authority, was repealed by the Municipal Act of 1913, 3 & 4 Geo. V. c. 43; but, if the validity of those provisions depended on s. 582 only, they ceased to be operative upon its repeal, for they were inconsistent with the provisions of the substituted enactment: Interpretation Act, R.S.O. 1914, c. 1, s. 16.

The city corporation was entitled to judgment upon its claim for fees for weighing loads of coal for the company: if the council of the corporation had power to enact the provisions of the by-law independently of the power conferred by s. 582, that result followed as of course: if that view was not the right one, the company, having taken advantage of the facilities for weighing its coal, was properly ordered to pay for the services rendered: and, in the absence of any evidence to the contrary, the fees prescribed by the by-law might be taken well to be a reasonable compensation for the services rendered.

Statement.

APPEAL and cross-appeal from the judgment of Latchford, J., in two actions brought by the J. G. Butterworth Company Limited and J. G. Butterworth, the latter suing as a ratepayer of the City of Ottawa on his own behalf and on behalf of all the other ratepayers of the city, against the Corporation of the City of Ottawa; and two actions by the city corporation against the company. All four actions arose out of the demand of the city corporation that the company should weigh all coal delivered in the city upon the scales or weighing machines provided by the city corporation, and should pay fees for weighing all loads, under the provisions of a city by-law, No. 3358, passed in 1912.

One of the actions brought by the city corporation was begun in the County Court of the County of Carleton. Upon the application of the defendants it was transferred into the Supreme Court of Ontario, and the four actions were ordered to be tried together. Judgment of Latchford, J., varied.

The judgment appealed from is as follows:—

The first action was begun on the 6th September, 1917, by the J. G. Butterworth Company Limited, and J. G. Butterworth, suing on behalf of himself and all other ratepayers of the City of Ottawa.

The defendants were at the time insisting that the plaintiff company should weigh all coal delivered in the city upon the scales or weighing machines provided by the city, basing their demand to have the coal so weighed and to collect fees for weighing each load, upon provisions of their by-law No. 3358.

The J. G. Butterworth Company has carried on the coal business in Ottawa for more than 35 years.

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In 1890, a by-law, No. 1081, was passed by the municipality. It prohibited the delivery of coal from a waggon or other vehicle without having the same weighed upon one of the city weigh-scales. Among other scales constructed for the weighing of coal was a weigh-house and scales at the St. Lawrence and Ottawa Railway depot in the north-eastern section of the city. A penalty was provided for any infraction of the by-law.

In 1912, by-law No. 3358 was passed. It is intituled a "By-law to regulate Markets and Weighhouses." Section 37 provides, *inter alia*, that a public weighhouse and weighing machine shall be established at the St. Lawrence and Ottawa Railway depot. A weighhouse was erected and scales installed and maintained until 1912, when the weighmaster was removed. The scales becoming out of repair, they were taken away by the city in 1913 or 1914.

In 1915, Healey & Co. Limited erected a coal-elevator at the St. Lawrence and Ottawa Railway depot, and on the 19th August applied to the city to have the scales restored. Later, in October, the same firm offered to purchase the old scales. The city council decided to accept the offer and to put a weighmaster in charge of the scales when replaced. In the event of the fees not being sufficient to pay the weighmaster's salary the firm was expected to make up the deficiency. Healey & Co. set up the old scales at their yard, but they proved of little use.

In April, 1917, the J. G. Butterworth Company purchased the Healey coal business and erected a new coal elevator and weigh-house, in which was installed a modern ten-ton weighing machine. Application was made to the city for the appointment of a weigh-master. This the city was willing to do, provided the company would pay the difference, if any, between the fees collected from the scales and the salary paid the weigher. No such requirement was imposed on other coal-dealers. The proviso was regarded as discriminatory and unjust, especially as the revenue derived by the city from the scales at the company's other yards exceeded the salaries paid the weighmasters there. The company suggested that the revenue derived from the scales at all their yards should be pooled, and were quite willing to pay any difference that might exist between that amount and the sum of the salaries paid the several weighmasters. This proposition the city refused to entertain.

The nearest public weigh-scales to the St. Lawrence and Ottawa Railway yard of the company was at By Ward Market, lying to the south-west, a distance of more than a quarter of a mile. The scales there were, at certain hours of the day, almost continuously in use weighing hay and other produce, thus occasioning delay, in addition to increasing the cost of delivery over the large and populous area of the city north and east of the company's yard.

The Butterworth Company regarded the treatment of the city as invidious, and delivered coal to customers from the yards at the St. Lawrence and Ottawa Railway depot, weighed only at its own scales.

The city prosecuted the company in the police court at Ottawa, and secured a conviction under the penalty clause of the by-law. A motion to quash the conviction failed. Pending the hearing by leave of a further appeal, the city instituted another proceeding in the police court.

The company then brought the first action. Upon an interlocutory application it was arranged that the city should not press the prosecutions in the police court, and that the company should expedite the hearing of the appeal from the order refusing to quash the conviction.

The appeal was argued and judgment was reserved. On the 10th December, before a statement of claim had been filed, the First Divisional Court of the Appellate Division delivered judgment upon the appeal. The Court held that the effect of the by-law was not to compel persons delivering coal from a waggon or other vehicle to have the coal weighed upon the city scales in all cases, but only where the buyer or seller required that it should be so weighed. As it was neither alleged nor proved that the buyer of the coal had required it to be weighed on the public scales, the appeal was allowed with costs and the conviction quashed with costs: *Rex* v. *Butterworth* (1917), 13 O.W.N. 263.

The question of the validity of the by-law was not determined. There was no necessity for determining it, as, whether the by-law was valid or invalid, there was no evidence that the by-law had been violated.

In the cases before me it seems proper that I should attempt to ascertain whether the provisions of by-law 3358, which are attacked in the actions brought by the Butterworths, are valid or not.

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Before the by-law of 1900 was passed, by the Municipal Amendment Act, 1887, 50 Vict. ch. 29, sec. 25, and R.S.O. 1887, ch. 184, sec. 489 (58), the councils of townships, cities, towns, and villages were given power to pass by-laws:—

"For erecting and maintaining weighing machines in villages or other convenient places, and charging fees for the use thereof."

A limitation is placed on the fees to be charged, but it does not apply to the weighing of coal.

The fees actually charged by the city for the weighing of coal are lower than the fees permitted to be charged for weighing other commodities.

The enactment in its original form was continued through the revisions of the Municipal Act: (1892) 55 Vict. ch. 42, sec. 489 (58); R.S.O. 1897, ch. 223, sec. 582; and (1903) 3 Edw. VII. ch. 19, sec. 582. The last consolidation was in force when by-law 3358 was passed in 1912.

It is urged that the statute enabled the city council to pass by-laws for the erection and maintenance of weighing machines only in villages or other convenient places of the same genus—in other words, outside the municipality.

With this contention I find myself unable to agree.

However ill-chosen or obscure the language of the statute may be, it is entitled to a liberal construction. So regarded, the city council was, in my opinion, authorised to pass a by-law providing for the erection and maintenance of weighing machines in convenient places within the city limits, and to charge fees for the use of the machines.

I therefore regard as valid those sections of by-law 3358 which provided for the establishment of weighing machines at certain places in the city of Ottawa.

It is nothing to the point that in the revisions of 1913 and 1914—3 & 4 Geo. V. ch. 43, sec. 411 (6), and R.S.O. 1914, ch. 192, sec. 411 (6), the power to erect and maintain weighing machines was restricted to townships, while "regulating the . . . weighing of . . . coal and other fuel" was the only power regarding coal given to urban municipalities: *ib.*, sec. 401 (6).

The law continued thus until the 26th March, 1918, when, by 8 Geo. V. ch. 32, sec. 8, sec. 401 was amended by adding thereto the following paragraphs:—

"11. For purchasing, leasing, erecting, maintaining and operating weighing machines and weighhouses, for appointing weighmasters and for prescribing their duties.

"12. For imposing, levying and collecting fees for the use of such weighing machines, not being contrary to the limitations prescribed by sub-section 8 of section 402.

"13. With the approval of the Municipal Board, and within the limitations and restrictions, and under the conditions prescribed by order of the Board for requiring all persons who shall, after a sale thereof, deliver coal or coke within the municipality, by a vehicle, from any coal-yard, storehouse, coal-chute, gas-house or other place:

"(*a*) To have the weight of such vehicle and of such coal or coke ascertained prior to delivery, by a weighing machine established as provided by paragraph 11.

"(*b*) To furnish the weighmaster in charge of such weighing machine, and to surrender to each purchaser, at the time of delivery, a weigh-ticket, upon which has been printed or written the name and address of the vendor, and the name of the purchaser, and to have such weigh-ticket dated and signed by such weighmaster, and to have him enter thereon the weight of such coal or coke.

"14. Nothing contained in the next preceding paragraph shall authorise a municipality to require the weighing of coal or coke sold in car lots at shippers' weights."

It may be mentioned that a by-law, No. 4522, passed by the City of Ottawa on the 2nd April, 1918, under this amendment, was the subject of attack by the Butterworth Company, but was upheld by the learned Chief Justice of the King's Bench and on appeal by a Divisional Court: *Re Butterworth and City of Ottawa* (1918), 45 D.L.R. 426, 44 O.L.R. 84.

No express power to lease was given when power was conferred to erect and maintain weighhouses, nor was the appointment of weighmasters authorised. But I think the greater power includes the lesser. It is obvious, too, that the scales could not be maintained and fees collected for their use without employing persons to do the weighing and collect or record the fees.

Different considerations would naturally arise if by-law 3358 had been passed after the consolidation of the Municipal Act in 1913 had taken away the powers enjoyed by cities since 1887, and

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conferred only power to regulate the weighing of coal. See *Rex v. Woollatt* (1906), 11 O.L.R. 544.

The operation of the weighing machines in the weighhouses at the Broad street and Arlington avenue yards of the company was carried on by the city at the instance of the company and for the company's benefit. The scales were on property owned by the company and leased by the company to the city. All the weighing required by the company was done. The placing by the company of each load of coal on the scales leased or owned by the city was as plainly to require the coal to be weighed as the most formal request could have been. Rentals to the 31st December, 1917, have been paid and accepted, and the leases have not been determined. In the second action a claim is made that the leases be declared invalid and the city be ordered to vacate the leased properties. As the power to lease existed, the Butterworth Company, even if not estopped by its own acts, is not entitled to the possession of the weighhouses and scales at Broad street and Arlington avenue.

After the decision of the Divisional Court on the first appeal and the filing of the city's defence in the first action, the company could have moved for judgment. It had in its favour a final adjudication on what was admitted to be the only important issue in the civil suit.

No evidence adduced at the trial advanced in this regard the position of either party.

The company is entitled in its first action to judgment declaring that upon the true construction of by-law 3358 it was not compulsory on persons delivering coal in the city of Ottawa from a waggon or other vehicle to have the coal weighed in all cases upon a weighing machine of the city, but only in cases where the buyer or seller required that it should be so weighed.

The company is also entitled to costs up to and inclusive of statement of defence and to subsequent costs as of a motion for judgment.

The company's second action fails and is dismissed. In view, however, of what I regard as the invidious, though not illegal, treatment of the company in connection with the payment of a weighmaster at the St. Lawrence and Ottawa Railway depot, the dismissal is without costs.

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For the reasons indicated in the course of this judgment, the city corporation is entitled to recover the amounts claimed in the two actions brought against the company.

There will be judgment accordingly for $1,189.60 with costs of both actions up to and inclusive of the costs of the order consolidating them, with subsequent costs as of one action.

Taylor McVeity, for the company.

F. B. Proctor, for the city corporation.

The judgment of the Court was read by

MEREDITH, C.J.O.:—Appeals by the plaintiffs in the two actions of J. G. Butterworth Co. Limited v. City of Ottawa and by the defendants in the two actions of City of Ottawa v. J. G. Butterworth Co. Limited from the judgments, dated the 29th January, 1919, which were directed to be entered by Latchford, J., after the trial of the actions before him sitting without a jury at Ottawa on the 16th October, 1918; and cross-appeal by the defendant corporation from so much of the judgment in the first action of J. G. Butterworth Co. Limited v. City of Ottawa as declared the true construction of the by-law in question and directed that the defendants should pay the plaintiffs' costs of the action up to and inclusive of the statement of defence and their subsequent costs as of a motion for judgment on the pleadings. Meredith, C.J.O.

The first action of J. G. Butterworth Co. Limited v. City of Ottawa was commenced on the 6th September, 1917 and in it the plaintiffs claim a declaration that secs. 37, 40, 41, 42, 48, and 50, and clauses (*i*), (*j*), and (*k*) of sec. 38, of by-law No. 3358, passed by the council of the defendant corporation on the 6th May, 1912, are invalid, void, and illegal, or that it be declared that, upon the true construction of the said by-law, it is not compulsory on persons delivering coal from a waggon or other vehicle, after a sale thereof in the said city of Ottawa, to have the coal weighed upon a weighing machine or weigh-scales of the defendant in all cases, but only in cases where the buyer or seller requires that it shall be so weighed; and for an injunction restraining the defendant from enforcing the impeached sections and clauses of the by-law, and from compelling the plaintiff Butterworth and other ratepayers of the said city of Ottawa, by prosecution in the police court or otherwise, to have coal delivered from a waggon or other vehicle, after a sale thereof in the said city of Ottawa, weighed upon a weighing machine

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or weigh-scales of the defendant, in cases where neither the buyer nor the seller has required such to be done.

By the judgment in that action the declaration as to the construction of the by-law which the plaintiffs claim was made, and the order as to costs as to which the corporation appeals was also made.

The second action of J. G. Butterworth Co. Limited v. City of Ottawa was commenced on the 2nd May, 1918. In it the plaintiffs claim to have the sections and clauses of by-law No. 3358 which were attacked by the first action declared to be *ultra vires* of the defendant and to be invalid, void, and illegal; and a claim is also made to have the defendant's weighmasters removed from two weighhouses established by the defendant on the premises of the plaintiffs; for possession of these weighhouses and the weighing machines; an injunction restraining the defendant from interfering with the free use of the said weighhouses and weighing machines by the plaintiffs, and from demanding and requiring the payment of tolls by the plaintiffs for the weighing of their coal thereon; and for an account of the tolls illegally exacted by the defendant from the plaintiffs for the weighing of their coal and the repayment of the same.

By their reply to the statement of defence in this action the plaintiffs set up a new claim; this claim is for relief by way of damages or injunction for the injury they have sustained by reason of the failure of the defendant to fulfil the obligation of a by-law which had been passed for the establishment and maintenance of a weighing machine at the St. Lawrence and Ottawa Railway depot; and the attack on the validity of the sections and clauses of by-law No. 3358 was repeated, including in the attack sec. 43.

By the judgment in this action, the action was dismissed without costs.

The plaintiffs in the first of these actions are the J. G. Butterworth Company Limited and J. G. Butterworth, the latter suing as a ratepayer of the City of Ottawa on his own behalf and on behalf of all the other ratepayers of that city.

The actions of City of Ottawa v. J. G. Butterworth Company Limited were brought to recover from J. G. Butterworth Company Limited fees for weighing coal of the defendant company which had been weighed on the plaintiff's weighing machines; the first

of these actions was commenced on the 31st March, 1918, and was for the recovery of fees for weighing between the 1st May, 1917, and the 1st February, 1918 (both inclusive); and the second action was commenced on the 3rd May, 1918, and was for the recovery of fees for weighing between the 1st March and the 1st May (both inclusive), and judgment was given in both actions in favour of the corporation for the amounts claimed.

Upon the argument before us it was contended by counsel for the appellants the Butterworths that the sections and clauses of the respondent's by-law No. 3358 which are attacked were invalid; that the council had no authority to establish weighing machines or to require that coal should be weighed on them, and still less authority to make it compulsory on coal-dealers to have the coal sold by them weighed by these machines, and it was contended by counsel for the corporation that its council had jurisdiction to enact the sections and clauses which are attacked.

It was held by this Court, in a former proceeding between these parties, *Rex* v. *Butterworth*, 13 O.W.N. 263, that the construction of the by-law in question contended for by the appellants the Butterworths is its true construction; and that question is no longer open to discussion.

The Municipal Act in force when the by-law was passed was 3 Edw. VII. ch. 19. By sec. 582 of that Act it was provided that:—

"The councils of townships, cities, towns and villages may pass by-laws:—

"1. For erecting and maintaining weighing machines in villages or other convenient places, and charging fees for the use thereof, not being contrary to the limitations provided by sub-section 8 of section 579 of this Act."

We agree with the view of the trial Judge that this section conferred upon the councils of cities power to do what the section provides for, and that the contention to the contrary of counsel for the Butterworths is untenable. To give effect to it would be to read out of the section the words "or other convenient places" or to attribute to the Legislature the intention to limit the right of cities and towns, at all events, to erect and maintain weighing machines to erecting and maintaining them in villages, which is most unlikely, and would, I think, be absurd.

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What was doubtless meant was that the councils of townships, cities, towns, and villages might erect and maintain them at convenient places within their own limits, and that township councils might erect and maintain them also in villages. That would be an application to these utilities of the principle upon which the Act enables township halls to be erected and maintained in "any town or village within or partly within the original boundaries of the township."

In my opinion, councils of cities, towns, and villages have, independently of the authority conferred by sec. 582, power to provide facilities for weighing coal, derived from sec. 580 (9), which empowers councils of cities, towns, and villages to pass by-laws:—

"For regulating the measuring or weighing (as the case may be) of lime, shingles, laths, cordwood, coal and other fuel."

The "good government" section of the Act (sec. 326) and sec. 537 (1), which empowered councils of all municipalities to pass by-laws for appointing such "officers as are necessary in the affairs of the corporation, or for carrying into effect the provisions of any Act of the Legislature or any by-law of the corporation," may also be invoked in support of the existence of the power to establish weighing machines and to appoint weighmasters.

All that I intend by what I have said is to say that I entertain the opinion that, apart from the powers conferred by sec. 582, councils of cities, towns, and villages have power, in order to facilitate the carrying out of the regulations they may prescribe as to the weighing or measuring of the articles mentioned in sec. 580 (9), to erect and maintain weighing machines and to appoint weighmasters; but I express no opinion as to their right to make the use of them compulsory or to require persons who do not desire to make use of them to pay fees for such compulsory use.

It was argued by Mr. McVeity that the effect of the repeal by 3 & 4 Geo. V. ch. 43 of sec. 582, and the re-enactment of it limiting its operation to townships councils, was that, by sec. 411 (6), any by-law which had been passed by the council of a city, town, or village under the authority of sec. 582, ceased to be operative when that legislation came into force.

Regina v. *Hiscox* (1879), 44 U.C.Q.B. 214, was relied on to support that contention, and Mr. Proctor relied on sec. 16 of the

Interpretation Act to save the by-law. His argument, however, failed to give effect to the provision that by-laws are to continue good and valid only "in so far as they are not inconsistent with the substituted Act or enactment." In this case, if its validity depended on sec. 582 only, the provisions of the by-law imposing fees were inconsistent with the provisions of the substituted Act. See also *Royal Insurance Co.* v. *City of Montreal* (1906), 29 Que. S.C. 161.

It is, however, unnecessary to decide whether the provisions of the by-law as to the imposition of fees ceased to be in force when the authority by virtue of which it was passed, assuming that the only authority was that conferred by sec. 582, was repealed.

In view of the construction which has been given by this Court to the by-law, if there were no other reason for refusing to pronounce the declaratory judgment which is claimed and has been pronounced, the fact that the use by the appellant company of the weighing machines was not compulsory would be a sufficient reason for refusing to pronounce such a judgment.

That the Court ought not, in such a case as this, to pronounce a declaratory judgment, is, I think, clear.

If, as was determined in the former proceeding to which I have referred, the by-law in question did not make it compulsory upon any one to have coal weighed on the city's weighing machines, the declaration sought for was unnecessary for the protection of the Butterworth Company; and, if the by-law did make it compulsory and was in that respect invalid, that defence was open to the company if it should be prosecuted for an infraction of the by-law, and the tribunal by which the complaint would be investigated was the forum appointed by the Legislature to hear and determine the complaint.

If the Butterworth Company is entitled to the declaration claimed, it would follow that, in any action pending in an inferior court or in any proceeding before a magistrate, the defendant might practically oust the jurisdiction of the tribunal seised of the case by obtaining a declaration as to the meaning of a contract that was in question or of the invalidity of an Act or by-law for a violation of the provisions of which the defendant was being proceeded against.

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Barraclough v. *Brown*, [1897] A.C. 615, is a conclusive authority against the company. It was there decided that, where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a court of summary jurisdiction: he can only take proceedings in the latter court.

In *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] 2 K.B. 536, at p. 537, it was held that "a declaration . . . that a person is not liable in an existing or possible action is one which will hardly ever be made, though it is not beyond the power of the Court in a very exceptional case to make such a declaration."

See also the cases as to declaratory judgments referred to in Holmested's Judicature Act, pp. 37, 38, and 39, and those referred to in the Annual Practice, 1919, pp. 422, 423, 424, especially *Grand Junction Waterworks Co.* v. *Hampton Urban District Council*, [1898] 2 Ch. 331, a case not unlike in its circumstances to the case at bar. See also *Attorney-General* v. *Cameron* (1899), 26 A.R. (Ont.), 103.

The claim for an injunction to restrain the enforcement of the by-law and the prosecution of the Butterworth Company for infraction of it properly failed. As I have said, if the by-law was invalid, that defence was open to the company if it should be prosecuted for violating the provisions of the by-law.

I agree with the conclusion of the learned trial Judge that the Corporation of the City of Ottawa is entitled to recover the amount for which it obtained judgment in respect of the fees for weighing.

If I am right in the view I have expressed as to the authority of the council of the corporation to enact the provisions of the by-law which are attacked, independently of the power conferred by sec. 582, that result follows as of course; and, if that view is not the right one, the appellants the Butterworths, having taken advantage of the facilities afforded them for weighing their coal, were properly ordered to pay for the services rendered; and, in the absence of any evidence to the contrary, the fees prescribed by the by-law may well be taken to be a reasonable compensation for the services rendered.

I agree with the statement of the law in Brice on Ultra Vires, 3rd ed., p. 653, that:—

"Corporations cannot be made directly liable in respect of an *ultra vires* engagement, and therefore, if and whilst such engagement remains unexecuted on their part, cannot be made to carry the same into effect; and . . . corporations must always account to the opposite party to any *ultra vires* engagement for any benefits which they may have received from such opposite party in respect of such engagement.

"It seems necessarily to follow . . . that the position of the other party to any *ultra vires* engagement is the exact correlative of that of the corporation."

This statement of the law appears to be not only sound in principle but to be supported by the authorities which are referred to and those which were cited at the bar.

The claim of the appellants the Butterworths for possession of the weighing machines they had leased to the corporation was properly dismissed. The corporation had, at all events, by virtue of the powers conferred upon it by sec. 582, if not otherwise, authority to acquire weighing machines by purchase or lease; and, the term of the leases not having expired, the fact that, as a result of the repeal of the section, the by-law ceased to be operative, if that was the result, is immaterial; for, although the by-law had ceased to be operative, the property in that which had been acquired under the authority of the section was not divested, but remained in the corporation, notwithstanding that the weighing machines could not thereafter be used for the purpose for which they were intended to be used when the leases were taken. If I am right in the view I have expressed as to the powers of the council independently of sec. 582, it is an *â fortiori* case for the dismissal of their claim for possession of the machines.

The claim for damages or an injunction in respect of the discontinuance of the weighing station at the St. Lawrence and Ottawa Railway depot is a somewhat strange one, in view of the contention of the Butterworths that the by-law under the authority of which it was established was invalid; but, in any case, there is no ground upon which the relief claimed can properly be awarded.

The result is that, in my opinion, the appeals of the Butterworths should be dismissed with costs, and the cross-appeal should be allowed with costs, and the judgment in favour of the Butterworths reversed, and that there should be substituted for that

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judgment, judgment dismissing the action. It should, I think, be dismissed without costs: the learned trial Judge, in the exercise of his discretion, dismissed the other action without costs; and I doubt not, had he directed judgment to be entered dismissing both actions of the Butterworths, he would have dismissed without costs the action which, in our opinion, should have been but was not dismissed. *Appeals dismissed; cross-appeal allowed.*

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REX v. GARTSHORE.

British Columbia Supreme Court, Hunter, C.J.B.C. October 25, 1919.

APPEAL (§ III B—77)—SUMMARY CONVICTIONS ACT (B.C.)—FINALITY OF FINDING OF SUPREME COURT—COURT OF APPEAL ACT—DUTY OF JUDGES TO FOLLOW JUDGMENTS OF HIGHEST COURTS.

Where a magistrate on a conviction under the Summary Convictions Act, B.C. stats. 1915, c. 59, has stated a case for the Supreme Court, under s. 92, the finding of the Supreme Court is final. There is no further appeal under the Court of Appeal Act of 1911.

The decisions of the Privy Council and English Court of Appeal are binding on the British Columbia Court of Appeal and on the Judges of the Supreme Court, and it is the duty of the Supreme Court Judges to follow and apply the decisions of these highest Courts of Judicature in preference to those of the British Columbia Court of Appeal where they are in conflict.

Statement.

APPLICATION for a writ of *habeas corpus* to shew cause why the prisoner should not be discharged from custody. Prisoner discharged.

E. P. Davis, K.C., and *Charles Wilson*, K.C., for application: *A. M. Johnson*, K.C., for Crown.

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HUNTER, C.J.B.C.:—This is an application for a writ of *habeas corpus* directed to the jailer of Okalla prison and to shew cause why the applicant should not be discharged from custody.

The defendant had been convicted by a Police Magistrate for the unlawful sale of intoxicating liquor in violation of s. 10 of the Prohibition Act, B.C. stats. 1916, c. 49, and sentenced to six months' imprisonment.

The hearing before the magistrate was concluded on January 22, 1919, and sentence was pronounced on January 30, and the warrant committing the defendant to prison was issued on the same day. He was not, however, lodged in prison pursuant to the warrant, being admitted to bail pending the hearing of a case stated by the magistrate under the provisions of the Summary Convictions Act, B.C. stats. 1915, c. 59, for the opinion of the

Supreme Court on, *inter alia*, the sufficiency of the evidence to warrant the conviction. The case was heard by me on February 7, and, after hearing the argument on behalf of the Crown and the accused, I came to the conclusion that, assuming that the defendant had agreed to sell the liquor in question, there was no evidence to shew that he had actually carried it out, whereupon I set aside the conviction.

The Crown took an appeal from my order to the Court of Appeal, and that Court, having heard argument and reserved judgment, on May 20, 1919, set aside my order and affirmed the conviction, stating it to have been made on January 4, 1919, which, of course, was erroneous, as it took place on January 30.

The case is not yet reported in the official Law Reports, but I have been furnished with copies of the judgments by the official reporter.

It appears that the defendant's counsel at the hearing of the appeal challenged the jurisdiction of the Court to entertain an appeal and wished to reopen the question which was supposed to have been settled by a former decision of the Court in *Rex* v. *Evans* (1916), 23 B.C.R. 128.

The Court (Martin and McPhillips, JJ.A., dissenting), decided to hear the argument and then reaffirmed the existence of the right of appeal. It does not appear that Eberts, J.A., assented to this decision, but it is clear that the other four Judges maintained the right of appeal. They then dealt with the appeal on the merits, and decided (McPhillips and Eberts, JJ.A., dissenting), to reverse my order. Two of the three Judges who reversed my order did not give any reasons for holding that I was wrong. The third, Martin, J.A., did give reasons, but, as it is reasonable to assume in a case concerning the liberty of the subject, that the majority consulted before reversing my order, the inference is that the other two Judges were not prepared to adopt the reasons given by Martin, J.A., or they would have said so. On the other hand, McPhillips, J.A., gave reasons in his oral judgment, stating that he entirely agreed with me. In fact, I do not see how the matter could be put any more clearly than it was when he said:—

> The mere finding of the articles on the premises, without more, constitutes very insufficient evidence of the completed sale. There must be something definite to enable it to be said that the defendant placed those articles there. It may not need to be very cogent evidence, but there would need to be

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some evidence; for instance, that the carter got his instructions for delivery from the defendant, or some evidence connecting the defendant with the selection, appropriation and delivery, but all such evidence is absent.

The result, then, of the appeal was unfavorable to the defendant by a majority of one, and he was taken into custody under the warrant which the magistrate had issued, no fresh warrant having been issued, and taken to the Okalla gaol to serve out the sentence, and now applies for his discharge.

The argument came on to be heard by me on October 15 and 16, Mr. Johnson, Deputy Attorney-General, appearing for the Crown, and Mr. Wilson and Mr. Davis for the applicant, but inasmuch as the matter presented for my consideration appeared to be of some gravity, I reserved judgment, and in the meantime admitted the defendant to bail, the Crown assenting to that course.

The application for *habeas corpus* and for the prisoner's discharge is based on several grounds. One is that the order of the Court of Appeal purported to affirm the conviction alleged to have taken place on January 4, 1919, whereas the conviction in question took place on January 30, and not on the 4th, and therefore was not affected by the order of the Court of Appeal. As to this objection, however, while it is true that one paragraph of the judgment purports to affirm a mythical conviction, another paragraph purports to set aside my order of February 7, so that, assuming the Court had jurisdiction to entertain the appeal, the order, in my opinion, would, nevertheless, have effectually disposed of the matter adversely to the defendant.

A number of objections were also taken to the legality of the warrant under which the defendant was taken into custody, but, as, upon a full examination into these points, it might be found that the net result would be that a fresh warrant could lawfully be issued by the magistrate, a discharge based on any such objection might turn out to be illusory, in which case the Court would then no doubt be confronted with the necessity of passing on the main question which has been raised, and which is that the Court of Appeal had no jurisdiction to entertain an appeal, and if that is the case the defendant has been unlawfully imprisoned.

Now, of course, a Judge when called on to say that an order of a higher Court is void, ought to consider the matter carefully before taking that course. I at first thought that it might be possible for the defendant to take an appeal to the Supreme Court

of Canada, but I find that the door of that Court has been closed by its decision in *Re McNutt* (1912), 10 D.L.R. 834, 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, in which it was held by a majority of the Court that no appeal lies to that Court in a case of this kind. It would also be open to the defendant to bring an action for false imprisonment, and in that way have the validity of the action of the Court of Appeal passed on by the Supreme Court of Canada, but in the meantime he would have to serve out the alleged unlawful sentence, and any damages which he might recover would be a very inadequate remedy, and in any event the object of the *habeas corpus* proceedings, which is to obtain speedy relief from unlawful imprisonment, would be frustrated by such delay. I think, therefore, that I am bound to consider the point and give my opinion on it.

In order that the nature of the question may be easily understood it is first of all necessary to set forth the legislation concerning the matter.

By the Court of Appeal Act, R.S.B.C. 1911, c. 51, s. 6, sub-s. 4 (a), it was provided that an appeal should lie to the Court of Appeal from the decision of the Supreme Court or a Judge thereof in a case stated under the Summary Convictions Act.

By the Summary Convictions Act, R.S.B.C. 1911, c. 218, s. 92, it was provided:—

> When a case is transmitted under this Act, the Supreme Court shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the Justice or Justices, with the opinion of the Court thereon or may make such other order in relation to the matter or may make such order as to costs, as to the Court may seem fit; and all such orders shall be final and conclusive on all parties.

By the Summary Convictions Act, B.C. Stats. 1915, c. 59 s. 105, the last-mentioned Act was repealed, s. 92 reappearing with some variations as follows:—

> 1. The Supreme Court to which a case is transmitted shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of which the case has been stated, or remit the matter to the Justice with the opinion of the Court thereon, or may make such other order in relation to the matter, and such order as to costs as to the Court seems fit; and all such orders shall be final and conclusive on all parties.

And the question was and is as to whether, this being the last legislative declaration on the subject, it did not abolish the right

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of appeal which had been allowed by the Court of Appeal Act, 1911, as above stated.

At the outset I think it is unnecessary to do more than state two propositions that are almost axiomatic in their nature. The first is that no appellate Court can usurp a jurisdiction to interfere with the judgment of a competent Court by merely declaring that it has the jurisdiction to do so, and the second is that the right of appeal is not a mere matter of procedure but a substantive right which can be created only by legislative authority and cannot be created by the inferior or superior tribunal or by both combined —*Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704, 11 E.R. 1200—and, of course, when granted, can be abolished only by legislative authority. As I have said, the jurisdiction of the Court of Appeal to hear the appeal from my order was upheld by the Court, or at any rate by four of the Judges, and they reaffirmed the reasons given in *Rex* v. *Evans* (1916), 23 B.C.R. 128.

I asked the Deputy Attorney-General, if the matter were *res integra*, whether he would be prepared to maintain the jurisdiction of the Court of Appeal, and, with his usual candour, he admitted that he could not, and that he could not see any escape from the conclusion that s. 92 of the Summary Convictions Act, B.C. Stats. 1915, c. 59, being the Act under which the conviction took place, cut off any right of appeal from my order to the Court of Appeal.

Notwithstanding that enactment, the majority of the Court held in the present case that the right of appeal still existed under the provisions already recited of the Court of Appeal Act, R.S.B.C. 1911, c. 51. In the *Evans* case the Court held that they had to deal with a conflict between two of the revised statutes, and that, inasmuch as the original Court of Appeal Act was passed later than the original Summary Convictions Act, the latter had to give way, but in *Gartshore's* case they held that the passage of the new Summary Convictions Act in 1915 made no change in the situation, although passed long after the Court of Appeal Act in 1911. They undoubtedly professed to apply the principle that where two enactments conflict the later legislation must prevail, a principle which cannot be disputed, but, with great deference to the Judges of the Court of Appeal, I think they misdirected themselves in endeavoring to apply the principle to the legislation in

question by inquiring into the priorities of the statutes which had been repealed.

In *Boston* v. *Lelièvre* (1870), L.R. 3 P.C. 157, Westbury, L.J., in delivering the judgment of the Privy Council, which, of course, binds both the Court of Appeal and myself, said at p. 162, in dealing with a converse case of a Court of Appeal refusing to hear an appeal on the ground that it had no jurisdiction:—

> The question is governed entirely by the language of the Colonial statutes. The Court of Appeal in Lower Canada is the creation of the statute and the subjects upon which appeal lies to that Court are defined with reasonable clearness. The jurisdiction of the Court existed before the consolidated statutes, but the consolidated statutes annulled all the antecedent statutes upon the subject. The consolidated statutes may be treated as one great Act, and their Lordships think it would not be wrong to take the several chapters as being enactments which are to be construed collectively, and with reference to one another, just as if they had been sections of one statute, instead of being separate Acts.

And in *B.C. Electric Railway Co.* v. *Stewart* (1913), 14 D.L.R. 8, [1913] A.C. 816, which was an appeal from the British Columbia Court of Appeal, Atkinson, L.J., says at p. 827:—

> The Consolidated Railway Companies Act, 1896, and the Municipal Clauses Act, 1896, were passed in the same session of the British Columbia Legislature, but the latter was c. 37 of the statutes of that year and the former c. 55, and presumably later in date. If there is a repugnancy between them, the later statute must prevail: *Moore* v. *Robinson* (1831), 2 B. & Ad. 817, at pp. 821, 822, 109 E.R. 1346.

In the *Evans* case, then, it is clear that the method of dealing with the statutes laid down by the Privy Council would have led to the opposite decision, and I must assume that the Court, if these decisions had been brought to their attention, would have decided that the right of appeal no longer existed. But it is not necessary for me to say anything more about the *Evans* case, which, in the view of the Court of Appeal, raised the question of a conflict between two statutes contained in the same consolidation, for in *Gartshore's* case, the case was not that of a conflict between two statutes contained in the same revision, but between the Court of Appeal Act of 1911 and the Summary Convictions Act, 1915, and therefore the decision in the *Evans* case, whether right or wrong, did not necessarily bind the Court in the present case.

On the argument in the present case, the case of *Rex* v. *Sit Quin* (1918), 25 B.C.R. 362, was referred to. In that case the Court of Appeal held that it had jurisdiction to entertain an appeal from a decision of the County Court on an appeal from Justices of

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the Peace, under the Summary Convictions Act. With regard to the objection which had been raised to its jurisdiction, the Chief Justice says (Martin and McPhillips, JJ.A., concurring):—

Then as to the preliminary objections which we reserved, I see no reason for changing the opinion which I held in *Rex* v. *Evans*, 23 B.C.R. 128. I do not think the subsequent re-enactment or consolidation of the Summary Convictions Act affects the principles which we laid down in that case.

But the Summary Convictions Act, 1915, c. 59, does not declare the judgment of the County Court to be final and conclusive, as it does the judgment of the Supreme Court, so that the case of *Rex* v. *Sit Quin*, *supra*, was not necessarily governed by the case of *Rex* v. *Evans*, *supra*, nor did it necessarily govern this case, and whether it is right or wrong it does not affect this case, and therefore it is unnecessary for me to consider it further.

So that the position is that the Court of Appeal, on the hearing of the appeal in the present case, were not bound by their decision in the *Evans* case, as the conflict there was between two coeval statutes, they evidently considering that although the Summary Convictions Act of 1915 was passed before the hearing of the *Evans* appeal, which had been taken before its passage, it had no bearing on the question, as they made no allusion to it. Nor were they bound by their ruling in the *Sit Quin* case, as that was the case of an appeal from a County Court and not from a Supreme Court. Nevertheless, they considered that their decision in the *Evans* case governed both the *Sit Quin* case and this case. The Court of Appeal therefore arrived at this result, that although the Summary Convictions Act of 1915 repealed the former Summary Convictions Act of 1911, R.S.B.C., c. 218, and undoubtedly, by s. 92, gave the defendant the right of appeal to the Supreme Court from the decision of the magistrate and by the same section declared the decision of the Supreme Court to be final and conclusive on all parties, it was not, however, effectual to extinguish the right of appeal which had been provided in another statute of 1911.

With the greatest deference to the learned Judges who so held, I think that they could not eliminate the last declaration of the Legislature in this way, and that the decision is in direct violation of the principles laid down by the Privy Council in *Boston* v. *Lelièvre*, L.R. 3 P.C. 157, and in *B.C. Electric Railway Co.* v. *Stewart*, 14 D.L.R. 8, [1913] A.C. 816, as already stated. It

may be suggested, although the Deputy Attorney-General did not see fit to suggest it, that the phrase in the statute "final and conclusive on all parties" was not to be taken at its face value, but should be understood as subject to an appeal to the Court of Appeal, and the Judges have, in fact, read into the statute some such expression as "subject to the right of appeal allowed by s. 6 of the Court of Appeal Act, 1911;" but this mode of construction has often been condemned by Courts of the highest authority.

In *Cushing and DuPuy* (1880), 5 App. Cas. 409, the Privy Council had to construe a Dominion statute which enacted that "the judgment of the Court to which an appeal under this section can be made shall be final." It was argued that this did not necessarily prevent an appeal as of right to the Crown, but Sir Montague Smith, in delivering judgment, said at p. 416:—

> Then it was contended that if the Parliament of Canada had the power, it did not intend to abolish the right of appeal to the Crown. It was said that the word "final" would be satisfied by holding that it prohibited an appeal to the Supreme Court of Canada, established by the Dominion Act of the 38 Vict., c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of Canada intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench to the Queen to remain. Besides the word "final" has been before used in colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty (see the Lower Canada Stat., 34 Geo. 3, c. 30). Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the Judges below were right in holding that they had no power to grant leave to appeal.

In *Lock* v. *Queensland Investment and Land Co.*, [1896] A.C. 461, Lord Halsbury, L.C., says, at p. 466:—

> Of course, if you can introduce into the language which the Legislature has used other language which would have a different effect (and that has been practically the argument addressed to your Lordships), you may turn any statute or any section of any statute into an absurdity. But Table A of the 7th section expressly says that "the directors may, if they think fit," make such an arrangement as has been here made; and every effort to turn those plain words into something else has resulted, on the part of the counsel who argued it, in an admission that, without the addition of some words, they cannot get into that 7th section that which their argument requires.

In *Salomon* v. *Salomon and Co.*, [1897] A.C. 22, Lord Halsbury, L.C., at p. 34, said that he "must decline to insert into that Act of Parliament limitations which are not to be found there."

In *Bank of New South Wales* v. *Piper*, [1897] A.C. 383, Sir Richard Couch, in delivering judgment, says at p. 388:—

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It is to be observed that in the first part of s. 7, which relates to the sale or delivery of wool that is under a lien, the words "with a view to defraud" are introduced as an essential quality of the offence; but in the part of the section which relates to the sale and disposition of sheep or cattle that have been mortgaged these words are omitted. This cannot be considered to be an unintentional omission unless it is shewn to be so by the context of the section. Their Lordships do not see any ground for construing the section as if the words "with a view to defraud" had been inserted in this part of it. They cannot alter the offence created by the statute by the introduction of words which the Legislature has omitted.

In *Regina* v. *Hunt* (1856), 6 El. & Bl. 408, 119 E.R. 918, Erle, J., said, at 413:—

I had been for some time in hopes that I might find language to express this meaning, but it is impossible to do so without inserting words in the section; for it is enacted that his "decision on the reasonableness as well as the legality of the charges shall be final," and not that his decision on the reasonableness shall be made in the same manner as on the legality of the charges. Neither can I read "final" as meaning "final unless appealed against." Probably that was the object of the Legislature; but it cannot be done without reforming the words of the statute; and therefore I agree that this rule must be discharged.

The decisions of the Courts of highest authority therefore make it clear that the Court erred in coming to the conclusion that the enactment that the decision of the Supreme Court was to be final and conclusive on all parties was to be considered as subject to the right of appeal, although the statute itself provides no such limitation. These decisions are, of course, binding on both the Court of Appeal and myself. In fact, the Privy Council declared in *Trimble* v. *Hill* (1879), 5 App. Cas. 342, that it was the duty of the Colonial Court of Appeal to follow the decision of the English Court of Appeal in preference to its own former decision where they came in conflict, which admonition has been followed by the Court of Appeal for Ontario, *e.g.*, *Mason* v. *Johnson* (1893), 20 A.R. (Ont.) 412. See also *Hollender* v. *Ffoulkes* (1894), 26 O.R. 61. *A fortiori* it is my duty to follow and apply the decisions of the highest Courts of judicature in preference to those of the local Court of Appeal where they are in conflict.

It is not enough, however, merely to say that the Court had no jurisdiction. An order of a Court made without jurisdiction may be void only if and when it is set aside and declared void by a higher tribunal, as, for instance, where the jurisdiction was conditional on the existence of certain facts or on certain proceedings being taken. Decisions made when the conditions necessary

to the existence of jurisdiction did not exist are not necessarily void, especially where the complaining party might have brought the true position to the attention of the Court and failed to do so. But there is a vital distinction between a case where there is a limited or conditional jurisdiction to do a judicial act and the case where, as in this case, there is no jurisdiction to do it under any circumstances. In the latter case it is void in the absolute sense and is just as inoperative for any purpose as if it had never been pronounced. It can establish no right or impose any obligation. It affords no protection to anyone who acts under it. It is, in short, a nullity and, as Boyd, C., said in *McLeod* v. *Noble* (1897), 28 O.R. 528, of an injunction which had been issued out of the High Court of Justice with no jurisdiction to do so, "a thing of naught which cannot be disobeyed."

Before taking the step which I am of the opinion I am forced to take, I may say that I have also considered whether or not I should adjourn the matter in order to enable the defendant, with the consent of the Crown, to make another application to the Court of Appeal to reconsider its decision as to its jurisdiction, or, if that were impracticable, then by way of Order of Reference.

But apart from the delay which that would involve, one difficulty is that the Court affirmed its jurisdiction on at least two if not three different occasions, although, as already pointed out, the former cases did not conclude the Court in the present case. The other difficulty is that two of the Judges have already expressed themselves in the present case as opposed to the reconsideration of the question. In fact, Martin, J.A., said in objecting to rehearing the question of the Court's jurisdiction in the present case:—

> I, for one, do not propose to say that I sit here at the beginning of this term and make a ruling which sends one man to the penitentiary and later on in this term or the first of next term to make another which frees another man guilty of exactly the same offence from the same consequences. I give on these questions one ruling once and for all.

And in his judgment referred to *Velazquez, Ltd.* v. *Commissioners of Inland Revenue*, [1914] 3 K.B. 458. With all deference, I am unable to see the justice of sending more men to prison because one man has already been wrongly sent there, nor am I able to see the relevancy of the case cited. It was a taxation case, and examination of it shews that the ground on which the English

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Court of Appeal refused to overrule their former decision was that that decision had been brought to the attention of the House of Lords on the argument in a similar case and that, as that tribunal did not disapprove of it, it was not for them to unsettle the law.

As a matter of fact, the highest tribunals do not hesitate to overrule their former decisions and those of co-ordinate Courts, whenever they consider it right, and to shew that that is so it may not be amiss to cite the following instances:—

In a case involving the question of the legislative power to imprison for contempt, the Privy Council in *Kielley* v. *Carson* (1842), 4 Moo. P.C.C. 63, 13 E.R. 225, overrule *Beaumont and Barrett* (1836), 1 Moo. P.C.C. 59, 12 E.R. 733, Parke, B., delivering both judgments.

In *Municipal Council of Sidney* v. *Bourke*, [1895] A.C. 433, it overruled *Bathurst* v. *MacPherson* (1879), 4 App. Cas. 256, on the question of the distinction between misfeasance and non-feasance.

The United States Supreme Court has frequently overruled former decisions of its own, as, for instance, *Leisy* v. *Hardin* (1889), 135 U.S. 100, overruled *Pierce* v. *New Hampshire* (1847), 5 Howard 504, although that decision was the result of full consideration and was the law for forty years. In *Tilghman* v. *Proctor* (1880), 102 U.S. 707, it overruled *Mitchell* v. *Tilghman* (1873), 19 Wall 287, although the validity of the same patent was in issue in both suits and the patentee was a party to both. In *Kilbourn* v. *Thompson* (1880), 103 U.S. 168, they overruled *Anderson* v. *Dunn* (1821), 6 Wheaton 204, on the question of the authority of Congress to commit for contempt. In the English Court of Appeal in *Re Dewhirst's Trusts* (1886), 33 Ch. D. 416, Cotton, Lindley and Lopes, L.JJ., overruled the decision of a former Court of Appeal consisting of James, Baggallay and Brett, L.JJ., in *Re Dalgleish* (1876), 4 Ch. D. 143, which had been followed by Jessel, M.R., in *Re Crowe's Trusts* (1880), 14 Ch. D. 304. In *Fowler* v. *Barstow* (1881), 20 Ch. D. 240, they overruled their former decision in *Great Australian Gold Mining Co.* v. *Martin* (1876), 5 Ch. D. 1, on one point. In *Re Hallett's Estate* (1879), 13 Ch. D. 696, they overruled the decision of the Court in *Pennell* v. *Deffell* (1853), 4 De G. M. & G. 372, 43 E.R. 551, on one point. In *The Bernina* (1886), 12 P.D. 58, they overruled the decision of

Thorogood v. *Bryan* (1849), 8 C.B. 115. The Divisional Court in *Bowen* v. *Anderson*, [1894] 1 Q.B. 164, overruled its former decision in *Sandford* v. *Clarke* (1888), 21 Q.B.D. 398, on a question of law. In *Fortescue* v. *Vestry of St. Matthew*, [1891] 2 Q.B. 170, they overruled *Vestry of St. Mary* v. *Goodman* (1889), 24 Q.B.D. 154. And on the hearing of the appeal the Chief Justice said:

"We have on one or two occasions overruled decisions of the full Court. In *Re Tiderington* (1912), 5 D.L.R. 138, 17 B.C.R. 81; in *Re Rahim* (1912), 4 D.L.R. 701, 17 B.C.R. 276, in which the Court, consisting of Irving, Martin and Galliher, JJ.A., and myself, overruled the decision of the full Court in *Ikezoya* v. *C.P.R.* (1907), 12 B.C.R. 454, Irving, J.A., dissenting."

Of course, in considering whether a former decision should be overruled, the Court has always to decide whether the principle of *stare decisis* or that error should be perpetuated is to prevail, and the principle clearly is that the Court should in each case consider whether it would be less mischievous to adhere to the error and leave it to be corrected by some higher authority or to correct the error. I venture to think that it is less mischievous to refrain from sending men to prison without the authority of law than it is to keep on doing so out of deference to an erroneous view of the law.

To sum up the matter, in view of what has taken place, I do not think that I can reasonably require the defendant to make another application to the Court of Appeal to reconsider its decision on the question of its jurisdiction, and therefore I have no alternative but to express my own opinion as to the legality of his imprisonment, and, indeed, I am required to do so on an application for a writ of *habeas corpus*, as pointed out by the House of Lords in *Cox* v. *Hakes* (1890), 15 App. Cas. 506.

The only conclusion I can come to is that the decision of the Court of Appeal in the present case, by which it assumed to set aside my order, was the result of a series of misconceptions and must be regarded as having been given *per incuriam*, especially as the principles laid down by the Privy Council in relation to the interpretation of the statutes were evidently not brought to their attention. If that is so, there is high authority for saying that a decision given *per incuriam* does not bind any Court. In *Sale* v. *Phillips*, [1894] 1 Q.B. 349, the Divisional Court overruled its

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own previous decision in *Lewis* v. *Arnold* (1875), L.R. 10 Q.B. 245, and Lord Coleridge, C.J., in delivering judgment, says at p. 350:—

It is clear that the Justices were not bound by *Lewis* v. *Arnold*. That case was decided under a misapprehension. The Judges were not informed that an incorporated statute contained a definition of "owner" which made the landlord liable.

But even assuming that the judgment was not given *per incuriam*, it is undeniably in the teeth of the statute of 1915, which declared the decision of the Supreme Court to be final and conclusive, which statute is of paramount authority to the decision of any Court.

For these reasons I am of the opinion that it is my duty to order the prisoner's discharge. *Order accordingly.*

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THE KING v. BANK OF MONTREAL.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 19, 1919.

STATUTES (§ 11 A—96)—CONSTRUCTION—RULE OF—INTENTION OF LEGISLATURE—DUTY OF COURT.

The rule by which the Courts are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice, and if it should, so to vary and modify them as to avoid that which certainly could not have been the intention of the Legislature. Where the Legislature has used in the enactment in question language so free from ambiguity and so clear and explicit as to leave no doubt as to its meaning, the Court must construe the enactment according to its expressed intention.

Held, that under the Act respecting public streets in the city of Saint John (1917, 8 Geo. V. c. 48, N.B.) the city had jurisdiction to pass a by-law forbidding the construction or maintenance of any surface opening in any sidewalk or the use for vaults, . . . of the space beneath the sidewalks . . . unless a permit was first obtained, and vesting the land under the sidewalks in the corporation, notwithstanding that the Act deprived the owner of land vested in it before the passing of the Act.

Statement.

APPLICATION by defendant for review of judgment of the Police Magistrate of the City of St. John, referred by the Chief Justice to the Appellate Division. Referred back to the Chief Justice to make order confirming the judgment of the Police Magistrate.

H. A. Powell, K.C., for defendant; *J. B. M. Baxter*, K.C., *contra*.

Hazen, C.J.

HAZEN, C.J. (oral):—I concur in the conclusion that has been reached by my brother White. I do so, however, very reluctantly and with some hesitation, as I believe the result of the statute will be to do a certain amount of injustice to the defendant and others

who for years past have been enjoying rights and privileges which they had a perfect right to enjoy, and who will have those rights and privileges taken away from them by the Act of the Legislature which is now under consideration. For these reasons I have come to the conclusion I have, reluctantly; but in view of the very clear and explicit language of the statute—language which I think is entirely free from any ambiguity whatever—I can see no possible reason to doubt the intention of the Legislature in respect to the matter. I have given every consideration to the very able argument made by Mr. Powell on behalf of the defendant, and to the elaborate brief which he filed in connection with the case, and was to some extent impressed by his contention that where an Act of the Legislature, in the opinion of the Court, did an injustice to anybody, then the Court, irrespective of its language, might be justified in giving to that Act a meaning that would prevent such injustice being done. I concur, however, with my brother White that such a construction could only be given when there is some possible doubt with regard to the intention of the Act, and looking at the language of this Act I can see no doubt whatever with regard to its meaning. As I said before, it is clear and explicit and free from any ambiguity. Therefore I think there can be no doubt whatever as to what the intention of the Legislature was, and that being so, I do not think we should search for canons of construction in order to define what the meaning of the statute is, as its meaning is absolutely clear without any canons of construction being applied.

I fully appreciate the fact that it is not the function of the Court to criticise legislation. The function of a Court is to give judicial meaning to any legislation that may be passed, and in case of any doubt as to the intention of the Legislature, to decide what the meaning of the statute may be; but it seems to me that in this case it would be only just and fair, having regard to the importance of the rights taken away by this legislation, that some amendment might in the near future be made to the Act so as to protect those persons who for years enjoyed the privileges which are now taken away, from being unduly interfered with.

While I entertain this opinion, I cannot, in view of the clear words of the statute, come to any other conclusion than that the intention of the Legislature was expressed therein, and therefore I concur in the conclusion at which my brother White has arrived.

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WHITE, J.:—This matter comes before us by way of reference to the Court by the Chief Justice of an application made to him by the Bank of Montreal, defendant below, for review of a judgment of the Police Magistrate of the City of St. John, whereby the said defendant was convicted of an offence charged in the information and stated in the conviction in the words following, viz:—

That the Bank of Montreal on September 1, 1918, did unlawfully occupy a portion of the street under the sidewalk and within the sidewalk lines on the south side of King Street in the City of St. John without having first obtained a permit so to do, contrary to the ordinance and by-law of the City of St. John, entitled A Law Respecting the use of Sidewalks within the said City of St. John.

On the hearing before the Police Magistrate the following facts were proven or admitted.

That the Bank of Montreal has for a number of years owned and occupied a building on the south side of King St. at the corner formed by the junction of that street with Prince William St.

That there is a vault 75 feet 1 inch measured along the street, 10 feet 4 inches wide, and in depth of more than 5 or 6 feet, constructed under the sidewalk on the south side of King St. in front of and abutting upon and connected with the said building. This vault was constructed some years ago (the exact date is not shewn). At the time of the passage of said Act, 8 George V. 1917, c. 48, and for a number of years previously, this vault was in the occupation of the bank, who claim to own the same. I infer, however, from what was said by counsel in the course of the argument, that apart from the presumption of ownership which arises from occupation, there was no proof furnished the magistrate that the bank had had such occupation of the vault in question as would give it a title by adverse possession, or that it had any title by deed to the land on which this vault rests other than such title if any as it would acquire by deed to it of the land it occupies abutting on the street. I say such title *if any* because the city claims that by virtue of its charter all the streets in what constituted the City of St. John prior to its union with the Town of Portland, together with all the land under such streets, were vested in the said city as the owner thereof; and that neither the bank, nor anyone under whom it claims, has ever acquired from

the city a title by deed or grant to the land occupied by the vault referred to. For the purposes of the present argument, however, it must I think be assumed that at the time of the passage of the Act, 8 George V. 1917, c. 48, the vault in question belonged to the Bank of Montreal.

The defendant was convicted, and thereupon applied to the Chief Justice for a review of the conviction, upon the ground that the by-law under which the conviction was made is invalid for reasons which are thus set forth in the defendant's factum:—

(A) It is admitted that the rights of the city to maintain the streets at the time of the passing of the Act were paramount and that these rights involved the control and user of the surface of the street. Beside this it has as incidental to the right of maintenance, so far as was reasonably necessary, the right to prevent any user of the soil under the surface which might be likely to injure or imperil the streets.

(B) It is a reasonably possible construction of the Act to confine its scope to the ends and purposes of the street and that the statute vests in the city the land under the surface of the street "only so far as it is ordinarily used in the way that streets are used."

(C) If the contention (B) is incorrect and the literal words of the statute confer upon the city the general right of property in the land under the street, then the bank contends that in view of the confiscation of the bank's valuable vault which the literal interpretation would work, the general words of the 2nd section should be restricted so that the bank's right in the vault at least would be preserved—the bank's right to the vault being of course subject to the dominant right of the city to interfere with it so far as might be necessary for the maintenance and improvement of the street.

(D) The bank contends that the 3rd section of the Act should be construed (1) In respect to the openings, that it would apply only to openings made after the passing of the statute and that the words "maintenance" and "use" to which it refers are the "maintenance" and "use" of such new openings. (2) So that the use of the lands beneath the surface of the street referred to in this section means only uses which may be initiated after the passing of the Act.

(E) The bank also claims that the by-laws of the city are not warranted by the Act of 1917.

The by-law, the validity of which is here in question, was passed by the city on September 22, 1917. The relevant sections thereof are as follows:—

(1) No person shall be allowed to construct or maintain any surface opening in any sidewalk or to occupy or use for vaults, coal-holes, man-holes, or other purposes the space beneath the sidewalks included within the sidewalk lines of any street within the City of St. John, unless a permit therefor shall have been first obtained from the Commissioner of Public Works, such permit to be issued only upon the condition that the person receiving the same shall as compensation for the privileges granted by said permit enter into a written agreement with the city, guaranteeing to pay an annual rental

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therefor, according to the scale of rates hereinafter set forth, and to open up and put back the sidewalk, and do all construction work subject to the directions and supervision of the road engineer or such other person as the Commissioner of Public Works may designate. Provided that 15 square feet shall be the maximum area of surface openings allowable, and in no case shall it be more than 5 feet 6 inches long, except in the case of prism sidewalk lights, when a greater area may be allowed in the discretion of the said Commissioner.

(6) The Commissioner of Public Works may order any opening which may have been made in the sidewalk for any purpose before the passing of this law to be closed up, and any vault or other structure to be removed forthwith unless the owner or occupant of the abutting property in front of which any such opening has been made, as aforesaid, enter into agreement as is hereinbefore in this law provided.

(7) There shall be paid to the City of St. John, as compensation for the privilege of opening the sidewalk and constructing underneath the same any vaults, coal-holes, area lights or other appliances, the following rentals, in each calendar year, within thirty days after demand thereof, namely:—

For openings which are eighteen (18) inches square or less, an annual rental or charge of two dollars.

For man-holes or other sidewalk openings larger than 18 inches square, an additional annual rental or charge of fifty cents per square foot.

For any vault or area occupied beneath the sidewalk or street level, an annual rental or charge of fifteen cents per square foot average horizontal measurement over and above the charge for any sidewalk opening which may exist.

Openings for prism sidewalk lights that are permanent structures to be used for lighting purposes only shall not be subject to charge.

Openings located at the walls of buildings, existing at the time of this law coming into force, and leading in each case to a sloping way or slide not larger than the opening, used only for fuel, ventilation or light, shall not be subject to charge, but shall be subject to all other provisions of this law.

Underground space where it is only a sloping way or slide for fuel, ventilation or light, moderate in size, not larger than the sidewalk opening, and located at the wall of the building, shall not be subject to charge.

The statute upon which the city relied as giving it the jurisdiction to enact said by-law is, as I think I have already stated, Act 8 George V. 1917, c. 48. As this Act is short it will be convenient I think to quote it here in full. It reads as follows:—

An Act respecting Public Streets in the City of Saint John. Be it enacted by the Lieutenant-Governor and Legislative Assembly, as follows:—

1. In this Act "Public Street" means any street, highway or square which is public. "City" means the City of Saint John.

2. The fee simple in all land over or upon which any public street in the city shall have been or hereafter may be laid out or used, is hereby declared to be vested in the said city.

3. The city, from time to time, may make by-laws regulating the making, maintenance and use of openings through the surface of public streets by the abutting owner, his tenant, or other persons, and the use by him or them of land beneath the surface thereof; may impose charges for such opening or use,

may vary, if it shall see fit so to do, such charge according to the locality in which such opening or use shall be made; may make provision for the closing of any such openings, and may enforce such by-laws by fine or by imprisonment in default of payment of such fine.

The defendant's counsel in a very able and exhaustive factum has cited a large number of cases wherein the Courts have given to certain statutes which they were called upon to construe a meaning which the language of the statute if given its strictly grammatical and primary meaning would not seem to have justified. This the Courts have done by applying, where necessary, certain settled canons of construction which experience has proven to be of value in the interpretation of doubtful or ambiguous statutory provisions; such, for example, is the rule that an Act is not to be given a retrospective operation so as to interfere with vested rights unless the intention of the Legislature that it should do so is clearly and unequivocally expressed in the statute. That is a canon of construction which the defendant's counsel argues we are bound to apply in considering the statute 8 George V., c. 48, here in question. What has been sometimes termed the Golden Rule for the interpretation of statutes is also referred to and relied upon by the defendant as requiring us to give the words of the Act before us the limited construction for which he contends. That rule is thus stated by Parke, B., in *Perry* v. *Skinner* (1837), 2 M. & W. 471, at p. 476, 150 E.R. 843 at 845:—

> The rule by which we are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the Legislature should be done.

The defendant's counsel also quotes and relies upon the rule as laid down by Burton, J., in *Warburton* v. *Loveland* (1828), 1 Hud. & B. 623, which is in substance the same as that laid down by Parke, B., although expressed in somewhat different phraseology. He also quoted and very strongly pressed upon our attention on the argument the canon of construction as first stated in *Stradling* v. *Morgan*, Plowd. 198b, and quoted with approval by Halsbury, L.C., in *Cox* v. *Hakes* (1890), 15 App. Cas. 506, at p. 518. This rule reads as follows:—

> From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from

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doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, *which expositions have always been founded on the intent of the Legislature*, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion. See *Stradling* v. *Morgan*, Plowd. at p. 205a.

But all rules of construction are intended to enable the Court to get at the real intention of the Legislature and are valuable only in proportion as they accomplish that end. Where the Legislature itself has used in the enactment in question language so free from ambiguity and so clear and explicit as to leave no doubt as to its meaning, rules of construction become valueless. In *Slattery* v. *Naylor* (1888), 13 App. Cas. 446, it was,

Held, that a by-law made in pursuance of s. 153 of the Municipalities Act, 1867 (Eng.), empowering municipal councils to make by-laws for regulating the interment of the dead is not *ultra vires*, by reason of its prohibiting interment altogether in a particular cemetery and thereby destroying the private property of the owners of burial places therein.

Lord Hobhouse delivered the judgment of their Lordships. In the course of the judgment, having stated that the first of three objections taken to the by-law was that it was *ultra vires* because it destroys private property, he uses the language following, at p. 449:—

In support of the first objection, their Lordships have been referred to cases in which Acts of the Legislature would, according to their full literal meaning, operate to take away private property without compensation; and in which Courts of Justice have, on account of the extreme improbability that the Legislature should have intended such a thing, sought for some secondary meaning to satisfy its expressions such as was the case of *Western Counties R. Co.* v. *Windsor & Annapolis R. Co.* (1881), 7 App. Cas. 178, before this Board. *But a statute cannot be so construed if it shews an intention to override the private rights in question.* (The italics of course are mine.)

The cases cited by the counsel in his factum are so numerous that it would not be practicable within the limits of this judgment to review them all. I shall have occasion to refer to some of them; but it is sufficient for the present to say that in no case cited has the Court gone so far as to hold, that where the language of an enactment is so clear and explicit as to leave no possible doubt as to the intention of the Legislature, the Court can refuse to give full effect to such intention merely because it may deem the

enactment unjust or objectionable upon other grounds, provided of course it is within the jurisdiction of the Legislature enacting it.

But inasmuch as the defendant rests his contention as to the true interpretation to be given to the Act in question so largely, if not entirely, upon what he refers to as the grave and shocking injustice which would be done his client, and other abutting owners, by giving to the Act the construction contended for by the city, I think it well to refer to a few considerations which should be borne in mind in attempting to estimate the character and extent of such alleged injustice.

In the first place, in considering the defendant's claim, that the legislation in question, if it be held to vest in the city, without compensation, the fee simple in all lands under the surface of the streets, will do a more grievous injustice to anyone who, like the defendant, owned at the time the Act was enacted, a vault or other subterranean structure built on his land under the sidewalk, than would result to abutting owners from the loss of their land situate under the surface of the street but not occupied by any vault or other underground structure, we should not overlook the fact, that while the owner of such vault or other underground structure is deprived by the Act of the ownership of the land upon which such structure rests, the statute makes provision for his obtaining from the city a permit under which he may have the continued use of such structure. It is true he must agree to pay a rental as a condition to the obtaining of such permit, but the charge or rental which he must undertake to pay is neither based upon, nor in any way affected by, the fact that such underground structure is in existence. The rental to be paid in order to obtain a permit must vary, if at all, according to locality only. The defendant, therefore, in order to obtain the permit required to give him continued use of his vault, pays no more for it than would the owner of an adjoining lot fronting on the street have to pay for a permit to use land on which he proposed to build a vault. Moreover, cases are easily conceivable, and very likely to exist, where to deprive the abutting owner of his right to build a vault, or other structure, under the sidewalk fronting his lot, would cause such owner more serious loss than that sustained by the defendant in being deprived of the land on which its vault rests. In other words, the injustice done by the statute in depriving

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without compensation an abutting owner of his land under the sidewalk, is the same in character whether the land so taken has a vault thereon or not; while the actual money loss sustained from such taking is not necessarily greater in the one case than in the other.

Another consideration which I think it is reasonable to suppose the Legislature probably had in mind in passing this statute is this—that if every owner whose land is taken were to be compensated therefor, the result would be that while the owner received compensation on the one hand, on the other he would be compelled to pay, in taxation necessary to furnish the fund from which compensation could be made, a sum which, in any event, must be considerable, and in many cases would exceed the compensation received.

I may add that the counsel for the defendant argued that his client, having at the time of the passage of the Act built the vault in question, or bought or otherwise acquired it from its predecessor in title, possessed such a vested interest in the vault and the soil it rests on, that even if we were satisfied the Legislature intended to vest in the city, in fee simple, unoccupied land of abutting owners beneath the surface of the streets, we should hold that it did not intend to deprive his client of its vault because the bank's interest therein had vested at the time the Act passed. But is not the right which an abutting owner possessed to land under the sidewalk, which land he had, prior to the statute, bought and paid for, equally a vested right?

I have referred to the foregoing considerations not as establishing that the statute in question, if construed according to what I think is its obvious meaning, will not work, or at least may not work, injustice in some instances; but I mention them as shewing that such injustice is not of that gross and revolting nature that we are bound to believe, that notwithstanding the clear and explicit language the Legislature has employed in the Act to express its meaning, it could not really have meant what it said. If the Legislature intended beyond any question to deprive abutting owners of all right and title to all land under the surface of the street, and to make the city the owner thereof in fee simple, how could it possibly have used language to express such intention more clear and explicit than that which is employed in s. 2:—

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The fee simple in all land over and upon which any public street in the city shall have been or hereafter may be laid out or used, is hereby declared to be vested in the said city.

Compare the language of this s. 2 with that used in s. 149 of the English statute, 38-39 Vict., the Public Health Act, which the Court of Appeal was called upon to construe in *Coverdale* v. *Charlton* (1878), 4 Q.B.D. 104, a case relied upon by the defendant as governing the one before us. Part of this s. 149 reads as follows:—

All streets being or which at any time become public highways reparable by the inhabitants at large within any urban district, and the *pavings, stones and other* materials thereof and all building implements and other things provided for the purposes thereof shall vest in and be under the control of the urban authority.

What is there declared to be "vested" in the urban authority is, all streets, etc., and the pavements, stones and other materials thereof, and all building implements and other things provided for the purposes thereof.

Brett, L.J., in the course of his judgment says, at p. 121:—

"Street" means more than the surface, it means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers, for, at the present day, there can be no street in a town without sewers, and also for the purpose of laying down gas and water pipes. "Street," therefore, in my opinion, includes the surface and so much of the depth as may not be unfairly used, as streets are used. It does not include such a depth as would carry with it the right to mines, neither would "street" include any buildings which happen to be built over the land.

Some two years after this case was decided the Court of Appeal in *Rolls* v. *St. George the Martyr, Southwark* (1880), 14 Ch. D. 785, was called upon to construe s. 96 of the Act 18-19 Vict., 1855, c. 120, wherein it is provided as follows:—

That the streets, being highways, and the pavements, stones and other material thereof shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situated.

The facts of the case are stated in the head note as follows:—

The plaintiff having, with the sanction of the Metropolitan Board of Works, made a new street over his land within the Metropolitan District, upon which land were two old streets, N. Street and A. Street, an order was made at quarter sessions for stopping up part of N. Street as unnecessary, and an order was also made for diverting a part of A. Street, and opening a new street in lieu thereof. The vestry of the parish gave notice to the plaintiff that he must not convert to his own use the stopped-up part of N. Street,

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nor stop up A. Street, or convert any part of the soil of it to his own use till he had purchased the same from the vestry. *Held*, by the Master of the Rolls (Jessel), that the case was governed by *Coverdale* v. *Charlton*, 4 Q.B.D. 104, and that under 18-19 Vict. c. 120, s. 96, the surface of the streets and the soil to such a depth as was required for the purposes of a road was in the vestry, so that when the streets were stopped up or diverted they could sell them under s. 154, and that the plaintiff had no right to deal with the soil without purchasing it from the vestry.

Held, by the Court of Appeal, that under 18-19 Vict., c. 120, s. 96, all streets being for the time being highways are vested in the vestry, but only so long as they are highways, and that when they cease to be highways by being legally stopped up or diverted, the interest of the vestry determines; *held*, therefore, that the plaintiff was entitled to convert to his own use the stopped-up part of N. Street and the diverted part of A. Street, subject, as to A. Street, to his first obtaining a certificate, under 5 & 6 Will. IV., c. 50, s. 91, that the substituted street had been completed and put into good condition and repair.

On the argument *Coverdale* v. *Charlton* was cited and discussed. In his judgment referring to that case James, L.J., says at p. 796:—

It is impossible to read any of the three judgments delivered on that occasion without seeing that in the view of the Judges the soil and freehold in the ordinary sense of the words "soil and freehold," that is to say, the soil from the centre of the earth up to an unlimited extent into space, did not pass, and that no *stratum* or portion of the soil, defined or ascertainable like a vein of coal, or *stratum* of ironstone, or anything of that kind, passed, but that the board had only the surface, and with the surface such right below the surface as was essential to the maintenance, and occupation, and exclusive possession of the street, and the making and maintaining the street for the use of the public.

Later, on the same page, referring to the statute then before the Court for interpretation, he says:—

It appears to me that the legitimate construction of the enactment that streets being highways shall vest is that streets if and so long as they are highways shall be vested. *There are no words of inheritance, there are no words of perpetuity in the Act, there is nothing to say whether the streets are to vest in fee simple or for any limited estate*, and it appears to me that they are given to and vested in the public body for the purposes of the Act and during the time for which those purposes require them to be held, and no longer. Words of divesting or defeasance are not required, because to my mind the interest of the vestry is exactly like a limited estate, etc.

Cotton, L.J., referring to the case of *Coverdale* v. *Charlton*, *supra*, says at p. 798:—

We must consider what that case decided and what it did not decide. The question there was as to the right of the plaintiff in respect of the grass growing on the surface of a highway, which grass had been demised to the plaintiff by the local board, and the Court of Appeal decided that the plaintiff was right if the surface of the soil had vested in the local board, who were his lessors, and they decided that at least the surface of the soil was vested in

the local board under the Act. They decided that what was described as a street in the section vested in the local board *as if transferred and conveyed to them from those who had previously had the property in it*, and that what was so transferred and vested in them was a material thing, and not a mere incorporeal right to protect the passage of the public over the highway. But they decided nothing as regards the duration or extent of the estate or interest in that material or physical thing.

Later, on the same page, referring to s. 96 which he was then interpreting, he says:—

That the street here means the material thing is shewn by the interpretation clause, which expressly includes bridges and certain other material things, but the only way in which we can see what the intention of the Legislature was as regards the duration of estate is by looking at the words "streets being highways," and I think the reasonable construction of these words is "streets for the time being used as highways. . . . That appears to me to be the period or limit of the estate which can fairly be collected from the words of the Act of Parliament, *and although we ought not to be influenced in the construction of clear words by any hardship which may arise from a particular construction*, it is not immaterial to observe that this gives a reasonable operation to the Act, having regard to the fact that where the local board purchase there is power to preserve a right of pre-emption; but where a street is otherwise than by purchase vested in the local board no right of pre-emption is given to the former owner.

These two cases of *Coverdale* v. *Charlton*, *supra*, and *Rolls* v. *Vestry of St. George the Martyr*, *supra*, so far from being authorities against the contention of the city in the present case, are I think both of them very strong authorities in favour of the city's contention. Because, in the present case, the property which the statute declares shall be vested in the city, is *the fee simple of all land over or upon which any public street in the city shall have been or may hereafter be laid out or used;* and both of the cases cited shew, that the word vest, thus used, is sufficient to transfer the property declared to be vested.

It is not disputed that prior to the enactment of the Acts in question here, the city possessed certain powers to use the soil under the surface of its streets for the laying of water mains, gas pipes, sewers, etc. Therefore it was not necessary that the Legislature should give or confirm to the city those rights which it already possessed. And it is admitted that "so far as was reasonably necessary the city had the right to prevent any user of the soil under the surface which might be likely to injure or impair the streets." It is also admitted that the rights of the city to maintain the streets at the time of the passing of the Act were paramount and that these rights involved the control and user of the surface of the streets. In the face of this, it is difficult

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to understand why, if the Act is to be given the limited construction the defendant contends for, the Legislature should have enacted it, inasmuch as it gives to the city no rights which it did not already possess.

On the other hand, it is argued by the defendant that if s. 2 has, as the city contends, transferred to it in fee simple all the lands under the surface of the streets, the enactment of s. 3 would be superfluous and unnecessary. But this argument loses whatever weight it might otherwise have had, when we bear in mind that the city can exercise only such powers in respect to its property as it possesses under its charter, or has acquired by legislative enactment. Without examining the provisions of this charter, which is a very lengthy one, and searching out and examining all the statutes relating to the powers and rights of the city, it is, of course, impossible to state with certainty just how far the city did or did not, prior to the passage of the Act, 8 Geo. V., 1917, c. 48, possess any, or if any then which, of the powers conveyed to the city by s. 3 of the Act. This much, however, is clear, that prior to the passage of the Act we are now interpreting the city did not possess the power expressly given to it by s. 3 to make by-laws regulating the use by the abutting owner, his tenant or other persons, of land beneath the surface of the public streets of the city, a power which is in distinct terms conferred by s. 3 upon the city. The section also I think gives the city power to impose a charge upon the abutting owner for the use of such land. This last mentioned power to impose such charge is denied by the defendant, who claims that in construing the words of the section, may impose charges for such openings or use, may vary if it see fit so to do such charges according to the locality in which such openings or use shall be made,

the word "use" must be construed as referring to the use of openings through the surface of the street "the making, maintenance and use of which the city is given power to regulate by by-law." Reading the section in its entirety I find it impossible to accept the construction which the defendant's counsel asks us to put upon it. If the Legislature had intended nothing more than the defendant's counsel claimed it did, it would have been unnecessary to employ the words, "or use," after the word, "openings," because clearly the power to impose charges for such openings would have covered the power to impose charges for their use.

And in the clause "such charges according to the locality in which such openings or use shall be made," the words "or use," if the section is to be construed as the defendant claims, would be clearly superfluous; because the use of the opening, it goes without saying, must be in the same locality where the opening itself exists.

With reference to the defendant's contention that the statute cannot be construed as having any retrospective effect, though I have already referred to it, I have not perhaps dealt with it as directly as I ought to do in view of the strenuousness with which that contention was pressed upon us by the counsel for the defendant. I entertain no doubt whatever that in construing an Act of Parliament it must not be construed to operate retrospectively so as to take away from any person rights or property vested in him at the time of the enactment, unless the Legislature has clearly expressed an intention to take away or impair such rights. But the words of s. 2 of the Act before us are "the fee simple in all land over or upon which any public street in the city *shall have been* or hereafter may be laid out." These words are so clear and unambiguous that not to give them their full effect would I think be equivalent to the Court usurping legislative authority rather than exercising its judicial functions.

With regard to the defendant's contention that s. 3 applies only to openings made after the passage of the statute, and that the words "maintenance and use" to which it refers are the maintenance and use of such new openings, and that the use of the lands beneath the surface of the street referred to in this section means only uses which may be initiated after the passing of the Act, I may say that this contention so far as openings are concerned, although not abandoned was not very strongly pressed upon the argument by Mr. Powell. It is quite clear that in the interest of the safety of the public using the sidewalks, the power given the city to regulate the openings referred to should extend and apply to all such openings, whether made after, or existing prior to, the passage of the statute. If the words of the section were ambiguous we should I think assume that the Legislature intended to give the public the full protection which it could only have if the city's power to regulate extends to all openings whenever made. But since it is admitted that by virtue of the Act in question, if not independently of that Act, the streets are

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vested in the city, the case of *Coverdale* v. *Charlton* already referred to seems to me decisive of that question as to the city's right to regulate and charge for the openings referred to in the section. And when once it is determined that the fee simple in all land under the surface of the street is vested in the city, the same case of *Coverdale* v. *Charlton* is I think conclusive in favour of the city's contention that by virtue of the Act in question it has authority to regulate the use of the land below the surface of the streets, and to charge for such use.

There remains one ground taken—I can scarcely say pressed—by the defendant, that the by-law upon which the conviction of the defendant rests is bad because it imposes an unreasonable charge upon an abutting owner desirous of obtaining a permit for the use of land under the sidewalk. As to this I can only say that we have no evidence before us in this case to enable us to form any opinion as to the excess or otherwise of the charge imposed by the city. Perhaps I should qualify this last statement by pointing out that the by-law here in question imposes a charge "for any vault or area occupied beneath the sidewalk or street level an annual rental or charge of fifteen cents per square foot average horizontal measurement over and above the charge for any sidewalk opening which may exist," and that this charge applies uniformly throughout the city. The defendant's vault is situated in one of the most central business locations in the city, where the rentals for business purposes are very high. If the charge of fifteen cents a foot is excessive in the case of the defendant, it would be absolutely prohibitive as applied to the major portion of the business streets of the city, so that if we are at liberty to draw any inference it would seem reasonable to suppose the city would not fix a rate so high as to be prohibitive throughout the greater part of the business portion of the city. In the absence of any evidence which would justify us in coming to the conclusion that the rate is excessive, I do not think we should quash the conviction on that ground.

For the reasons stated I have reluctantly come to the conclusion that judgment on the review must be for the City of St. John.

The case will be remitted to the Chief Justice to give judgment accordingly.

Grimmer, J.

GRIMMER, J., concurred with White, J.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. November 14, 1919.

PARTNERSHIP (§ III—14)—CORROBORATION—EVIDENCE ACT—QUESTION OF FACT—BURDEN OF PROOF.

A widow and executrix of her husband's estate, suing for the price of goods sold and delivered cannot succeed when the defendant company holds an assignment of her late husband's debts to his former partner, provided that partner can fully prove the partnership and consequent liability of the deceased to him.

[*Voyer* v. *Lepage* (1914), 19 D.L.R. 52; 8 Alta. L.R. 139, referred to.]

Statement.

APPEAL from the judgment of Walsh, J., in an action by a widow and executrix to recover the price of goods sold and delivered. Affirmed, the court being equally divided.

H. P. O. Savary, K.C., for appellant.

G. H. Ross, K.C., for defendant.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from the judgment of Walsh, J., in favour of the defendant on a counterclaim.

In the fall of 1915 one Edison Simpson and one J. T. Tasker neighbouring farmers with large quantities of grain in their fields decided to build an elevator for the purpose of better handling the grain. The elevator was built and early in the year 1916 they began hauling their grain to the elevator. Tasker was in town where the elevator was and Simpson was on his farm some miles away. The grain of other farmers was taken in and Tasker conducted the whole business of the elevator until the fall of 1916 when the defendant company was incorporated, the shareholders being Simpson and Tasker, and a brother of the latter, and one Battrum. In March, 1917, Simpson died, but prior to his death he had delivered grain to the defendant company, and subsequently, the plaintiff, his widow, and personal representative, did likewise. In June Tasker purchased from the plaintiff and paid for the shares which the deceased held in the defendant company. Settlement not having been made for the grain delivered the plaintiff began this action in October, 1917, claiming $8,147.99, the estimated amount due. On the day following Tasker made an assignment to the defendant in the following terms:—

I, James T. Tasker, of Barons, in the Province of Alberta, believing the estate of Edison Simpson, deceased, to be truly indebted to me in the sum approximating $8,844.50, in consideration of advances of cash having been made to me by the Tasker-Simpson Grain Company, Ltd., of Barons, hereby

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assign to the said Tasker-Simpson Grain Company Ltd., the said sum of $8,844.50, or whatever amount may be proven to be owing to me by the said Edison Simpson estate, whether it be more or less than the said sum of $8,844.50.

Dated at the City of Lethbridge, in the Province of Alberta, this 27th day of October, A.D. 1917.

The defendants' counterclaim is based on this assignment.

The position taken by Tasker is that he and Simpson were in partnership on equal shares in the buying and selling of grain and that in the carrying on of that business there was considerable loss incurred which he made good and that he is entitled to contribution from the plaintiff to the extent of one-half of such losses.

The plaintiff, while admitting that there was a partnership in so far as the building of the elevator and the operation of it for the storage of their own and others grain was concerned, denies that there was any partnership in the buying and selling of grain.

The trial Judge in his reasons for judgment says:—

Tasker's evidence is that a definite, concluded agreement was made and entered into between him and Simpson under which the buying and selling and storing of grain in the elevator which they owned together was carried on from the time that the elevator was finished in the fall of 1915, until the limited company took it over in the fall of 1916, the basis of their partnership being an equal sharing of the gains and losses.

Counsel for the plaintiff in his factum says:—

James T. Tasker, of course, swears to the existence of the alleged partnership and it becomes a question as to whether or not his evidence finds the necessary corroboration.

After a very careful reading of the evidence of Tasker and a re-reading of portions of it many times I confess myself unable to find any such statement by him of a definite, concluded agreement of partnership. When he is first asked about his business relation with Simpson he says: "We were in partnership in the elevator and grain business." Then when he is asked what were the terms of the partnership his answer is "That we were to share and share alike profits and losses."

Having received this answer, never again does his counsel ask him for the terms of the agreement as to the character of the partnership, but proceeds to ask him what he did in carrying on the partnership and what Simpson did.

The nearest to a statement of a definite agreement that I can find appears in the cross-examination. The plaintiff's counsel is calling his attention to his particulars in which it is stated that the

partnership was constituted under an oral agreement and commenced about November 1, that it was in the first place for the handling of the grain of the two partners, but later on they determined to handle grain for others in a general way, as grain dealers. He then asks how much later and is told about ten days. He then says: "So your evidence would be . . . that before the end of November 1915, you determined to embark on a general grain business and Simpson concurred in that," and Tasker's answer is "Yes." Now, what the witness meant when he acquiesced in the use of the word "concurred" is not very clear. He certainly does not say there was any definite agreement to that effect. The concurrence might be in some quite different way.

In this regard reference might usefully be made to his evidence regarding the grain on the farm in which two others were interested with him. He says he and Simpson agreed that each should put in his grain to the elevator at 93 or 94 cents.

Q.—What interest had these farmers in the grain on your farm? A.—They had a third interest.

Q.—And they were satisfied with about 94 cents, with a 94 cent deal on this wheat? A.—I never heard anything about it.

Q.—But they were satisfied? A.—Oh, yes.

Q.—Did they ever hear about your having made this arrangement? A.—I don't know whether they did or not.

In the light of that evidence the statement that Simpson concurred in the business does not seem by any means conclusive or one which can be deemed to mean that he agreed to anything. As I read the reasons for judgment of the trial Judge I do not gather that he intended to rely upon the evidence of Tasker as much as upon the circumstances from which he concluded that Simpson knew that Tasker was conducting the business in which he was interested as a general grain dealer and that he therefore had agreed to it or acquiesced in it.

Tasker, on his own admissions, did all the business of the partnership of whatever nature it was. He had one bank account in his own name and through that all the financial transactions of the partnership were conducted. It was also the account for his own personal transactions as well as for the transactions of the farm in which he and others were interested and possibly for other businesses not disclosed. Simpson was willing to trust him and to have the account in this way.

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Under these circumstances it is not sufficient for Tasker to make out a *primâ facie* case which is to be met by the other side. Occupying a fiduciary position the Court placed a special burden on him. Simpson being dead, the Court always did and the statute now does place a further burden on him and it seems clear that he must give convincing evidence to establish the position he sets up.

Early in 1916 one McCallum, a representative of a Winnipeg grain brokerage firm interviewed both Tasker and Simpson by reason of an application having been made for credit. After his interview he wrote his firm a letter which does not appear to have been made an exhibit, but to which reference is made upon the cross-examination of McCallum who was a witness for the defence. His attention was directed to the letter and he was asked and replied as follows:—

Q.—That was the impression you got, that they only intended to use the elevator for their own grain and one or two of their neighbors? A.—Yes.

Q.—They were not going into a regular grain business that year at least; I would judge that from your letter? A.—They were not going in as a public warehouse.

Q.—My instructions are that the elevator was built primarily for the purpose of handling their own grain only? A.—Yes.

Q.—And that incidentally they might handle one or two of their neighbors? A.—Yes.

Q.—That was your impression? A.—Yes.

It is true that Tasker swears that he does not know how McCallum got such an impression, but it seems most unlikely that McCallum would have deliberately misled his principals, and if he did not get the impression he had from Tasker that he got it from Simpson and it would indicate Simpson's intentions as to the scope of the partnership. The trial Judge does not discredit the evidence of McCallum which is taken on commission, but he does express difficulty in understanding why a credit of $20,000, which was granted, could have been necessary if the operations were to be limited as McCallum supposed.

I am free to confess that I also do not see the necessity for it, but it apparently appeared perfectly reasonable to McCallum and his principals, persons who understood thoroughly the nature of the business, and I see no reason therefore why it should seem unreasonable to us.

A sample of the unreliability of Tasker's evidence is shewn in connection with this matter. In his examination in chief he says:—

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We made an arrangement for a $15,000 credit to start in. We received this in two drafts at the time, one for $7,500 at that time and one for $7,500 a little later.

Then in cross-examination appears:—

Q.—At the time the notes to the Benson Stabeck Co. were given no money was advanced then, you gave the notes for $20,000 and you did not get an immediate advance for $20,000? A.—We did indirectly.

Q.—You did not get the immediate advance? A.—No.

Q.—What happened is, you shipped grain, and you made drafts on the Benson Stabeck Co. for shipment and discounted those at the Union Bank? A.—Yes.

Q.—Under arrangements the Benson Stabeck Co. made with the Union Bank? A.—Yes.

Q.—And that is the only way you got the money from that company? A.—Yes.

On the same point as well as on the question of the scope of business we find that on February 17, 1916, Tasker wrote to the Grain Board in connection with bonds for a license adding a postscript as follows: "Might say that so far we are handling only our own grain." In his evidence he says that he began selling futures about February 1. He also says that they took in grain of others in January and that the statement he made in his letter is not correct. Again when he wrote to the Board for a track buyer's license on August 24, 1916, he stated the approximate amount of the monthly business for the last crop year was $2,000, and verified the statement by statutory declaration. When his attention is called to this in cross-examination, he answers: "I think that is approximately correct." Counsel then states that he must have been doing 5 to 10 times that, and he answers: "Yes, it figures out that way." Counsel then points out that the records before the Court shew that he bought on the track grain to the value of $438,000 and that of course would all be since sometime in January preceding at the earliest.

At the time of the negotiations with McCallum they intended to put up a mill and carry on milling operations, which of course would involve expense. That was, however, admittedly abandoned. The trial Judge expresses the view that

> the operations gradually extended until they blossomed into the extensive business eventually carried on,

and states the impossibility of thinking

> that Simpson with the part that he seems to have taken in the business, and with the knowledge which I think he must have had that his name was being used in it, was unaware of its expansion beyond the limits originally set for it.

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Assuming the trial Judge to be right in the conclusion he draws, with all respect I am not satisfied that it makes out the case which the defendant seeks to establish. As against the public Simpson might be held to be a partner. See *Radcliffe* v. *Rushworth*, (1864) 33 Beav. 484, 55 E.R. 456.

But a mere knowledge that Tasker was making an unauthorized use of the firm name could surely not make the innocent partner liable to the wrongdoers. I find however no evidence that Simpson did know that the firm name was used for these transactions and unless he did and in some manner approved of it I do not think he was bound. There is one circumstance which does not seem to have been particularly considered by the trial Judge which seems to me to be important and to have considerable weight against the defendant's contention. Tasker speaks of dealing in options and futures, of hedging and switching. Whatever all of these terms may mean, they certainly are none of them necessary in referring to the buying and selling of grain as an ordinary merchantable commodity, but apparently the large part if not all of the business out of which the losses were incurred was of a character to which these terms are applicable.

Tasker says that one of the entries of sales of futures which is marked "five and five" he thinks refers to a sale of five thousand for himself and one of the same amount for Simpson. He says: "He and I talked it over one day and he said 'put five on for me' and I put on five."

Then Reesor, agent for a firm of grain brokers in Lethbridge said that Simpson was often in his office but that he did no business on account of the partnership except on one occasion when he was there with Tasker. He is asked:—

> At the time they were throwing off the hedges, that you have spoken of, was Simpson taking the same part as Tasker, what part was he taking?

And he answered:—

> He appeared to be taking the same responsibility as Tasker, in fact he took off some of the hedges as well and signed some of the orders.

Now it is clear that Simpson took no part in the management of the partnership business, and it would be very strange if in the presence of Tasker he would assume to give written directions relating to that business.

The evidence of Tasker I have referred to shews that Simpson was doing a little speculating on his own account and what took

place in Reesor's office indicates the same, and that Tasker was transacting similar business which surely Simpson would suppose was his own personal affair for his asking Tasker to "put five on for him" when Tasker was doing the same would seem to indicate that he thought Tasker was doing this on his own account and not on account of the partnership. This appears to me much more consistent with the view that Simpson not merely did not intend to authorise but did not know of Tasker's doing this sort of business for the partnership, than with the contrary view.

Then when we come to the banking arrangements we find that the banker though knowing of the partnership looked to Tasker solely for the account though the debit balance became a very considerable one, and that the only time Simpson was called on was at the end of the bank's year when the manager did not wish to carry over a heavy debit balance. Then Simpson joined in giving notes to cover the balance over the end of the month, but when Simpson's notes fell due he was not called on to meet them and the bank gave up the security for Tasker's personal liability. Moreover Simpson did not in the giving of the notes assume a liability equal to that of Tasker as would have been expected if they had been equal partners. What took place seems much more like a matter of accommodation than the assumption of an obligation, and in so far as it might suggest an existing obligation in respect of the overdraft it certainly does not indicate an obligation of equality with that of Tasker.

Then when it came to a final closing of the partnership account at the bank Tasker says he had to pay an overdraft of over $21,000. This was several months before Simpson's death but he made no suggestion to Simpson that there was any liability attaching to him. Then in June when Tasker purchased the shares in the company from the plaintiff he paid for them without any suggestion of having any claim to set off, and as far as appears until this action was brought no claim whatever was ever made against Simpson or his estate.

On the whole evidence it appears to me that the probabilities are quite against the view that Simpson either expressly or impliedly authorised any speculative buying and selling of grain as was indulged in. It is not improbable, though the evidence does not satisfy me that it was the fact, that he did authorise the

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buying and selling of farmers' grain as delivered, but whatever the nature of the authorised partnership business was the evidence falls far short of satisfying me that there was any deficiency for which the plaintiff can be called on.

Then as my brother Stuart points out, there is not the slightest corroboration of Tasker's evidence that their shares in the partnership were equal, while there is evidence as I have indicated which suggests that they were not. Tasker's evidence shews that their respective interests were settled by agreement, so there is no room for the statutory implication of equality which is only applicable in the absence of agreement.

I would allow the appeal with costs and vary the judgment by striking out all of its provisions except the direction in favour of the plaintiff for the amount she is found entitled to recover.

The plaintiff should have the costs of the action including the costs of the counterclaim.

Stuart, J.

STUART, J.:—The taking of an account of the partnership business, however wide or narrow were the limits of that business, must, according to the defendant's claim, lead ultimately to an assertion by the defendant that Simpson at his death owed Tasker a certain sum of money as his share of the losses which were suffered and which have, it appears, been settled by Tasker. The claim for that sum of money so found is really the claim which Tasker is making against the estate of his deceased partner. To substantiate that claim Tasker must prove not only that there was a partnership but what were the terms of it. Subject to a provision of the Partnership Ordinance, (N.W.T. Ords. 1911) to which I shall refer, he must prove that they agreed to share profits and losses equally if he is to substantiate his claim that Simpson owed him a sum of money equal to one-half of those losses. If one-half of the losses were $8,000, then Simpson would owe him $8,000. If Simpson agreed only to bear one-third of the losses then Simpson would owe him $5,333. If Simpson agreed to bear one-quarter of the losses then Simpson would owe him only $4,000. If Simpson had agreed to bear only a fifth of the losses and get one-fifth of the profits then Simpson would owe him $3,200.

It seems to me that this makes it clear that in order to decide the amount which Tasker or his assignee, the defendant, can recover whether that sum is $8,000 or $50, Tasker must establish the terms

of the partnership. Is it then sufficient to say that there are circumstances corroborating Tasker's evidence that a partnership on some terms or other existed when there is absolutely nothing to corroborate his assertion that they were equal partners?

If an independent witness proves that the deceased, shortly before his death, admitted to him that he owed the claimant plaintiff some money, without saying how much, would that satisfy the statute as corroboration of a claimant's assertion that the deceased owed him $50,000?

Tasker at the beginning had twice as much grain as Simpson had, (that is by the crop of 1915) to handle which they decided to build an elevator. Tasker's evidence certainly suggests that he advanced, at least in the first place, much more of the capital to build the elevator than Simpson did. Plaintiff's counsel admitted that the two were joint owners of the elevator but there was no admission that they were owners of equal shares. When it came to giving notes to the Union Bank to cover the firm's overdraft Simpson certainly did not give as large an amount as Tasker; though Tasker does give an explanation of this, more or less satisfactorily. Then there is no independent evidence to shew that they each took the same amount of shares in the limited company which acquired the elevator and the business.

In the face of these circumstances it seems to me to be going rather far to say that Tasker's evidence as to the relative shares and responsibilities of the partners as between themselves does not need to be corroborated, merely because there is something which corroborates his story that a partnership existed. The whole extent of Simpson's liability depends on the share he had in the partnership. If we are to take Tasker's uncorroborated word on this point then we should have to take it if he had said that Simpson owned three-fourths of the partnership and himself one-fourth. I mean, we could not even in that case reject it merely for want of corroboration.

I do not think that the mere probability of two such men going in on an equal footing is so great that that probability can be taken as corroboration. And, as I have said, there are facts which point in the very opposite direction.

I know, indeed, that s. 26 of the Partnership Ordinance, (N.W.T. Ords. 1911) enacts as follows:—

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The interest of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

1. All the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

No doubt this rule was in the minds of all parties at the trial and this perhaps accounts for the fact that no attempt was made either there or on the hearing of the appeal to suggest the possible existence of a contrary agreement.

But it does seem to me that the very existence of the reservation as to a contrary intention being shewn by express or implied agreement ought to cast upon the surviving partner a peculiar burden of proof. Tasker, in this case, did not suggest that any third party heard the making of the partnership bargain between him and Simpson. It was entirely oral and entirely confined to the knowledge of the two of them. Surely in these circumstances and when the whole question of the amount of alleged liability depends upon the respective shares of the partners and one of them is dead, the burden of shewing that there was no variation made in the general rule ought to be cast upon the surviving partner, especially where he admits that he was practically in sole control of the business and asserts that heavy losses were incurred, for a portion of which he seeks recoupment from the deceased's estate, after letting several months go by during the deceased's life without making any claim to him personally.

It is very curious that evidence was not adduced to shew what the incorporated company gave in the way of shares for the elevator, to whom those shares were given and in what proportion. Surely the transfer of the business and its tangible assets to the limited company was a winding up of the partnerships' affairs, and if Tasker had any lien or charge for a share of losses upon Simpson's interest in the partnership property, which would include the elevator, it is very peculiar that some adjustment of the matter was not then made. Of course counsel knew about what was then done and probably one should rest in confidence that, if there had been anything in it which would have assisted the court had it been brought out, counsel would have caused it to be told. It may be that Tasker and Simpson paid cash for their shares in the limited company and that that company bought the elevator

and the business at a price. The evidence does shew that the elevator was taken over "at cost" but we are never told what the cost was. It is, however, fairly clear that the change was made in a very loose way, for Tasker still kept the bank account of the limited company mixed with his own personal account, and said that it was only when, sometime after the incorporation, there did not seem to be "enough money around" that he began to suspect that the partnership had been run at a loss.

If Simpson were alive he would be at liberty to prove, if he could, that the presumption of equality had been varied by express or implied agreement. But he is dead. Tasker makes the very lamest sort of an attempt to prove their partnership agreement. He could not remember when it was made in so far as the proposed wider field of its operations was concerned. He never made the slightest attempt to state where the two of them were when it was made. In reality he was allowed to swear to what it was the duty of the court to decide. He swore to the legal result of a mysterious conversation between himself and Simpson, the time, circumstances and details of which he made no attempt to describe and counsel did not seem curious to discover.

Tasker, admittedly, managed everything. He made a belated discovery that his alleged partnership had suffered losses. There is the very strongest ground for believing that these losses were due to his own carelessness and misconduct, that is, mismanagement.

In these circumstances I think it is legally necessary that the surviving partner should, before asking the court for judgment for a very large sum of money as one half of the losses suffered by the firm, establish affirmatively either that there was no agreement made as to their respective shares or that there was a direct agreement that they should be equal partners and also that his testimony on either of these points should be corroborated under the statute. It may appear curious to demand corroboration of a mere negative statement but it simply amounts to a demand that his evidence as to the terms of the partnership agreement should be corroborated. Of course he does say that the matter was the subject of direct agreement and was not merely left open so that the statutory presumption would operate. But my view is that not only should his statement as to a positive agreement be corroborated but that if he had testified that the subject was not mentioned he should, even

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in such a statement as that, be corroborated as against a deceased partner before the estate can be made liable for a large sum of money as one-half of the losses of the partnership. I see nothing in the reasons in *Voyer* v. *Lepage* (1914), 19 D.L.R. 52, 8 Alta. L.R. 139, which is inconsistent with this view.

Even if the case goes on to a reference it seems to me that at every turn Tasker will be held up, and properly held up, by the necessity of corroboration as to item after item because it will depend solely upon his evidence whether the subject matter of each item was a dealing which came within the ambit of the partnership business, whether it was his own private business, or Simpson's private business or his farming partnership's business or the alleged firm's business, all of which seems to have been mixed up together.

I would allow the appeal with costs and direct the counterclaim to be dismissed with costs.

Simmons, J.

SIMMONS, J.:—The plaintiff is the widow and executrix of Edison Simpson, late of Barons in this Province. The defendant is an incorporated company carrying on an elevator and grain business at Barons.

Plaintiff's claim is for the sum of $8,147.99 for grain sold and delivered to defendant. The claim is not disputed. Defendant, however, alleges a right of set-off on account of a partnership debt which defendant says was owing by the plaintiff and which was assigned to defendant. In December 1916, the defendant company took over the elevator and grain business of the Tasker-Simpson Mill & Elevator Company at Barons. The Tasker-Simpson Mill & Elevator business came into existence in November, 1915, under the following circumstances:—

James J. Tasker and Edison Simpson were farmers at Barons. Tasker had about $47,000 worth of grain on his farm and Simpson had about $24,000 worth of grain on his farm. They decided to form a partnership to construct an elevator to accommodate this grain. Tasker secured a lease in his own name from the railway company for a site. Tasker supplied the moneys for actual construction and repaid himself for same out of the business afterwards. Simpson paid for a gasoline engine to operate the elevator, and likewise he was paid out of the moneys of the business. They adopted a partnership firm name for the conduct of the business.

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but the bank account was kept by Tasker in his own personal name and was not separated from his own personal account in the bank. The elevator was completed early in 1916, and a license obtained from the Grain Board. The business was extended into a general elevator and grain business and a line of credit of $20,000 was secured from a Winnipeg grain company. In December, 1916, the business was taken over by the defendant company, and Simpson, James T. Tasker, A. H. Tasker, his brother, and E. D. Battrum were the incorporators of the limited company.

Heavy losses were incurred in its operation in 1916 between the time of commencement until December, 1916, when the limited company was formed. James T. Tasker says he paid these on account of the partnership and claims contribution from the estate of his co-partner and he subsequently assigned the claim to the defendant company which now sets up the same by way of set-off to plaintiff's claim.

Edison Simpson died in March, 1917.

The plaintiff claims that her late husband was not a party to the extension of the business beyond the purpose originally contemplated and that there is therefore no liability to contribute to these losses.

There are a number of circumstances which in my view have a tendency to place James T. Tasker in a position which calls for a searching scrutiny of his evidence. He was the manager and had charge of the conduct of the business and therefore occupied a fiduciary relation to his co-partner. He had sole control of the bank account and did not separate it from his personal account. He did not keep proper books. He is unable to give a satisfactory explanation of how and where the losses were incurred. He can not produce a record of grain received and grain shipped out although such a record was kept, and although it is obvious that this book might contain information of value in determining the issues raised here. He purchased and paid for the shares of the Simpson estate in the limited company and made no claim for a set-off.

A very large part of the business was track buying. The fact that Simpson was a partner for the original purpose introduces a degree of doubt in regard to much of the evidence as to whether as against Simpson it related to the original purpose of the partnership or the later extended operations. Seven men were employed

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in and about the elevator and none of these were called by Tasker. When Tasker wrote the Board of Grain Commissioners at Ft. William in February, 1916, he says, "that so far we are handling only our own grain," yet admits that the business was not at that time confined to handling their own grain. Notwithstanding all this the conclusion reached by the trial Judge that Simpson was a partner in extended dealings beyond that which at first was contemplated is supported by the evidence cited by the trial Judge. It is true that the evidence which implicates Simpson referred to by the trial Judge does not go any further than that, that there was a partnership in a general elevator and grain business carried on until the limited company was formed.

There is no evidence corroborating Tasker's allegation of the actual terms of oral agreement that the partners were to share alike in profits and losses. However, the Evidence Act would seem to be satisfied when there is corroboration of a material element of the contract, namely, that the partnership was formed and subsequently extended so as to include a certain class of business. *Voyer* v. *Lepage*, 19 D.L.R. 52.

I have therefore come to the conclusion that this appeal should be dismissed with costs, but in my view this does not involve the conclusion that Tasker has established that Simpson was a partner in all the transactions which he has included in the statements contained in schedule "A," "B," "C" and "D" in his statement of defence. This branch of the case will come up for consideration in the reference and in view of the manner in which Tasker as manager conducted the business, the onus is upon him of establishing every transaction in the business in which he claims that Simpson was a partner.

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MCCARTHY, J.:—Mrs. Simpson, who was plaintiff in the action and now is the appellant is the widow and executrix of the late Edison Simpson. The latter was a partner of one James Tasker in what in the pleadings is called "the elevator business," known as the Tasker-Simpson Elevator and Mill Company, which partnership existed from the fall of 1915, and was afterwards in the fall of 1916 turned into a limited company, Tasker and Simpson jointly, with one A. H. Tasker, and one E. D. Battrum incorporating the company which acquired the elevator and now is the defendant company.

The claim of the plaintiff is for the grain placed in the elevator being the crop of 1916 delivered partly by Edison Simpson and partly by his estate after his death, he having died in March, 1917.

The defendants contend that the deceased was indebted to them by virtue of an assignment from James T. Tasker dated October 27, 1917. The assignment purports to cover a debt due from the late Edison Simpson, representing his share of the losses in the partnership carrying on a general grain business between the fall of 1915 and part of the year 1916.

The plaintiff contends that the deceased had nothing to do with the general grain business or speculations in grain, but was only a joint owner of the elevator for the purpose of handling his own grain and that any losses incurred in the buying and selling of grain were the losses of Tasker and should be borne by him. To substantiate this amongst other things a report of one McCallum, who is the traveller for the grain company and from whom Tasker and Simpson were desirous of obtaining a loan, is put in at the trial and from which it will be observed that McCallum reports to his principals upon the application, in effect, as follows:—

Neither of these fellows know anything about the grain business whatever, and while they only intend to use the elevator *for their own wheat and one or two other* neighbors I do not think there is any chance of their hooking us.

It is also to be observed that an application was made in the year 1916 to the Board of Grain Commissioners for a license to operate in Alberta and part of the correspondence put in at the trial, as follows:—

Barons, Alberta, April 14, 1916, Board of Grain Commissioners, Fort William, Gentlemen: We request that the bond of the Dominion of Canada Guarantee & Accident Company *in my behalf*, . . . Yours truly. (Signed) J. T. Tasker.

The assignment of the debt alleged to be due by the defendant is as follows:—

I, James T. Tasker, of Barons, in the Province of Alberta, believing the estate of Edison Simpson, deceased, to be truly indebted to me in a sum approximately $8,844.50, in consideration of advances of cash having been made to me by the Tasker-Simpson Grain Co. Ltd., of Barons, hereby assign to the said Tasker-Simpson Grain Co. Ltd., the said sum of $8,844.50, or whatever amounts may be proven to be owing to me by the said Edison Simpson estate, whether it be more or less than the said sum of $8,844.50.

Dated at the city of Lethbridge, in the Province of Alberta this 27th day of October, A.D. 1917.

It is to be observed that this assignment is dated the day after

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the statement of claim is issued. It is also admitted by the defendants that no claim was ever made against the late Edison Simpson or his estate for the moneys covered by the assignment until after the action was brought on October 26, 1917, and further that the shares of the late Edison Simpson in the limited company were purchased by the two Taskers from the Simpson estate and payments made therefor without any mention of the claim that is sought to be set off in this action by the defendants.

A letter was also put in at the trial from J. T. Tasker, to E. Battrum, in which the request was made that all letters directed to him presumably in connection with the elevator business be marked "*Personal*," and evidence is also adduced at the trial disclosing that in the communication from J. T. Tasker to the Grain Commissioners he notified them that only he and one Shrigley, one of the employees were authorized to sign the warehouse receipts, etc. It would also appear from the evidence that the late Edison Simpson became much more active in the affairs of the company after it was incorporated, although there is evidence to shew that he was in and about the warehouse before the incorporation, but as none of the other employees were called to shew to what extent the late Edison Simpson participated in the affairs of the company the fact as to his participation must depend largely upon the evidence of James T. Tasker.

It would appear from the evidence that the general grain business carried on in 1916 resulted in a heavy loss which Tasker assumed and it is for one-half of this that he seeks to set off against the plaintiff's claim. The defendants also claim that Simpson received from Tasker $1,926.72 more than the value of the grain delivered by him to the elevator in the spring of 1916.

The question in dispute between the parties is as to whether or not Simpson was a partner with Tasker in the grain business carried on through the elevator from November, 1915, to 1916, and the plaintiff urges for the reasons above set out, amongst others, that he was not.

Reference is made by the trial Judge in his judgment to the practice carried on in their banking operations. Apparently the bank account was kept in the name of J. T. Tasker. It is also pointed out and it would also appear from the evidence, that during the time in question, that, in so far as the general grain

business is concerned, that Tasker acted as manager, hired and discharged the employees and paid all the moneys. On the other hand there is much in the evidence which would justify the conclusion that Simpson was a partner in the general grain business during the period in question. The defendants contend that the bank account was in Tasker's name at the request of Simpson, who lived about 7 miles from Barons where the elevator was located. They also contend that the same practice was carried on when the elevator was being constructed, viz., that the bank account was in Tasker's name and that the payments for all goods supplied were made by him. They also contend that an application was made for a loan for the sum of $20,000 in the joint name of Tasker and Simpson and suggest that they would not require this joint loan if the intention was to handle only their own crops. It is further pointed out that the individual financial statements for the purposes of obtaining this loan are given by both Tasker and Simpson in the month of February, 1916, and that when one Hagen, the manager of a grain commission company, called at the elevator in the fall of 1916, Simpson was introduced to him by Tasker as "my partner."

A number of witnesses are called by the defendants to shew that Simpson tried to buy their grain and reference is made by them at the trial to a communication to the Board of Grain Commissioners under date of February 17, 1916, referred to above, practically to the postscript which says; "Might say that so far we are handling only our own grain,"—the suggestion being made by the defendants that at some later date they intended to embark on a much larger scale.

The question being entirely a question of fact I hesitate to disturb the trial Judge's findings and it seems to me that although it is a difficult question to determine, that I would have arrived at no other conclusion. It is difficult to conceive how Simpson being in and about that elevator as he is proved to have been and a partner in the elevator, was not participating in the gains and losses which were incurred in the general grain business. Cash tickets were in the name of the Tasker-Simpson Elevator and Mill Co., and were filed as exhibits at the trial, as also storage receipts of the Tasker-Simpson Elevator and Mill Co. were filed as exhibits at

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the trial. It is difficult to understand how that Simpson was not aware that a general grain business was being carried on and his name being used; indeed there is evidence that at least one of the storage receipts of his own grain was signed by him. It would seem to me that the only fair conclusion to be drawn is that whilst in the inception the elevator was used only for their own grain and a few of the neighbouring farmers that the business expanded beyond what they originally intended, as is the case in many partnerships, where they embark in a small business and then expand into other lines that are incident to the business originally started. That, I think, is a daily occurrence, and that is, I think, what took place in this case with the knowledge of Simpson.

Upon the question of corroboration required by the statute to enforce a claim against the estate of a deceased I think that the evidence shews ample corroboration and I am therefore of the opinion that the appeal should be dismissed with costs.

Appeal dismissed, the Court being equally divided.

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JACKSON v. CANADIAN PACIFIC R. Co.

Saskatchewan Court of Appeal, Newlands, Lamont and Elwood, JJ.A. October 22, 1919.

MASTER AND SERVANT (§ II D—206)—WORKMAN—PROHIBITED ACTION—INJURY—NO COMPENSATION—DAMAGES.

Where a workman deliberately performs an act prohibited by his employers, the transgression committed carries him outside the sphere of his employment and as he is not required or expected to perform such act he is not entitled to compensation for injuries resulting from such act.

Statement.

APPEAL from the trial judgment in an action for damages for injuries sustained by an employee of the defendant company. Affirmed.

E. F. Collins, for appellant; *L. J. Reycraft*, K.C., for respondent.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—The District Court Judge in his notes of evidence finds that the plaintiff was a switchman employed at Broadview by the defendant company, and while so employed was making a coupling, *i.e.*, attaching a caboose to a train, and when the cars were coming together he noticed that the coupling could not be made, on account of one draw-bar protruding. In order to save time, he pressed the draw-bar over with his foot,

which permitted the coupling to be made, but at the same time his foot was caught and crushed. For the injury thus received this action is brought.

The evidence shews that to use his foot in this manner was against the rules of the company. The plaintiff in his examination for discovery admits knowledge of this rule, but says he took this method in order to save the engineer backing up again.

The evidence before us as to the duties of the plaintiff is very meagre. Apparently, the engineer in backing the train to make the coupling was acting under the plaintiff's instructions; that is, he gave the signal to the engineer when to back up, when to stop, when to go ahead. There is nothing to shew whether or not it was the duty of the plaintiff to adjust the coupling. I infer from his evidence that if he had not adjusted it in the manner in which he did, the engineer would have gone ahead and then backed again, when the coupling might have been made, and, if not successful on that occasion, then the engineer would have gone ahead and backed up until it was made successfully. I apprehend that the coupling is an automatic one.

Some of the defendant's rules were put in, and from them I quote the following:

The company is most desirous of impressing upon all employees "Safety First" rules, and that safe course be taken and no risks run.

The following rules, which cover some of the most flagrant forms of carelessness, must be obeyed.

Employees violating these rules will be regarded as subject to discipline.

Every employee is required to exercise the utmost caution to avoid injury to himself or his fellows and especially in switching or other movements of trains.

The following and all similar acts of recklessness are specifically forbidden.

(a) Entering between or passing in front of cars in motion to couple or uncouple same, or for any other purpose whatsoever.

. . . . .

(j) Shoving over draw bars with their foot in order to insure coupling.

It will be seen from these rules—and it was admitted by the plaintiff—that, in using his foot as he did, he was doing something expressly forbidden, and which he knew he was forbidden to do.

The District Court Judge held that, under the circumstances of the case, the plaintiff at the time of the accident was performing an act outside the scope of his employment, which disentitled him to recover. From that judgment this appeal is taken.

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In *Brice* v. *Edward Lloyd, Ltd.*, [1909] 2 K.B. 804, the head note is as follows:

A workman employed at certain works climbed on to a hot water tank in the building to eat his supper. The tank was only partially covered in. On returning to his work the man fell into the tank and was scalded to death. The workmen were not allowed on the tank:—

Held, that the accident did not arise "out of the employment" within the meaning of the Workmen's Compensation Act, 1906, and that compensation was not recoverable under that Act.

At p. 808, Cozens-Hardy, M.R., is reported as follows:

The question which the Court has to consider in the present case is whether the deceased was acting within any authority which he had—whether in fact he was not needlessly exposing himself to a risk which could not be fairly said to arise out of the employment.

At p. 809, Farwell, L.J., is reported as follows:

It is now well settled that the word 'employment' in the Act is not to be confined to actual work. In my opinion it extends to all things which the workmen is entitled by the contract of employment expressly or impliedly to do. . . . . But he is not entitled, and therefore he is not employed, to do things which are unreasonable or things which are expressly forbidden . . . . . Take the case of *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K.B. 539. There Mr. Simon in the course of his argument put the case of a swing bridge which the workmen were in the habit of using as a way out of the works; it would surely be impossible to say that a workman was entitled to jump across when the bridge was open for the passage of boats, because that would not be a reasonable user of the way, and such a user would not be in the course of his employment.

In *Barnes* v. *Nunnery Colliery Co. Ltd.*, [1912] A.C. 44, Lord Atkinson is reported as follows, at 49:

In these cases under the Workmen's Compensation Act, 6 Ed. VII., 1906, c. 58, a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well be held in most cases rightly to be a risk incidental to his employment. Not so in the other case. For example if a master employs a servant to carry his (the master's) letters on foot across the fields on a beaten path, or on foot by road to a neighbouring post office, and the servant, having got the letters, went to the stables, mounted his master's horse, and proceeded to ride across country to the post office, was thrown and killed, or went to his master's garage, took out his motor car, and proceeded to drive by road to the post office, came into collision with something and was killed, it could not be held, I think, according to reason or law, that the injury to the servant arose out of his employment, though, in one sense, he was about to do ultimately the thing he was employed to do, namely, to bring his master's letters to the post. In such a case the servant puts himself into a place he was not employed to be in, and had no right to be in—the back of his master's horse, or the seat of his master's motor car. He was doing a thing he was not employed to do, and had no right to attempt to do namely.

to ride his master's horse across country or to drive his motor car. These were altogether outside the scope of his employment. He exposed himself to a risk he was not employed to expose himself to—a risk unconnected with that employment, and which neither of the parties to his contract of service could ever be reasonably supposed to have contemplated as properly belonging or incidental to it.

And at p. 51, Lord Mersey is reported as follows:

He was not doing a permitted act carelessly, but he was doing an act which he was prohibited from doing at all . . . . . .

It is no doubt true that one object which he had in view in getting into the tub was to reach his work, but the intention existing in his mind cannot, in my opinion, convert the forbidden act into a part of his employment. . . . . The act was, in my view, expressly prohibited, and there were no circumstances which could in any way justify the boy in disregarding the prohibition.

In *Plumb* v. *Cobden Flour Mills Co. Ltd.*, [1914] A.C. 62, Lord Dunedin is reported as follows, at p. 67:

. . . . . there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

And further down he quotes with approval Earl Loreburn, L.C., in *Barnes* v. *Nunnery Colliery Co. Ltd.*, [1912] A.C. at p. 47, as follows:

Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment.

and then proceeds:

The Lord Chancellor there put the test cumulatively, because that fitted the facts of the case in which boys in a mine rode in tubs, a thing they were not employed to do, and which they had been expressly told not to do. But I imagine the proposition is equally true if he had expressed it disjunctively and used the word "or" instead of "also".

and at p. 68:

As I have already said, however, the question of within or without the sphere is not the only convenient test. There are others which are more directly useful to certain classes of circumstances.

One of these has been frequently phrased interrogatively. Was the risk one reasonably incidental to the employment? And the question may be further amplified according as we consider what the workman must prove to shew that a risk was an employment risk or what the employer must prove to shew it was not an employment risk.

As regards the first branch, I think the point is very accurately expressed by the Master of the Rolls in the case of *Craske* v. *Wigan*, [1909] 2 K.B. 635,

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where he says: "It is not enough for the applicant to say 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say 'The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some particular danger.'"

As regards the second branch, a risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself.

In *Herbert* v. *Samuel Fox & Co. Ltd.*, [1916] 1 A.C. 405, a workman employed as a shunter upon his employer's private railway was seriously and permanently injured by falling from the buffer of a wagon upon which he was improperly riding. His duty when wagons were being moved was to walk in front of them and keep a look-out. A notice to this effect was posted in his employer's engine shed. On the occasion of the accident, at the conclusion of some shunting operations, four wagons were being pushed by an engine toward the engine shed, when the workman, instead of walking in front of them, climbed upon the buffer of the leading wagon and sat there till he fell and was run over. It was held that the man in sitting on the buffer was acting outside the sphere of his employment, and that therefore the accident did not arise out of his employment.

Lord Atkinson is reported as follows, at p. 411:

But his own evidence shows conclusively that it was not his duty to be on the buffer; that, on the contrary, it was his duty not to be upon it. He was employed to do a particular work away from it, and was expressly forbidden, while engaged in that work, to be anywhere but on the ground, walking in front of the foremost wagon. He says he got on the front wagon to keep a look-out. He admits that his proper duty *was to walk* in front of the wagon to keep a look-out. That it was no part of his duty to get on the wagon. That it is a dangerous thing to ride on the buffer. That it is against the rules to do so. That if the manager saw him riding on the buffer he would be dismissed.

And at p. 412:

He was thereby knowingly exposing himself to risks not reasonably incidental to his employment, risks which neither he nor his employer contemplated that he should run, risks which the employer forbade him to run, new perils added by his own rashness.

Lord Shaw of Dunfermline is reported as follows, at p. 416:

In my view this case is not one of making a mistake, or even doing a wrong, in a mere breach or rules affecting the service. It is outside the scope of the service altogether; and it was that, and that alone, and not the employment, which brought about the special danger from which the man performing the act suffered. I may add, my Lords, that if it were held that this was an accident arising out of the employment, and that compensation was due,

then, in my humble opinion, a real and damaging blow would have been delivered at the whole system of safeguards and protections under which, in many industrial employments, so much may be effected for the safety of life and of limb of the workers engaged.

In *Lancashire & Yorkshire Railway* v. *Highley*, [1917] A.C. 352, Lord Atkinson quotes with approval, at p. 371, the following observations of Farwell, L.J., in *Brice* v. *Edward Lloyd, Ltd.*, [1909] 2 K.B. 804, at 809, namely:

It is now well settled that the word "employment" in the Act is not to be confined to actual work. In my opinion it extends to all things which the workman is entitled by the contract of employment expressly or impliedly to do . . . . . But he is not entitled, and therefore he is not employed, to do things which are unreasonable or things which are expressly forbidden.

Lord Sumner says, at p. 372:

There is, however, in my opinion one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury.

I think I am justified in assuming that the cars which were being coupled complied with s. 211 of the Railways Act, which would mean that the couplers were automatic, and that in order to couple or uncouple there was no necessity for any person to go between the ends of the cars, and I gather from the evidence that the plaintiff's sole duty with regard to the operation of coupling, was to stand at one side and give the engineer the necessary signals for backing up, stopping, or going ahead, as the case might be. It is possible that, were the train standing still, he might go in and adjust a draw bar so that the coupling might possibly be more certain of taking place without the necessity of repeated trials, but we are left solely to conjecture as to that. I would go so far as to say that, even if that were a part of his duty, it would not extend to going between the cars while in motion; in fact, the rules expressly prohibit it. In my opinion the plaintiff was at a place he was not supposed to be at, and which his contract of employment and the

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rules of the company never contemplated he should be at. He was not merely doing something he was entitled to do in a reckless or forbidden way, he was doing something he was expressly forbidden to do at all. He unnecessarily exposed himself to a risk he was not employed to expose himself to; he was doing something outside the sphere of his employment.

The cases which I have above referred to seem to me to hold that, under the facts as presented in this case, the plaintiff is not entitled to succeed.

In my opinion, therefore, the appeal should be dismissed with costs. *Appeal dismissed.*

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Re STUDEBAKER CORP. OF CANADA and CITY OF WINDSOR.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. June 23, 1919.

TAXES (§ I C—38)—INTERPRETATION OF "BUSINESS OF A MANUFACTURER"—LEASED PREMISES IN CITY—ASSESSMENT ACT, R.S.O. 1914, c. 195, s. 10(1), (D).

A company carrying on a manufacturing business, having its factory and head office in one place, and a show room and sales room in another, must be assessed as a "business assessment" for the latter premises under the provisions of the Assessment Act, R.S.O. 1914, c. 195, s. 10 (1), (d).

Statement.

APPEAL by the Studebaker Corporation of Canada Limited from an order of a County Court Judge dismissing the appellant corporation's appeal from the decision of the Court of Revision as to the business assessment of the appellant corporation and increasing the amount of the assessment. Affirmed.

The appeal was upon a special case stated by the Judge of the County Court, under the Assessment Act, as follows:—

This was an appeal from the decision of the Court of Revision of the City of Windsor confirming the appellant's business assessment, made under clause (*f*) of sub-sec. (1) of sec. 10 of the Assessment Act, R.S.O. 1914, ch. 195, in respect of a commercial business carried on by the appellant as an agent only.

At the hearing of the appeal before me, the appellant requested me to note and state as a special case for a Divisional Court, the following question:—

"Upon the facts in evidence, is the appellant carrying on the business of a retail merchant within the meaning of clause (*h*) of sub-sec. 1 of sec. 10 of the Assessment Act?"

The facts in evidence relative to the question are not disputed, and are as follows. The appellant is a manufacturer of automobiles, having its factory and head office at Walkerville, Ontario. Sales of the products of the factory for shipment to or delivery at places other than in Windsor are made at the appellant's premises in Walkerville. The appellant occupies leasehold premises in Windsor, whereon it carries on the business in respect of which the assessment in question was made. These premises are used as a show-room and sales-room for the sale by the appellant of the products of its factory directly to the public; and automobile parts and accessories, also the products of the factory, are similarly sold, and a gasoline and repair station is maintained there. No manufacturing of any kind is done on these premises. There is a manager in charge, an employee of the appellant, who is paid for his services a fixed salary, besides a certain commission on sales made at the premises. Automobiles, not of the appellant's manufacture, are sometimes taken in trade or as part payment on sales of automobiles manufactured by the appellant. Automobiles so taken are kept and resold on the premises.

The preponderating business carried on by the appellant on the premises in question is the sale of the products of its factory, automobiles and automobile parts and accessories, directly to the public.

My decision upon the question aforesaid was in the negative.

My decision on the whole matter was that the appellant should not be assessed either under clause (*f*) as carrying on a commercial business as an agent only, or under clause (*h*) as a retail merchant; but that it was carrying on upon the premises in question the business of a manufacturer within the meaning of clause (*d*) of sub-sec. 1 of sec. 10* of the Act, and should be assessed as such

*10.—(1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "Business Assessment" to be computed by reference to the assessed value of the land so occupied or used by him, as follows:—

. . . . . .

(*d*) Subject to the provisions of clause (*i*) every person carrying on the business of a manufacturer for a sum equal to 60 per cent. of the assessed value; and a manufacturer shall not be liable to business assessment as a wholesale merchant by reason of his carrying on the business of selling by wholesale the goods of his own manufacture on such land.

Clause (*i*) deals with the case of a flour-miller.

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thereunder. And, under sub-sec. 16 of sec. 69 of the Act, I directed the city clerk to amend the roll accordingly.

Pursuant to sec. 81 of the said Act, as enacted by 6 Geo. V. ch. 41, sec. 6, and in compliance with the appellant's request, I state the foregoing as a special case for the purposes of an appeal from my said judgment to a Divisional Court.

The reasons for the decision of the learned County Court Judge were as follows:—

The appellant company is assessed for business assessment on a 50 per cent. basis, under sec. 10 (1), clause (*f*), as carrying on a commercial business as an agent. The ground of appeal is that the company carries on the business of a retail merchant, and should be assessed under clause (*h*) on a 30 per cent. basis.

The facts upon the evidence are as follows. The company is a manufacturer of automobiles, having its factory and head office at Walkerville, Ontario. Sales of the company's product for shipment to places other than Windsor are made at the company's premises in Walkerville. The company is tenant of the premises in respect of which it is assessed. These premises are used as a show-room and for the sale of the products of the company, directly to the public; automobile parts, also the products of the company, are similarly sold; and a gasoline and repair service is also maintained there for the benefit of the company's customers. No manufacturing is carried on there. There is a manager in charge, an employee of the company, who is paid a fixed salary and, in addition, a certain commission on his sales, for his services. Automobiles, not of the company's manufacture, are sometimes taken in trade or in part payment on sales of cars manufactured by the company; cars so taken are kept and resold on the premises.

Upon these facts, my opinion is that the company carries on, upon the premises, the business of a manufacturer. It cannot be successfully contended that, in respect of sales made at the company's premises in Walkerville, it carries on a retail business. Neither would it be contended, if the company had established in Walkerville, separate from the factory, a sales-room similar to that in Windsor, that, while in respect of its factory it would be carrying on the business of a manufacturer, in respect to the sales-room, its business would be that of a retail merchant. Can it make any difference if, instead of setting up the separate sales-room in

Walkerville, it be set up in another municipality? I think not. The sale of the product of a manufacturer, wherever it may be sold, is as much a part of the business of the manufacturer as is the making of the product, and is clearly distinguishable from a sale by a retail merchant. The business of a retail merchant is the selling of the product of another bought by the merchant for the purpose of resale.

For these reasons, I am of the opinion that the company should not be assessed either under clause (*f*) as a commercial agent, or under clause (*h*) as a retail merchant, but that it should be assessed under clause (*d*) as a manufacturer.

I dismiss the appeal, and, under sec. 69 (16), direct the clerk to amend the roll by increasing the assessment from 50 per cent. to 60 per cent. of the assessed value of the premises in question.

A. J. Gordon, for the appellant corporation.

F. D. Davis, for the city corporation, respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the Studebaker Corporation of Canada Limited from an order of the Judge of the County Court of the County of Essex allowing an appeal from the decision of the Court of Revision of the City of Windsor as to the business assessment of the appellant.

I am of opinion that, upon the facts as disclosed in the special case, the appellant was properly assessed under clause (*d*) of sub-sec. 1 of sec. 10 of the Assessment Act, R.S.O. 1914, ch. 195.

The business assessment is upon persons occupying or using land for the purpose of any business mentioned or described in sec. 10, and the provision of clause (*d*) is that every person carrying on the business of a manufacturer shall be assessed for a sum equal to 60 per cent. of the assessed value of the land.

The appellant is undoubtedly carrying on the business of a manufacturer; and, in my opinion, the business carried on in Windsor is a part of that business. The appellant's business has two branches, one its manufactory proper and the other its show-room and sales-room, and both are an integral part of the business of a manufacturer carried on by the appellant.

I would dismiss the appeal with costs.

Maclaren, J.A.
Hodgins, J.A.

MACLAREN and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

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RE STUDEBAKER CORP. OF CANADA AND CITY OF WINDSOR.

Magee, J.A.

MAGEE, J.A.:—The Studebaker Corporation is a tenant of premises in Windsor, of which the assessed value is $40,000. A business assessment of 50 per cent. of this amount was made by the city assessor, apparently treating the business there as an agency, and this, on the company's appeal, was increased by the County Court Judge to 60 per cent., as a manufacturing concern, and the company again appeals to have this reduced to 30 per cent., as a retail merchant.

The facts are succinctly stated in the amended special case. The preponderating business carried on by the appellant on the premises in Windsor is the sale of the products of its factory—automobiles and automobile parts and accessories—directly to the public. No manufacturing of any kind is done on the premises. The company is a manufacturer of automobiles, having its factory and head office in Walkerville, and sales of the product of the factory for shipment to or delivery at places other than in Windsor are made at the premises in Walkerville. It is not stated whether sales by wholesale are made by the company anywhere.

Section 10 of the Assessment Act, in sub-sec. 1, enacts that "every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called 'Business Assessment' to be computed by reference to the assessed value of the land so occupied or used by him, as follows:" and, in clause (*b*), makes brewers assessable for 75 per cent., but only for 60 per cent. on the portion of the land used as a malting house. Clause (*c*) makes one carrying on the business of a wholesale merchant assessable for 75 per cent. Clause (*d*) makes every person carrying on the business of a manufacturer assessable for 60 per cent., but declares that a manufacturer shall not be liable to business assessment as a wholesale merchant by reason of his carrying on the business of selling by wholesale the goods of his own manufacture on such land. Clause (*e*) relates to departmental stores and retail merchants dealing in more than five branches of retail trade on the same premises and to other business; and clause (*g*) refers to the publisher of a newspaper in a municipality. By clause (*h*), every person carrying on the business of a retail merchant in a municipality is assessable for a percentage which, in places having the population of Windsor, is placed at 30 per cent.; and clause (*j*)

fixes 25 per cent. for any business not specially mentioned. Sub-section 3 directs that no person shall be assessed in respect of the same premises under more than one of the clauses of sub-sec. 1, and where he does carry on more than one of the kinds of business mentioned in that sub-section, on the same premises, he shall be assessed under the clause which includes the chief or preponderating business.

The effect of the decision appealed from is that if A. and B. are separately engaged in selling the same sort of goods by retail in, say, Toronto, each occupying and using for that purpose land assessed at $20,000, and if A. buys his goods in say Kingston, but B. manufactures his goods in Kingston, A. is liable only to an assessment of $5,000, while B. is liable to one of $12,000.

It may be that the Legislature intended to discourage dealings direct between manufacturer and consumer and to encourage middlemen, but it makes one pause to find such a result. The question is one of considerable importance, as it would affect not only sales-rooms, in various towns, of motor factories, but also of such products as biscuits, confectioneries, ready-made clothing, stoves and furniture, and many others.

I am not disposed to dissent from the conclusion that the appeal should be dismissed, but I confess that it is with much doubt that I concur in that result. The word "merchant" has had and may have different meanings. For instance, it was said, "Bankers, and such as deal by exchange, are properly called merchants;" and, "Those who buy goods, to reduce them by their own art or industry, into other forms, and then to sell them, are artificers, not merchants:" see Tomlin's Law Dictionary. Sometimes it has been applied to those dealing by wholesale; sometimes to those trafficking to foreign countries. Sometimes to shopkeepers: *Buckley* v. *Barber* (1851), 6 Ex. 164, 180, 181; and this very commonly in Scotland: Murray's Dictionary. Generally it has involved the idea of buying and selling, but sometimes it has been applied to one buying without selling in the same condition, or selling without buying in the same condition. Thus in the United States in *In re Cameron Town Mutual Fire Lightning and Windstorm Insurance Co.* (1899), 96 Fed. Repr. 756, it was said: "He would be a merchant if his business consisted in buying without selling, and he might be a merchant by simply

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RE STUDEBAKER CORP. OF CANADA AND CITY OF WINDSOR.

Magee, J.A.

selling." In *State of Missouri* v. *Richeson* (1870), 45 Mo. 575, the statute defined the merchant as one "who shall deal in the selling of goods," and the defendant, a manufacturer having goods on hand ready for sale and not merely made to order, was held to be within the statute. In *Washburn* v. *City of Oshkosh* (1884), 60 Wis. 453, the Supreme Court approved a holding that for statutory assessment of merchants' goods the word "merchants" must receive its most extended meaning, and include all persons who keep for sale and sell any kind of chattel property at a fixed place, and therefore included lumber manufactured by the defendant from logs.

On the other hand, in *Josselyn* v. *Parson* (1872), L.R. 7 Ex. 127, in construing the defendant's bond to the plaintiff not to travel for any porter or ale merchant within certain limits, the Court or a majority seem to have considered that a person dealing in one kind of porter was not properly a porter merchant, and Bramwell, B., said in addition at p. 129: "A merchant of or in an article is one who buys and sells it, and not the manufacturer selling;" but the Court there was dealing with the contract and its spirit.

The Legislature has used the word "manufacturer" as well as the word "merchant," but one can be a manufacturer without any intention of selling the product manufactured. Thus, in the case of the brewer, the statute recognises the difference between the malting house and the brewery of which it is a part. So, it may be conceived, it would be profitable for extensive farmers to manufacture artificial fertilizers, or for sulphuric acid to be manufactured by those requiring much of that product. This appellant does indeed manufacture to sell; but, though the selling is part of his business, it is not manufacturing.

Some considerations connected with the statute itself incline one to doubt that the Legislature intended what the appellant objects to. In clause (*d*) it has been thought proper to declare that the manufacturer selling by wholesale shall not be liable to the business assessment as a wholesale merchant. It is not said that he shall not be deemed a wholesale merchant, and it would seem that the Legislature had present to its mind that without express declaration to the contrary he might be considered a merchant of his own commodities. If so, why is no mention made of selling by retail—although the Act was passed as recently as

1904, when retailing by manufacturers was not uncommon? The statute also refers to selling by wholesale upon the lands, but I I do not think that weighs for the appellant, by meaning "upon the land where he manufactures." The provision was, I think, in case of the manufacturer, to relieve him from the higher tax—because of the possibility of his being considered a merchant.

Then, too, one has to remember that the business assessment took the place of the former provision which assessed the goods themselves and deducted the debts owing in respect of them, thus necessitating unwelcome inquiry into the business. It substituted a rough and ready average of equality by proportionate relation to the premises used. Under the old system, B., in the case I have put, would not have more to pay than A., assuming equal stocks and both equally free from debt, and it is very questionable if the Legislature ever intended that he should.

However I do not feel justified in differing from other members of the Court in the construction placed upon the words the "business of a manufacturer," and therefore concur in dismissing the appeal. The Legislature can clear up any doubt.

Appeal dismissed

McDERMIT v. EDDY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

BILLS AND NOTES (§ V A—111)—PAYABLE ON DEMAND—DEMAND MADE—PAYMENT ON ACCOUNT—PAYMENT VALID—ENDORSER FOR VALUE TAKES SUBJECT TO SUCH PAYMENT.

An endorser for value takes a promissory note, payable on demand, subject to any prior payments made on account to the drawee provided that the drawee has demanded payment of the note, and such note has so become overdue.

[*Glasscock* v. *Balls* (1889), 24 Q.B.D. 13; *Barough* v. *White* (1825), 4 B. & C. 325, 107 E.R. 1080, referred to.]

Statement.

APPEAL by defendant from the trial judgment in an action on a promissory note. Varied.

E. F. Collins, for appellant; *A. Benson*, for respondent.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This is an action on a promissory note, payable on demand, made by the defendant in favour of one Snyder, and by Snyder endorsed to the plaintiff for value. Prior to the endorsement of the note to plaintiff, Snyder demanded payment

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Elwood, J. A.

of the note from the defendant, and the defendant paid him $40 on account thereof.

The defendant contends that he is entitled to be credited with this $40. The trial Judge held otherwise, and gave judgment for the plaintiff for the full amount of the note.

The trial Judge based his judgment upon *Glasscock* v. *Balls* (1889), 24 Q.B.D. 13, and s. 182 of the Bills of Exchange Act, R.S.C., 1906, c. 119.

In my opinion s. 182 of the Act does not affect the question. It is not contended here that there is any defect in the title of the holder of the note, but merely that the holder, while entitled to recover on the balance of the note, is affected by the payment made to Snyder while the note was in his hands.

It is contended by the appellant that the demand by Snyder for payment caused the note to be overdue when he subsequently endorsed it to the plaintiff.

My attention has not been called to any authority which deals squarely with the question which we have to consider in this case, but there are observations in some of the cases which, I think, are of some assistance.

In *Glasscock* v. *Balls*, *supra*, Lord Esher, M.R., at p. 15 of the report, says as follows:

> The plaintiff cannot be said to have taken the note when overdue, because it was not shewn that payment was ever applied for, and the cases shew that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back.

In *Barough* v. *White* (1825), 4 B. & C. 325, at p. 327, and 107 E.R. 1080, at p. 1081, Bayley, J., in considering the question of whether a demand note was overdue, says: "In this case no demand was proved." Littledale, J., says "We could not treat it as overdue without evidence of payment having been demanded and refused." See also the observations of Abbott, C.J., in the same case, as reported in (1825), 2 C. & P. 8, at p. 9.

In Falconbridge on Banking & Bills of Exchange, 2nd ed., c. 53, at p. 790, the learned author, in his notes to the above s. 182, says:

> The Act is not referred to in *Glasscock* v. *Balls*, *supra*, but the Court must have been of opinion that the Act has made no change in the law as expounded in the earlier cases, namely, that a promissory note, payable on demand, is not to be considered as overdue without some evidence of payment having been demanded and refused.

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Elwood, J. A.

There is no evidence before us of any refusal to pay, but I am of opinion that where there is evidence of a demand for payment and failure to pay, that is an equivalent of a refusal. I conclude, therefore, on the authorities, that the note in question in this action was overdue at the time it came into the hands of the plaintiff, and that he therefore took it subject to the payment of $40, theretofore made to Snyder. There appears to be no evidence as to the precise date that this payment was made, and unless the parties can agree upon the date that this payment was made, there will be a reference to the Clerk of the Court to ascertain the exact date and credit the payment of $40 upon the promissory note as of the date on which it was paid. The plaintiff's judgment will be reduced by the payment of the $40 to be credited as above mentioned, and the plaintiff will only be entitled to costs on the small debt scale. The defendant will be entitled to set off his costs as indicated by the trial Judge. The defendant will have the costs of this appeal. *Judgment accordingly.*

JONES v. CANADIAN PACIFIC R. Co.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. November 10, 1919.

MASTER AND SERVANT (§ II E—225)—ACCIDENT IN ONE PROVINCE—SUIT IN ANOTHER—NEGLIGENCE ALLEGED—REMEDY AT COMMON LAW—DAMAGES.

An employee bringing an action in Manitoba to recover damages for alleged negligence taking place in Alberta cannot succeed under the Workmen's Compensation Act (Man.), 6 Geo. V. 1916, c. 125. He must find his remedy, if any, at common law.

[*Simonson* v. *C.N.R.* (1913), 15 D.L.R. 24, applied.]

Statement.

APPEAL from a judgment of Metcalfe, J., on a question of law before trial takes place, action sent down for trial.

A. A. Fraser, for plaintiff; *L. J. Reycraft*, K.C., and *H. A. V. Green*, for defendants.

Perdue, C.J.M. Cameron, J.A. Haggart, J.A.

PERDUE, C.J.M., CAMERON and HAGGART, JJ.A., concurred with Fullerton, J.A.

Fullerton, J.A.

FULLERTON, J.A.:—This action is brought to recover damages for personal injuries suffered by the plaintiff through the alleged negligence of the defendant. The plaintiff was an employee of the defendant and was at the time the accident occurred engaged in operating a dredge on land belonging to the defendant near Lethbridge in the Province of Alberta.

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Fullerton, J.A.

Among other defences the defendant pleaded:—

Para. 11. The defendant says that if the plaintiff was an employee of the defendant, and if the plaintiff was injured as alleged while in the employ of the defendant, . . . the act complained of was not one which would have been actionable in any Court of law in this Province, if it had occurred within the jurisdiction of this Court.

The defendant says no action now lies in this Province in connection therewith, and that the plaintiff's statement of claim discloses no cause of action and is bad in law, and the defendant demurs thereto.

The plaintiff by his reply, para. 5, says:

This action was and is competent to the plaintiff in the Province of Manitoba and also in the Province of Alberta, and the said The Workmen's Compensation Act of Manitoba, 6 Geo. V. 1916, c. 125, and the said The Workmen's Compensation Act of Alberta, 8 Ed. VII. 1908, c. 12, do not apply to his claim in any way whatsoever.

Upon this state of pleadings the defendant applied to the Referee in Chambers under r. 466 of the King's Bench Act and an order was made in the following terms:

It is ordered that the following question of law be decided before any evidence is given or any question or issue of fact is tried, namely:—1. Does the plaintiff's statement of claim disclose any cause of action, that is to say, is the act complained of one which would have been actionable in any Court of law in this Province if it had occurred within the jurisdiction of this Court, and does an action now lie in this Province in connection therewith?

The matter then came before Metcalfe, J., who made an order "that the above question be answered in the affirmative."

From this order the defendant appealed.

Counsel for the defendant contends that in order that the wrong complained of should be actionable here it must be wrongful according to the law of Alberta and actionable if done here.

He does not dispute that the act was wrongful according to the law of Alberta, but contends that if it had happened in this Province the plaintiff could not maintain an action here but would be compelled to resort to his remedy under the Workmen's Compensation Act, 6 Geo. V., 1916, Man., c. 125.

The statement of claim alleges that the defendant owns land to the north-east of Lethbridge, in which there is a trench or ditch for irrigation purposes, and that the plaintiff was engaged as engineer in operating a dredge cleaning out said trench or ditch when the accident occurred.

Schedule 1 to the Workmen's Compensation Act enumerates the classes of industries to which Part I. of the Act applies. The defendant contends that the work in which the plaintiff was

engaged at the time he received his injuries comes within one or more of these classes, that in consequence Part I. of the Act is applicable and that if the accident had happened in Manitoba the plaintiff would have been precluded by s. 13 (1) of the Act from bringing an action.

The law is undisputed that our Courts have jurisdiction in respect of a tort committed in another jurisdiction if the act complained of is not justifiable by the law of the place where it is done and is an act which if done here would be a tort.

In *Simonson* v. *C.N.R.* (1913), 15 D.L.R. 24, 24 Man. L.R. 267, affirmed in (1914), 17 D.L.R. 516, the plaintiff sued for damages for personal injuries sustained while acting as a brakeman for the defendant in the Province of Saskatchewan. The defendant set up the defence of common employment. By statute in Saskatchewan the defence of common employment is done away with.

Counsel for the plaintiff admitted that at common law the action would not lie in this Province, but contended that the case came within the Employers' Liability Act, R.S.M., 1913, c. 61, in which case the defence of common employment would not be open to the defendant. Metcalfe, J., held that the Employers Liability Act was limited and local and did not apply to injuries suffered outside the Province.

On appeal this judgment was upheld, Howell, C.J., dissenting. Richards, J.A., in his judgment, 17 D.L.R., at p. 518, refers to the rule of law stated in Dicey's Conflict of Laws (2nd ed.) p. 645, to the effect that:

> An Act done in a foreign country, is a tort and actionable as such in England, if it is *both*,—(1) Wrongful, *i.e.*, not justifiable, according to the law of the foreign country where it was done, *and*, (2) Wrongful, *i.e.*, actionable as a tort, according to English law, *i.e.*, is an act which, if done in England, would be a tort.

He then says, 17 D.L.R. at p. 519:

> But it seems to me that our Act, giving only a statutory remedy where, but for it, there was none, the right of action given by it is special, created only by statute, and what is sued for under it is not a tort in the ordinary common law meaning as contemplated by sub-sec. (2) of the above rule.

The Court of Appeal in Ontario in the case of *Story* v. *Stratford Mill Bldg. Co.* (1913), 18 D.L.R. 309, 30 O.L.R. 271, took the contrary view and held that both the common law and the statute law of Ontario may be looked at in determining whether a "delict" is actionable.

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Fullerton, J.A.

The Workmen's Compensation Act of Manitoba, 6 Geo. V., 1916, c. 125, in express terms applies to injuries sustained under certain circumstances by workmen outside the jurisdiction. S. 5 provides as follows:—

5 (1) Where an accident happens while the workman is employed elsewhere than in Manitoba what would entitle him or his dependents to compensation under this Part if it happened in Manitoba, the workman or his dependents shall be entitled to compensation under this Part.

(a) if the place or chief place of business of the employer is situate in Manitoba and the residence and the usual place of employment of the workman are in Manitoba, and his employment out of Manitoba has lasted less than six months, or,

(b) if the accident happens on a steamboat, ship or vessel or on a railway and the workman is a resident of Manitoba and the nature of the employment is such that, in the course of the work or service which the workman performs, it is required to be performed both within and without Manitoba.

(2) Except as provided by sub-sec. (1) no compensation shall be payable under this Part where the accident to the workman happens elsewhere than in Manitoba.

The Legislature has thus expressed its clear intention that except in the cases specifically mentioned the Act shall not operate beyond the territorial limits of the Province.

Applying the principles laid down by the Court of Appeal in *Simonson* v. *C.N.R.*, *supra*, by which we are of course bound, unless the place of business of the defendant is situate in Manitoba and the residence and the usual place of employment of the workman, are in Manitoba, and his employment out of Manitoba has lasted less than six months, within the meaning of s. 5 (1) (a) of the Workmen's Compensation Act, the plaintiff in this case would have no remedy under the Act and would be in the same position as if the statute did not exist, and could therefore sue at common law.

Whether or not the plaintiff comes within the provisions of s. 5 (1) (a) can only be determined at the trial.

It is impossible to answer directly the questions as framed. The action should go down to trial.

Dennistoun, J.A.

DENNISTOUN, J.A.:—The defendant company having obtained an order from the Referee in Chambers for the decision of certain questions of law before trial of this case, the following questions were submitted to a Judge in Wednesday Court and answered by him in the affirmative.

1. Does the plaintiff's statement of claim disclose any cause of action, that is to say, is the Act complained of one which would have been actionable

in any Court of law in this Province if it had occurred within the jurisdiction of this Court?

2. Does an action now lie in this Province in connection therewith?

The defendant company has appealed asking that the questions be answered in the negative, and the action dismissed.

The statement of claim has been answered by a statement of defence and supplemented by a reply and in my opinion both claim and reply may be looked at in order to ascertain what is the case put forward by the plaintiff.

Summarized it is as follows:—The plaintiff, a resident of Manitoba, while in the employ of the defendant in Alberta as an engineer in charge of a gasoline engine, operating upon a dredge, engaged in deepening an irrigation ditch, was injured by machinery of defective construction, through the negligence of the defendant company, for which he claims damages.

Such a cause of action has always been recognized by the Courts of both Manitoba and Alberta under the common law.

If the matter rested as stated, there would undoubtedly be a good cause of action in Manitoba for the tort committed outside the Province, the defendant having been brought within the jurisdiction of the Manitoba Courts.

The defendant company say that the plaintiff's pleading discloses no right of action at common law in Manitoba, the right to compensation being governed by the Workmen's Compensation Act, 6 Geo. V., 1916, c. 125, which gives exclusive jurisdiction to the Workmen's Compensation Board to deal with accidents happening to persons employed in industries set forth in Schedule I. of the Act, and to award compensation therefor to persons who come within the provisions of Part I. of the Act, and that the statement of claim shews that the plaintiff has no right of action in the Courts, and can claim compensation, if at all, only under the Compensation Act.

The plaintiff alleges that the Workmen's Compensation Act of Manitoba does not apply to his case.

Under s. 5 of the Act by which this case will be governed if the Act applies, it must be shewn that the place or chief place of business of the employer is situate in Manitoba, that the usual place of employment of the workman is in Manitoba, and that his employment out of Manitoba lasted less than six months. When

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JONES v. CANADIAN PACIFIC R. CO.

Dennistoun, J.A.

these points have been determined, it will then be necessary to ascertain whether the workman and the employment in which he was engaged are within the purview of Part I. of the Act and of Schedule I. thereto, and not until these and possibly other points have been investigated and determined by the trial Judge can the questions propounded be answered by a direct affirmative or negative.

Question 1 is hypothetical and indicates a situation which does not apply, as the accident did not occur within the jurisdiction of this Court. It was no doubt framed so as to apply the tests as to jurisdiction laid down in *Simonson* v. *C.N.R.* (1913), 15 D.L.R. 24, 24 Man. L.R. 267, affirmed in (1914), 17 D.L.R. 516, but in my opinion that should not be done at this stage of the proceedings. The conclusion is reached that the questions should not be answered by an unqualified "Yes" or "No" upon the pleadings alone, and in order not to create in the mind of the trial Judge an impression that the Court has definitely decided that the plaintiff has a cause of action, I would qualify the answers given by the Judge appealed from so as to make it clear to the trial Judge that the jurisdiction of the Court to deal with this action must be determined by him after evidence has been taken.

Opinion is therefore given that the answers of the Court below should be amplified to express what is understood to be their true meaning, and the intention of the Judge who gave them.

I construe the answers to both questions as follows:—

Yes; provided it is established at the trial that the Workmen's Compensation Act does not apply to the case.

I would allow the appeal in part and qualify the answers given in the Court below as indicated.

Costs of the motion and of this appeal to be costs in the cause to the plaintiff. *Judgment accordingly.*

ONT.

S. C.

STEINBRECKER v. MUTUAL LIFE INSURANCE CO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. June 23, 1919.

INSURANCE (§V B—216)—PREMIUM PAYABLE BY NOTE TO AGENT—RULES OF INSURANCE COMPANY—DEATH OF ASSURED—POLICY IN FORCE—LIABILITY.

An insurance company, whose authorized agent takes a note payable to him for the premium of a policy he has written and remits said premium less his commission to the company out of his own pocket, must regard this premium as paid, and the policy in question as in force.

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S. C.

STEINBRECKER v. MUTUAL LIFE INSURANCE CO.

APPEAL by defendant from the trial judgment in an action on an insurance policy. Affirmed.

THE following statement is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant company from the judgment, dated the 14th November, 1918, pronounced by the Chief Justice of the Common Pleas, after the trial of the action before him, sitting without a jury, at Toronto, on that and the previous day.

The action is brought to recover the amount payable under the terms of a policy of the appellant company, dated the 7th November, 1916, on the life of the husband of the respondent, Arthur Steinbrecker, she being the beneficiary named in the policy.

The defence which is set up is:—

That the application for the insurance, which was in writing, was delivered to R. B. Hood, sub-agent of the company at Calgary, for transmission to the appellant company's head office at Waterloo; that one of the provisions of the application, which was in the form of an agreement by the applicant, is as follows:—

"And I further agree to accept the policy when presented and pay the stipulated premium therefor, and that the said assurance shall not take effect or be binding until the first premium shall have been paid to such company or to a duly authorised agent thereof, during my lifetime and good health . . . and that if a promissory note or other written obligation be given for any premium or part thereof and be not paid at maturity the policy shall cease to be in force (but may be revived in accordance with its terms) but I am nevertheless to be liable upon such obligation to the full amount unpaid thereon . . ."

That the application was forwarded to the appellant company on or about the 7th day of November, 1916, "when it caused a policy of insurance to be issued numbered 121153" (the policy sued on) "on the life of Steinbrecker, for $2,000, payable to his wife . . . subject, however, to the payment of the said annual premium of $79."

That the policy contains the following provision:—

"This policy is issued by the company and accepted by the assured upon and subject to the privileges and conditions

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STEINBRECKER v. MUTUAL LIFE INSURANCE CO.

printed and written by the company on the succeeding page hereof, all of which are hereby made a part of this contract."

That the policy was subject to the following conditions:—

"(1) This policy and the application therefor (a copy of which is attached to this policy when issued) constitute the entire contract between the parties hereto. All statements made by the assured shall, in the absence of fraud, be deemed representations and not warranties, and no statement of the assured shall avoid this policy or be used in defence to a claim thereunder unless it is material and is contained in the said application."

"(5) All premiums are payable at the head office of the company, but will be accepted elsewhere in exchange for the company's printed receipts signed by the president and the managing-director, and countersigned by any authorised agent. No agent has authority to put this policy in force before payment of the first premium and delivery of the company's printed receipt; and, should the policy be delivered without such payment and receipt, it shall be conclusively presumed that it was delivered for examination only, and the company shall not thereby be deemed to be upon the risk.

"(6) If any premium or written obligation given therefor be not paid when due (except as provided in the clause respecting non-forfeiture hereinafter contained), or if the interest on any loan secured by this policy remain in default until such loan and the accrued interest thereon capitalised annually amount to its cash surrender value, the policy shall be void and all liability of the company thereon shall cease, but it may be revived by the company within two years from the date of lapse, on satisfactory evidence being furnished of the assured's insurability, and on payment of overdue premiums and any other indebtedness, with interest at a rate not in excess of 6 per cent. per annum compounded yearly."

That the policy was forwarded to the Calgary agency for delivery to the assured, together with the appellant company's regular printed receipt for the premium, also for delivery to him on payment by him in cash of the first premium; that this receipt had printed at the foot of it:—

"If any promissory note or other obligation given for the first year's premium or part thereof be not paid when due the policy

will cease to be in force, but such obligation must nevertheless be paid. . . ."

That the agent Hood delivered the policy to the assured on or about the 13th day of November, 1916; and that, instead of paying the premium in cash, the assured gave the agent a promissory note for the amount of the premium, dated on that day and payable in three months; that "as a matter of accounting simply between himself and the company, and pursuant to his contract with the company, the sub-agent, on or about the 6th day of February, 1917, remitted to the company that portion of the premium representing the difference between the full premium and the commission he was entitled to receive if the premium had been paid;" that the assured failed to pay the premium note at maturity, and that no part of it, except $10, which was paid on the 21st day of March, 1917, was ever paid; that the printed receipt was never delivered to the assured, but has always remained in the possession of the appellant company or its agent.

The assured died on the 5th day of August, 1917.

Hood was a sub-agent, appointed by George A. Robinson, the appellant company's general agent at Calgary; by the agreement between the company and Robinson it is amongst other things provided that:—

"If an applicant fails or refuses to take his policy, it having been issued in accordance with the application, the agent will be liable for the sum of $2 in addition to the medical examiner's fee, which must be remitted with the refused policy to the general agent with his first monthly report next succeeding the issue of the policy. In no case will the company allow policies to be retained beyond the third report-day after issue, and for all policies not then returned or paid the agent shall be reponsibile for the first premium less commission thereon."

By this agreement Robinson was required promptly at the close of each month, or oftener if required by the company, to make, on forms furnished by the company for that purpose, a full report of all collections . . . and to make that report to the cashier at Calgary not later than the first day of the succeeding month.

Similar provisions to these are contained in the agreement between Robinson and Hood, but Hood's report was to be made to the general agent.

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When the policy came to the hands of Hood, he delivered it to Steinbrecker, and took from him a receipt for it, in which it is stated that he had "made settlement of the first premium with the agent Mr. R. B. Hood;" and the promissory note to which reference has been made, which was not drawn on the appellant company's printed form, and was made payable to the order of Hood, and the receipt for the first premium, were retained by Hood.

When Steinbrecker's application was taken by Hood and when the policy was delivered and the note was taken, "Steinbrecker said he needed a little time" and Hood "told him this could be arranged." Hood had known Steinbrecker for five years. Steinbrecker, after this transaction, went to Seattle, and, judging from the correspondence which took place between them when Steinbrecker was living at Seattle, they were on familiar terms, and Hood was apparently treating Steinbrecker as his debtor for the amount of the promissory note. A payment of $10 was made by Steinbrecker to Hood on the 21st March, 1917, and this money was treated by Hood as his own, and the fact that it had been received does not appear to have been communicated to the appellant company or to the general agent.

On the 6th February, 1917, Hood paid to the cashier at Calgary the amount of the premium, less his commission for obtaining the risk, and in his February report the general agent reported the payment to the head office, and the money that had been paid by Hood came to the hands of the company, and has been retained by it.

In the cash-book of the general agency at Calgary the payment of the premium appears, and it also appeared in the books of the head office, and the policy was recognised and treated as a binding obligation of the appellant company until after the death of Steinbrecker, when the company repudiated liability on the ground that it takes in its defence.

On the 8th February, 1917, the official receipt for the premium, in which it is stated that the money was received from Steinbrecker, was signed by G. H. Ryan, cashier, and it is a reasonable inference that, after having been signed, it was handed back to Hood, in whose possession it had been. This payment was made by Hood several days before the promissory note fell due.

It should also be mentioned that the note was payable with interest at 8 per cent. per annum, and that if it had been made payable to the company the rate of interest would have been 6 per cent., and that on his examination under commission Hood testified that he paid the head office the amount of the note, and that, after he paid it, he expected that the money was his.

D. L. McCarthy, K.C., and *H. J. Sims*, for the appellant company.

Gideon Grant, for the plaintiff, respondent.

The judgment of the Court was read by

MEREDITH, C.J.O. (after stating the facts as above):—It is, I think, a reasonable inference from all the circumstances, beginning with the making of the note payable to Hood, and not to the appellant company, and ending with the payment of the premium by Hood, followed by his application to Steinbrecker for payment of the note long after the 6th February, that Hood had led Steinbrecker to believe that he would provide for the payment of the note when it matured, and that Hood intended to do this and himself to pay the note if Steinbrecker was not able to pay it when it should become due, and that when Hood paid the premium he intended to pay it for and on behalf of Steinbrecker, and not, as he now says, only because he was by his agency contract obliged to do so. Meredith, C.J.O.

It is true that it was a term of his agency contract that policies were not to be retained beyond the third report-day after issue, and that in respect of all policies not then returned or paid he was responsible for the first premium less commission thereon. I doubt whether this provision has any application to a case such as this, where the policy had been delivered to the assured and the premium had been paid by a promissory note which was still current. In such a case I incline to think that the agent would have done all that he was bound to do when he handed to the general agent the note he had taken for the premium. That it was within the authority of Hood to take a promissory note for the first premium is not disputed. When a note is given it operates as a payment of the premium, but if it is not paid at maturity the policy *ceases to be in force*. It goes into force when the premium is paid in cash or by a promissory note.

A fact not yet mentioned is that as late as the 13th August,

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1917, Steinbrecker's note was in the hands of Hood—this appears from his letter to the respondent of that date; and another is the statement in a letter of the general agent to the secretary of the company, dated the 13th August, 1917, as follows:—

"The letter which Mrs. Steinbrecker refers to was written by Mr. Hood in a further effort to try and collect something, as of course Mr. Hood had paid the note and wanted to collect enough from Mr. Steinbrecker to at least break even himself."

It is significant, and supports the inference which, as I have said, should be drawn as to the reason for the payment of the premium by Hood, that, after he learned of the death of Steinbrecker, he laid all the papers before the general agent and asked for a ruling as to where he stood; that he was concerned about getting the note paid out of the insurance money, and that he thought that that was discussed.

It was then, apparently, that it entered into the mind of the general agent that the appellant company would or might be entitled to repudiate liability on the policy because Steinbrecker had not paid the note.

The inference which, as I have said, should be drawn is supported by the letter which Hood wrote to Steinbrecker on the 24th April, 1917, in which, referring to the premium, he said:—

"You see, I had to pay the company for this long ago and I would like to get my own out of it."

If ratification of the payment on his behalf of the note be necessary, it is to be found in Steinbrecker's letter to Hood of the 17th May, 1917, in which, answering Hood's letter, he says:—

"As soon as I can get under way and get hold of a little money, I will look after you in good shape."

Mr. McCarthy contended that the case fell within the principle of the decisions in *Acey* v. *Fernie*, (1840), 7 M. & W. 151, 151 E.R. 717, and *London and Lancashire Life Assurance Co.* v. *Fleming*, [1897] A.C. 499,but those cases are, in my opinion, distinguishable.

In *Acey* v. *Fernie*, the premium became due on the 15th March, but was not paid until the 12th April, when the agent through whom the insurance had been effected gave a receipt for the amount of it; in accordance with the arrangement that existed

between the company and its agent by which it was provided that where the premium was not paid within 15 days from the time of its becoming due the agent's account should be debited for the amount after the 15 days had expired, the premium was charged to the account of the agent. Two things were decided in that case: first, that "the mere debiting the agent with the premium could not be considered as a payment to the company by the assured;" and, secondly, that, "as the agent had no authority to contract for the company, the fact of his receiving the money after the expiration of the 15 days, and the entry in the company's books, debiting him with the amount, were no evidence of a new agreement between the company and the assured."

In the case at bar there was not a mere debiting of the amount of the premium to the agent's account, but an actual payment of it by him to the appellant company, and a payment made while the policy was in force and within the period that had been allowed for paying the premium.

In the *Fleming* supra case also there was no payment in cash, but the agent gave his note for the amount of the premium, which the insurers agreed to "hold as requested," and the agent's testimony at p. 505 was that: "Where I had given time on premiums and the cash had not been paid to me, and I had not the cash to pay myself, I gave a note myself as evidence that there was something due them—not as payment of the premium"—while in the case at bar Hood admits that he paid the premium.

See also *In re Economic Fire Office Limited*, 12 T L. 142, in which *Acey* v. *Fernie* was explained by Vaughan Williams, J.

If I am right in my conclusion as to the inferences to be drawn as to the payment of the premium by Hood, the cases relied on are *à fortiori* inapplicable.

I would, for these reasons, affirm the judgment and dismiss the appeal with costs. *Appeal dismissed.*

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Alberta Supreme Court, Hyndman, J. November 21, 1919.

AUTOMOBILES (§ III B—205)—MOTOR CAR ACCIDENT—LIABILITY UNDER S. 21 OF THE MOTOR VEHICLES ACT (ALTA.) 7 GEO. V. C. 3—PENAL, NOT CIVIL.

Under section 21 of the Motor Vehicles Act (Alta.) 7 Geo V., c. 3, the liability for violation of the statute is penal only, not civil.

[*B. & R. Co. Ltd.* v. *McLeod* (1912), 7 D.L.R. 579, 5 Alta. L.R. 176, and on appeal (1914), 18 D.L.R. 245, 7 Alta. L.R. 349, distinguished].

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JOHNSON v. MOSHER.

Hyndman, J.

ACTION for damages for injuries received in a motor car collision. Dismissed.

J. J. MacDonald, for plaintiff; *A. A. McGillivray*, K.C., for defendant.

HYNDMAN, J.:—These two separate actions against the same defendants arise out of the same set of circumstances and by order were consolidated for trial together with a jury.

The facts of the case may be briefly stated as follows:—The defendant, J. F. Mosher, is the father of the defendant L. Mosher. The father was the owner of a garage in the town of Vulcan, but his home was in Calgary, where his family resided. He usually spent his week days at Vulcan but came to Calgary on Saturday evenings and spent Sundays with his family. On the Saturday prior to Sunday, June 1, 1919, which latter was the day of the accident hereinafter referred to, he purchased a second-hand McLaughlin car, and the same day a number plate, D. 83, was placed upon it and with such number thereon he motored to Calgary.

This plate is what is known as a dealer's plate provided for in the Motor Vehicle Act, 2-3 Geo. V. 1911-12, Alta., c. 6, and was issued to the defendant J. F. Mosher as a dealer, but can lawfully be used only on demonstration cars which, according to the evidence, this was not, and the defendant J. F. Mosher, had no right to use the said plate except on cars for demonstration purposes and may be liable for certain penalties under the said Act but that particular phase of the case need not be considered here.

It is established that the defendant, L. Mosher, lives in Calgary in his father's house, is 18 years of age and is engaged on his own account with the Imperial Oil Co., and is not in the service of his father or in any way connected with his father's business.

On Sunday, June 1, the motor referred to was standing in the private garage of the defendant, J. F. Mosher, which was on the rear of the lot on which his residence is situated and the entrance and exit of the garage is on the lane at the rear of the lot.

Without the actual knowledge of the defendant J. F. Mosher, the son took out the motor for the purpose of pleasure only, and not on any errand or business of his father. The evidence is, however, that there was a general understanding that the son

might take out his father's motor any time if the father did not himself need it, and, whilst no request was made for it on this occasion and there is no absolute proof even that the father knew he was taking the car, he would, had he asked for it, undoubtedly have been allowed to use it, and the jury found that the car was used with the father's consent.

During the course of the son's ride, owing to his negligence, a collision took place between his motor and one driven by the plaintiff Johnson, with whom the other plaintiffs were riding and the plaintiffs were injured some more than others, and suffered damages according to the finding of the jury in the following amounts:

W. J. Johnson	$ 556.25
Mrs. Johnson	1,500.00
Mrs. McCallum	2,500.00
Mr. McCallum	450.75
Total	$5,007.00

At the conclusion of the evidence Mr. McGillivray asked me to withdraw the case from the jury as against the defendant J. F. Mosher on grounds, amongst others, that:

(1) There was no permission or sanction from the said defendant to his son to take the car on the occasion in question; (2) There is no liability at common law under the circumstances of the case; (3) That there is no liability by statute for the reasons that: (a) There was no certificate of registration of the particular car which is a condition precedent; (b) That the statute does not impose any civil liability but is penal only.

I allowed the whole case to go to the jury and reserved the motion until after verdict. Subsequently Mr. McGillivray moved to enter judgment for the defendant J. F. Mosher, notwithstanding the verdict.

The jury found that the said defendant:

(1) Was the *owner in fact* of the motor car, (2) That he was *not the registered owner* of the car for which a license was issued, (3) That the car was issued with the consent of the owner, and (4) That the plate with No. "83. D" was attached to the car.

The case of *B.& R. Co., Ltd.* v. *Hugh S. McLeod* (1912), 7 D.L.R. 579, 5 Alta. L.R. 176 (and in Appeal (1914), 18 D.L.R. 245, 7 Alta. L.R. 349), it was decided that, under circumstances similar to the present action, there is no liability of the owner of a vehicle at common law and the liability, if any, must be by statute. It was, however, also held on the appeal, reversing the judgment of the trial Judge, Stuart, J., that a civil liability was

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created by sec. 35 of the Motor Vehicle Act. That decision was rendered on May 30, 1914, and the said s. 35 at the time of the commencement of the action enacted that:—

The owner of a motor vehicle for which a certificate of registration has been issued under the provisions of this Act shall be liable for violation of any of the provisions thereof in connection with the operation of such motor vehicle.

Assuming that the defendant J. F. Mosher was at the time the registered owner of the car and the law was as it stood in 1912, I, undoubtedly, would be bound by the decision in *B. & R. Co., Ltd.* v. *Hugh S. McLeod, supra,* but in the year 1913, 4 Geo. V., c. 2, s. 22 (2nd ses.) (whilst the action of *B. & R. Co., Ltd.* v. *McLeod* was pending) the following was added to the section, viz:

Provided that if the owner was not at the time of the offence driving the motor vehicle he shall not be liable to imprisonment.

And again in the year 1917, 7 Geo. V., c. 3, s. 21, the section was changed to read as follows:—

35. The owner of a motor vehicle for which a certificate of registration has been issued under the provisions of this Act, shall be liable for violation of any of the provisions thereof in connection with the operation of such motor vehicle unless such owner shall prove to the satisfaction of the Justice of the Peace or Police Magistrate trying the case that, at the time of the offence, such motor vehicle was not being driven by him, nor by any other person with his consent, express or implied.

Provided that if the owner was not at the time of the offence driving the motor vehicle he shall not in any event be liable to imprisonment.

These amendments have effected such a change in the statute that I feel free to consider the point without reference to the decision of *B. & R. Co., Ltd.* v. *Hugh S. McLeod, supra.*

Whatever reasons there may have been before these amendments for holding that the Motor Vehicle Act created a civil right, I am of opinion that the present language puts it beyond doubt that the violation of any of the provisions of the Act imposes penal only, and not a civil liability. If that section as it now stands was intended to impose a civil obligation it seems just to say that a defendant ought to be entitled to have the whole section applied to his case and, consequently, as counsel pointed out, the defendant ought to be given the right *to prove to the satisfaction of a Justice of the Peace or a Police Magistrate that he was within the exceptions prescribed in the present section.* As the section obviously contemplates a trial in a Magistrate's

Court it, therefore, would appear that such cannot apply to a trial in a Court of Record. It would indeed be absurd to suppose that a trial should be interrupted to enable the defendant to make such proof as it referred to.

Then, again, if the section was intended to create a civil responsibility it would practically amount to this, that a plaintiff would have all the rights which he had before at common law, and that being the case, it seems to me, s. 34 would be entirely superfluous. That section enacts that:

> Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute an action for damages by reason of injuries to person or property resulting from the negligence of the owner or operator or his agent, employee or servant of any motor vehicle or resulting from the negligent use of the highway by them or any of them.

I would think that if there had been an intention to make a change in the common law it would have been a very simple matter indeed to have said so in apt, clear and unambiguous language and the legislature would have said so, especially considering the fact that the legislature did not overlook dealing with common law rights to the extent set forth in said last mentioned section.

Having arrived at the above conclusion it is not necessary to deal with the other point raised by the defence, that the defendant, J. F. Mosher, was not the owner of the car for which a certificate of registration was issued.

I am of opinion, however, that, notwithstanding the said defendant was the owner of the car and the number plate thereon, nevertheless as the motor car in question was not one upon which the plate D. 83 could properly be placed (and as referred to above its presence there possibly renders him liable to penalties under the Act) he is not liable under the statute. S. 35 is clear and unambiguous. It does not say, the owner to whom a certificate is issued, but the owner of a vehicle *for which* a certificate has been issued.

Mr. MacDonald argues that the defendant is estopped from saying that he is not the registered owner of this particular car because of the plate referred to having been proven to be his, notwithstanding the further testimony that it was a dealer's number and could properly be used only on a demonstration car, this one not being such.

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I do not think, however, this is a case for the application of the doctrine of estoppel. Estoppel pre-supposes something done by one party upon the strength of which another party acts to the latter's prejudice.

I am at a loss to see in what manner the plaintiffs changed their position here because of the unlawful use of the plate number in question.

The onus is upon the plaintiffs to prove their case and if a statutory, civil liability rests upon the defendant J. F. Mosher as a condition precedent it must be proven that he was the owner of the car and for which a certificate of registration had been issued.

The jury have found to the contrary and as my view is that estoppel does not apply, the action against him must fall on that ground.

The action is therefore dismissed as against the defendant J. F. Mosher, with costs. *Action dismissed.*

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WOOLLINGS v. BARR.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. June 23, 1919.

CHATTEL MORTGAGE (§ II B—10)—DESCRIPTION OF MORTGAGED GOODS—IDENTITY—ORAL EVIDENCE—FACTS—R.S.O. 1914, c. 135, s. 10.—INTERPLEADER ISSUE.

The requirements of s. 10 of the Bills of Sale & Chattel Mortgages Act, R.S.O. 1914, c. 135, are fulfilled when the mortgage on the face of it shows sufficient to identify the property mortgaged, the question of the sufficiency of a description being one of fact, may be determined upon by the aid of oral evidence.

Statement.

APPEAL by the defendant from the judgment of a District Court Judge on an interpleader issue as to the ownership of goods seized by the Sheriff under the execution of the defendant and claimed by the plaintiff under a chattel mortgage. Affirmed.

A. G. Slaght, for the respondent, the plaintiff.

The judgment of the Court was read by

Ferguson, J.A.

FERGUSON, J.A.:—On this appeal we reserved judgment on the appellant's contention that the description contained in the claimant's mortgage did not satisfy the requirements of sec. 10 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135. This section reads:—

"Every mortgage and every conveyance or agreement required

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to be registered under this Act shall contain such sufficient and full description of the goods and chattels that the same may be thereby readily and easily known and distinguished."

The description in the chattel mortgage reads as follows:—

"All and singular the goods and chattels particularly mentioned and set forth in the schedule endorsed hereon (or hereunto annexed) and marked with the letter A, all of which said goods and chattels now are the property of the said mortgagor and are situate in, around, and upon the premises known as logging and pulpwood camps situate at and in the vicinity of Long Lake and the navigable rivers tributary thereto, in the district of Temiskaming."

Schedule A, referred to:—

"The entire stock of horses, waggons, sleighs, harness, blankets, tools, and other logging and pulpwood camp equipment, including all meats, groceries, and provisions of every nature and kind in or connected with the said logging or pulpwood camps or logging or pulpwood operations carried on by the mortgagor on the shores of and in the vicinity of Long Lake and the navigable streams tributary thereto, in the district of Temiskaming."

Counsel for appellant contended that, under the foregoing description, the mortgaged goods could be identified only by their location, and that the description of the locality was so indefinite that this could not be done readily and easily. The witnesses at the trial found no practical difficulty in identifying the horses seized as being part of the mortgagor's *entire* stock of horses in, around, upon, or connected with the logging or pulpwood camps or logging or pulpwood operations carried on by the mortgagor on the shores of and in the vicinity of Long Lake and the navigable streams tributary thereto, in the district of Temiskaming.

After a perusal of the authorities cited and those collected and discussed in Barron and O'Brien on Chattel Mortgages and Bills of Sale, 2nd revised ed., it seems to me that if there is sufficient material on the face of the mortgage to indicate how the property may be identified, after proper inquiries are made, the statute has been complied with—Ritchie, C.J., (1887), in *Hovey* v. *Whiting*, 14 Can. S.C.R. 515, at p. 520. In the same case, Gwynne, J., at p. 567, says: "Whether or not a description is sufficient to enable the goods mortgaged to be distinguished within the meaning of

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the statute, is always a question of fact and not of law." And at p. 569: "The statute never intended, in my opinion, to exclude oral evidence of circumstances surrounding the execution of the mortgage and throwing light upon the question of fact to be determined."

Applying these principles to the description, I see no difficulty in readily and easily identifying the horses mortgaged. The description covers the mortgagor's *entire* stock of horses in, around, or upon the camps in or connected with the logging and pulpwood operations of the mortgagor in the locality named; and it was to my mind a pure question of fact whether or not the horses of the mortgagor were at the time of the mortgage in or around the camp-premises connected with these operations. The learned trial Judge appears to have had no difficulty in identifying the horses; and, unless we are satisfied that his conclusion on this question of fact was erroneous, we should not, I think, reverse it. I am not satisfied that he was wrong: on the contrary, my study of the mortgage and the evidence brings me to the same conclusion.

I would dismiss the appeal with costs. *Appeal dismissed.*

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C. A.

SASKATCHEWAN CO-OPERATIVE ELEVATOR Co. Ltd. v. JACKSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

PRINCIPAL AND AGENT (§ II A—6)—SALE OF WHEAT—INTERPRETATION OF "INSTRUCTIONS TO SELL"—DAMAGES—LIABILITY.

When a commodity such as wheat is put in the hands of parties with instructions to sell, those instructions mean that the parties so authorized are to sell as soon as a buyer appears, unless such instructions are countermanded or varied.

Statement.

APPEAL by defendant from the trial judgment in an action for damages. Reversed.

E. B. Jonah, for appellant.

N. R. Craig, for respondents.

The judgment of the Court was delivered by

Lamont, J.A.

LAMONT, J.A.:—In or before the month of April, 1917, the plaintiffs shipped two cars of wheat to the defendant company, which were unloaded at the terminal elevator at Moose Jaw. Some time later, they ordered the cars reshipped to Port Arthur. The defendants reshipped the cars. On May 18 the plaintiffs caused a

telegram to be sent to the defendant company, instructing them to sell at once the plaintiffs' wheat. On receiving the telegram the defendants wrote the plaintiffs as follows:—

We are today in receipt of a wire from our agent instructing us to sell Wesley Jackson's wheat and Norman Jackson's wheat.

We find that we have open on our books car No. 310505, shipped by Wesley, and car No. 111610 shipped by Norman Jackson, both of which cars were unloaded at Moose Jaw. Acting on instructions received we ordered both of these shipments re-loaded and billed to lake terminals. You will understand that until these cars arrive at Port Arthur, we will be unable to make sale.

The reason the defendants advised the plaintiffs that they would be unable to sell the wheat before it arrived at Port Arthur was, that owing to the uncertain state of the market buyers would then not purchase wheat in transit. From May 18 to May 28 the defendants' representative attended at the Grain Exchange, but was unable to find a purchaser for the plaintiffs' wheat in transit. On May 28, two buyers appeared, willing to purchase, and the defendants on that day sold one of the plaintiffs' cars to the McLean Grain Co. and the other to the Bawlf Grain Co. Up to that time the defendants had received no communication from the plaintiffs after they had been instructed to sell. On June 1, the plaintiffs inquired by telegram if their wheat had been sold. Through an error on the part of a clerk in the defendants' employ, an answer was sent back the same day saying that Wesley Jackson's wheat had not been sold, but saying nothing about Norman's. On June 4 the plaintiffs telegraphed the defendants to hold their wheat for instructions. Next day the defendants telegraphed in reply: "Advised you before that Wesley and Norman Jackson's cars were sold." In due course the defendants forwarded to the plaintiffs the returns for the cars sold. Not being satisfied with these, the plaintiffs have brought this action; in which they claim damages (1) because the defendants did not sell their wheat on May 18, when the price was $2.77 per bushel, but sold it on May 28, when the price was only $2.44 per bushel, causing them to lose the difference between these prices; and (2), in the alternative, that the defendants' letter of May 18, saying they could not sell before the arrival of the cars at Port Arthur, led the plaintiffs to believe that the grain would not be sold before its arrival there, and, in consequence, they gave no further instructions and thus suffered damage.

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SASKATCHEWAN CO-OPERATIVE ELEVATOR CO., LTD. v. JACKSON.

Lamont, J.A.

The District Court Judge before whom the matter came gave judgment for the plaintiffs, holding:

that as the instructions to sell could not be carried out by reason of the fact that there was no market, the agents could not as a matter of law of their own motion, sell at such time as they pleased, and having advised the principals that the wheat would not be sold until it reached Port Arthur they were not justified in selling it before its arrival at that point. The instructions to sell not being able to be carried out, they had in fact no instructions to sell.

With deference I am of opinion that the Judge erred in so holding. Instructions to "sell" or "sell at once" are, according to the uncontradicted evidence, understood on the Grain Exchange to mean "sell as soon as possible." I do not see how they could mean anything else. The defendants could not sell before a buyer appeared, and there was no buyer willing to take the plaintiffs' wheat on May 18, nor until 10 days afterwards. That the plaintiffs understood their instructions to sell were continuing instructions, is made very clear by their own evidence. In his examination for discovery, Norman Jackson said he thought the defendants had time enough to sell between May 18 and May 28, and it was because he wanted to know whether or not they had sold that he caused the telegram of June 1 to be sent. Wesley Jackson in his evidence said, he understood the wheat could not be sold until it arrived at the terminal, but "if it arrived at the terminal it would be sold I expected." If sold by the defendants at the terminal it would have to be pursuant to the plaintiffs' instructions of May 18, for these were the only instructions to sell that they ever gave. The plaintiffs therefore intended their instructions to sell to continue until countermanded or until the grain was sold.

The only other contention seriously advanced before us was, that the defendants' letter of May 28 amounted to an intimation to the plaintiffs that the wheat would not be sold until it reached the terminal, and, relying upon this, the plaintiffs refrained from giving other instructions while the grain was in transit. The short answer to this contention is, that there is no evidence that either of the plaintiffs received this letter prior to May 28. Norman Jackson admits that he did not see it until some time in June; Wesley Jackson did not say when he received it. But even if it had been shewn that the plaintiffs had received the letter a day or so after it was written, they would not, in my opinion, be entitled to recover—at any rate without establishing clearly that they had

been misled by it—for the letter is no more than an intimation that in the opinion of the defendants a buyer would not appear for the wheat until it reached the terminal. It cannot in my opinion be construed as an undertaking on part of the defendants not to sell in transit if a buyer appeared. The defendants having been instructed to sell, were in duty bound to carry out their instructions at the earliest moment they could secure a buyer, unless their instructions were countermanded or varied. As soon as a buyer appeared the defendants sold, and in my opinion acted in accordance with their instructions in so doing.

The appeal should be allowed with costs, the judgment below set aside, and judgment entered for the defendants with costs.

Appeal allowed.

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SASKATCHEWAN CO-OPERATIVE ELEVATOR CO., LTD. v. JACKSON.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 3, 1919.

PRINCIPAL AND AGENT (§ II D—33)—NEGLIGENCE OF AGENT—SALE OF WHEAT —LOSS TO PRINCIPAL—AGENT'S LIABILITY.

The prompt carrying out of the express orders of his principal by an agent even though loss results therefrom does not constitute negligence or breach of duty on his part; unless circumstances are such that no reasonable agent would carry out his principal's orders.

[*Saskatchewan Co-operative Elevator Co.* v. *Jackson*, ante 354; *Commonwealth Portland Cement Co. Ltd.* v. *Weber* [1905] A.C. 66, followed.]

APPEAL from the trial judgment. Affirmed.

Statement.

J. Feinstein, for appellant; *F. F. MacDermid*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—On May 3, 1917, the plaintiff went to the defendants' agent at Birdview, one Dowler, and instructed him to sell two car loads of wheat which the plaintiff had at the defendants' elevator. One car was at the time being loaded, and the other had been loaded a day or so previously but was still on the track. The plaintiff says he instructed Dowler to sell at $2.95 per bushel; Dowler says his instructions were to sell, no price being mentioned. The instructions were given after the close of the market at Winnipeg. Dowler at 3.10 p.m. telegraphed the defendants as follows: "Sell C. A. Gearhart's car 73042 loaded today and No. 45052 loaded April 30." The price of No. 1 Northern wheat at Ft. William at the close of the market on May 3, was $2.95. At the opening of the market on May 4, the

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defendants' representative at the Grain Exchange sold the plaintiff's two cars at $2.64 per bushel. On that day No. 1 Northern wheat at Ft. William was sold as high as $2.95. The plaintiff's wheat, not being at Ft. William, was sold as "track" wheat or wheat in transit. The plaintiff refused to accept payment on the basis of the sale made, and brought this action for the difference between the amount of a sale at $2.95 and the sale made at $2.64.

The trial Judge found as a fact that the defendants' instructions were to sell without stipulating any price, and he gave judgment for the defendants. The plaintiff now appeals.

His appeal is based on two grounds: (1) that the Judge erred in finding that the plaintiff had not stipulated for $2.95 per bushel, and (2), that, in any case, when the defendants found the market had broken on the morning of May 4, for track wheat, there was a duty devolving upon them to notify the plaintiff before selling at $2.64, and that their failure to give that notice constituted negligence on their part.

There was abundant evidence to support the finding of the trial Judge. Dowler's testimony that no price had been fixed was corroborated by Joseph Doll, who stated that he heard the plaintiff admit to one Heaslop that he had not instructed Dowler to sell at $2.95, but that he expected to get that price. The finding of the trial Judge therefore cannot be disturbed.

The plaintiff having instructed the defendants to sell his two cars without stipulating for any price, and the defendants having sold them at the earliest opportunity after they were so instructed, the only remaining question is, were they guilty of any negligence in so doing.

The contention that the prompt carrying out of the express orders of his principal constitutes negligence on the part of an agent is one not often advanced.

In Bowstead's Law of Agency, 5th ed., at p. 168, art. 56, the law is laid down as follows:

> (a) where an agent is clearly authorized to do any particular act, or to effect any particular transaction, he is not liable to the principal for any loss or injury suffered in consequence of the imprudent or improper nature of that act or transaction;
>
> (b) where an agent strictly follows the instructions of the principal . . . . . he is not liable to the principal for loss or injury resulting therefrom.

There may be cases in which conditions have so altered between the receipt of express orders by an agent and their execution by him that no reasonable agent would carry out his principal's orders; as, for example, where the agent was directed to put a horse in a certain barn and when he went to the barn with the horse he found it in flames. If under these circumstances he persisted in putting the horse in the barn and it was burned to death, the agent might be liable. But no such unreasonable conduct was present here. The evidence shews that on the afternoon of May 3, the members of the Grain Exchange at Winnipeg withdrew trading in options on the Exchange. This would naturally affect the market so far as option wheat was concerned. In addition to this, there was at the time a likelihood that the Dominion Government would step in and fix the price of wheat. If wheat were in Ft. William, or so near there that there was no doubt that it would arrive at that point in time to be applied on the May options, the circumstances above mentioned would not affect its price. But if it were at country points where it might not reach the terminal in time to be applied on the May options, the value of the wheat would be materially less, and if the wheat should not arrive before the Government fixed a price, the seller would get no more for it than the Government price. As the plaintiff's wheat was at Birdview on May 3, there was a possibility of its not reaching Ft. William in time to be applied on the May options. Everything depended on the transportation facilities. Anyone who purchased that wheat must take the risk. There was also a possibility that the wheat would fall in price considerably below what it then was. No one could tell. On May 4, no buyers were willing to purchase wheat on the track at Birdview at a figure higher than $2.64 per bushel. There is not a particle of evidence to shew that the defendants could have sold this wheat at a higher price. The plaintiff says that on May 4, or within a day or so thereafter, the Reliance Grain Co. sold a car of his wheat for $2.95, and he contends the defendants should have done the same. But the Reliance Co. were able to sell at that price because their car was already at Ft. William and could be delivered at once.

The plaintiff also says that on the morning of May 4, when the defendants found that there had been a break in the market, their

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duty was not to sell without getting further instructions. I know of no such duty. An agent's primary duty is to carry out his instructions.

Instructions to "sell" without more means, as stated by this Court in *Sask. Co-operative Elevator Co. Ltd.* v. *Jackson*, ante 354, is "sell as soon as possible," unless there is something in the circumstances, or the custom of a particular trade known to both parties, to give the words a different meaning. The plaintiff's objection when he got notice that the grain had been sold at $2.64 seems to have been, not that the defendants were not authorised to sell, but that they did not get the market price. The evidence shews that they got all that could be obtained for the plaintiff's wheat on track, and that the unusual spread of 31 cents between wheat at Ft. William and wheat at the track in the country was caused by the action of the Grain Exchange in withdrawing option trading, and the possibility of grain not arriving in time to be applied on May options, together with the likelihood of the Dominion Government stepping in and fixing the price.

In his factum the plaintiff says:

> the unreasonable spread of 31c. between track and spot wheat was not fixed by any rule or custom of the Winnipeg Grain Exchange, but was occasioned by the extraordinary state of circumstances brought about by the unexpected action of the Dominion Government coming in and setting a price; and the defendant acted negligently in selling on such a market.

In *Commonwealth Portland Cement Co. Ltd.* v. *Weber, Lohmann & Co. Ltd.*, [1905] A.C. 66, the defendants contracted to unload machinery from a vessel and load it on trucks and pass it through the custom house. It was common knowledge that an import duty was about to be charged on machinery. The defendants might have cleared it in time to escape the duty, but they did not do so, though they cleared it within the time prescribed by the customs regulations. As a result of the failure of the defendants to have the machinery passed through the customs before the new regulations came in force, the plaintiffs were called upon to pay some £900 duty. In an action against the defendants for the amount of the duty paid, it was held that there was not evidence to leave to the jury of any negligence or breach of duty for which the defendants would be liable.

Lord Lindley, in giving the judgment of the Privy Council, at p. 70 says:

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There is no doubt that all agents are bound to take reasonable care in doing what they have undertaken to do; but it appears to their Lordships that the appellants cannot succeed unless they can shew that it was the duty of the respondents to attend to taxation by the Government and to take reasonable care to protect the appellants' goods from taxation. Their Lordships are of opinion that the contract between the parties did not impose upon the respondents any legal obligation to pay attention to what the Government might or might not do as regards altering Customs duties, and there was no evidence to go to the jury of any breach by the respondents of any duty which they owed to their employers.

I am therefore of opinion that the defendants in selling the plaintiff's wheat pursuant to his instructions, simply did what they had undertaken to do, and there is no evidence that they were guilty of any breach of duty to the plaintiff.

Had they failed to sell on May 4, because the market had broken to $2.64 for track wheat, and had the plaintiff as a result thereof been obliged to sell at a price below that figure, he might in that case with considerable reason claim that the defendants were liable to him for any loss suffered by reason of their failure to carry out his instructions.

The appeal should be dismissed with costs.

Appeal dismissed.

PROVINCIAL SECRETARY-TREASURER OF N.B. v. ROBINSON and BARTLETT.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 19, 1919.

TAXES (§ V B—185)—CHARITABLE BEQUEST—SUCCESSION DUTY—CHARITABLE PURPOSES WITHIN THE PROVINCE—SUCCESSION DUTY ACT, N.B., 5 GEO. V. 1915, c. 27, s. 6.

In New Brunswick charitable bequests are liable to succession duty unless specifically bequeathed for charitable purposes within the Province. The rate of duty is 10% and accrued interest at 5% if not paid within 6 months after the testator's death.

[Succession Duty Act (N.B.) 5 Geo. V., 1915, c. 27, ss. 6, 10, 18.]

Statement

CASE stated for the opinion of the Court and for a declaration as to the succession duty payable under the Succession Duty Act, N.B., in respect of monies passing to trustees under the residuary clause in a will.

J. P. Byrne, Att'y-Gen'l and *A. E. MacKay*, for plaintiff.

M. B. Dixon, K.C., and *W. P. Jones*, K.C., for defendants.

The judgment of the court was delivered by

Hazen, C.J.

HAZEN, C.J.:—This action was commenced on July 12, 1919, the plaintiff claiming a declaration that succession duty is payable

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at the rate of 20% on all moneys passing to the defendants as trustees under the residuary clause in the last will and testament of Abner R. McClelan, deceased, and for the amount of such succession duty as claimed, with interest and costs. The parties have agreed in stating a case for the opinion of this Court, and have agreed upon the facts as follows:—

(a) Abner R. McClelan, late of the village of Riverside, in the County of Albert, in the Province of New Brunswick, Gentleman, deceased, departed this life at the village of Riverside, aforesaid, on Jan. 30, 1917, having first duly made and executed his last will and testament bearing date Jan. 11, 1913 and thereby appointed Clifford W. Robinson and Abner E. Bartlett the above named defendants, executors and trustees of his said last will and testament.

(b) The said Abner R. McClelan, deceased, was born at the village of Riverside, in the County of Albert aforesaid, and during the term of his natural life resided and had his domicile at the village of Riverside aforesaid, and never had a residence or domicile at any place other than at the village of Riverside aforesaid.

(c) The said Abner R. McClelan, deceased, during his life time took an active interest in charitable, educational and other public institutions in the Province of New Brunswick.

(d) That at the time "The Jordan Memorial Sanitarium" was established at River Glade in the Parish of Salisbury in the County of Westmorland and the Province of New Brunswick, in 1911, the said Abner R. McClelan, deceased, was appointed one of the commissioners of said sanitarium and continued to be such commissioner up to the time of his death, and took an active interest in the affairs of said sanitarium.

(e) That Clifford W. Robinson and Abner E. Bartlett, the above named defendants, are both residents of and have their domiciles in the said Province of New Brunswick and that neither of them have had a residence or domicile out of the said Province.

(f) That the said last will and testament of the said Abner R. McClelan, deceased, was duly proved in the Probate Court of the County of Albert aforesaid on March 23, 1917, and letters testamentary thereof were duly granted by said Probate Court unto the defendants, Clifford W. Robinson and Abner E. Bartlett, the executors named in the said will.

(g) In the said will was a residuary clause, said clause reading as follows:

I give and bequeath all the residuary estate to my executors and trustees in trust to manage, to call in, collect and convert the same into money and deposit the same at interest in a chartered bank or banks and use and employ the money so deposited from time to time and all interest therefrom arising for the benefit, advantage, assistance or the founding of such charitable, religious, educational or sanitary institutions as my said executors and trustees may from time to time see fit and deem desirable.

(h) It is agreed that the aggregate value of the estate for succession duties purposes, under The Succession Duty Act, 5 Geo. V. 1915, c. 27, and amending Acts, is $205,602.08, of which under the clauses of the will other than the said residuary clause there is deemed to pass under the said Act, to various legatees therein mentioned, the sum of $52,603, and that under the said residuary clause there is deemed to pass under the said Act, to the said Clifford W. Robinson and Abner E. Bartlett as trustees, the sum of $152,999.08.

(i) It is further agreed that upon the said sum of $52,603 so deemed to pass to various legatees and devisees under clauses of the said will other than the said residuary clause there should be taxed a succession duty of $3,125.15, which said sum of $3,125.15 has been paid to the plaintiff by the said defendants. Of this $192.27 was paid after the issuance of the writ, but it is agreed that this be considered as paid before the writ was issued.

(j) It is further agreed that if interest be payable as claimed, such interest should date from Feb. 25, 1918.

(k) It is claimed by the plaintiff that on the said sum of $152,999.08, deemed to be passing under the said residuary clause to the said Clifford W. Robinson and Abner E. Bartlett as trustees thereunder, there is payable under clause (d) of s. 10 of the said Act, succession duty at the rate of 10% and that under clause (e) of s. 10 aforesaid, this should be doubled, and that there is therefore due and payable to the plaintiff 20% of the said sum of $152,999.08, which amounts to $30,599.81.

(l) The claim of the plaintiff as set forth in paragraph (k) is denied by the defendants, who claim that the said sum of $152,999.08, so passing under the said residuary clause is exempt from payment of succession duties under s. 6, sub-s. 2 of the said The Succession Duty Act, 1915.

(m) The plaintiff claims interest on the said sum of $30,599.81, at the rate of 5% from Feb. 25, 1918, until judgment.

The questions upon which the opinion of this Court are sought are as follows:—

(a) Is the plaintiff entitled to succession duty under The Succession Duty Act, 1915 in respect of all moneys passing to the said Clifford W. Robinson and Abner E. Bartlett, as trustees under the residuary clause in the will of the said Abner R. McClelan, deceased?

(b) If the Court should decide that the plaintiff is entitled to succession duty under The Succession Duty Act, 1915, in respect of all moneys passing to the said Clifford W. Robinson and Abner E. Bartlett, as trustees under the residuary clause in the will of the said Abner R. McClelan, deceased, at what rate is such succession duty to be computed?

(c) Is the plaintiff entitled to interest on such succession duty, as claimed?

It is further agreed that a decree and judgment shall be entered in accordance with the opinion of the Court on these questions, and the costs shall be in the discretion of the Court.

Taking up these questions in the order in which they are stated, the first on which it is necessary for the Court to express its opinion is:—

(a) Is the plaintiff entitled to succession duty under the Succession Duty Act 1915, in respect of all moneys passing to the said Clifford W. Robinson and Abner E. Bartlett as trustees under the residuary clause in the will of the said Abner R. McClelan, deceased?

It seems to me that the answer to this question depends upon the construction to be placed upon s. 6, sub-s. 2 of c. 27, 5 Geo. V.

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1915, entitled an Act to Amend and Consolidate the law relating to Succession Duty and which reads as follows:—

No duty shall be computed in reference to (2) any property given, devised or bequeathed for religious, charitable or educational purposes *to be carried out in New Brunswick* nor the amount of any unpaid subscription for any like purpose made by any person mentioned in this sub-section for which his estate is liable.

It is claimed by the defendant that as the testator by his residuary clause gave and bequeathed all the residuary estate to his executors and trustees to employ the money arising therefrom for the benefit, advantage, assistance or the founding of such charitable, religious, educational or sanitary institutions as his said executors and trustees might from time to time see fit and deem desirable, that the same is exempt as property given, devised, or bequeathed for religious, charitable or educational purposes. Such a contention does not give any effect to the words "to be carried out in New Brunswick" the meaning of which I think is clear and plain. Under the language of the residuary clause in the will it would not, I think, be disputed that the executors and trustees are not limited in any way as to the place in which the moneys to be used and employed by them are to be so used and employed, and they could if they saw fit give contributions for the purpose of such institutions as are described in any province of Canada or anywhere else, or could if they chose found institutions of a like character in any place either in New Brunswick or outside the same. Under the Succession Duty Act, 1915, which I have cited the distinct provision is that no duty shall be computed with reference to any property given, devised or bequeathed for religious, charitable or educational purposes to be carried out in this Province, and the language on this point being clear, definite and free from any ambiguity whatever, I entirely fail to see how the contention of the defendant can succeed. In the language contained in the plaintiff's factum:

the bequest for religious, charitable or educational purposes to be exempt under s. 6, sub-s. 2 must be bequeathed for these purposes to be carried out in New Brunswick, and there are no words in the clause in question stating where the bequest thereunder is to be carried out, nor are there any words that can be construed into a direction.

The whole residuum of the estate is given and bequeathed by the testator to his executors and trustees for such charitable, religious, educational or sanitary institutions as his executors and

trustees may from time to time see fit and deem desirable. The words "to be carried out in New Brunswick" were first inserted in the Act as amended and consolidated in 1915. McClelan died in January, 1917, and his will bears date Jan. 11, 1913. S. 7, sub-s. 2 of the Consolidated Act 1915, provides:—

Succession duty is hereby declared to be and to rank as a debt due to the Crown in right of the Province immediately before the death of the deceased,

while s. 18 provides that:—

The duty imposed by this Act unless otherwise provided for shall be due at the death of the deceased,

and I think that it is perfectly clear that this will must be looked at as from the date of the death of the testator. In *In re Jarman's Estate* (1878), 8 Ch. D. 584, 47 L.J. Ch. 675, 39 L.T. 89, Hall, V.C., says, at 587:—

The Court is not to wait and see whether the executors will appoint to charitable objects or not, but to look at the will as at the date of the death of the testator and at once say whether the gift is definite or indefinite.

Looking at the will in question as at the date of the testator's death, it seems to me that the Court is bound to say that the gift of the residuary estate is to the trustees to employ the same, subject to the limitations imposed by the testator in such way as they may from time to time see fit, and deem desirable, and they may do this irrespective entirely of whether the institutions are in New Brunswick or elsewhere, and it cannot therefore be successfully argued that the estate is free from duty under the provisions of the Succession Duty Act, 1915, contained in s. 6, sub-s. 2. The attention of the Court was not called to any authorities that would be binding upon it, but several cases were cited from the Irish Law Reports, the reasoning and decisions in which appeal to my judgment and meet with my approval. In the Act, c. 82, 5-6 Vict. 1842, (Imp.), entitled an Act to Assimilate the Stamp Duties in Great Britain and Ireland, etc., there is added to s. 38, defining what are legacies within the meaning of the Act, the following proviso:—

That nothing herein contained shall extend or be construed to extend to charge with Duty in *Ireland* any legacy given for the education or maintenance of poor children in *Ireland* or to be applied in support of any charitable institution in *Ireland* or for any purpose merely charitable.

It was subsequently decided in the *Att'y-Gen'l* v. *Hope* (1868), I.R. 2 C.L. 368, that the words in the last clause "or for any purpose merely charitable" shall be read "or for any purpose merely charitable in Ireland."

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On this proviso there are two cases which are certainly very much in point. The first case is that of the *Att'y-Gen'l* v. *Delaney* (1875), I.R. 10 C.L. 104. In this case a testatrix, domiciled in Ireland, bequeathed after a number of bequests the residue of her personal estate in Ireland to a Roman Catholic Bishop, and the President of a Roman Catholic College in Ireland, for the education of clergymen for a foreign mission, and it was held that the bequest was liable to legacy duty. Palles, C.B., in his judgment which was concurred in, says at p. 131:—

> To bring the case within the statute the legacy must be given for a charitable purpose in Ireland. There must be a clear intention manifested upon the face of the will that the purpose should be effectuated here, and there must be an obligation upon the trustees to apply the money in Ireland. It is not sufficient that an application of the money in Ireland would satisfy the bequest.

He adds:—

> I base my judgment on this—that, upon a true construction of the will, there is no obligation on the trustees to expend the money in Ireland, and that the bequest is not a bequest "merely charitable in Ireland."

The other case is *Kenny* v. *The Att'y-Gen'l* (1883), 11 L.R. Ir. 253. The testator, in this case, was a parish priest in the country part of Ireland, who by his will bequeathed as follows, see p. 253:—

> After paying all my debts I bequeath all my property and money to the poor,

and he appointed two of his clergy as executors. It was held that notwithstanding the proviso to s. 38, c. 82, 5-6 Vict. (Imp.), which I have already cited, this bequest was liable to legacy duty. This case is certainly very much on all fours with the one under consideration.

On this point, following the authorities referred to, I base my judgment upon the fact that upon a true construction of the will there is no obligation on the part of the trustees to carry out the intention of the testator in this Province, and that the bequest is not a bequest to be carried out in New Brunswick. To bring the case within the statute the legacy must be given to be carried out in New Brunswick, and there must be a clear intention manifest upon the face of the will that the purpose is to be effectuated here. In the language of Palles, C.B., *mutatis mutandis* it is not sufficient that an application of money in New Brunswick would satisfy the bequest. In my opinion therefore the answer to the first question must be yes, or in other words that the plaintiff is entitled to suc-

cession duty under the Succession Duty Act, 1915, in respect of all moneys passing to the said Clifford W. Robinson and Abner E. Bartlett, as trustees under the residuary clause in the will of the said Abner R. McClelan, deceased.

Coming to question No. 2:—

(b) If the Court should decide that the plaintiff is entitled to succession duty under the Succession Duty Act, 1915, in respect of all moneys passing to the said Clifford W. Robinson and Abner E. Bartlett as trustees under the residuary clause in the will of the said Abner R. McClelan, deceased, at what rate is such succession duty to be computed?

The rates by which succession duties shall be computed are found in s. 10 of the Succession Duty Act, 1915, and sub-s. (d) provides that where the aggregate value of the property exceeds $5,000, and any part thereof passes to or for the benefit of any stranger in blood to the deceased, the succession duty shall be a rate of 10% to the value of so much thereof as so passes. In the case of *In re Griffiths* (1845), 14 M. & W. 510, 153 E.R. 577, Parke, B., adopted the principle that where money is bequeathed for some public purpose either to the committee of a charity or the persons administering it, or to trustees in order that it may be applied to such purpose it must be considered as a legacy for the benefit of strangers in blood to the testator, and liable to the duty of 10%, and in *Att'y-Gen'l* v. *Delaney*, Palles, C.B., says: "That appears to me the true state of the law on this subject." In the case of *In re William Parker* (1859), 4 H. & N. 666, 157 E.R. 1002, it was held that:—

a bequest of money for the purpose of building a church and parsonage-house and of endowing and repairing the church is subject to a legacy duty of 10%.

And in delivering judgment in that case Pollock, C.B., said at 678:—

It may therefore be laid down as a general rule that where money is bequeathed, whether to those who administer a charity or who administer funds for any public purpose, ecclesiastical or otherwise, it is subject to a legacy duty of 10% inasmuch as it is to be considered a legacy for the benefit of persons strangers in blood to the testator.

And in the course of his judgment the same eminent Judge refers to the case of *In re Griffiths, supra*, referred to with approval by Palles, C.B., in the *Att'y-Gen'l* v. *Delaney*.

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Counsel for the plaintiff called attention to clause (e) of s. 10, which is to the effect that where a successor resides out of the province he shall pay double the rate otherwise provided for, and contended that under a correct reading of that statute the double rate should be applied in the present case, or in other words that the Crown was entitled to a duty of 20% on the amount of the residuary bequest. It is quite clear that if the bequest were made for the benefit of a charitable institution outside the province the assessment on the amount would be as follows: A rate of 10% would be computed owing to the institution being a stranger in blood to the testator, and this would be doubled because such beneficiary was outside the province. From this counsel for the plaintiff argue that that would be the case here, if it is decided that the bequest must be considered a bequest for charitable purposes not to be carried out in New Brunswick. That, however, is not my opinion. My judgment is that it is liable to a duty of 10% because it goes to institutions that must be regarded as in the same position as strangers in blood to the testator, and because it is not directed that it shall be disposed of for purposes to be carried out in New Brunswick. It is not, however, clear that the whole or any part of the amount passing under the residuary clause of the will is to go to parties outside of this province. In view of the fact that the testator was a lifelong resident of New Brunswick, in which province he held most important public positions, and in which during his lifetime he took an active interest in charitable, educational and other public institutions, and in view of the further fact that the executors are both residents of and interested in the welfare of New Brunswick, it would seem altogether natural and reasonable that the reverse would be the case, and as it is the duty of the defendants within a reasonable time to distribute the estate, in my opinion the question as to whether double succession duties shall be paid or not must await the result of their determination. Such of the residuary as is applied for purposes to be carried out in New Brunswick would not be so liable, while if any of it is applied otherwise it will have to pay the double duty. As I said before, it will be the duty of the trustees within a reasonable time to distribute the residuary. If they do not do so it will be open to the Crown to intervene and in any event the province will be protected by the bond which under the provisions of s. 12 of the Succession

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Duty Act the executors delivered to the Registrar of Probates before letters testamentary were issued. My opinion therefore in answer to the second question is that the rate at which duty on a sum of $152,999.08, the balance that in the said residuary clause is deemed to pass under the said Act to the said Clifford W. Robinson and Abner E. Bartlett shall be computed at the rate of 10%, amounting to $15,299.90.

The third question is:—

(c) Is the plaintiff entitled to interest on such succession duty, as claimed?

The plaintiff claims interest at the rate of 5% from Feb. 25, 1918, until judgment on the sum allowed as succession duties on the amount of the residuary estate. S. 18 of the Succession Duty Act provides that the duty unless otherwise provided for shall be due at the death of the deceased, and payable to the Provincial Secretary-Treasurer of New Brunswick within 6 months thereafter, and if the same is paid within 6 months no interest shall be charged or collected thereon, but if not so paid interest at the rate of 5% shall be charged and collected from the death of the deceased, and such duty together with the interest thereon shall be and remain a lien upon the property out of which it is payable until the same shall be paid. The succession duty in this case was not paid within 6 months of the death of the deceased. It is clear therefore that interest at the rate of 5% can be charged and collected from the time of his death, but as the plaintiff only claims interest from Feb. 25, 1918, I find that the plaintiff is entitled to interest at 5% on the sum of $15,299.90 from Feb. 25, 1918, until judgment.

In my opinion the costs of all parties as between solicitor and client should be taxed by the registrar and paid out of the residuary estate.

Judgment accordingly.

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British Columbia Supreme Court, Murphy, J. October 9, 1919.

CONTRACTS (§ II D—170)—ACCEPTANCE—MODIFICATION OF ORIGINAL TERMS—COMPLETION.

A contract is not complete until the proposition put forward by the proposer is accepted by the other party in a simple and direct affirmative. Conditions which vary the terms or provisions of such contract must be agreed to by the party making the proposal otherwise there is no contract enforceable at law.

[*Cole* v. *Sumner* (1900), 30 Can. S.C.R. 379, applied.]

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Murphy, J.

ACTION on an alleged option contract. Dismissed.

J. H. Senkler, K.C. and *W. S. Buell*, for plaintiff; *S. S. Taylor*, K.C. and *C. W. Craig*, K.C., for defendant.

MURPHY, J.:—Admittedly the law applicable to this action is as set out in *Cole* v. *Sumner* (1900), 30 Can. S.C.R. 379, viz: an acceptance of a proposition must be a simple and direct affirmative in order to constitute a contract and if the party to whom the proposition is made accepts on any condition, or with any change of its terms, or provisions which are not altogether immaterial, it is no contract until the party making the offer consents to the modification; that there can be no contract which the law will enforce until the parties to it have agreed upon the same thing in the same sense. Here, there were two options, both dated Jan. 24, 1919. The first letter relied upon, as converting one of these options—that for $1,500 cash—into a contract is that dated Feb. 14, 1919. In my opinion it is not such an acceptance as above defined. In the first place, it is impossible to ascertain from this letter which option is being exercised since its terms are as referable to the one as the other. Next, the provisions as to draft inspection and payment in Vancouver are, I think, clear changes of the terms of the original options. If this view is correct there is no contract thus far. But it is said defendants, by their letter of Feb. 18, 1919, consented to any modifications contained in the letter of Feb. 14. I cannot so view the matter. The opening paragraph strongly relied upon is not, I think, a simple direct affirmative acceptance of such modifications but is merely an acknowledgment of receipt of the letter of February 14. Further, if the view already expressed is correct, there were no modifications clearly set out in the letter of February 14 which defendant could accept because the letter of February 14 was equally referable to one or the other options of January 24. The first step necessary towards converting what had occurred up to February 18 into a contract was to appropriate, if the expression may be allowed, the letter of February 14 definitely to one or the other of the options of January 24. This, I think, defendants assumed to do by theirs of February 18 by reference to $750 being half the purchase price. They in that letter made a further and, in my opinion, independent proposition as to immediate manufacture. On the above legal principle there was yet no

binding contract for the appropriation of the letter of February 14 by defendants if the $1,500 option could only become binding if plaintiff consented thereto. It was in reality a counter-proposition for plaintiff's acceptance. Clearly, I think, if defendants attempted at this stage to enforce the $1,500 contract against plaintiff his defence that he had never exercised it would be a bar to any such action. The next letter from plaintiff, March 17, 1919, contains nothing bearing on this phase of the question. By wire of April 8, defendants, as was their right, if my view is correct, substituted another offer for the one then outstanding. This was not accepted. Another proposal was made later but this also was not accepted. In my opinion there never was a completed contract and the action must be dismissed.

Action dismissed.

THE KING v. SCHOOL DISTRICT No. 1, PARISH OF MADAWASKA, EDMUNDSTON; Ex parte FRASER Co., Ltd.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. September 19, 1919.

SCHOOLS (§ IV—74)—TAXES—ASSESSMENT—SCHOOL PURPOSES—SPECIAL EXEMPTION BY STATUTE—APPLICABILITY—SCHOOLS ACT—CON. STATS. N.B. 1903, c. 50, ss. 105-108.

Exemptions, as to assessment within a city or town granted by statute to a corporation are not applicable to the assessment fixed by the School District, in which the corporation in question owns the assessable property unless the schools in the school district have been taken over by the city or town under the provisions of ss. 105 and 108 of the Schools Act. (N.B. Cons. Stats. 1903, c. 50.)

Statement.

APPLICATION for order nisi to quash an assessment made by the assessors of a school district in the Province of New Brunswick.

J. M. Stevens, K.C. and *M. G. Teed*, K.C., support the order.

M. D. Cormier and *P. J. Hughes, contra.*

The judgment of the Court was delivered by

Hazen, C.J.

HAZEN, C.J.:—School District No. 1, in the Parish of Madawaska, was established and organized under the provisions of the Schools Act, Con. Stats., N.B., 1903, c. 50, many years ago, and before the incorporation of the town of Edmundston under the Towns Incorporation Act, Con. Stats. N.B., 1903, c. 166. The school district when established included the land that is now covered by the town of Edmundston, and since its incorporation that town has not come under the provisions of s. 105 of the

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Schools Act which provides for the management of schools in the incorporated towns of St. John and Fredericton, provision being made in s. 108 for the application of its provisions to any town thereafter incorporated, provided that the town council determines in favour of the adoption of such provisions and certifies the same to the Lieutenant-Governor-in-Council. The school district in question therefore is a separate corporation from the town, embracing the territory covered by the town within its jurisdiction. The affairs of the schools under the Schools Act are managed by a board of trustees selected by the people in the ordinary way at the annual school meeting, and the school taxes are collected and handled by the school trustees separate and apart from the taxes that are levied for town purposes and which are collected through the officers of the town council.

Some time previous to 1912 and during that year the Fraser Companies (then known as Fraser, Ltd.) had in contemplation the erection of a pulp and paper mill, involving the expenditure on capital account of a large sum of money in the town of Edmundston. An application was made to the Legislature in that year for the fixing of a maximum valuation upon its property in said town for taxation purposes for a period of 25 years, and by c. 104 of 2 Geo. V., 1912, it was provided "that the valuation of the real and personal property, lands, tenements, hereditaments, capital stock and income of Fraser Ltd., or its assigns, situate or to become situate within the town of Edmundston in the County of Madawaska, legally liable or to become liable for assessment for rates or taxes within *said town*," including any additions thereto and any additions to the capital stock, should not exceed the sum of $200,000 nor be less than $55,000 for the purpose of assessment for rates and taxes within *said town* for a period of 25 years from the ordering of the next annual assessment. Another section of the Act authorized and empowered the town council to order that the valuation of the property above mentioned for the purpose of assessment for rates and taxes within the *said town* should be fixed for a definite amount during the said period of 25 years, such amount not to exceed the sum of $200,000 or to be less than $55,000, and upon such order being made by the said town council, it was provided that it should be the duty of the town clerk to notify the assessors

of the town of such order, and enter the valuation in the assessment book and assess the said Fraser Ltd. or its assigns upon the same. There was also a provision that in any valuation for *county purposes* thereinafter to be made during the period of the years in which the Act was made to apply, the total valuation should not exceed the sum mentioned in par. 1 of the Act until fixed by the said town council under par. 2 of the Act, after which time the valuation should be the amount so fixed by the town council. There were also certain provisions to the effect that the Act should not apply to dwelling houses afterwards erected or acquired, or any land appurtenant to the same, and that the Act should not come into force until a certain amount of money had been expended by the company to the satisfaction of the Lieutenant-Governor-in-Council.

It will be seen that the Act makes special reference to assessments for rates and taxes within the town, and to taxes for county purposes, but makes no mention whatever of taxes for school purposes, which as I have stated are levied on the school district, it being a distinct and separate corporation from the town itself.

In December, 1916, an agreement in writing was made and entered into between Frasers Ltd., which as I have stated is now the Fraser Companies Ltd., and the town of Edmundston, and an Act confirming said agreement was passed by the Legislature at its session of 1917, it being c. 65 of 8 Geo. V., 1917. The agreement so entered into provided that the valuation for assessment purposes should be fixed at the sum of $100,000 with the exception of dwelling houses and lands appurtenant thereto, and that in the case of such while owned by Frasers Ltd. the valuation of said dwelling houses and lands appurtenant thereto during the period of 25 years should not exceed 60% of the actual cost thereof. Under the legislation, therefore, to which I have referred, and the contract or agreement entered into between the company and the town, and its confirmation by Act of the Legislature, the Frasers are liable for a period of 25 years for assessment in the town of Edmundston on a valuation of $100,000 and in addition thereto to 60% of the actual value of the dwelling houses and lands in connection therewith. The question arises as to the valuation of these properties for assessment purposes in School District No. 1 in the Parish of Madawaska, and the important

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question which this Court is asked to determine is as to whether or not for school purposes in the said district the property of the Frasers is to be assessed on the same valuation as it is assessed for municipal purposes in the town of Edmundston, or in other words if the property which according to the assessors is worth upwards of $1,000,000 is to be assessed for school purposes on a valuation of $100,000 plus whatever the 60% for the dwellings will amount to, and the schools of the town shall be thus deprived of the taxes which would be available for these purposes if no such exemption had been granted by the Legislature.

It is laid down very clearly in the text-books and in cases that have been decided on the question that as taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms, and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. Taxation, it is said, is an act of sovereignty to be performed as far as it conveniently can be with justice and equity to all, and exemptions no matter how meritorious are of grace and must be strictly construed. In Cooley on Taxation, 2nd ed., p. 205, it is stated it is a very just rule that when an exemption is found to exist it shall not be enlarged by construction. On the contrary it ought to receive a strict construction for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favour will be extended beyond what is meant. On this ground it was held that an exemption of property from taxation will not preclude business or privilege taxes being imposed on the favoured class; and that bequests to colleges, etc., may be taxed under the general statute taxing bequests, although after being received they would be exempt under the general statute exempting the property of such institutions. So an academy of arts is not exempted under an exemption of universities, colleges, academies and school houses, and a statute for the exemption of factories will not be applied to such as were erected previous to its passage.

It is pointed out by the same author that the most striking illustration of the rule of strict construction of exemptions is seen in the case of special assessments for local improvements,

such as the paving and repairing of streets, etc. It is almost universally held that a general exemption from taxation will not extend to such assessments. In the leading case the words of the exemption were that no church or place of public worship "should be taxed by any law of this State." (*In Re The Mayor, etc., of New York* (1814), 11 *Johns.* 77). Upon this the Court remarked, at p. 80:—

> The word "taxes" means burdens, charges, or impositions, put or set upon persons or property for public uses, and this is the definition which Lord Coke gives of the word *talliage*, 2 Coke's Inst. 532; and Lord Holt in Carth. 438, gives the same definition, in substance, of the word tax. The legislature intended, by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister, not exceeding in value $1,500. But to pay for the opening of a street, in a *ratio* to the "benefit or advantage" derived from it, is no *burden*. It is no talliage or tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister, as well as of other persons, pay for such an improvement in proportion as it is benefited? There is no inconvenience or hardship in it, and the maxim of law that *qui sentit commodum debet sentire onus*, is perfectly consistent with the interests and dictates of science and religion,

and yet these assessments are a legal exercise of the taxing power, and can only be justified on that ground.

The law seems to be very clearly summarized in Maxwell on Statutes, 1912, 5th ed., p. 485, as follows:—

> As regards enactments of a local or personal character, which confer any exceptional exemption from a common burden or invest private persons or bodies, for their own benefit and profit, with privileges and powers interfering with the property or rights of others, they are construed against those persons or bodies more strictly, perhaps, than any other kind of enactment. Any person whose property is interfered with has a right to require that those who interfere shall comply with the letter of the enactment so far as it makes provision on his behalf. The Courts take notice that they are obtained on the petitions framed by their promoters; and in construing them, regard them, as they are in effect, contracts between those persons, or those whom they represent, and the legislature on behalf of the public and for the public good. Their language is therefore treated as the language of their promoters, who asked the legislature for them, and when doubt arises as to the construction of that language, the maxim (ordinarily inapplicable to the interpretation of statutes) that *verba cartarum fortius accipiuntur contra proferentem*, or that words are to be understood most strongly against him who uses them, is justly applied. The benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers which the enactment grants, and against those who claim to exercise them. Indeed, if words in a local or personal Act seemed to express an intention to enact something unconnected with the purpose of the promoters, and which the committee, if they had done their duty would not have allowed to be introduced, *almost any construction*,

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it has been said, *would seem justifiable* to *prevent them from having that effect.* (Note 487 *per* Lord Blackburn, *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743).

Even if such statutes were not regarded in the light of contracts, they would seem to be subject to strict construction on the same ground as grants from the Crown to which they are analogous are subject to it. As the latter are construed strictly against the grantee on the ground that prerogatives, rights and emoluments are conferred on the Crown for great purposes and for the public use, and are therefore not to be understood as diminished by any grant beyond what it takes away by necessary and unavoidable construction, so the Legislature in granting away in effect the ordinary rights of the subject shall be understood as granting no more than passes by necessary and unavoidable construction.

The exemptions granted by the Legislature in this case if they applied to taxes for school purposes would be in violation of the principles which have been acted upon by the Legislature of this Province during very many years, and also in violation of the underlying and fundamental principles of the free school law, which was founded upon the idea and principle that the schools of the country should be supported by taxation upon the land of the country. In past years the Legislature in passing taxation exemption measures has almost invariably I think jealously guarded and protected the schools from being rendered less efficient in consequence of the property within the school districts being exempted from taxation, and during the 13 years that I sat in the Legislature of this Province I never knew of a case in which the interests of the schools were not carefully and jealously guarded in this respect. The hardship that would follow if it were held that the exemption granted by the Acts of the Legislature and the agreement hereinbefore referred to applied to taxes for school purposes would be very great, for the establishment of such an industry within the town would naturally lead to a larger population in that part of the school district which is within the town of Edmundston, and a necessary increase in the buildings and facilities required for school purposes, and would either throw an undue burden upon the rest of the property in the community or would lead to impairment in the efficiency of the schools and the education that would be received therein by the youth of the district. I cannot think that the members of the company would

desire such a result, for the efficiency of their industry would be increased and the welfare and happiness of their employees advanced by the maintenance of schools of an up-to-date character. From their own standpoint and in their own interests such schools should prove a valuable asset.

Applying to the statutes passed by the local Legislature and the agreement entered into with the town, the rules of construction laid down in regard to exemptions of this sort, I can come to no other conclusion than that the exemption does not apply to taxes for school purposes in the district mentioned, and that had it been the intention of the Legislature to have made it so apply, it would have used express words to that effect. The purpose of the promoters it seems to me was to obtain exemption from taxes for town purposes in the town of Edmundston. I cannot believe that they had in their minds at the time the idea of exemption from school taxes or that idea would have been expressed. In neither statute nor agreement is any reference made to school taxes or the school district, and the school trustees of the district were in no sense parties to the agreement or the legislation upon which it was based. I can see nothing in the Act which is unconnected with the purpose of the promoters which was I believe to be exempted from taxes for town purposes. The rule that where an exemption is found to exist it shall not be enlarged by construction is so clear and well recognized that in this case I feel it would be thoroughly unjustifiable, not in the public interest, and contrary to public policy to extend in any way the meaning of the language use by the Legislature and in the agreement.

Section 111 of the Schools Act, Con. Stats. N.B., 1903, c. 50, was cited by those who were contending in favour of the exemption, which section provides that where

> a school district contains within its limits a city or incorporated town, for the purpose of levying any school rates upon said district, the persons, properties and incomes ratable within the said district, as well as without as within the said city or incorporated town, shall be deemed to be ratable as if within the said city or incorporated town; and the assessors of rates for the said city or incorporated town shall for the purpose of levying and assessing any rates ordered to be levied by the city or town council in accordance with the requisition of the board of trustees or otherwise under the provisions of this chapter (c. 50) include in the assessment list of the said city or town, the name of each person liable to pay a school rate or tax, in said school district, whether resi-

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dent therein or non-resident, and whether resident within the said city or town or non-resident, and said rates shall be assessed, levied and collected in the same manner as if the whole of the said district were included within the corporate limits of the said city or town.

In my opinion this applies only to cases in which the schools have been taken over by the town, under the provisions of ss. 105 and 108 of the Act, to which I have previously referred. In this case the town has not taken over the administration of the schools, and the collection of taxes continues to be governed by the general ss. 76, 77, 78 and 79, and it seems to me that it is the duty of the town clerk when applied to by the trustees to supply a list of the persons liable to taxation and the amount on which each person is so liable, and in cases such as this where for the purpose of taxation within the town the valuation is placed at a certain amount, the proper practice would be to set out the actual value of the property and underneath it the words "Valuation for purposes of taxation, according to Act so-and-so of the Legislature, such-and-such an amount." This seems to have been the practice that has been followed by the assessors, for on Jan. 7, 1919, the town secretary in writing informed the secretary of the board of school trustees that the "valuation on the plant of the Fraser Companies, Ltd., for 1918 had been changed to read $1,000,000 and the net assessment as per contract with the town of Edmundston to be reduced to $100,000."

The question of exemption of the property for school purposes is the substantial point which was brought before the Court. There was also some question with regard to the way in which the assessment of 60% on the buildings had been imposed. Very little stress was laid on this, however, and it seems to me that it is a matter which might without difficulty be adjusted between the parties interested.

In my opinion the rule should be refused.

Rule to quash refused.

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NOLAN v. EMERSON BRANTINGHAM IMPLEMENT CO.

Alberta Supreme Court, Stuart, J. November 20, 1919.

SALE (§III A—57)—WARRANTY—BREACH—S. 5 FARM MACHINERY ACT, 4 GEO. V., 1913, ALTA., C. 15—DAMAGES.

Section 5 of the Farm Machinery Act (Alta.) 4 Geo. V., 1913, Alta., c. 15, amply covers warranties and breaches in respect to the sales of farm implements, and it is unnecessary to have recourse to the general conditions referred to in s. 16—Sales of Goods Ordinance. Relief for breach of warranties referred to in the said s. 5 of the Farm Machinery Act is found in damages, not in rescission of the contract.

ACTION for rescission of a contract of purchase or for damages. Judgment for plaintiff.

A. M. Sinclair, K.C., and *P. D. McAlpine*, for plaintiff; *A. H. Clarke*, K.C., and *R. M. Edmonson*, for defendant.

STUART, J.:—The trial of this action lasted four days. I regret the delay in giving judgment, but I have found it unavoidable. My notes of the evidence covered 39 closely written pages on my note book, and I do not think I omitted any essential statement.

I have read and re-read several times these notes of evidence, and the evidence of Sunden *de bene esse* as well as the exhibits, and I have reached thereon the following conclusions:—

1. I do not think the plaintiff made out his case for rescission. It is impossible, I think, in the circumstances to grant relief of that nature. With respect to the case in the Scotch Court of Session—I would refer to the observations of Chalmers in his book on the Sale of Goods Act (1893), at p. 27.

2. I have decided that no basis of relief can be found in any of the alleged verbal representations. It is impossible, I think, to find fraud, and indeed this is not alleged. Then, even if the word "representations" as used in the Farm Machinery Act, 4 Geo. V., 1913, Alta. (1st sess.), c. 15, s. 4, were properly to be interpreted as meaning "warranty," as to which I have very grave doubt, I am unable to conclude that a verbal warranty was intended to be given. Particularly do I find it too difficult to believe that the plaintiff could have understood that he was receiving a warranty as to the amount of work the tractors would do, when, in his own hearing and according to his own witness, the two agents themselves disagreed as to that question. It is also unnecessary, I think, to worry about any other alleged verbal warranty, because what was suggested is fully covered, in my opinion, by the statutory warranties provided for in s. 5 of the Farm Machinery Act. The provisions of that section, which are made specially applicable to sales of farm implements, also, in this case at least render quite unnecessary any recourse to the general conditions and warranties referred to in s. 16 of the Sales of Goods Ordinance.

3. I have concluded, however, that with respect to the Model L tractors, there was a breach of two of the warranties provided

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for in s. 5 of the Farm Machinery Act, viz.: (1) the warranty that the tractors would satisfactorily perform the work for which they were intended, and (2) the warranty that they were properly constructed as to design. I do not propose to enter into any detailed examination of the evidence, although I had written out for my own satisfaction a complete precise of all the material statements of the witnesses on both sides on these points. I have treated this evidence as a juryman would have to treat it, and not as a technical expert which I make no pretence of being. My conclusion is that in consequence of the breach of these warranties, the tractors were practically (*i.e.*, for practical purposes on a large farm) valueless. The damages I therefore assess at the actual amounts paid for them, viz.: $2,600, less the discount for cash. I think there was nothing shewn to be wrong with the ploughs, and I therefore allow nothing in respect to them. I assume that the same proportion of discount was allowed on the tractors and the ploughs, and on that assumption the cash paid for the four tractors was $4,610.20.

4. With respect to the Model D tractor, which was purchased for the purpose of running a separator, the evidence is by no means so strong. The witnesses had much less to say about this than about the Model L. My conclusion is that there was a breach of warranty in regard to the Model D also, because there was a secret defect, viz; the defective construction at the end of the piston pins and because it was not properly constructed in other respects as detailed by the witness Sunden. But the tractor was by no means valueless. No witness said it was utterly valueless, and the plaintiff got a great deal of work out of it. The plaintiff paid $2,410 cash for it. I think it was not worth more than $1,500 but it was probably worth about that. I will therefore allow $900 damages in respect of the value of the Model D.

5. I allow the plaintiff $400 for the freight he paid both ways on sending the Models L to Regina.

6. I allow no other damages. The loss of the crop was too uncertain, and I cannot make anything more than a guess at what it might be. This, of course, is not a legal ground for refusing to assess them but the plaintiff got some work out of the machines (Models L) which he is now getting for nothing. When I say

they were valueless it is not inconsistent with their capacity to do some work of some kind. But, as merchantable articles, they were valueless. Nevertheless, the actual work done with the machines for which nothing is to be paid will more probably offset the uncertain loss in excessive use of oil, lack of work done which was expected to be done, useless payment of men and experts, etc.

There will be judgment for the plaintiff for the sum of $5910.20 and costs. *Judgment accordingly.*

Re COTÉ.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. March 27, 1919.

WILLS (§ III G—136)—CONSTRUCTION—APPLICATION OF GIFT OVER—CHILDREN DYING WITHOUT ISSUE SURVIVING—INTERPRETATION OF WILLS ACT, s. 33—SALE AND DISPOSITION OF ESTATE BY EXECUTORS—DEVOLUTION OF ESTATES ACT, ss. 14 & 19.

Where there is a gift over to other beneficiaries contingent on the death of the children leaving no issue living at their death, the children take an absolute interest in the real and personal estate subject to the proviso.

In the Wills Act, R.S.O. 1914, c. 120, s. 33, the words "dying without issue," mean a lack of issue in the lifetime or at the death of the child or children.

Held, also, reversing judgment of Latchford J., that power of sale according to the Devolution of Estates Act (R.S.O. 1914, c. 119, s. 14), may be exercised, subject to consent of official guardian or order of Judge of the Supreme Court.

Statement.

APPEAL from the judgment of Latchford, J. on an application, upon originating notice, by Edmond Coté and Yvonne Coté, for an order or judgment determining certain questions arising in respect of the meaning and effect of the will of the late Marie Eliza Coté, of Ottawa, wife of the late Joseph Coté, of the same place. Varied.

The judgment appealed from is as follows:—Subject to charges which have been paid, Mrs. Coté devised all her real and personal estate to the child or children that might be born of her marriage with Joseph Coté.

The will further provided that, in the event of her child or children dying without issue, her real and personal estate was to pass to her father, mother, brothers, and sisters in equal shares.

Mrs. Coté died in 1896. Her executors did not dispose of or convey her real estate within twelve months after her death, nor did they register a caution, as they were enabled to do by an Act respecting the Sale of Real Estate by Executors and Adminis-

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trators, 54 Vict. ch. 18, sec. 1, and an Act respecting the time for the Vesting of Estates in Heirs and Devisees, 56 Vict. ch. 20, sec. 1. As the lands were not disposed of within the twelve months' period fixed by the statute then in force, and as no caution was registered, the interest of the executors in them was at an end, and the lands became vested in the children of the testatrix, Edmond and Yvonne Coté: Devolution of Estates Act, R.S.O. 1897, ch. 127, sec. 13 (1).

But that interest is subject to be divested should the children die without issue—an event that is improbable, considering one of the dominant characteristics of the race to which the Cotés belong.

If, however, there should be a want or failure of issue in the lifetime of Edmond and Yvonne Coté or at the time of their death Wills Act, R.S.O. 1914, ch. 120, sec. 33*, the gift over would undoubtedly become effective.

The executors, if living, could not sell the lands, which twelve months after the death of the testatrix became vested in the devisees, and the children can sell only the interest which is vested in them and subject to be divested in the event mentioned.

These conclusions sufficiently answer the several questions submitted.

Costs out of the estate.

C. E. Seguin, for the appellants.

E. C. Cattanach, for the Official Guardian.

Meredith,C.J.O.

MEREDITH, C.J.O.:—This is an appeal by Edmond Coté and Yvonne Coté from the order of Latchford, J., dated the 8th February, 1919, on an originating motion for the construction of the will of Marie Eliza Coté.

The will is dated the 4th day of August, 1891, and the testatrix died in 1896.

*33. In any devise or bequest of real estate or personal estate, the words, "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; but this Act shall not extend to cases where such words import if no issue described in a preceding gift be born, or if there be no issue who live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

By the will executors were appointed and all the real and personal estate of the testatrix was given "to the child or children that may be born to me during my present marriage to the said Joseph Coté subject to the payment of one-half of the annual income thereof without deducting from the whole annual income thereof the payment of taxes, interest on mortgages, insurance moneys, and repairs on the buildings on my said real estate to be made yearly to my said husband during his lifetime to assist him in the support maintenance and education of my child or children such yearly payment to my husband not to exceed in any one year the sum of $400 and it is my wish and desire that if any male child is born to me that he shall be educated in one of the learned professions."

This bequest is followed by a clause which reads as follows:—

"In the event of my death without issue or in the event of my child or children dying without issue I give all my real and personal estate to my father, mother, brothers, and sisters in equal shares subject to the payment of one-third of the annual income thereof instead of one-half as is mentioned in the precedent clause of this my will (after deducting from the whole annual income thereof the payment of taxes, interest on mortgages, insurance moneys, and repairs on the buildings on my said real estate) to be made yearly to my said husband during his lifetime such yearly payment to my said husband not to exceed at any one year the sum of $400."

Clause 7 is as follows:—

"I authorise my executors to sell and convert into money such real and personal estate as they will think proper in their discretion and to invest the money thus arising and the money arising from the annual income of my real and personal estate (after deducting the yearly payment to my said husband above mentioned) in some good Canadian chartered bank or on good mortgages on real estate or in the purchase of real estate at their discretion in trust for the child or children to be born of my present marriage with the said Joseph Coté, and in the event that no child should be born to me during this present marriage with the said Joseph Coté or in the event of the death of the child or children to be born of the present marriage with the said Joseph Coté dying without issue, in trust for my father, mother, brothers, and sisters in equal shares."

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The testatrix died on the 17th January, 1896, leaving her surviving the appellants, her two children, issue of her marriage with Joseph Coté.

The father and mother of the testatrix died long ago, and her only brother, Romauld Delfausse, died in June, 1914, and her five sisters are still living.

The deceased brother of the testatrix left surviving him five children, Therese Delfausse, and Jeanne, Marie, Mauriel, and Pauline Delfausse, the last four of whom are infants.

It is contended by the appellants that they take an absolute interest in the real and personal estate of the testatrix, and that the interest in the land is an estate in fee simple.

My brother Latchford decided against that contention, and held that the estate, though absolute, is subject to be divested in the event of the death of the appellants leaving no issue living at their death; and that, if that last event should happen, the gift over to the father, mother, brothers, and sisters of the testatrix will take effect.

I agree with the view of my brother Latchford. The testatrix evidently intended to provide for the gift over on the happening of either of the two events that she mentions, her own death without issue, or her child or children, if she should have any, dying without issue.

The effect of sec. 33 of the Wills Act is that "dying without issue" means a want or failure of issue in the lifetime or at the time of the death of the child or children, and not an indefinite failure of issue, no contrary intention appearing by the will.

I am, with respect, unable to agree with the conclusion of my brother Latchford that the executors, if living, could not sell the real estate because it has become "vested in the devisees, and the children can sell only the interest which is vested in them and subject to be divested in the event mentioned."

My learned brother's attention was not called to the provisions of sec. 14 of the Devolution of Estates Act, R.S.O. 1914, ch. 119, which provides that: "Nothing in section 13" (i.e., the vesting section) "shall derogate from any right possessed by an executor . . . under a will."

Though the power of sale which the will confers might yet be exercised if the executors or one of them were living, the proceeds

of the sale would be held by the executors upon the same trusts as those upon which the real estate is held, and cannot therefore be distributed until the event happens upon the happening of which the divesting provision of the will is not to take effect, i.e., the death of the child or children of the testatrix leaving issue surviving, whereas, if they die without issue, the divesting provision takes effect. Meredith, C.J.O.

Both of the executors being dead, the power of sale may be exercised by the executor of the executor who last died: Farwell on Powers, 3rd ed., pp. 106, 107; Williams on Executors, 9th ed., pp. 829, 830; or, if there is no such executor, by an administrator with the will annexed of the testatrix, appointed as provided by sec. 45 of the Trustee Act, R.S.O. 1914, ch. 121.

As infants are interested, no sale can be made by the executor without the written approval of the Official Guardian or an order of a Judge of the Supreme Court: Devolution of Estates Act, sec. 19.

The judgment should be varied by substituting for the declaration and judgment that the power of sale is not now exercisable, a declaration in accordance with the opinion I have expressed.

The costs of all parties of the appeal should be paid out of the estate.

MACLAREN and HODGINS, JJ.A., agreed with MEREDITH, C.J.O. Maclaren, J.A. Hodgins, J.A.

MAGEE, J.A. (dissenting):—The will in this case was made before any issue was born of the marriage and was in anticipation of such issue. It gives all the realty and personalty "to the child or children that may be born to me during my present marriage," subject to provision for the husband during his life. It authorises the executors to sell and convert the estate into money and to invest and hold the proceeds, after deducting the yearly payment to the husband, in trust for the child or children to be born. Whether this is a power or trust is not, I think, material to inquire. The will declares that "in the event of my death without issue or in the event of my child or children dying without issue," or, as elsewhere put, "in the event that no child should be born to me of my present marriage with the said Joseph Coté and in the event of the death of the child or children to be born . . . dying without issue," then "all my real and personal estate" is to be held in trust for her father, mother, brothers, and sisters. Magee, J.A.

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Magee, J.A.

The Wills Act would prevent the interpretation of the words "dying without issue" as creating an estate tail, and I agree that the event is to be ascertained under the statute at the death of some one—but, inasmuch as there appears no reason why one child's share should be affected by failure of issue of another, and as the event is the total failure of any issue of the testatrix, and the whole estate, and not merely one child's share, is to go over, I cannot but conclude that the event contemplated by the testatrix was her own death and the non-existence at that date of any issue. As that state of affairs did not occur, I think each of the children took an absolute interest in his or her share of the estate, and that the appeal should be allowed and the order varied accordingly.

Order as stated by the Chief Justice.

MAN.

K. B.

PETTYPIECE v. HOLDEN.

Manitoba King's Bench, Macdonald, J. November 5, 1919.

BROKERS (§ II B—12)—COMMISSION—INTRODUCTION BY AGENT—SUBSEQUENT PURCHASE THROUGH THIRD PARTY—COMMISSION TO ORIGINAL AGENT.

When the steps taken by an agent bring the future purchaser of land into touch with the principal, and the purchase is subsequently completed, even through the medium of another agent, the original agent is entitled to a commission on the sale.

[*Spenard* v. *Rutledge* (No. 2), (1913), 10 D.L.R. 682; *Burchell* v. *Gowrie & Blockhouse Collieries*, [1910] A.C. 614; *Vachon* v. *Straton* (1910), 3 S.L.R. 286, (1911), 44 Can. S.C.R. 395, referred to.]

Statement.

ACTION by real estate broker to recover commission on the sale of lands. Judgment for plaintiff.

J. L. Bowman and *J. N. McFadden*, for plaintiff; *F. E. Simpson* and *E. M. McGirr*, for defendant.

Macdonald, J.

MACDONALD, J.—The plaintiff, who is a real estate broker, brings this action claiming commission on the sale of lands.

The defendant was at the time a farmer living upon and working three quarter sections in township 34, range 29 W.

The plaintiff says that in the winter of 1917-1918 he first interviewed the defendant with respect to the sale of his land, and that the defendant intimated he might sell. Early in the spring of 1918 they met again and the defendant remarked that he thought he ought to get $22,000 for it, and asked what the commission on the sale would be and was advised that it was 5%. He then told the plaintiff if he got a purchaser to bring him out. Later on in

the same spring the defendant advanced his price to $30,000, and at this price the plaintiff made several efforts to sell. In the fall of 1918 the plaintiff brought three men to see the farm, and introduced them to the defendant, but nothing resulted. In December 1918, the defendant called upon the plaintiff and stated that he wanted $30,000 clear over and above commission and all expenses, and he then advanced the price to $32,000, and gave the plaintiff a written authority to sell at that price; $8,000 to be paid in cash, and the balance of the purchase price he would accept in payments equal to one-half the proceeds of the crop in each year, with 7% interest; the defendant to get $30,000 clear, the additional $2,000 to go to the plaintiff for commission, and in payment of any other expenses in connection with the sale.

The defendant in his direct evidence denied that he ever listed the property for sale at $22,000 or $30,000. He says he never did but once at $30,000 and that was $30,000 clear. In cross-examination however, he is not so positive. He says:

> I gave a listing in December 1918 or January 1919. I may have quoted a price before. I do not remember quoting $22,000 but may have mentioned that amount. I may have quoted $30,000 to him; do not think so, but will not swear I did not.

The plaintiff interviewed one Sofonoff, who had purchased land near the defendant's, and advised him that he had this land for sale, and to look out for a purchaser. Through Sofonoff, Steve Gryba was introduced to the plaintiff as a prospective purchaser, and he became the purchaser, the final negotiations having been concluded through one Samuel Tax, and the plaintiff claims the commission agreed upon with the defendant as a result of this sale.

The defendant repudiates liability to the plaintiff, claiming that the lands were taken out of the hands of the plaintiff before concluding the sale with Gryba, and that the sale was concluded with Tax, to whom a commission has been paid.

The payment of the $8,000 cash deposit was the difficulty in the way of the closing of the deal between the defendant and Gryba until the defendant took away the further control of it from the plaintiff, and placed it in the hands of Tax, and from the evidence of the defence and the conduct of the parties I am led to the belief that the removal of the plaintiff and the substituting of Tax was the result of a scheme to get rid of the plaintiff and

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the substantial commission agreed to be paid in the event of a sale through him.

The defendant says that the plaintiff was to arrange for Gryba the raising of the $8,000, as the latter not being a business man and not versed in such things, did not know how to finance the matter. This was not however a part of the bargain between the plaintiff and the defendant, but rather a voluntary undertaking by the plaintiff to assist the purchaser, Gryba. Gryba was possessed of enough means to undertake such an obligation as the purchase of this property, but his assets were not in a liquid form and required some considerable energy and activity in so reducing them to raise the $8,000, and the plaintiff was assisting towards this end.

That Tax, Gryba and the defendant put their heads together and determined to get rid of the plaintiff I am fully convinced.

The defendant met the plaintiff several times and enquired how Gryba was progressing and finally as he says it was getting late he determined to bring matters to a conclusion and so advised the plaintiff. The latter asked him to let it stand until the following Saturday. On Saturday he again called on the plaintiff, but in the meantime he had met Tax, and no doubt Gryba, and the plaintiff told him that he had failed to raise the money to meet the deposit, and then the defendant withdrew the farm from sale, and the listing card which he had given the plaintiff was destroyed. On the following Tuesday Tax puts in an appearance, according to the defendant, for the first time, as in any way identified with Gryba or the lands in question, but is this a fact?

Before Tax had anything to do with the lands Gryba tried to sell, and finally succeeded in selling him for cash a quarter section of land for the sum of $2,500. A short time after this sale Tax met the defendant and asked him if he had sold his farm, and on receiving a negative reply said: "I can sell it for you to Gryba." His next remark is significant: "Nothing further was done that day as it was in Pettypiece's hands." The defendant went away and came back 2 or 3 days afterwards and said: "Now you can sell my farm," and Tax then closed with Gryba. Compare this with the defendant's evidence:

"It was getting late in the season and I called on Pettypiece and explained this, and if no sale I wanted to get ready for spring

work." Pettypiece asked him to let it stand until the following Saturday. On Saturday he called with the result as stated. Defendant says: "I gave up all hope of selling to Gryba."

The following Tuesday he met Tax and the deal with Gryba was closed at the same price as that for which it was held by the plaintiff, but on easier terms. The cash payment being reduced to $3,000 instead of $8,000, and a commission paid to Tax out of the $3,000.

An effort is made by the defendant to establish the fact that Tax was the first to introduce Gryba as a prospective purchaser. Tax says that in December, 1918, he learned from the defendant that the land was for sale and that he advised Gryba to go and see it. Gryba says that he went to see the farm through the advice of Tax before he knew the plaintiff in the transaction and that he went a second time to see it with Wasyl Sofonoff, Sofonoff wanted to buy it for his brother-in-law, but could not manage it, and that he advised Gryba to buy it. This, he says, was the first time that the plaintiff's name was mentioned; the defendant advising him to see the plaintiff as he had it for sale.

Wasyl Sofonoff says that he had not been with Gryba on the lands but once, and that was after both he and Gryba had seen the plaintiff; that he knew the plaintiff had the land for sale and advised Gryba, and that they both interviewed the plaintiff before they went to see the farm; that this was the first time that Gryba and the defendant had met, and that he stated the object of their visit.

Gryba's evidence is very unsatisfactory and unreliable.

I find that the plaintiff had the farm for sale at first without any stated price or terms, these to be settled by the owner after a prospective purchaser appeared, and the commission to which the plaintiff was to be entitled was to be 5% and any price mentioned by the defendant was merely as a basis for future negotiations. The employment therefore, was a general one.

Finally the price was fixed at $32,000, $2,000 of which was to be paid to the plaintiff to cover his commission and any other expenses in connection with the completion of the sale.

Gryba was first introduced to the defendant by the plaintiff, and the lands were sold at the price stipulated, but on easier terms than those at which they were held by the plaintiff for sale.

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The lands were withdrawn from the sale by the plaintiff without his knowledge that Tax was intervening to complete the sale to Gryba, and the defendant knew at the time of his withdrawal of the land from the plaintiff that Tax and Gryba were negotiating a completion of the work commenced by the plaintiff; that the steps taken by the plaintiff had brought the defendant into relation with Gryba, who finally became the purchaser, and the plaintiff is entitled to a commission on the sale.

Vachon v. *Straton* (1910), 3 S.L.R. 286, reversed in part, (1911), 44 Can. S.C.R. 395.

Burchell v. *Gowrie & Blockhouse Collieries Ltd.*, [1910] A.C. 614; *Spenard* v. *Rutledge* (No. 2) (1913), 10 D.L.R. 682, 23 Man. L.R. 47.

Although $2,000 was agreed upon as covering the commission, and any other expense connected with the sale, there is nothing to shew what that other expense would be. The plaintiff, however, admits that seed grain to the value of $740 was included in the $32,000 and that he had agreed that $400 of the $2,000 should be applied to on such seed grain, leaving his commission at the even 5% on the $32,000, and this being the customary commission there will be judgment for the plaintiff for $1,600, together with costs. *Judgment accordingly.*

SASK.

C. A.

BESTPFLUG v. MARTIN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 3, 1919.

SEDUCTION (§ I—3)—SEDUCTION ACT R.S. SASK. 1909, c. 139, s. 4—PREVIOUS UNCHASTITY OF PLAINTIFF—EFFECT—DAMAGES.

The question of a plaintiff's previous unchastity does not necessarily enter into consideration in an action for seduction under promise of marriage and this question does not enter into an action for seduction brought by a parent or master, where the gist of the action is loss of service.

Statement.

APPEAL from the trial judgment in an action for seduction. Affirmed.

W. A. Begg, K.C., for appellant; *D. Buckles*, K.C., for respondent.

The judgment of the Court was delivered by

Haultain, C.J.S.

HAULTAIN, C.J.S.:—This appeal, in my opinion, should be dismissed.

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Haultain, C.J.S.

The action as tried was narrowed down to an action for seduction under s. 4 of an Act Respecting Actions for Seduction. (R.S. Sask., 1909, c. 139, s. 4). The only real conflict in the evidence was with regard to the previous unchastity of the plaintiff, and in view of the evidence given on that point, and the very strong opinion with regard to it expressed by the trial Judge, I do not think that we should be justified in disturbing his finding on that point.

It will therefore be unnecessary to consider the question whether the previous unchastity of the plaintiff in an action of this sort enters into consideration at all. It certainly would not in an action for seduction brought by a parent or master where the gist of the action is loss of service. Apart from the question of previous unchastity seduction is practically admitted by the defendant, and is otherwise amply proved. The damages awarded by this case are appealed against on the grounds that they are excessive and that the Judge in assessing them took into consideration what had occurred on the trial of the defendant on a charge of seducing the plaintiff under promise of marriage.

The matters referred to by the Judge were all before him in the evidence, and in my opinion, the persistent attempt by the defendant on both occasions to fix unchastity on the plaintiff was properly taken into consideration in the assessment of damages. While the amount awarded is large, it cannot be argued that in arriving at that amount the trial Judge took into consideration matters which he should not have considered, and there is, in my opinion, no reason for interfering with his discretion in that regard.

The appeal ought therefore to be dismissed, with costs.

Appeal dismissed.

BANNERMAN v. BRADLEY.

MAN.

K. B.

Manitoba King's Bench, Prendergast, J. November 10, 1919.

BROKERS (§ II B—12)—SALE OF LAND—COMMISSION—"SPECIAL EMPLOYMENT"—AGREEMENT SIGNED—UNSATISFACTORY—QUANTUM MERUIT.

An agent, who obtains a fixed price and stated percentage of commission on real estate listed with him by his principal, cannot recover the full commission when he concludes a sale for a much lower price, and on entirely different terms than those set out by his principal in their agreement.

[*Smith* v. *Barff* (1912), 8 D.L.R. 996; *Herbert* v. *Vivian* (1912), 8 D.L.R. 340; *McCallum* v. *Russell* (1909), 2 S.L.R. 442, referred to.]

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BANNERMAN v. BRADLEY.

Prendergast, J.

ACTION by a real estate broker for commission on sale of land.

J. P. Foley, K.C., for plaintiff.

P. C. Locke, for defendant.

PRENDERGAST, J.:—The plaintiff, who is a real estate broker, sues the defendant, who is a farmer, for commission.

The statement of claim alleges that the defendant employed the plaintiff to find him a purchaser for 1,520 acres of land therein described upon a stated commission of 5%; that he, the plaintiff, did find the defendant a purchaser in the person of one Francis Watkins; that the defendant and Watkins subsequently came to an agreement as to the purchase price and terms of payment and then executed and delivered to each other an agreement in writing for the purpose of carrying out the sale of the said lands.

It is admitted that the defendant listed these lands with the plaintiff.

As to the object of the employment, I find that it was "to sell" the defendant's property. That is shewn by the plaintiff's own testimony, where he says: "The defendant told me 'Sell me out here'." Also in his examination for discovery (answers 22, 24, 28 and 30) where the expressions: "You sell out this place" and "If you sell me out" constantly recur. I find, however, that although it was for a sale, the original employment was not for a sale of the land alone but was to include the defendant's equipment of cattle, horses, implements, etc., together with his furniture, the price for the whole being fixed on the basis of $80 an acre, with a cash payment which may have been of $10,000 or $15,000, according to the conflicting versions of the parties.

The plaintiff through advertisements in the newspapers found as a prospective purchaser one Francis Watkins, who told him he could not make any cash payment, but that he had all the equipment of horses, harness and machinery necessary to farm 3,000 acres, together with some seed and feed, although not quite enough. This, as I take it, meant in itself that he could only purchase on crop payments. The plaintiff having then telephoned to the defendant the particulars of the situation of the purchaser whom he said he had found, the defendant told him to bring him up to his farm, which was done.

After some conversation, most of which occurred when the plaintiff was not present, and after a somewhat superficial inspec-

tion of the buildings and of part of the land, the defendant and Watkins entered into a written agreement dated December 18, 1918 (Ex. 2) which they asked the plaintiff to prepare and which they signed in his presence.

In this writing, the wording and whole tenor of which shews total inexperience in the drafting of such documents, the vendor agrees to sell and the purchaser to purchase certain parcels of land therein described and stated to contain 1,520 acres more or less for the price of $91,200, to be paid as follows:—

The vendor agrees to accept crop payments by taking a lien on all the crops grown on the property excepting what goes for seed and feed. And the remaining expense of farm and living expense for the purchaser. The vendor agrees to pay 1918 taxes and pay insurance on the buildings to 1918. The purchaser agrees to put all equipment on the farm and furnish all seed. Price to be $60 per acre.

At the same time that the document was executed, there were three things, as both parties testify, that were then specified and understood between them:—

(1) That Watkins was buying for himself and his three sons;

(2) That a certain half section should be excluded from the bargain should the defendant find himself unable to make title to the same;

(3) A date was fixed for taking possession.

What seems to have happened next is that William Watkins, the eldest son of Francis Watkins, went to the office of Mr. Sexsmith, who was the defendant's solicitor. How it came to be that he went there, does not seem clearly appear, but I infer that it was at Mr. Sexsmith's invitation. Mr. Sexsmith says:—

William Watkins came and met me by appointment after supper. The sale was discussed. He said he and his two brothers and his father were all going into it. I said, I have seen the preliminary agreement and it would be better to have some set agreement about the crop and running expenses than leave it the way it was. I suggested it would be a more workable agreement. He thought so too and said he would speak about it.

Shortly after, Francis Watkins got from Mr. Sexsmith the draft of agreement which he had prepared, wherein the defendant is the vendor and the four Watkins purchasers. It is a somewhat lengthy document of ten pages of closely typewritten matter.

I will not enlarge upon this document. It probably does not contain anything that a vendor who proposes to sell merely on crop payments, could not fairly ask to protect himself when negotiating on the bargain. But a mere glance at it shews that it is in effect an altogether different agreement and contains a great

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number of conditions, some of which are indeed very onerous to the purchasers, that are not mentioned in, nor could even be said to be distantly implied by, the terms and conditions of the first. On this account, and more particularly because the second draft limited the living expenses to $2,000, on which he says he could not at all subsist, Francis Watkins refused to sign.

After some other interviews, the parties met again on February 14 last, in Mr. Sexsmith's office and agreed finally that the whole matter of the purchase of the land should be dropped. Francis Watkins on that occasion signed a document in the form of a letter addressed to the defendant, in which he says:—

> In reply to the letters received from your solicitors and also in reply to your own request over long distance that I proceed with the intended purchase of your farm near Oakville, I beg to notify you that I find after further consideration, that I was not able at the time of the discussion between us, and am not now able or willing or in a position financially, to proceed with the said purchase on the original terms discussed between us.
>
> And further, I am not willing to sign or give you a lien on all the crops grown on the property excepting what goes for seed and feed and the running expenses of farm and living expenses of myself as originally discussed between us.

The first question which presents itself is whether the agreement of December 7, 1918, is an enforceable agreement. I am of opinion that it is. It is no doubt a crude and improvident agreement, not so much in what it provides as in all that it leaves unprovided for, and the more so if one considers the magnitude of the transaction. But it is the parties' agreement for all that, and I think that the Courts, if it came to that, could define the vendor's right to a lien on the crops which is reserved thereunder, and fix, on the proper evidence being produced, the amount to be allowed the purchaser for living and running expenses. That the defendant must have understood that this document was to be binding in itself, is shewn by that part of his evidence where he states that the plaintiff said: "We might make a little agreement because I want to make sure of the place."

The two conclusions to be drawn from this finding are, first: that there was in effect, by virtue of the agreement itself, a sale, of which of course the plaintiff was the *causa causans*, and, secondly, that Francis Watkins was justified in refusing to sign the much more onerous document presented to him.

As to the terms "sell" and "effect a sale" as commonly used in such agreements, see *Smith* v. *Barff* (1912), 8 D.L.R. 996.

Of course, Watkins' letter of February 14, 1919, would make it appear that he was the one who backed out of the agreement. But the parties' actions speak louder than their words, even though the latter were put in the form of a written declaration such as this letter contains. Watkins' conduct shews that he wanted the land on the terms of the agreement he had, and he took many steps to bring the matter to a conclusion. It was only the insistence of Mr. Sexsmith (who was only protecting his client in this) that a new agreement should be signed with the many additions already referred to, that brought the transaction to naught; and Watkins, who was not attended by counsel, seems also to have come to the conclusion from the resolute attitude taken by the other side, that whatever the agreement stated, it was stated the defendant's power to limit his running and living expenses to $2,000, which was not enough to allow him to subsist and carry on farming operations of that magnitude. The transaction was abandoned, not of Watkins' free will, but at the instance of the defendant, who, while carefully avoiding the responsibility of an open break, consistently manoeuvred so as to bring about an abandonment, which, I am free to say, was, probably enough, to the best interest of both parties to this unwise transaction. That is, however, a consideration which does not affect the plaintiff's position.

There is also the question of Watkins' ability to carry out the agreement, which here means, as there were no direct money payments to be made, his personal ability to farm the land, the sufficiency of his equipment and his means of procuring seed and grain. The fact of the defendant and Watkins having executed the agreement is *primâ facie* evidence of the latter's ability to carry it out: Ogden on Real Estate Agents, pp. 25 and 126; Walker, American Law of Real Estate Agency, p. 116; *Herbert* v. *Vivian* (1912), 8 D.L.R. 340, 23 Man. L.R. 525; *McCallum* v. *Russell* (1909), 2 S.L.R. 442.

Watkins, moreover, says that he fully and honestly explained his situation to the defendant at the first interview, which is not denied. It would also appear from his evidence that he is a farmer of unusual experience, that his equipment was sufficient to farm much more land than he bought, and that he had enough cattle to realize the money necessary to supplement whatever he did not have sufficiently of seed and feed for the first year.

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Prendergast, J.

It is true that on this point again, we have Watkins' declaration of February 14 that his abandonment was due to his inability to carry out his undertaking. I have already stated how, in my opinion, the abandonment or cancellation was brought about. Watkins, who by the way seems to be far from self-assertive, also says that there were prepared 3 drafts of abandonment which he would not sign but that he consented to sign the last although realizing that it was also unsatisfactory. Then, the document shews, I believe, the relation that existed in Watkins' mind between his declared inability and the limitation of his living and running expenses to $2,000 as insisted upon by the defendant.

I find that the plaintiff is entitled to recover on a *quantum meruit*.

The sale brought about by the plaintiff is, however, very different from the defendant's proposition to sell his land with the equipment, cattle and furniture at $80 an acre, with which he had at first coupled his offer of a 5% commission.

All that I have said of the improvident and generally unsatisfactory character of this agreement, as having no bearing on its enforceability, must bear now with all its weight on the question of the quantum of remuneration.

The plaintiff claims $4,560. For his services in bringing about a sale of such problematical advantage (which the defendant, however, entered into willingly), I think he will be well compensated by being paid the sum of $500, for which he will have judgment with costs on the King's Bench scale.

Judgment accordingly.

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McDONALD v. BURR.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 3, 1919.

NEGLIGENCE (II A—78)—OF DEFENDANT—PERSONAL INJURIES OF PLAINTIFF DUE TO HIS OWN ACTS—DAMAGES.

A plaintiff whose own acts placed him in obvious danger cannot succeed in an action for damages against the defendant, even though the latter is found negligent, unless the plaintiff can shew that the defendant's negligence placed a third party in danger; and that he acted as a reasonable and prudent man would.

Statement.

APPEAL from the trial judgment in an action for damages for personal injuries. Affirmed.

R. F. Hogarth, for appellant; *P. E. Mackenzie*, K.C., for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an action for damages for personal injuries received by the plaintiff through being knocked down by a grain tank on a sleigh attached to the defendant's runaway four-horse team.

On December 19, 1917, the defendant negligently left a double-team (one team hitched ahead of the other) attached to a grain tank unattended and untied in Rosetown. The team ran away, going up Main Street from south to north. The plaintiff at the time was standing on the sidewalk on the west side of Main Street, a short distance north of its intersection by First Avenue. He noticed the runaway horses just as they reached said intersection. As the horses approached where the plaintiff was standing, he ran out into the roadway to try and stop them. He caught the near leader by the rein just back of the bit, but was unable to hold on; the horses passed him, but the tank, which swung toward the west, caught him, knocked him down, broke his leg and inflicted other injuries.

The plaintiff testified that he attempted to stop the defendant's team because he looked up the street to the north and saw some children on the roadway, near the intersection of Second Avenue, and apprehended that their lives would be in danger unless the horses were stopped.

The defendant denied negligence on his own part, and alleged that the plaintiff's injuries were the result of his own reckless conduct in leaving a place of safety and endeavouring to stop the runaway team.

The trial Judge found that the defendant had been negligent in leaving his team unattended, but held that the plaintiff had not established that his attempt to stop the horses was the result of a belief on his part that there were children on the street whose lives would be in imminent danger if the horses were not stopped, and that the determining cause of the accident was the reckless act of the plaintiff in putting himself in unnecessary danger. He therefore gave judgment for the defendant. The plaintiff now appeals.

The principle upon which a plaintiff in an action of this kind

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is entitled to recover is laid down in Street's Foundations of Legal Liability in a passage quoted by the trial Judge as follows:

> Where by the negligence of A. a situation has been created by which B. is placed in danger, C. is not guilty of contributory negligence in making an effort, such as a reasonable and prudent man would make in such emergency to rescue B, although by pursuing that course C. places himself in great and obvious danger. See also *Town of Prescott* v. *Connell* (1893), 22 Can. S.C.R. 147; Pollock on Law of Torts, 10th ed., pp. 502-03.

To succeed, therefore, the plaintiff had to establish the following facts: (1) that the defendant had been guilty of negligence contributing to the accident; (2) that such negligence created a situation by which the lives of certain children were placed in danger, and (3), that it was to prevent harm coming to the children that he attempted to stop the defendant's team.

On these facts being established the plaintiff would be entitled to recover, unless, under the circumstances of the case, a reasonable and prudent man would not have acted as the plaintiff did.

The negligence of the defendant was established and found. Whether or not such negligence created a danger to children depends upon whether or not there were children on the roadway. On each side of the street there was a ten-foot sidewalk with a roadway between. The plaintiff testified that he saw children on the roadway near the intersection of Second Avenue. A number of witnesses for the defendant testified that, at the time the horses were going up the street, they looked north and did not see any children or any one else on the roadway. Lovett, a witness called by the plaintiff, testified he was on the roadway with his team facing north, and was opposite Geddes' store, which was some distance nearer Second Avenue than where the plaintiff was standing. Lovett said he saw the runaway team before the plaintiff went out, and at a point further south than where the plaintiff says he first saw the team. Lovett said he looked north to see if the road was clear ahead of the horses and that it was. He said he saw a woman and two children, but he placed them on Second Avenue and not on Main Street at all.

If Lovett's testimony be believed, the children, being on the sidewalk on Second Avenue, were not in a position of danger and the roadway ahead of the team was clear. If these be the facts, the plaintiff's action in rushing out to stop the team was reckless and imprudent, as the trial Judge has found. It was, in

my opinion, open to the trial Judge to accept either the plaintiff's testimony as to the position of the children or Lovett's; or he might have concluded that the time Lovett saw the children was later than when the plaintiff looked up the street, and that, in the meantime, the children had got to the Second Avenue sidewalk. He, however, evidently chose to believe Lovett. As he was the tribunal charged with the duty of finding the fact, and as he found against the plaintiff on disputed evidence, we cannot, in my opinion, interfere with his finding.

The plaintiff having failed to establish that the defendant's negligence placed the lives of the children in danger, the appeal should be dismissed. *Appeal dismissed.*

ALLEN v. STANDARD TRUST COMPANY.

Manitoba King's Bench, Galt, J. November 17, 1919.

COMPANIES (§VII C—376)—FOREIGN CORPORATION—ACTION AGAINST CANADIAN STOCKHOLDER—BOUND BY LAWS OF FOREIGN STATE.

An action is instituted by the receiver of a foreign corporation to recover the sum of $5,000 being the value of 50 preference shares of the said corporation held by an estate of which the defendant company is the executor. The Court decided that the proper law of contract was that of the state where the foreign corporation had its head office, and such being the case that the purchaser of shares in the said corporation was bound by the laws of the said state, and so must meet the liabilities on the said shares according to the laws of the said state.

Statement.

ACTION by the receiver of a foreign company to recover the value of preference shares of the company held by an estate of which the defendant company is the executor.

A. C. Ferguson and *E. H. Morphy* (St. Paul, Minn.), for plaintiff.

E. K. Williams and *R. M. Fisher*, for defendants.

Galt, J.

GALT, J.:—The plaintiff sues as receiver of the O. W. Kerr Co., a foreign company incorporated in the State of Minnesota, with its head office in Minneapolis, doing business as vendors and purchasers of real estate.

The defendants are sued as the executors of the estate of the late Sir William Whyte.

The relief claimed is $5,000, being the par value of 50 preferred shares held by the late Sir William Whyte, with interest at 6%.

The plaintiff in his statement of claim has set forth very fully the facts on which he relies, including the laws of Minnesota

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applicable to the status and liabilities of shareholders in a Minnesota corporation.

The basis of the claim consists in a double liability, alleged to attach in favour of creditors to every share of stock issued by a corporation which has become insolvent.

The plaintiff is a practising attorney in Minnesota, and gave expert evidence as to the laws of that State applicable to the case. The statutes of Minnesota and many decisions thereon were also produced and referred to in confirmation of the plaintiff's evidence.

The statement of defence consists almost wholly of specific denials.

The substantial allegations in the defence are:—

(a) That the late Sir William Whyte had for 20 years past been domiciled in Manitoba and was not subject to the laws of Minnesota, nor had the plaintiff any cause of action against the defendant in Minnesota; (b) that the defendant is not a shareholder in the O. W. Kerr Co.; (c) that the defendant was not a party to the proceedings in which the plaintiff was appointed receiver; (d) that the liability in question is penal and therefore not enforceable in Manitoba.

The case was conducted with great ability by counsel on both sides and it presents some important and intricate features.

I will first refer to the law applicable to the questions in dispute:

Under the principles of international law, a contract made in one country is often, by the comity of nations, enforceable in other countries. The essential validity of a contract (as distinguished from its formal validity) as well as its interpretation and effect, and the rights and obligations of the parties to it, are governed (with certain exceptions) by the law which the parties have agreed or intended shall govern it, or which they may be presumed to have intended. This law is generally known as the proper law of the contract. See 6 Hals. Laws of England, p. 238, s. 356.

Contracts, whatever their proper law, are illegal in England if contrary to English ideas of public policy or morality or even if any part of them is so contrary . . . but a contract good by its proper law, though invalid in England, will nevertheless be enforced in England, if not inconsistent with public order or good morals.

6 Hals., p. 244, s. 363.

The position of a British or Canadian shareholder in a foreign company has been dealt with in several well recognised authorities.

In *Copin* v. *Adamson* (1874), L.R. 9 Ex. 345, an action was brought in England on a French judgment. The defendant

pleaded that he was not at any time before judgment resident or domiciled in France, or within the jurisdiction of the Court, or subject to French law; that he was never served with any process; nor had any notice or opportunity of defending himself.

The plaintiff filed two replications alleging:

(1) that the defendant was holder of shares in a French company having its legal domicile in Paris, and became thereby subject by the law of France, to all the liabilities belonging to holders of shares, and, in particular, to the conditions contained in the statutes or articles of Association; that by these statutes it was provided and agreed . . . (stating certain provisions as to service of process on shareholders, and compliance therewith by the Company or its assignee). (2) a similar replication, . . . but omitting all reference to the statutes or articles of association.

On demurrer it was held by the Court of Exchequer that the first replication was good but the second was bad. In the present case it is argued for the defendants that they are in the same position as the defendants in *Copin* v. *Adamson*, *supra*, were under the facts set out in the above second replication. The allegations in the statement of claim appear to sufficiently bring the present case within the first replication in *Copin* v. *Adamson*, but that case was decided on demurrer whereas the question here is whether the evidence at the trial sufficiently establishes the plaintiff's claim.

In *Emanuel* v. *Symon*, [1908] 1 K.B. 302, Lord Justice Kennedy says, at p. 314, that *Copin* v. *Adamson*, *supra*, is an express decision that a subject of Great Britain does not by the mere fact of becoming a shareholder in a foreign company submit himself necessarily to the jurisdiction of the foreign Courts.

Copin v. *Adamson*, *supra*, was taken to the Court of Appeal only in respect to the first replication (1875), 1 Ex. D. 17. Lord Cairns, L.C., in giving judgment dismissing the appeal, says at p. 19:—

The replication goes on to represent that, by the law of France, a person taking shares and becoming an *actionnaire* in the company, was bound by all the statutes and provisions of the company. The question might arise whether, without any express averment, by the law of France as by that of every civilized country, the shareholder would not be bound by all the statutes and provisions of the company in which he was a shareholder. But that question does not arise here, and I say nothing further about it. The averment is, that by the law of France he was bound by all the statutes and provisions of the company. The Court of Exchequer have held that a good replication. I am clearly of the same opinion.

In the *Bark of Australasia* v. *Harding* (1850), 9 C.B. 661, 137 E.R. 1052, the following points were decided on demurrer to the declaration:—

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(a) The members resident in England of a company formed for the purpose of carrying on business in a place out of England are bound, in respect of the transactions of that company, by the law of the country in which the business is carried on accordingly.

(b) A statute authorizing an unincorporated company to sue and to be sued in the name of its chairman constitutes the chairman, when so suing or so sued, an agent for the members of the company in the affairs of the company.

(c) The members of a company formed for the purpose of carrying on business in a colony are not discharged from liability on judgments obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, and having received no notice of the proceedings.

(d) Where a statute subjects the property of members for the time being of an unincorporated company, to execution upon a judgment obtained against their chairman, reserving in other respects the liabilities of parties, the remedies given against the property are in cumulation, and a member may be proceeded against by action.

(e) A judgment in a colonial Court is no estoppel; nor is it pleadable in bar in an action brought in England for the same cause.

Wilde, C.J., in delivering judgment, says, 9 C.B. at p. 685:—

The objection to the declaration is to the first count. That count states that the defendant was a member of a banking company acting under a colonial statute; a statute which may be assumed to have been obtained at the request of the parties. It provides that one member holding a principal office in the company may sue and be sued, instead of the whole body; and that execution may issue against the property of the other members of that body. But, while giving this benefit to the company, the Act provides that it shall not vary the rights or the liabilities of the parties. Now, independently of the colonial Act, the defendant would have been liable in respect of the demand for which the defendant is now sued; and, if the judgment had been recovered in an action brought against all the members jointly, an action of debt or assumpsit would clearly have lain against the defendant upon that judgment. The first objection taken to the count is that the remedy given by the colonial act upon the judgment, is not against the person of the shareholder, but is limited to execution against the goods of those who are partners at the time the execution issues. I think this is not so; but that the effect of the colonial Act is to extend the effect of the judgment. The first count of the declaration shews that, under the colonial Act, all previous rights and liabilities of the parties were reserved. These are sufficient to bind the defendant.

Cresswell, J., says, at 687:—

I am of opinion that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a company who must be taken to have been a consenting party to the passing of the colonial Act. He must, therefore, be regarded as having agreed that suits upon contracts entered into by the company, might be brought against the chairman, and that the chairman should for all purposes represent him in such actions. Being his own appointed agent, he had notice of the proceedings. If he had been resident in the colony, he could not have made himself party to the action, or in any manner personally interfered in the proceedings. The 5th section of

he Act extends the remedy by execution to new shareholders, who but for this enactment, would not have been liable upon contracts to which they were not originally parties.

Telfourd, J., says, 9 C.B. at 688, 137 E.R. at 1062:—

The second question is whether the fourth plea presents any answer to the cause of action set forth in the first count. That plea states that the defendant was never resident in New South Wales, and had no notice of the proceedings. The answer to that is, that the defendant was a member of a partnership carrying on business in the colonies, and was contented to leave his property there to be regulated by the law of the colony.

The present case has been argued on behalf of the defendants mainly upon the ground that the plaintiff is seeking to enforce against the defendants a personal judgment obtained in Minnesota against the late Sir William Whyte, a non-resident and without notice. But the action is not in truth upon any such judgment, nor is it true that the proceedings in Minnesota which resulted in the appointment of the plaintiff as receiver and the assessment levied upon all the shareholders were carried on without notice to the defendants.

William Harvey, manager of the defendant company, was called as a witness before me and amongst the documents produced by him were the following:—

(1) A notice from R. H. Owne, president of the O. W. Kerr Co., to the stockholders of the company, dated January 28, 1915, reciting that the company was in financial difficulties and the claims of its creditors were being pressed by suit and otherwise and giving notice of a special meeting of the holders of common and preferred stock to be held at Minneapolis on February 3, 1915, for the purpose of bringing before stockholders of said company its present acute financial condition and making such arrangements with reference thereto as might be deemed advisable or necessary and adding, "It is of the highest importance that you be present at said meeting."

(2) A copy of an order made by Horace D. Dickenson, District Judge, dated at Minneapolis, January 24, 1916, in an action brought by Thomas Hallaway, plaintiff, against The O. W. Kerr Co., defendant, whereby it was ordered that a petition of Edmund P. Allen, as receiver of the above named defendant company, be heard at a special term of said Court to be held at the Court House in the City of Minneapolis on Saturday, March 11, 1916, at the hour of 10 a.m. at which time after proof of due service of this order the Court will receive and consider such proof by affidavit or otherwise as may be presented or offered on said petition or in relation to the matter therein contained by or on behalf of the said receiver, or of any creditor, officer or stockholder of said corporation or any person interested therein appearing in person or by attorney, and particularly upon the following points:

1. The nature and probable extent of the indebtedness of the said defendant corporation. 2. The probable expenses of the receivership. 3. The probable amount of the available assets. 4. The parties liable as stockholders, the nature and extent of the liability of each and their probable solvency or insolvency.

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And it is further ordered that the said receiver give notice of such hearing by causing a copy of this order to be published once each week for four successive weeks in the Minneapolis "Tribune," a daily newspaper printed and published in the said Hennepin County, and by causing a copy of this order to be mailed to each of the stockholders of the said defendant corporation whose post office address is known to the said receiver or his attorneys at least 30 days prior to the date of said hearing.

(3) Copy of order made by W. E. Hale, District Judge, on April 1, 1916, in the said suit of *Hallaway* v. *O. W. Kerr Co.* This order contains a very full recital of the proceedings by Edmund P. Allen as receiver of the defendant corporation for an assessment upon the shareholders of the corporation and the appearance of several stockholders thereupon who moved to dismiss the petition upon the ground that the said Court had no jurisdiction to make any order of assessment or any order for the purpose of enforcing the double liability against the stockholders of the said O. W. Kerr Co., and that by order of March 13, 1915, the said Edmund P. Allen was appointed receiver with all the usual powers of a receiver of said Court; and that all the assets of said defendant corporation were by the said order sequestered; and that the receiver had given the requisite security; and that the plaintiff had recovered judgment for $1,446.04, and that the defendant corporation is insolvent, and it further appearing that the constitutional liability of the stockholders of the said corporation exists and that it is necessary to resort to the same; it was ordered that an assessment equal to the par value of each share of the capital stock of the said defendant corporation, to wit, the sum of $100 on each and every share of said capital stock be and the same is hereby assessed upon and against each and every share of the said capital stock and upon and against the persons or parties liable as stockholders of the said defendant corporation and that each and every person or party liable as such stockholders do pay to the said Edmund P. Allen as receiver the said liability within 30 days from the date of this order and that the said receiver forthwith proceed to collect the several amounts due from the several persons or parties liable as stockholders of the said defendant corporation under the terms of this order, and that in case any person liable as a stockholder should fail to pay the amount assessed within the time limited the receiver is authorised to institute and prosecute such action or actions at law or in equity or other proceedings in any Court having jurisdiction whether in the State of Minnesota or elsewhere, which said receiver may deem necessary, etc., and it is further ordered that the said receiver give notice of this order by mailing a copy of the same within 5 days from the date hereof to each stockholder of the said defendant corporation whose name and address is known to the said receiver or to his attorneys or either of them.

Harvey admitted that these documents were received at the office of the defendant company at about their dates; but that the defendants ignored the demands made by the receiver for payment.

As a general rule, when a judgment is entered, the original cause of action merges in the judgment.

But this is not necessarily so with regard to foreign judgments: see *Bank of Australasia* v. *Harding*, *supra*. The order of assess-

ment in the present case does not appear to be recognised as a judgment even in Minnesota, for the order itself authorizes the receiver to prosecute actions at law or in equity against any defaulting shareholders, a provision which would be absurd if the order itself operated as judgment.

The liability sought to be enforced against the estate of the late Sir William Whyte is a constitutional liability, expressed in the statutes as follows:—

Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him.

See R.S. Minnesota, 1905, p. 1186.

This law is still in force as appears from the Revised Stats. of 1913, and by oral expert evidence. The construction placed upon this provision by the Supreme Court of the United States, and now applied by the Courts in Minnesota, is that it is a provision intended to protect the creditors of companies and that it imposes upon all shareholders a liability over and above any balance remaining due upon their shares, to the full extent of the par value of their shares. It operates as a double liability.

The wording of the section does not clearly to my mind express a double liability. We have in Canada a liability of this kind in the Bank Act, 3-4 Geo. V., 1913, c. 9, s. 125. It is expressed in our statutes as follows:—

INSOLVENCY—In the event of the property and assets of the bank being insufficient to pay its debts and liabilities, each shareholder of the bank shall be liable for the deficiency, to an amount equal to the par value of the shares held by him, in addition to any amount not paid up on such shares.

But if the law of Minnesota be taken to be the proper law of the contract, the interpretation of it cannot depend upon the view taken of it by any particular Judge or Court here in Manitoba. This point came before the Court of Queen's Bench in England in *Baron De Bode's* case (1845), 8 Q.B. 208, 115 E.R. 854.

Lord Denman, C.J., says at 250:—

The witness, upon being questioned as to the state of law in France in 1789, refers to a decree of that date. The form of the question is, I think, immaterial: in effect, the witness is asked to speak to the decree. It is objected that this is a violation of the general principle, that the contents of a written instrument can be shewn only by producing the instrument or accounting for the non-production. But there is another general rule: that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men: and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound

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to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law: the witness is called upon to state what law does result from the instrument.

Coleridge, J., says, 8 Q.B. at 265, 115 E.R. at 875:—

What in truth is it that we ask the witness? Not to tell us what the written law states, but, generally, what the law is. The question is not as to the language of the written law . . . The question for us is, not what the language of the written law is, but what the law is altogether as shewn by exposition, interpretation and adjudication.

To the same effect were the opinions expressed by the Law Lords in *The Sussex Peerage* case (1844), 11 Cl. & Fin. 85 at 114-117, 8 E.R. 1034 at 1045-1047.

These two decisions are quoted in the last edition (5th ed.) of Westlake's Private International Law as being still leading authorities on the subject.

In the present case Allen, a competent expert on the law of Minnesota, testified as to what that law was, and his evidence was not shaken by cross-examination. I therefore feel bound to accept such evidence as accurate.

It is true that stockholders in any companies organised for the purpose of carrying on any kind of manufacturing or mechanical business are excepted from the double liability; and Mr. Williams points out that under the powers conferred upon the company by its certificate of incorporation the company has power amongst other things, to sell and dispose of grist-mills, flour-mills, etc., and to do and perform all things necessary in connection therewith; but Mr. Morphy, on behalf of the plaintiff, shewed very clearly that this exception is confined in Minnesota to companies *exclusively* carrying on a manufacturing or mechanical business, which cannot be said of the O. W. Kerr Co.

My findings upon the evidence are as follows:—

1. That the O. W. Kerr Co. was duly incorporated in the State of Minnesota as set forth in the statement of claim in the year 1907. The certificate of incorporation provides that:—

The undersigned agree to and do hereby associate themselves as a body corporate for the purposes hereinafter expressed, and do hereby, under and pursuant to the laws of the State of Minnesota incorporate ourselves and our successors, and to that end we hereby adopt and sign the following certificate of incorporation.

2. That on or about January 25, 1911, William Whyte (afterwards Sir William Whyte) purchased 50 shares of the preferred

stock of the O. W. Kerr Co. through William Harvey, then acting as the company's agent for the purpose in Winnipeg; and that William Whyte thereby became a preferred shareholder, and received from time to time dividends on his shares from the company. See Whyte's certificate of shares, Exhibit 13 and Exhibits 17 to 24 inclusive.

3. That Sir William Whyte was a British subject and a non-resident of Minnesota, and he purchased the shares in question in Winnipeg; but, in my opinion, the proper law of the contract in question, in so far as the rights and liabilities of the late Sir William Whyte are concerned, is the law of Minnesota.

4. That the laws of Minnesota applicable to the questions in dispute are set forth with substantial accuracy in the statement of claim, save and except the allegations in par. 11, and possibly elsewhere, to the effect that, even in cases where the proceedings were taken in Minnesota against non-resident persons, or without notice to the defendant, relief may be legally recovered by judgment in Minnesota. Such a provision, in the absence of agreement by such individuals, would in my opinion, be contrary to British ideas of public policy, and as such not enforceable here.

5. That this action is not open to the objection that it is a penal action and therefore unenforceable in Manitoba. The test to be applied in deciding the point is to ascertain whether the proceeding or proceedings in Minnesota were in the nature of a suit in favour of the state, whose law had been infringed. See *Huntington* v. *Attrill*, [1893] A.C. 150 at 157. I consider the liability in question is merely a civil remedy not enforceable by the State of Minnesota at all.

6. Finally, I find that when Sir William Whyte became a shareholder of the O.W. Kerr Co., in the year 1911, he agreed by implication that his rights, liabilities and status as a shareholder in that company should be governed by the laws of Minnesota, and that under these laws the defendant company, as executors of the estate of Sir William Whyte, are now liable for the relief claimed (see *Pickles* v. *China Mutual Ins. Co.* (1913), 10 D.L.R. 323, 47 Can. S.C.R. 429), together with interest at 6% in accordance with the law of Minnesota: See 6 Hals., s. 367.

I therefore give judgment in favour of the plaintiff for the sum of $5,000 with interest at 6% as claimed and the costs of the action.

Judgment accordingly.

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WRIGHT v. SMITH and NELSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 3, 1919.

BROKERS (II B—12)—COMMISSION—"GENERAL EMPLOYMENT"—"SPECIAL EMPLOYMENT"—DEFINITION.

An agent, who has been employed to sell real estate, and has been given a price by his principal has a right to the commission on any sale made by his principal to a purchaser introduced by him, even though such sale be at a lower price than the one given, unless the terms of his contract with his principal are such as would shew "special employment" only.

[*Stratton* v. *Vachon* (1911), 44 Can. S.C.R. 395; *Burchell* v. *Gowrie & Blockhouse*, [1910] A.C. 614; *Colonial Real Estate* v. *Sisters of Charity* (1918), 45 D.L.R. 193, 57 Can. S.C.R. 585, referred to; see also *Bridgman* v. *Hepburn* (1908), 42 Can. S.C.R. 228; *Prentice* v. *Merrick* (1917), 38 D.L.R. 388.]

Statement.

APPEAL by defendant from the judgment of Taylor, J., in an action by a real estate broker for commission on the sale of land. Affirmed.

J. F. Bryant and *C. Burrows*, for respondents.

Haultain, C.J.S.

HAULTAIN, C.J.S. (dissenting):—I regret that I am unable to agree with the conclusion arrived at by the other members of the Court in this case.

In my opinion the agents' employment was not a "general employment" in the sense in which those words are used by Lord Watson in *Toulmin* v. *Millar* (1887), 58 L.T. 96.

The agreement in this case, as I gather it from the evidence, was that the plaintiffs were employed as agents to sell the land in question for $38 per acre, which price was to include a commission of one dollar an acre. The plaintiff Nelson in his evidence says that he asked the defendant to give him "his best price including the regular commission." On his examination for discovery Nelson was asked the following question: "And on this listing if you produced a purchaser at the price as stated," (*i.e.*, $38 per acre), "you were to get $1.00 an acre?" To this question he answered, "That is it exactly."

The commission in this case is an arbitrary amount based on the number of acres to be sold and dependent upon the price to be secured. It is not a case of an agreed commission of 5% or 10% upon the amount of purchase price secured. There does not seem to be any method by which the amount of commission can be reduced proportionately to the price obtained if the land is sold at any lower price than the amount mentioned in the listing agreement, and, in any event, there is no claim here upon a *quantum*

meruit. To still allow a commission of $1.00 an acre out of a price less than the listing price, means allowing the agent a commission increasing in inverse proportion to the amount of purchase price obtained.

In the cases of *Toulmin* v. *Millar*, *supra*, and *Burchell* v. *Gowrie & Blockhouse Collieries Ltd.*, [1910] A.C. 614, the commission agreed upon was a percentage of the purchase price, which fixed the value of the agent's services no matter what the actual purchase price might be. In those cases the agent was awarded the commission which, under the circumstances, he was held to have earned. I quite agree that in this case the purchaser was introduced to the defendant by the plaintiffs and that, consequently, the introduction was the cause of the sale, but, in my opinion, there was no contractual relation between the introduction and the sale. To entitle them to the commission, the plaintiffs were under an obligation to secure a purchaser ready, able and willing to pay $38 an acre for the land. In response to the request to name his best (*i.e.*, lowest) price including commission, the defendant practically said to the plaintiffs, "If you secure me a purchaser at $38 an acre, I will allow you a commission of $1.00 per acre." This is not a case such as the case put by Lord Watson in *Toulmin* v. *Millar* of a proprietor merely mentioning the sum he is willing to accept as the basis of future negotiations, leaving the actual price to be settled later on. The defendant did not merely mention the price he was willing to accept, but the best, that is, the lowest, price he would accept, and that price was to include the commission. There is no evidence in the case to shew that the purchaser was ever ready, willing and able to give $38 per acre for the land. In fact, the evidence is all the other way. There is also no evidence to shew that by any act of the defendant a sale at the listing price was prevented or that the defendant improperly sold the land behind the plaintiffs' back. If a sale at the stipulated amount was prevented by the defendant, he would, of course, be liable for the whole commission agreed upon. But that is not the case here.

For the above reasons I think that the appeal should be allowed with costs, and the judgment below set aside and judgment entered for the defendant dismissing the action, with costs.

NEWLANDS, J.A.:—In this case they practically cut out the Newlands, J.A.

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agent and sold behind his back without taking his commission into consideration. I concur in the result.

LAMONT, J.A.:—This is an appeal by the defendant from the judgment of Taylor, J., in an action for commission on the sale of land.

In November, 1918, the defendant listed his farm, which consisted of 800 acres, with the plaintiffs for sale at $38 per acre, with a commission of $1 per acre. A short time afterwards two farmers were in the plaintiffs' office with a view to purchasing land, one Marquette and the other Hart, both of Pense. The plaintiff Smith brought the defendant's land to their attention, with the object of having Marquette go and see it as a possible purchaser. When Hart and Marquette left the plaintiffs' office, Marquette said he would like to see the land. Hart had his car, and they at once drove to the defendant's farm. The defendant asked them who sent them, and all parties agree that Marquette told the defendant that they had come from the plaintiffs' office. They looked over the farm. On their way home Hart told Marquette that if he (Marquette) was not going to take the place, he thought he would take it himself. Marquette found himself unable to buy. The following week the plaintiff Smith saw Hart at Pense and spoke to him about the farm. A few days later Hart was down at the farm and bought it from the defendant at $37 per acre. The defendant having refused to pay the commission, the plaintiffs brought this action.

Two defences were set up: (1) that the plaintiffs were not the efficient cause of the sale, and (2), that the plaintiffs' employment was a special one and that no commission was therefore payable unless they procured a purchaser at $38 per acre.

The trial Judge held that the relation of buyer and seller had really been brought about by the act of the plaintiffs, and he gave judgment in their favour. The defendant now appeals.

In my opinion there cannot be any serious doubt that the plaintiffs were the efficient cause of the sale. The contention that Hart was introduced to the land by Marquette is untenable. The plaintiff Smith brought the land to the attention of both men in his office, and they went direct from there and inspected the land. It does not make any difference, in my opinion, that the primary object of the trip was to let Marquette see the place.

Hart was in the market as a purchaser of land and his introduction to the defendant's land was brought about by the plaintiff Smith. In this case the plaintiffs' act was much more directly the efficient cause of the sale than that of the agent in *Stratton* v. *Vachon* (1911), 44 Can. S.C.R. 395.

The contention that the plaintiffs' agency amounted to a "special employment," the trial Judge held to be answered by the following passage from the judgment of the Privy Council in *Burchell* v. *Gowrie & Blockhouse Collieries, Ltd.*, [1910] A.C. 614 at 625:

> The answer to the second contention is, that if an agent such as Burchell was brings a person into relation with his principal as intending purchaser, the agent has done the most effective, and, possibly the most laborious and expensive, part of his work, and that if the principal takes advantage of that work, and behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale. There can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given by the agent.

In my opinion this passage is an answer to the defendant's contention if, but only if, the plaintiffs were agents "such as Burchell was." Burchell's agency had been found to be a "general employment," and the above passage states the rights of an agent where his employment is general. A "general employment" means that the understanding, express or implied, between the parties is, that if the agent procures a purchaser who is willing to buy at a price and upon terms which the vendor is willing to accept the agent shall be entitled to his commission; the price and terms specified in the listing being considered simply as a basis of negotiations. See Duff, J., at 406, in *Stratton* v. *Vachon*, *supra*.

If such be the agreement between the owner of the land and the agent, and the owner sells to a purchaser secured by the agent although at a lower price and on different terms from those specified in the listing, the agent is entitled to his commission. On the other hand, if the arrangement between the owner and the agent is that the agent is to be paid a commission only in the event of his procuring a purchaser willing to buy at the price and on the terms specified in the listing, the agency is a "special employment," and the agent is not entitled to any commission or remuneration unless he procures a purchaser willing to buy on the specified terms. See judgment of Anglin, J., in *Colonial Real*

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Estate Co. v. *Sisters of Charity of the General Hospital of Montreal* (1918), 45 D.L.R. 193, 57 Can. S.C.R. 585, at 594.

If, under a "special employment," the agent introduces a purchaser who will not pay the stipulated price but who offers the vendor a lower price and, rather than lose the sale, the vendor agrees to accept the lesser amount and completes a sale, the agent is not entitled to any remuneration, for his contract is that he is to be paid for his services only in case he complies with the terms of his listing.

This I think is made clear by Lord Esher, M.R., in *Barnett* v. *Isaacson* (1888), 4 T.L.R. 645, where he points out that as the true meaning of the arrangement made between the agent and the owner was that the agent was not to be paid unless he performed the terms of his contract, and that as he had failed to do so he could not recover under his contract. As to the claim that the agent was entitled upon a *quantum meruit*, he says, at 646:

> To entitle a plaintiff to sue upon a *quantum meruit* the rule was that if the plaintiff relied upon the acceptance by the defendant of something he had done, he must have done it under circumstances which led the defendant to know that if he, the defendant, accepted what had been done it was on the terms that he must pay for it.

Whether or not the plaintiffs are entitled to recover in this action depends, therefore, upon whether or not their agency amounted to a "general" as against a "special employment." The onus is upon them to establish to the satisfaction of the Court the terms of the contract of agency under which they claim. It is not enough for them to shew that they found a purchaser to whom the land was subsequently sold. They must go further, and shew that under the arrangement with the defendant they were to be paid for these services in such event. Whether they were or not is a question of fact to be determined on the evidence. It is simply a question of the intention of the parties. In determining their intention it is necessary to bear in mind what was laid down by Lord Watson in *Toulmin* v. *Millar* (1887), 58 L.T. at 97;

> When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment . . . The mention of a specific sum . . . . is given merely as the basis of future negotiations.

There is no mention of commission or remuneration in the listing, so we are left to collect the contract of employment from

the verbal testimony. The defendant says he listed his land with the plaintiffs and promised them $1 per acre commission if they sold on the listing terms. The plaintiff Nelson, with whom the land was listed, says:

I asked him to give us the very best price including the regular commission.

On his examination for discovery the plaintiff Nelson gave the following testimony:

Q.—And on this listing, if you produced a purchaser at the price as stated here you were to get one dollar an acre? A.—That is it exactly.

Q.—And if you did not you were not? A.—Well, we would not expect it.

If this testimony stood alone, I would think it strongly supported the contention of the defendant that the plaintiffs were to receive their commission only in case they produced a purchaser at $38 per acre. There is, however, other evidence which must be considered. Marquette testified that a few days before the sale was completed, the defendant came to his livery barn and asked him if he thought the plaintiffs had a right to the commission, remarking at the same time that if they had no right to it he would give Hart the benefit of it.

In his evidence the defendant said he asked Hart if the defendants had ever offered to sell him his land, and Hart replied they had not. In another place he says:

He told me that Smith and Smith had never said anything about the land, and I told him I would throw off the one dollar to close the deal and about that time Smith drove in the yard.

What took place when Smith arrived is to my mind very significant. Smith told them that if they concluded a deal he would be entitled to a commission. Hart said he would not be, for he had not got the information concerning the land from him but from Marquette. Smith maintained that Hart got the information from his office.

Smith in his evidence says:

While I was talking with Hart, Wright came up, and he said that I didn't have any commission coming because Hart didn't get his information from me, and I told him he did get his information, that the information came direct from our office, that it was in there he got the information. Well, he said he wouldn't pay any commission.

And in his evidence the defendant gave the following testimony:

Q.—And what next happened? A.—Well, they argued there for a while and finally Smith told me that if I sold that land to Hart that he was entitled to commission. I told him I didn't think he was.

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It will be observed that during this interview, when the question of the plaintiffs' commission formed the whole topic of conversation and when the defendant was disputing the plaintiffs' right thereto, he never once suggested that the plaintiffs had no right to commission because they had not found a purchaser who would pay $38 per acre. The only objection raised was, that it was Marquette and not the plaintiffs who had found the purchaser. Had the understanding been that no commission would be payable unless the purchaser was willing to pay $38 per acre, I think the defendant would at once have put it forward as soon as Smith claimed he would be entitled to commission if they closed the deal.

The fact that the defendant asked Marquette if he thought the plaintiffs would be entitled to commission in case he sold to Hart, and the fact that no question was raised that the plaintiffs would not be entitled to the commission, if in reality they were the ones who introduced Hart to the land, leads me to the conclusion that the defendant believed the plaintiffs would be so entitled if Hart was their purchaser.

The conduct of the defendant, and his failure to take the objection now raised when Smith was claiming the commission before the sale was completed, to my mind speak more loudly than the defendant's statement in the witness box.

There is no doubt that Hart was endeavouring to persuade the defendant that the plaintiffs were not entitled, so as to get the benefit of the $1 per acre. He succeeded in this effort, although it was not in accordance with the fact. For this the plaintiffs are not responsible.

I am therefore of opinion that there were no limitations placed on the agreement to pay the commission which would make the listing a "special employment."

The appeal should, therefore, be dismissed, with costs.

Elwood, J.A.

ELWOOD, J.A., concurred with LAMONT, J.A.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Sutherland, J. June 24, 1919.

ALIENS (§ III—20)—INTEREST IN ASSETS OF ESTATE—WAR MEASURES ACT, 5 GEO. V., 1915, C. 2, (DOM.)—CONSOLIDATED ORDER 28—TRADING WITH ENEMY—WILL—CITIZEN OF UNITED STATES—TRUSTS FOR BENEFIT OF WIFE AND DAUGHTER—EQUAL SHARES—PROVISION IN WILL AUTHORIZING ALTERATION OF TRUSTS BY CONSENT—LEGAL DOCUMENT DRAWN ACCORDINGLY—APPROVED BY FOREIGN COURT—DAUGHTER MARRIED TO ALIEN ENEMY—HER INTEREST TREATED AS SUCH—ATTEMPT TO ALLOCATE ONTARIO ASSETS TO WIFE—DAUGHTER'S INTEREST—TRANSFERRED TO PUBLIC CUSTODIAN—EFFECT OF FOREIGN COURT ORDER—LEAVE TO APPEAL—PERSONA DESIGNATA—R.S.O. 1914, c. 79, ss. 2 & 4.

The assets of an Ontario estate which belong to or are held or managed for an alien enemy, may, on application to a Judge of the Supreme Court of Ontario, be vested in "the Custodian" appointed under the Consolidated Orders respecting trading with enemy 1916.

A document brought into existence by agreement of persons interested as devisees or legatees under the will and made subsequent to the death of the testator, even though in pursuance of a power conferred in the will, cannot be admitted to probate in Ontario, and even though a foreign Court ratified such a document, this decision cannot be treated as effective and binding.

A beneficial interest had passed from the testator to his daughter on his death, and that interest has not passed from the daughter by reason of the document already referred to, and so still remained liable to forfeiture under the Consolidated Orders.

The theory of the comity of nations should be modified or restricted when it conflicts with matters of public policy, which was essentially the case.

The order was made by a Judge as "*persona designata*" and an appeal, if any, would lie with special leave under the Judges' Orders Enforcement Act, R.S.O. 1914, c. 79, ss. 2 and 4.

[See annotation on aliens, 23 D.L.R. 375.]

Statement.

Application at the instance of the Secretary of State for Canada, and on notice to the National Trust Company, under the War Measures Act, 1914, 5 Geo. V. 1915, ch. 2 (Dom.), and orders in council issued pursuant thereto, for an order vesting in "the Custodian" one half of the assets, situate in the Province of Ontario, of the estate of Franklin Hiram Walker, deceased, on the ground that they belonged to or were held or managed for the Countess Ella Matuschka, an enemy.

Christopher C. Robinson, for the applicant.

Glyn Osler, for the National Trust Company.

Sutherland, J.

SUTHERLAND, J.:—When the testator died, the British Empire was at war with Germany, with the usual result that commercial intercourse between them was suspended, and the subjects thereof prevented from trading with the public enemy unless with the permission of the Sovereign. A reference to the preamble contained in the Imperial Act intituled "An Act

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to Amend the Trading with the Enemy Act, 1914, and for purposes connected therewith" (1914-15), 5 Geo. V. ch. 12, makes it plain that, while it would appear to be an Act intended to deal chiefly with trading with the enemy, it goes much further. Jurisdiction is given to impound the property of an enemy for the following purposes: to prevent money going out of the country, and possibly being used to give aid to the enemy, and to create a fund available on the conclusion of peace: *In re Ling & Duhr*, [1918] 2 Ch. 298, at p. 300. Presumably our War Measures Act, 1914, and the orders in council passed pursuant thereto, are intended for the like purpose.

This application is made under the authority of Consolidated Order in Council No. 28, in force in the year 1916.

The testator, Franklin Hiram Walker, a citizen of the United States of America, resident in the city of Detroit, in the State of Michigan, made his will on the 14th June, 1916, and died there three days later. He appointed the Detroit Trust Company executor and trustee under the will, and left an estate inventoried at $3,762,393.90, of which $2,969,209.49 were assets within the Province of Ontario, and $793,184.41 outside thereof and in the said State.

Some years prior to his death, his daughter, and only child, Ella, was married to Count Manfred von Matuschka, a citizen of Germany, where she was residing with him at the time of her father's death, and was in a legal sense, like him, an alien enemy.

The testator's widow, May Walker, was, like himself, a citizen of the United States.

By the terms of the will, after certain devises and bequests, admittedly not relatively large as compared to the residue of the estate, the testator dealt with and disposed of such residue under the following clauses of his will, namely:—

"(11) Inasmuch as the residue of my estate is to be divided between my wife and daughter, or the survivor of them, as hereinafter stated, the trusts and provisions hereby made and declared with respect to such residue shall from time to time be subject to such variations or new or other trusts and provisions as my wife and daughter and my trustee may agree upon, and my trustee may from time to time act upon instructions from my wife and daughter with respect to any matter or question relating to the residue of my estate or as to the action to be taken by them in connection therewith. If, by

reason of the death of either my wife or daughter before my decease, the survivor thereof shall be entitled to the whole of the residue of my estate, then the power conferred by this provision upon my said wife and daughter may be exercised by the survivor of them.

"(12) I direct my trustee to hold, for the sole use and benefit of my wife and daughter, share and share alike, and free from the control of any husband, the said residue of my estate, and to pay over to them respectively, from time to time, share and share alike, the entire net income of such residue, and to pay, hand over or convey to them respectively, from time to time, share and share alike, the whole or such part of said residue as they may request and direct. It is my intention under this provision, among other things to confer upon my said wife and daughter the power to require from time to time the delivery to them of the whole or any part of the residue of my estate, and thereby, as to such residue, terminate the trust powers of my estate. If by reason of the death of either my wife or daughter before my death, the survivor thereof should take the entire residue under the terms of this will, it is my intention that the powers conferred of requiring the handing over, payment and conveyance of the whole or any part of the estate, as hereinbefore in this provision provided, shall enure to the benefit and may be exercised by the survivor. It is further my will and intention that in the event of the death of either my wife or daughter after my death and before delivery to them of the residue of my estate, under their right to request and direct the delivery and conveyance of the same, as provided in this paragraph, then the survivor of them shall have the right to request and direct that her share of the residue, or so much thereof as remains unpaid, undelivered and unconveyed, shall be paid, delivered and conveyed over to her from time to time as she may request or direct.

"(13) Should my wife not survive me, and my daughter should survive me, then it is my will that all of the residue of my estate shall go to my daughter, and shall be taken and held by the said trustee under the provisions of this will, for the sole use and benefit of my said daughter and the whole of said residue shall vest in my said daughter.

"In like manner, should my daughter not survive me, and

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my wife should survive me, then all of the said residue shall be taken and held by the said trustee, under the provisions of this will, for the sole use and benefit of my said wife, and all of said residue shall vest in my said wife. If neither my wife nor my daughter survive me, then it is my will that all of my estate shall go to my heirs-at-law in the proportions fixed by the Statute of Distribution and Descent of the State of Michigan."

Towards the end of October or early in November of 1916, the Countess Matuschka came to the United States from Germany, in relation to matters connected with the estate, and remained till on or about the 3rd February, 1917, when she returned to Germany and rejoined her husband, being apprehensive at that time that there would be a break between the United States and that country. This in fact occurred soon after, in the month of April.

During this visit of the countess to the United States, Mr. Sydney T. Miller, a counsellor-at-law residing in the city of Detroit, and general counsel for the Detroit Trust Company, was consulted by her and acted for her in the matter about to be referred to. Mr. Edward Donnelly and Mr. William M. Donnelly (father and son), two other members of the legal profession practising in the city of Detroit, were acting for Mrs. Walker, therein. The latter were also general solicitors, or, as it is termed in Michigan, attorneys, for the Detroit Trust Company. Mr. Z. A. Lash, K.C., a Canadian counsel, was acting for the estate in some general way; and these legal gentlemen had conferences about matters relative thereto. The question of obtaining a grant of letters probate in Wayne County, the place of domicile of the testator, from the proper Court there, was discussed between the Detroit legal advisers mentioned and taken up and discussed by them with the Hon. Edgar O. Durfee, a Judge of Probate. Preliminary thereto and in connection therewith, a written agreement was entered into between the following named parties: the Detroit Trust Company, May Walker, and the Countess Ella Matuschka. This agreement is headed: "State of Michigan. In the Probate Court of the County of Wayne. In the matter of the estate of Franklin H. Walker, deceased." It contains the following amongst other clauses:—

"First: In the above named estate a petition has heretofore

been filed and is now pending for the probate of the last will and testament of the above named Franklin H. Walker, deceased; that such instrument was deposited with this Court as required by law and is now on file and in the possession of this Court; that the Detroit Trust Company is named in the said instrument as executor and trustee.

"Second: Further in said last will and testament it appears that the said Franklin H. Walker devised and bequeathed all of the residue of his estate over and above certain legacies and charges of small amounts to the Detroit Trust Company in trust and subject to certain provisions and to the exercise of certain powers for the benefit of the undersigned May Walker, his widow, and the undersigned Countess Ella Matuschka, his only daughter and only child (said May Walker and said Countess Matuschka being the only heirs at law of the said Franklin H. Walker, deceased).

"Third: It further appears from said instrument that no provision was made therein for the segregation of the properties constituting said residue or that particular parts of said residue would be held and administered by the executor and trustee for the benefit of one or the other of said beneficiaries, and it is deemed proper and the said beneficiaries and the said trustees agree that the securities and properties constituting the said residue should be allocated and set apart so that the interests of each of the said beneficiaries in the said residue will be represented and definitely determined by allocating (for the benefit of and to each) certain of the real and personal property constituting said residue to be held in trust under such will as varied in this instrument and the new trusts and provisions hereby made and declared.

"Fourth: It further appears from said last will that trusts and provisions made and declared therein with respect to said residue are made expressly subject to such variations or new order for trusts and provisions as the wife and daughter of the deceased and the trustee should agree upon; the force and effect of which is to confer upon the said trustee and the said wife and daughter the power to vary the said trusts and provisions with respect to the said residue, and that such variations or new or other trusts and provisions are so made and declared by said trustee and said wife and daughter that the same shall stand as trusts and provisions

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affecting said residue and under which the said executor and trustee shall receive and administer and hold in trust the said residue.

"Fifth: Now therefore, for that purpose and in the exercise of said power in this respect, the undersigned, the Detroit Trust Company of Detroit, Wayne County, Michigan, the trustee named in the last will and testament of Franklin H. Walker, deceased, and May Walker, the widow of the said deceased, and Countess Ella Matuschka, daughter and only child of said deceased (in the exercise of the power conferred by said will), do hereby make and declare the following variations and new trusts and provisions under which the executor and said trustee shall receive and hold said residue, that is to say:—

"(a) The variations from the trusts and provisions contained in said will and the new trusts and provisions herein contained made and declared shall be treated as in full force and effect from the date of the death of Franklin H. Walker, deceased, and be deemed a part of his testamentary disposition of the residue of his estate.

"(b) The following pieces and descriptions of the real and personal property, and all being a part of the residue of the estate, shall be received and held in trust for the sole use and benefit of May Walker, widow, and the same are hereby allocated and set apart to be so held in trust for her sole use and benefit, and the same shall pass to said executor and trustee and be held by it as and for the due share and interest of the said May Walker in the residue of the estate of the said Franklin H. Walker, that is to say . . ."

Thereafter, in the said agreement are set out what are all or substantially all of the assets of the estate in Ontario. This allocation agreement assumes therefore to segregate all the Canadian assets of the estate for the benefit of May Walker.

On the day of the date of the agreement, the said will was, by an order of the said Judge of the Probate Court of the County Court of Wayne, duly "proved and allowed."

An order was also made by him on that day in substantial part as follows:—

"In the above estate, it appearing to the Court by the terms of the last will and testament of Franklin H. Walker, deceased, now on file in this Court, and this day duly admitted to probate,

that the trusts and provisions contained in, made, and declared in said last will and testament, with reference to the residue of the estate of Franklin H. Walker, deceased, were made and are expressly subject to such variations and new and other trusts and provisions as the wife and daughter of said Franklin H. Walker and the (Detroit Trust Company) trustee named in said will, should agree upon, from time to time, with reference to said residue; and it further appearing from the files and records in this matter that the said wife and daughter and Detroit Trust Company, the trustee named in said last will, in the exercise of the power conferred upon them by paragraph 11 of said last will and testament, have agreed upon and declared, in a written instrument, certain variations of the trusts and provisions made and declared in said will as to the said residue and upon new and other trusts and provisions with reference thereto, and that said instrument was duly executed by them at the city of Detroit, Wayne County, Michigan, United States of America, on the 25th day of January, 1917, and that on the 25th day of January 1917, a triplicate original copy thereof was filed in this Court in this matter, attached to and as a part of a petition made in the name and on behalf of the said wife and daughter and trustee, praying that, on the hearing of the probate of this will, this Court will take cognizance of said instrument and of the variations and new and other trusts and provisions affecting the residue of said estate therein contained, made, and declared, and that this Court will make such order with reference thereto as shall provide that the variations from the trusts and provisions contained in the said last will and testament, and the new and other trusts and provisions made and declared in such instrument, and the allocation and designation of certain real and personal property described in said instrument, as and for the due and proper share of the said May Walker of the residue of said estate, shall, so far as the same applies, take the place of the trusts and provisions as to said residue contained in said will, so far as the interests of the said May Walker are concerned therein, and that said variations and new trusts and provisions shall be given full force and effect by the executor and trustee named in said will, as though set forth in and as a part of the provisions of the testamentary trust created by and contained in the said last will and testament of said Franklin

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H. Walker, deceased, as to the residue of his estate, which petition has been duly heard as prayed therein.

"And it further appearing to the Court that May Walker, one of the parties to the said instrument, is the widow of said Franklin H. Walker, and that Countess Ella Matuschka, one of the parties to said instrument, is the daughter and only child of said Franklin H. Walker, and that the said May Walker and Countess Ella Matuschka are the only heirs at law of said Franklin H. Walker, and are his next of kin, and are the persons named in said last will and testament, for whose benefit the residue of the estate of said Franklin H. Walker is to be held in trust, and are the persons empowered to act with the trustee under the power granted in paragraph 11 of said last will and testament, to vary the trusts and declare new and other trusts and provisions as to the residue of said estate, it is ordered and adjudged:—

"(1) That the said instrument executed by said wife and daughter and said trustee, hereinbefore referred to, and on said 25th day of January, 1917, filed in this Court, stand and have effect as a proper, lawful, and effective exercise of the power conferred upon said wife, daughter, and trustee, by paragraph 11 of said last will and testament, to vary the trusts and provisions and to make new and other trusts and provisions as to the residue of the estate of Franklin H. Walker, deceased.

"(2) That the provisions of said instrument shall apply to and govern, in so far as the same are applicable, the disposition of the said residue under said will, and that the same shall be deemed and are hereby declared to be a part of the trusts and provisions of the testamentary trust made and declared in the said last will and testament with reference to the residue of the estate.

"(3) That the variations from the trusts and provisions contained in the said last will and testament and the new and other trusts and provisions created by said instrument shall have and be given the same force and effect as if they were contained in and formed a part of the last will and testament of the said Franklin H. Walker, at the time of his death, and shall relate back to the death of the said Franklin H. Walker.

"(4) That the real and personal property described in said instrument and in said variations and said new and other trusts

and provisions, as allocated to the said May Walker as in said instrument provided, and forming a part of said residue, be and the same are hereby allocated to the said May Walker, as her due and proper share of the residue of said estate of Franklin H. Walker, deceased; and that, in the exercise of its powers and duties as executor and trustee, the Detroit Trust Company shall act according to the variations and the new and other trusts and provisions made and declared in said instrument, and shall receive and hold the real and personal property described in said instrument, as allocated to and as and for the sole use and benefit of said May Walker, and as her due share and part of said residue and for no other person whatsoever, and shall deliver and convey to itself, as trustee, the real and personal property and securities described in the said instrument, in trust for the use and benefit of said May Walker, and for no other person whatsoever, and shall account to and pay over to the said May Walker all of the rents, issues, and profits arising from the same, and the principal thereof to the said May Walker, as provided in said instrument."

While no reference is made in the said agreement or order to the segregation of the share of the residue of the estate to the Countess Matuschka, it was admitted or stated upon the argument that the assets of the estate outside of Ontario were segregated at the same time or to be segregated for her benefit or subject to her disposition.

On the 24th December, 1917, on the application of the National Trust Company Limited, a grant of ancillary letters of administration with the said will annexed was obtained in the Surrogate Court of the County of Essex, in the Province of Ontario, in part as follows:—

"Be it known that Franklin Hiram Walker, late of the city of Detroit, in Wayne County, in the State of Michigan, one of the United States of America, gentleman, deceased, who died about the 17th day of June in the year of our Lord 1916, and had at the time of his death his fixed place of abode in the said city of Detroit, Wayne County, and State of Michigan, made and duly executed his last will and testament and did therein name the Detroit Trust Company executor thereof, a true copy of the exemplification of which said last will and testament is hereunder written, leaving at the time of his death property in the county of Essex and

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Province of Ontario to be administered: and be it further known that on the 24th day of December in the year of our Lord 1917 letters of administration with said will annexed of all and singular the said property of the said deceased were granted by His Majesty's Surrogate Court of the County of Essex to the National Trust Company Limited (the said the Detroit Trust Company having expressly renounced all right and title to administer the property of the said deceased in the Province of Ontario), the nominee of the said Detroit Trust Company, the said National Trust Company Limited having been first sworn well and faithfully to administer the same according to the tenor of the said will by paying the just debts of the deceased and the legacies contained in his will," etc.

This grant was made, as is usual since the war, subject to the following condition: "That no portion of the assets shall be distributed or paid during the war to any beneficiary or creditor who is a German, Austro-Hungarian, Turkish, or Bulgarian subject, or other alien enemy, wherever resident, or to any one on his behalf or to or on behalf of any person resident in Germany, Austria-Hungary, Turkey, or Bulgaria, or other enemy country, of whatever nationality, without the express sanction of the Crown acting through the Treasury, and if any distribution or payment is made contrary to this provision the grant of probate or letters of administration will be forthwith revoked." No reference to the agreement or order hereinbefore referred to is made in the said grant.

An exemplification of the Detroit letters probate, which, no doubt, formed part of the material filed on which the grant was made, probably contained references thereto.

On the 31st August, 1918, the estates manager of the National Trust Company wrote to "the Custodian," Ottawa, Ontario, a letter in part as follows:—

"This company is ancillary administrator with the will annexed of the estate in Ontario of the late Franklin H. Walker, a citizen of the United States and a resident of Detroit, in which city he died on June 17th, 1916. As such ancillary administrator, we have so far progressed in the administration of paying the succession duties, etc., that under ordinary conditions we would now proceed to consider the handing over to the domiciliary executor, the Detroit Trust Company, of the assets in Ontario that are in

our hands, and so close the ancillary administration. Having regard, however, to the state of war, we desire before dealing further with the estate to submit the facts to you." After making brief reference to the will and the dispositions of the residue hereinbefore referred to, the letter proceeds: "After the testator's death, and before diplomatic relations between Germany and the United States had terminated and before the United States entered the war, namely, on or about the 25th day of January, 1917, Mr. Walker's wife and daughter, together with the Detroit Trust Company, the trustee under the will, entered into an agreement for the purpose of varying the trusts declared by the will and allocating certain of the securities and properties forming part of the residue of the estate to the widow, May Walker, as and for her interest, and under this agreement there was allocated to Mrs. Walker assets situate in Ontario and at present under our control, valued in the application for probate at $2,968,409.49, of which particulars are contained in the agreement, a copy of which is sent you herewith marked No. 3 and hereinafter referred to."

There was, later in the letter, a reference to the fact that the Probate Court of Michigan, "when granting probate on January 26th, 1917, made an order that the trusts and provisions created by the agreement should have and be given the same force and effect as if they were contained in and formed a part of the will of Franklin H. Walker at the time of his death, and should relate back to the date of the testator's death," etc. There was also this further statement contained therein: "The domiciliary executor informs us that it has already filed with the Alien Property Custodian at Washington a report with reference to the estate of Franklin H. Walker. Accompanying said report were copies of all of the papers above mentioned with the exception of letters of administration granted us by the Surrogate Court of the County of Essex. Before proceeding to deal further with the assets of the estate in our hands as ancillary administrators, we place the facts before you for your information and consideration, and we shall be glad to hear from you at your convenience."

Further communications and probably conferences followed between the representatives of the estate in Ontario and the Department of State for Canada.

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On the 13th May, 1919, this motion was launched on behalf of the Secretary of State for Canada for an order "vesting in the Minister of Finance and Receiver-General, as the Custodian appointed under the Consolidated Orders respecting Trading with the Enemy, 1916, and conferring upon him power to get in, sue for, recover, receive, hold, and manage one half of the assets situated in the Province of Ontario of the estate of Franklin Hiram Walker, deceased, on the grounds that one half of the said assets belongs to or is held or managed for or on behalf of the Countess Ella Matuschka, and that said Countess Ella Matuschka is an enemy and that such vesting is expedient for the purposes of said Consolidated Orders."

In support of such motion was filed an affidavit of Thomas Mulvey, Under Secretary of State for the Dominion of Canada, who states therein that in that capacity he is charged, under the direction of the Secretary of State, with the greater part of the administration of the said Consolidated Orders. Paragraph 5 of his affidavit is as follows:—

"It is expedient that enemy property in Canada should be vested in the Custodian, in order both to prevent any disposition thereof by the enemy and to enable Canada to fulfil her international obligations."

The motion is made pursuant to Consolidated Order 28,* passed pursuant to the War Measures Act of 1914. Order 28 is as follows:—

"Any Superior Court of Record within Canada or any Judge thereof may, on the application of any person who appears to the Court or Judge to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property, real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the Custodian or any Department of the Government of Canada, by order vest in the Custodian any such real or personal property as aforesaid, if the Court or the Judge is satisfied that

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

such vesting is expedient for the purpose of these orders and regulations, and may by the order confer on the Custodian such power of selling, managing, and otherwise dealing with property as to the Court or Judge may seem proper: Br. Cap. 12–14, s. 4."

The notice of motion having been served on the National Trust Company, the motion came on to be heard before me on Friday the 30th May, 1919.

It was argued on behalf of the applicant that, at the death of the testator, by the terms of the will, there were in Ontario assets vested in or belonging to the Countess Matuschka, an alien enemy, or in which she had a beneficial interest, amounting to upwards of $1,000,000, being one half of the residue of the estate in Ontario.

It was suggested that, while it was expedient in the public interest, for the purposes referred to in the said Consolidated Order No. 28, that the interest of the said Countess Matuschka in the said assets in Ontario should be vested in the Finance Minister as Custodian, any question which should be reserved, such as that the National Trust Company or Mrs. Walker might bring an action to contest the right to make such order or to establish her claim to the entire residue of the said estate within the Province of Ontario, might be so reserved. It was suggested, on the other hand, by counsel for the National Trust Company, that, if any order were made, it should provide that the assets situated in the Province of Ontario of the said estate, vested in the Countess Ella Matuschka, and held or which will hereafter be acquired by the National Trust Company Limited, as administrator, be vested in the Minister of Finance as Custodian, and that an issue be tried in which the Custodian should be plaintiff and the National Trust Company Limited, Mrs. Walker, and the Detroit Trust Company be defendants, to determine which, if any, of the assets now held or which may hereafter before the termination of the said issue be acquired by the National Trust Company are assets belonging to or held or managed for or on account of the said Countess Matuschka, and which would be by the order made vested in the Custodian.

Prior to the motion coming on before me, the National Trust Company intimated a desire to cross-examine Mr. Mulvey on his affidavit; but the Crown apparently refused to produce him for

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that purpose. Counsel agreed that the motion before me should be treated not as a Chambers but as a Court motion. Mr. Osler contended that, under the Consolidated Rules of Practice in Ontario, Rule 227, he was entitled as of right to cross-examine Mr. Mulvey on his affidavit to be used upon the motion.

No practice or procedure is referred to or laid down in Consolidated Order No. 28, and I am not at all satisfied that the ordinary practice and procedure in the Courts of the Province must necessarily be followed upon an application such as this. The Judge dealing with the matter should give reasonable opportunity to enable the parties interested to adduce before him all necessary facts to enable him to determine satisfactorily whether the vesting of the property in the Custodian is or is not expedient for the purposes of the orders in question.

The further question came up as to the propriety of Mrs. Walker being notified of the application, inasmuch as Mr. Osler could not say that he had been expressly retained or instructed by her. Thereupon I directed an enlargement of the motion for one week, and that notice in the meantime be given to her. The matter came on again before me on the 6th June. Meantime Mrs. Walker had been notified, but was not definitely represented or at all otherwise than that the counsel for the National Trust Company was in a sense representative of all parties interested in the estate.

Mr. Osler complained that too little time had been given to prepare an answer to so important a motion, and urged that the matter should not be disposed of by me on summary application, but an issue directed. He again urged that he was entitled to the usual right of discovery by way of cross-examination on the affidavit referred to. While he did not profess to be retained by Mrs. Walker, he, notwithstanding, urged that, as a result of the tying up of the property by the making of an order such as asked, she might be put to serious inconvenience as to her use thereof and her income therefrom. Counsel for the Secretary of State again declined to produce Mr. Mulvey for cross-examination, unless I made an order for that purpose. In the circumstances, I did not deem it incumbent upon me to make such order.

The Trust Company then proceeded to call evidence. Mr Angell, a counsellor-at-law, practising in the city of Detroit,

testified that the Probate Court of the County of Wayne has "exclusive or original jurisdiction of testamentary matters and all trusts incident to the settlement of estates, but does not as a Court deal with claims against estates. Under the statute relevant thereto the Judge of Probate appoints two or more persons who are called 'Commissioners on Claims,' who, in the first instance, adjudicate upon claims presented against the estate." He expressed the opinion that the Court of Probate in Wayne County had jurisdiction to make the order referred to; and that there was an exercise of the power by the donees of the power clearly granted by paragraph 11 of the will.

He also expressed the opinion that what the donees of the power did was to make the new trusts operative as part of the will, which speaks from the death of the testator; and, further, that it was competent under the statute of the United States for a testator to include a grant of power such as is included in the said section. He admitted that he had never known the Probate Court to make such an order as the one in question before, and that he was expressing an opinion on a clause in a will such as he had never come upon before. He also said that, though time was provided for an appeal from the order in question, it was now too late to appeal therefrom, and that the order was existing and effective.

Mr. Sidney T. Miller was also called as a witness, and testified that he had been consulted by the Countess Matuschka, and was concerned with her and the Detroit Trust Company with reference to the agreement in question. He said that she had stated to him that she wished to give any interest, present or future, that she had in the estate to her mother, so that the latter would have the entire estate. It was finally decided that she should give her mother the greater part of the estate, and that the balance should be left as it was subject to future disposition between the parties; that it was not considered as being finally allocated to Countess Matuschka or anybody else. The countess, he said, had told him her reasons for wishing to give the property to her mother, the first being that the latter "had always been accustomed to get the general income of the estate," and the second that "she feared if she took any part of the estate into Germany it would probably be appropriated by the German Government."

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He said that a deed and possibly a bill of sale or some other form of transfer, which would have covered all her interest in the estate, was prepared and executed, but not delivered, and finally, to the best of his recollection, destroyed; that, after getting these papers ready and signed, it was doubted whether it would be advisable to give the mother everything and leave the countess without any part of the estate.

He said there was a document relating to the American assets that had not yet been filed and "was not probated," the reason being that the Countess Matuschka thought she might want to make some other disposition of these assets—she might want to give them all to her mother, or to an aunt, Mrs. Swift. He said that in the conferences leading up to the agreement the question of the danger of having German-owned property in Canada, owing to the war, arose for discussion, but he did not think that was one of the reasons for the execution of the agreement; that he did not think he talked that feature of the matter over with the Countess Matuschka; that, no doubt, she was aware of the fact that, as she was a German subject, at any rate having domicile there, it was desirable, if possible, to have things so arranged that she would be protected; but that, so far as he knew, that was not her moving consideration, though it might have been a consideration. He expressed the opinion, however, that the agreement would have been made in the same way whether there was a war on or not. He stated that he had never seen a will with a clause such as the one in question before. He also said that the order of the Judge admitting the will to probate was the first document leading to the grant and was endorsed on the papers. He further said that the order confirmatory of the agreement was made on the same day.

Mr. William M. Donnelly, also a counsellor-at-law practising in the city of Detroit, testified that he had acted on behalf of Mrs. Walker, and that the primary object sought to be gained had been to get her interest distinctly "set off," and so as not to be marked or included with that of the Countess Matuschka.

It appears from the material filed that on the 6th November, 1917, that is to say, at a date subsequent to the time when the United States became a participant in the war, a license was granted to the Detroit Trust Company, by the "War Trade

Board of the United States and Bureau of Enemy Trade," to act as executor and trustee of the will of Franklin H. Walker, deceased, "on behalf of Ella Countess von Matuschka, of Bechau, Germany, or of any other enemy claiming any interest in said estate through the said Countess Matuschka, until the end of the present war or until the Alien Property Custodian requires a transfer thereof under the Trading with the Enemy Act."

Included also therein was a letter from the Assistant General Counsel of the Alien Property Custodian in Washington, expressing the following opinion: "In view of the fact that a Court of competent jurisdiction has confirmed the allocation agreement entered into between the devisees, and in view of the further fact that the Alien Property Custodian has determined Countess Ella Matuschka to be an enemy and has demanded the delivery of said property to him, in accordance with the provisions of the Trading with the Enemy Act, this office regards the decree of the Court and the determination of the Alien Property Custodian as binding upon your client, the Detroit Trust Company, the executor, and must insist upon compliance with our demand, and that the property now in the possession of the Detroit Trust Company mentioned in the demand be turned over to the Custodian."

It will be apparent that considerable latitude was allowed in the reception of evidence in opposition to the motion. It was argued on behalf of the applicant that one half of the residuary estate vested at the death in each of the devisees and legatees mentioned. It was conceded to be arguable or possible that the legal estate may have vested in the trust company, but that the beneficial estate vested in the devisees and legatees. It was argued that, even at common law, while a war was on between the British Empire and Germany, the Countess Matuschka could not effectually divest herself of her interest in the estate, and further that in any event she could not do so in face of the War Measures Act, 1914, and the orders in council passed thereunder. It was argued that this must be so apart altogether from any question of the validity of the agreement in question between the parties concerned, and the validity thereof in the United States; that, as against the Custodian, her interest has never effectually passed out of her and in to any one else, and must be considered to be held and managed in the hands of the National Trust Company

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for her. Reference was made in this connection to certain of the other Consolidated Orders, namely:—

"4. (1) No person shall by virtue of any assignment of any debt or other *chose in action*, or delivery of any coupon or other security transferable by delivery, or transfer of any other obligation, made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against the person liable to pay, discharge, or satisfy the debt, *chose in action*, security or obligation, unless he proves that the assignment, delivery, or transfer was made by leave of the Secretary of State or was made before the commencement of the present war, and any person who knowingly pays, discharges, or satisfies any debt, or *chose in action*, to which this sub-section applies, shall be deemed guilty of the offence of trading with the enemy. Provided that this sub-section shall not apply where a license has been duly granted exempting the particular transaction from the provisions of this order, or where the person to whom the assignment, delivery, or transfer was made, or some person deriving title under him, proves that the transfer, delivery, or assignment, or some subsequent transfer, delivery, or assignment, was made in good faith and for valuable consideration before the publication in the *Canada Gazette* of these orders and regulations, nor shall this sub-section apply to any bill of exchange or promissory note.

"(2) No person shall, by virtue of any transfer of a bill of exchange or promissory note made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against any party to the instrument, unless he proves that the transfer was made before the commencement of the present war, and any party to the instrument who knowingly discharges the instrument shall be deemed to be guilty of the offence of trading with the enemy. Provided that this sub-section shall not apply where a license has been duly granted exempting the particular transaction from the provision of this sub-section, or where the transferee, or some subsequent holder of the instrument, proves that the transfer, or some subsequent transfer, of the instrument was made in good faith and for valuable consideration, before the publication in the *Canada Gazette* of these orders and regulations.

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"(3) Nothing in this order shall be construed as validating any assignment, delivery, or transfer which would be invalid apart from this order or as applying to securities within the meaning of order 6 of these orders and regulations."

"6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette* (unless upon license duly granted exempting the particular transaction from the provisions of this sub-section) by or on behalf of an enemy of any securities shall confer on the transferee any rights or remedies in respect thereof, and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such a transfer.

"(2) No entry shall hereafter, during the continuance of the present war, be made in any register or branch register or other book kept within Canada of any transfer of any securities therein registered, inscribed or standing in the name of an enemy, except by leave of a court of competent jurisdiction or of the Secretary of State.

"(3) No share-warrants payable to bearer shall be issued during the continuance of the present war in respect of any shares or stock registered in the name of any enemy.

"(4) Any violation of any provision of this order shall be an offence against these orders and regulations."

It was contended that the whole estate in Ontario consisted of *choses in action* or other securities transferable by delivery or transfer, within the meaning of the said Consolidated Orders.

It was argued on behalf of the Trust Company that, under the comity of nations, our Courts should follow the order made in the domiciliary Court, namely, the Probate Court of Detroit: *Oskey* v. *City of Kingston* (1914), 32 O.L.R. 190, 20 D.L.R. 959; *Doglioni* v. *Crispin* (1866), L.R. 1 H.L. 301; *Laneuville* v. *Anderson* (1860), 2 Sw. & Tr. 24; *Enohin* v. *Wylie* (1862), 10 H.L.C. 1; *In re Medbury, Lothrop* v. *Medbury* (1906), 11 O.L.R. 429; *Pescovitch* v. *Western Canada Flour Mills Co.* (1914), 18 D.L.R. 786; *Porter* v. *Freudenberg*, [1915] 1 K.B. 857; *In re Duchess of Sutherland, Bechoff David and Co.* v. *Bubna* (1915), 31 Times L.R. 394; *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284, 293, and 304.

Conversely it was argued, first, that, while ordinarily a foreign

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court would follow the judgment or order of the domiciliary court, this rule of comity was subject to this, that, if there were a matter of high public policy in the interests of the foreign country involved, this might well form an exception to such a rule; and, secondly, that a distinction must be drawn between the locality of the contract and the locality of its performance. Thus, if the contract were partly to be performed in Ontario, and that performance were contrary to the law of Ontario, no matter how legal the making of the contract might have been in the United States, the Court here would not give legal effect to it. It was also argued that, even if it were admitted, as contended by the National Trust Company, that it would be its duty to collect and get in the assets in Ontario, and transfer and hand them over to the Detroit Trust Company, the contemplated transfers from the one company to the other of the stock etc., and the registration thereof, must be done in Ontario to carry out the arrangement said to have been made in Detroit.

It was accordingly argued that it was useless to set up the validity of the contract in the United States, or the order or judgment of the Probate Court of the County of Wayne, if the performance, by such transfers and registrations in Ontario, would be illegal and could not be given effect to.

It was contended on behalf of the National Trust Company that in reality the Countess Matuschka was not an alien enemy in alien territory when the contract was made, within the meaning of the relevant Consolidated Orders, viz.:—

"1. (1) For the purposes of these orders and regulations, the following expressions shall be construed so that—

. . . . . .

"(*b*) 'Enemy' shall extend to and include a person (as defined in this order) who resides or carries on business within territory of a State or Sovereign for the time being at war with His Majesty or who resides or carries on business within territory occupied by a State or Sovereign for the time being at war with His Majesty, and as well any person wherever resident or carrying on business, who is an enemy or treated as an enemy and with whom dealing for the time being is prohibited by statute, proclamation, the following orders and regulations or the common law, but said expression does not include a subject of His Majesty or of any

State or Sovereign allied to His Majesty who is detained in enemy territory against his will, nor shall such last-mentioned person be treated as being in enemy territory.

"(c) 'Enemy subject' extends to and includes a person (as defined in this order), wherever resident, who is a subject of a State or Sovereign for the time being at war with His Majesty."

It was contended that there is a difference between an "enemy" and "enemy subject." It was argued that the orders, so far as this application is concerned, strike at an "enemy subject," and that it is not the nationality but the residence which forms the controlling factor here. It was also argued that the Countess Matuschka was, at the time the agreement was made, a resident of a neutral country. Admittedly, however, she was, at the death of the testator, a resident in an alien enemy country, and later had gone to the United States temporarily and for the purpose of dealing with the estate matters. It was also said that the contract was not one which, by possibility, could be of advantage to the enemy, but that what was contemplated was in reality to take the property away from the possibility of German taxation; that, in any event, and in fact, the property was transferred to the citizen of a then neutral country. It was also contended that the agreement so called was not in fact a contract or agreement, but the exercise of a power which, under the will, could be properly exercised by the joint concurrence of the two individuals beneficially interested and entitled, and the Detroit Trust Company, the executor and trustee; that no property had vested in the Countess Matuschka, and that the agreement was in no sense a transfer by her of any property belonging to her, but simply an effective variation of the trusts of the will, and was effective from the same date as the will was effective, namely, the death of the testator: *Rodriguez* v. *Speyer Brothers*, [1919] A.C. 59.

It was argued that the administrator will have to deal with the estate in specie where the residue is so large, that the National Trust Company will realise, will pay debts and legacies, and hand over the residue to the Detroit Trust Company, and that the residuary legatees or devisees could not say that any part of the estate necessarily belonged to them, as it might be required or sold by the administrator to answer the debts.

In this connection I point out what was not referred to upon

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the argument, namely, the statement in the Ontario grant to the effect that the Detroit Trust Company is said to have expressly renounced all right and title to administer the property of the deceased in the Province of Ontario, and that the National Trust Company Limited is its nominee to administer and distribute—whatever the effect of that renunciation may be.

The War Measures Act, 1914, Statutes of Canada, 5 Geo. V. ch. 2, sec. 6, confers upon the Governor in Council the power of "(*f*) appropriation, control, forfeiture and disposition of property and of the use thereof;" and, under that Act, the various orders in council have been passed, inclusive of No. 28, already referred to.

The result of the dealings with this estate is rather a curious one. The Dominion of Canada had apparently a right, on the death of the testator, the Countess Matuschka being then interested, after payments of debts and legacies, in the residue of the estate, to the extent of a one half interest therein, to make an application to have it vested in the Custodian, as provided by Consolidated Order No. 28, Canada and Germany being then at war. At that time the United States, not being at war with Germany, could not assert any claim with reference to the interest of the Countess Matuschka in that portion of the residue of the estate which was in the United States.

Between the date of the death of the testator and the time when the United States became embroiled in the war, the tentative or initial one half interest in the assets of the estate in the United States which the Countess Matuschka had, has been increased, so that she has had allotted the whole of those assets, or at all events they are held subject to her disposition. She had apparently not dealt with them in any way up to the time when the United States and Germany went to war. If effect is given to the contention put forward by counsel for the National Trust Company, the result is that Canada, a participant in the war at the time of the testator's death, has lost an opportunity to lay its hands upon upwards of $1,000,000 worth of property of which an alien is alleged to have been the beneficial owner at the time of the death of the testator; and the United States, which became a participant at a date considerably subsequent to his death, has acquired a right to impound twice as much of the assets of the estate as it would have had the right to do had they been con-

batants at that date. Of course, if what has been done is such as properly and legally to bring about that result, effect must be given to it.

I have, as will be seen, set out the documents, evidence, and contentions at considerable length, being of opinion that, in the circumstances, it was desirable so to do.

It seems to me, however, that what I am to do is to treat this motion as one made to me as *persona designata* under Consolidated Order No. 28, and to determine, on the facts presented to me and relevant to that question, whether it has been satisfactorily shewn to be expedient that a vesting order should be made as asked.

I have come to the conclusion that it is appropriate and expedient to make the order. Admittedly the clause in the will which is in question is an unusual one. The agreement or exercise of power in question is also an unusual one, as is the order alleged to be confirmatory thereof. While a document distinctly referred to in a testator's will, and in existence at the time of its execution, might well be admitted to probate therewith, and possibly a document referred to in the will in definite terms and to be prepared thereafter but before the death of the testator, particularly if there were subsequently a codicil, it would seem to me most unusual, if not entirely unique, that a document brought into existence by an agreement of persons interested as devisees and legatees under the will, and made subsequent to the death of the testator, even though in alleged pursuance of a power conferred in the will, could be. I should doubt it. I do not think it could be done in this country or in England: Tristram & Coote's Probate Practice, 15th ed. (1915), pp. 42 and 43. I should not have thought it possible that it could be done elsewhere were it not that it had been done by a Judge of great experience in the Wayne County Probate Court, and that lawyers of repute, practising in the domiciliary jurisdiction, had expressed the opinion that it could properly and legally be done. But, be that as it may, I do not think this is a case in which I can properly consider myself bound to follow and treat as effective and binding upon me what has been done in the domiciliary Court.

I am of opinion that the Countess Matuschka is an alien enemy, to whom the War Measures Act and orders passed thereunder apply. I am also of opinion that there was at least in her a

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beneficial interest, at the time of the death of the testator, which came under the scope and operation of said orders, and which has not been dealt with and transferred by what has been done elsewhere so as to escape therefrom. I am of opinion, also, that no theory of the comity of nations, which implies usually a favourable consideration and adoption by foreign Courts of judgments or orders made in the Courts of domicile, can or should be carried so far as to require me to decline to make the order asked under the circumstances referred to. Any such theory is subject to the essential modification or restriction that, if it runs counter to high public policy, it cannot be given effect to. Here what has been done in the State of Michigan does come into conflict with public policy of great importance so far as Canada is concerned: Westlake's Private International Law, 5th ed. (1912), pp. 55 and 308.

As to the form of the order to be made, it was suggested on behalf of the National Trust Company that any order made should be expressed in some such way as the following:—

"That all the assets situated in the Province of Ontario (1) which are now or have at any time since the blank day of blank, 1916, when the said Consolidated Orders respecting Trading with the Enemy, 1916, were passed, been vested in the Countess Ella Matuschka, and are now held or shall hereafter be acquired by the National Trust Company Limited, as administrator with the will annexed of the estate of Franklin Hiram Walker, deceased, be and they are hereby vested in the Minister of Finance and Receiver-General as the Custodian appointed under the Consolidated Orders respecting Trading with the Enemy, 1916; and (2) that an issue be directed, in which the said Custodian shall be plaintiff and the National Trust Company Limited, Mrs. May Walker, and the Detroit Trust Company shall be defendants, in order to determine which, if any, of the assets now held or which may hereafter, before the determination of the said issue, be acquired by the National Trust Company Limited, as administrator with the will annexed of the estate of Franklin Hiram Walker, deceased, are assets belonging to or held or managed for or on account of the Countess Ella Matuschka, and which have been by the preceding paragraph of this order vested in the said Custodian."

It was suggested that there was possibly no appeal from any

order that I might make. I was referred to a decision in the Quebec Courts in the case of *Canadian Pacific R.W. Co.* v. *Secretary of State for Canada*, in which counsel stated that it had been held that there was no right of appeal from an order made by the Superior Court under Consolidated Order in Council No. 28. I had thought it possible that there might be an appeal, at all events with special leave, under the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, secs. 2 and 4. If it applies—as to which I express no opinion—and leave is desired, I grant such special leave to appeal to a Divisional Court.

I think the order should issue in the form suggested by counsel for the Department, and I am attaching hereto a draft of the order in those terms, subject to the same being spoken to later, if so desired.

No question of costs was referred to me on the motion, and I assume that I am to make no order with respect thereto.

It was suggested that the making of an order might interfere with the reasonable use and enjoyment by Mrs. Walker of her interest in the residue of the estate in the Province of Ontario and her income therefrom. This would, of course, be regrettable. As apparently, however, a one undivided half interest belongs to her, in any event, it may well be that some arrangement between her and the Custodian can be made, which will alleviate to a very substantial extent any anxiety or difficulty on this score.

The draft order referred to is in these words:—

Upon motion made unto this Court on the 27th day of May and on the 6th and 7th days of June by counsel on behalf of the Secretary of State for Canada for an order vesting in the Custodian one half of the assets in Ontario of the estate of Franklin H. Walker, deceased, in the presence of counsel for the National Trust Company Limited, May Walker, widow of the said Franklin H. Walker, having been duly served with notice of the said application and not appearing, upon hearing read the affidavit of Thomas Mulvey filed in support of the application and the exhibits therein referred to, and the affidavit of filed, and the evidence of Angell, Sydney T. Miller, and William M. Donnelly adduced on behalf of the National Trust Company Limited, and upon hearing what was alleged by counsel

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aforesaid, and judgment upon the said motion having been reserved until this day, and the same coming on this day for judgment:—

1. This Court doth order and adjudge that an undivided one half interest in the assets of the estate of Franklin H. Walker, deceased, now in the hands of or being administered by the National Trust Company Limited, and set out in the schedule to this order (hereinafter called the "scheduled assets") be and the same is hereby vested in the Minister of Finance and Receiver-General of Canada as the Custodian appointed by the Consolidated Orders respecting Trading with the Enemy, 1916.

2. And it is further ordered that the said Custodian shall have power to join with the National Trust Company Limited in doing all such acts and executing all such documents in respect of the interest in the scheduled assets vested in him by this order as may be necessary for the due and proper administration of the scheduled assets.

3. And it is further ordered that nothing in this order shall prejudice any action or other proceeding which May Walker, widow of the said Franklin H. Walker, may bring or take within three months from the date of this order, for a declaration that no part of or interest in the scheduled assets could, under the said Consolidated Orders, properly be vested in the Custodian, or for such other declaration or other relief as she may be advised; and this Court reserves the right to make such further or other order with regard to the scheduled assets as may seem proper or necessary to give effect to any such declaration or other relief.

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K. B.

CANADIAN NORTHERN R. Co. v. WILSON. (Givens' Case).

Manitoba King's Bench, Galt, J. October 20, 1919.

MASTER AND SERVANT (§V—340)—WORKMEN'S COMPENSATION BOARD (MAN.)—WORKMAN ACTING WITHIN COURSE OF EMPLOYMENT—POWERS OF BOARD—FINALITY OF DECISION.

The Workmen's Compensation Board (Man.), is empowered by the Workmen's Compensation Act and amendments to determine whether at the time of the accident the injured workman was or was not acting in the course of his employment and the finding of the Board is by the Act made final and conclusive.

[Workmen's Compensation Act (1916 Man. c. 125) authorizing the appointment of the Board held to be *intra vires* the Manitoba Legislature. The decision in *Winnipeg Electric R. Co.* v. *City of Winnipeg* (1916), 30 D.L.R. 159, being accepted; *Can. Northern R. Co.* v. *Wilson* (1918), 43 D.L.R. 412, referred to.]

MOTION for judgment in an action against the defendants, constituting the Workmen's Compensation Board, under the Workmen's Compensation Act.

O. H. Clark, K.C., for plaintiffs; *A. Erskine Hoskin*, K.C., for defendants.

GALT, J.:—This is a motion for judgment in an action brought by the Canadian Northern R. Co. against Herbert George Wilson, Andrew R. D. Paterson and Charles W. N. Kennedy, the defendants constituting the Workmen's Compensation Board under the Workmen's Compensation Act (Man. stats., 6 Geo. V., 1916, c. 125).

It appears by the statement of claim that on and prior to August 23, 1918, one Andrew L. Givens, deceased, was in the employment of the plaintiff as a tower signalman, and shortly before his death was riding a speeder, borrowed from a friend, on the track of the Canadian Government Railway to convey him to his work at the interlocking tower situate at the crossing of the plaintiff's railway and the Canadian Government Railway. At a few minutes after seven in the morning, Givens, while riding on the speeder, or removing it from the track, was overtaken by a Canadian Government Railway train and was killed. A claim was made by Givens' widow for compensation under the above-mentioned Act, and an order was made by the Workmen's Compensation Board for payment by the plaintiff to the widow of $20 per month so long as she remains unmarried; and that Mary, daughter of the said deceased, do receive $5 per month until she attains the age of 16 years.

At the hearing before the Board, counsel for the plaintiff objected (1) to the jurisdiction of the Board on the ground that the statute which authorises the appointment of such Board was *ultra vires* of the Legislature; and (2) that the accident which caused the death of the deceased did not arise out of or in the course of the employment of the said deceased, because, in using the speeder on the Canadian Government Railway he was acting outside of his duties and indeed contrary to them.

The Workmen's Compensation Board have not yet filed their judgment pursuant to the Act, and in this action the plaintiff claims:

(a) That this Court may declare that the said order of June 5, 1919, was made wholly without jurisdiction and is null and void:

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(b) An injunction restraining the defendants from filing the said order under the provisions of s. 60 of the Workmen's Compensation Act and from further proceedings thereon.

(c) The costs of this action.

The constitution of the Board of Compensation is provided for in c. 125 of the statutes of Manitoba, 1916.

The first objection relied upon by the plaintiff, in regard to the jurisdiction of the Board, was not argued, because I intimated to counsel that I felt myself bound by the judgment of the Court of Appeal in the *Winnipeg Electric Railway Co.* v. *City of Winnipeg* (1916), 30 D.L.R. 159, 26 Man. L.R. 584. In that case the validity of the Public Utilities Act was in question. The Court of Appeal (composed of four Judges), by an equal division of opinion, dismissed an appeal against the validity of the Act. Perdue and Haggart, JJ.A., were of opinion that the Act was *ultra vires*, but Howell, C.J.M., and Richards, J.A., declined to hold this, and they dismissed the appeal. The Workmen's Compensation Board is constituted by an Act very similar in its terms and scope to the Public Utilities Act, and it is open to similar objection. For this reason I simply accepted the decision in the other case without attempting to express any decided opinion upon the question myself.

One of the objects of the Workmen's Compensation Act, apparently, is to render the decisions of the Board as final as possible. In a previous case of the *Canadian Northern R. Co.* v. *Wilson* (*Craig's* case) I had occasion to consider a similar claim to this, and I found that the Board had no jurisdiction to proceed with a claim against an employer without giving notice of its proceedings to the employer. My judgment in that case was affirmed by the Court of Appeal (1918), 43 D.L.R. 412, 29 Man. L.R. 193.

In the present case the plaintiff relies upon want of jurisdiction of the Board by reason of the fact, as the plaintiff alleges, that the accident did not arise out of or in the course of employment of the deceased. A number of cases decided under the English Act were cited to me, and if the question depended upon the strict law applicable to employer and employee, a nice point would arise as to whether in the present case the deceased was or was not at the time of the accident acting in the course of his employment. There was no particular authorised route which the deceased

ought to have taken in going from his home to his place of employment, and there was evidence to shew that several employees of the plaintiff from time to time went to their work along the tracks of the Canadian Government Railway; but there was no authority given by the plaintiff to the deceased to use a speeder, and in going to his work on the morning of the accident the deceased used a speeder on the right-hand track along which any trains would come behind him. If he had used the left-hand track he would have been able more readily to notice a train approaching him. The decision of this point, however, by me does not appear to be necessary. S. 57 (1) 6 Geo. V., 1916, c. 125, provides that

> 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 by 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.

During this present year the Legislature has repealed sub-s. (2) of s. 57 and has enacted some additional provisions. They are contained in 9 Geo. V., 1919, c. 118, s. 23 (assented to March 14, 1919), so that sub-s. (2) now reads as follows:

> (2) Without hereby limiting the generality of the provisions of sub-s. (1), it is declared that the exclusive jurisdiction of the Board shall extend to determining . . .
>
> (h) whether or not any workman in any industry is within the scope of this Part and entitled to compensation thereunder. The whole of this subsection shall be retroactive and shall be held to have been in force since the commencement of the said Act.

My attention was not drawn to this new provision during the argument but I think it is decisive of the present case. The Board was empowered to determine whether at the time of the accident Givens was or was not acting in the course of his employment. They determined this in the affirmative. This decision is made final and conclusive by the Act.

I therefore give judgment for the defendants with costs.

Judgment accordingly.

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BARR v. TORONTO R. Co. and CITY OF TORONTO.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren and Ferguson, JJ.A., and Logie, J. June 23, 1919.

STREET RAILWAYS (§III B—33)—PASSENGER—ALIGHTING TO TRANSFER—OBSTRUCTION AT STOPPING PLACE—INJURY BY SWING OF CAR ROUNDING CURVE—NEGLIGENCE—LIABILITY.

The obligation of a street railway company to a passenger who has not completed his journey but who has alighted for the purpose of transferring to another car is greater than it would be to a passenger who has completed his journey, but even as to such a passenger the company is bound to provide a stopping place at which the passenger can proceed to the sidewalk without having to pass through a deep pool of water or subjecting him to the danger before he has reached the sidewalk, assuming that he has not unnecessarily delayed in crossing, of being struck by a car when swinging around a curve existing at the stopping place.

[*Barr* v. *Toronto R. Co.* (1918), 46 D.L.R. 722, 44 O.L.R. 232, affirmed.]

Statement.

APPEAL by the defendant company from the judgment of MIDDLETON, J. (1918), 46 D.L.R. 722, 44 O.L.R. 232. Affirmed.

R. McKay, K.C., and *G. S. Hodgson*, for the appellant company.

William Proudfoot, K.C., and *G. H. Gilday*, for the plaintiffs, the respondents.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant company from the judgment of Middleton, J., dated the 6th December, 1918, pronounced after the trial before him sitting without a jury at Toronto on the 5th day of that month.

The action is brought to recover damages for injuries sustained by the female plaintiff by being struck by a moving car of the appellant when it was rounding the curve at the junction of the McCaul and Queen streets lines of its railway, and damages were claimed by her and her husband, and she was awarded $1,000 damages and her husband $330.

The main facts of the case are not seriously in controversy. The female respondent and her sister-in-law, Mary Ingle, took passage on the appellant's line at the corner of Sussex street and Spadina avenue, intending to journey to the lower part of the city. They paid their fares and obtained transfers to the Queen street line. When the car in which they were travelling reached the crossing at Queen street, it was brought to a stop, and the female respondent and her sister-in-law alighted from the car, leaving it by the front-door. At the point where the car stopped, there was a waggon drawn by a team of horses standing on the west side of McCaul street, and the horses' heads were on or about the street

crossing leading from the east to the west side of McCaul street. There was, according to the testimony of the female respondent and her sister-in-law, a pool of water and slush covering the crossing and the space in front of the horses' heads and extending almost to the track of the railway. The depth of the water and slush was estimated by the female respondent to be three or four inches, and, according to the testimony of the sister-in-law, its depth was sufficient to cover her boot-tops. On account of this water and slush, and not desiring to get their feet wet, the two women did not pass to the sidewalk in front of the horses, but turned to the north, intending to pass around the end of the waggon, where the street was dry or at all events there was no water or slush lying. While they were moving northward and had proceeded for about half the length of the car, the car was started, and, in rounding the curve, owing to the sweep of the car, it struck the two women and knocked them down, severely injuring the female respondent.

The distance of the west track from the kerb on McCaul street is 12 feet, 4 inches, and the curve begins 25 feet north of the line of Queen street. When rounding the curve, the 12 feet 4 inches would be reduced, owing to the "swing of the car," to 6 feet 6 inches. The horses and waggon took up 5 feet, 4 inches, or 5 feet, 8 inches, and therefore when the car was swinging round the curve the space not occupied by the horses and waggon and the car would be reduced to a little more than one foot. It must therefore have been obvious to the conductor and the motorman that any one who was on the pavement between the horses and waggon and the car would be put in great peril if the car were started on its journey around the curve.

There was a conflict of testimony as to the condition of the street crossing and the existence of the pool of water and slush—the evidence as to which, of the two women, I have mentioned. The testimony of the motorman was that the pavement where the street crossing was, was "nice and clean," and that there was no pool of water and slush there and nothing to prevent passengers from the car from passing dry-shod to the sidewalk, and the testimony of the conductor, speaking of the street in front of the horses was that "there was not any particular puddle, only the water that ordinarily would be there; there was no particular puddle of water: only ordinary slush."

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I do not stop to point out the important differences between the statements of the motorman and the conductor, because the learned trial Judge has accepted the testimony of the female respondent and her sister-in-law, and has found that:—

"There was however a foot of water or slush between the place where they" (i.e., the women) "alighted from the car and the walk."

No witness estimated the depth of the water and slush to be one foot, and it is probable that in stating it to have been of that depth my learned brother took judicial notice of the height of a woman's boot according to the fashion of to-day.

My learned brother's view was that the obligations of the appellant to the female plaintiff as its passenger were ended when she reached a place of safety upon the road, and he rested his judgment upon an invasion by the appellant of her rights as a traveller upon the highway, and his conclusion was that there was a duty resting upon the conductor of the car to see that "all is safe before he signals the motorman to round a curve."

I am, with respect, of opinion that the view of my brother Middleton that the obligation of the appellant to the female plaintiff, as its passenger, was ended when she reached a place of safety, was too narrow a view of the obligation of the appellant to her as its passenger; I should entirely agree with his view if what he meant was a place from which she might have safely passed from the point of debarkation to the place where she had to go to transfer to the Queen street line. The obligation of the appellant was, I think, greater towards a passenger who had not completed her journey, but in order to do that had to transfer to another line, than it would be to a passenger who had completed his journey; but, even as to such a passenger, the appellant was, in my opinion, bound to provide a stopping place at which the passenger could proceed to the sidewalk without having to pass through such a pool of water as existed at the usual place for crossing McCaul street, or subjecting him to the danger, before he had reached the sidewalk, assuming that he had not unnecessarily delayed in crossing, of being struck by a car when it was swinging around a curve such as existed at the stopping place.

If there had been no pool of water and nothing else to prevent the female respondent from going, after she had alighted from the

car, to the sidewalk before the car was started, but she had unnecessarily delayed to do that and her injury had resulted from that delay, I should have agreed with the contention of the appellant that it was not liable for the injury; but in this case the conductor and the motorman knew or ought to have known that their passengers would not, at all events, be likely to wade through the pool, but would do as the female respondent and her sister-in-law did, proceed to the rear of the waggon in order to be able to pass dry-shod to the sidewalk. They also knew that the horses and waggon were where they were, and that the space between them and the car when it rounded the curve was so small that any one who was standing or walking in that space would inevitably be struck by the moving car; and they were, therefore, in my opinion, guilty of negligence in starting the car without first making sure that the passengers who had left the car were not still between it and the waggon; and that negligence was the proximate cause of the injuries which the female respondent received.

In resting my judgment on this ground, I am not, I think, differing substantially from my brother Middleton; for, if I am right in my conclusions from the evidence and as to the duty of the conductor and the motorman, the appellant was guilty of an unlawful interference with the rights of the female respondent as a traveller upon the highway, and the effect of my judgment is only to attribute to the appellant a higher duty to her, arising from the fact that she had been carried by it as a passenger on its line and was injured while proceeding to the place to which she had to go to complete her journey as a passenger, than if she had not been a passenger.

I would, for these reasons, affirm the judgment of my brother and dismiss the appeal with costs. *Appeal dismissed.*

MORRAN v. HANNAH.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart and Dennistoun, JJ.A. November 10, 1919.

VENDOR AND PURCHASER (§ I E—27)—SYNDICATE TO PURCHASE LAND—FRAUD ON ONE OF PURCHASERS—WITHDRAWAL FROM TRANSACTION—RETURN OF MONEY—RIGHTS OF THIRD PARTIES.

Where a syndicate is formed for the purchase of land the purchasers become partners as to the particular transaction and the utmost good faith is due from every member of the syndicate towards every other member. The concealment from one of the members of special advan-

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tages offered to another of the associates whose entry into the syndicate is influential in causing such member to join in the purchase, justifies such member from withdrawing from the transaction except in so far as the rights of third parties are affected.

[*Kildonan Investment* v. *Thompson* (1917), 38 D.L.R. 96, 55 Can. S.C.R. 272, applied.]

Statement.

APPEAL by defendant from the judgment at the trial in an action on a promissory note given as payment for real estate. Reversed.

H. V. Hudson and *R. M. Pearson*, for appellant; *E. Bailey Fisher* and *H. F. Tench*, for respondents.

[Perdue, C.J.M.

PERDUE, C.J.M.:—This is an action on a promissory note for $1,124 and interest made by the defendant to the Consolidated Investments Limited (which I shall call the company), and indorsed by them to Morran. Both payee and indorsee are joined as plaintiffs. The note, which is dated October 23, 1914, and is payable on December 1, 1915, was given to secure payment by the defendant of an instalment of purchase money on an agreement for the sale of land by the company to Hannah and 3 other persons, Maveety, Cameron and Thompson. The first agreement was dated May 31, 1913, and contained the terms of purchase of 26 lots in the vicinity of Edmonton, Alberta, at the price of $15,000. The defendant paid his share of the cash payment under that agreement by giving his promissory note for the sum of $1,250. This note was not paid and after certain negotiations a new agreement dated October 23, 1914, was entered into between the vendor and the purchasers and the note sued on was given to take the place of the first note.

The defendant sets up the following defences

1. That the plaintiffs cannot furnish title to the lands in question.

2. That defendant was induced to enter into the agreement and make the note sued on by misrepresentations by the plaintiff company concerning the property, its location, surroundings, position, value and selling prices, which alleged misrepresentations are specifically set out in the statement of claim.

3. That it was represented by the plaintiff company that the buildings of the City of Edmonton extended to the property in question, whereas, it is alleged, there are wide stretches of unoccupied land between the city and the sub-division.

4. 7B. The defendant (plaintiff) its servants or agents represented to the plaintiff (defendant) this (*sic*) his co-purchaser H. T. Maveety had become a co-purchaser under the hereinbefore recited agreement *bonâ fide* and with the intention of carrying out the contract in its entirety, whereas the fact was that the said H. T. Maveety was not to be liable on his covenant in the said

agreement and had not paid any portion of the cash payment which the plaintiff represented to the defendant had been paid by the said H. T. Maveety, and which the defendant relied upon when he signed the said agreement for sale.

With all the above defences except the last (No. 4) the trial Judge has sufficiently dealt. The defendant had before signing the second agreement ample time and opportunity to learn the truth or falsity of the representations made to him by the company or its agents at or previously to the signing of the first agreement. The property was examined by one, at least, of the parties and enquiries were made and the result communicated to the defendant and his co-purchasers. Certain concessions in regard to the time of making the payments and as to other matters were granted by the vendors and inserted in the second agreement. I think the signing of the latter and the delay in repudiating the contract preclude the defendant from successfully urging the alleged misrepresentations.

The defence as originally fyled contained an offer by the defendant to carry out the agreement if the plaintiff, who claimed to be assignee of the agreement, would shew himself able to specifically perform the same. In their reply to the amended statement of defence the plaintiffs refer to the above offer and allege that the plaintiff Morran is ready and willing to give a transfer of and furnish title to the property upon payment of the amount due. If the question involved were simply this, the matter in issue between the parties could be settled by an inquiry as to the sufficiency of Morran's title.

I think that the trial Judge made a proper disposition of the several issues he has dealt with in his judgment. He has not, however, given any expression of opinion upon the defence raised in paragraph 7b above set forth. The paragraph is very loosely framed but its meaning is sufficiently indicated.

The evidence clearly establishes that Simons, the president of the plaintiff company, and Brant, the agent, offered special inducements to Maveety for the purpose of persuading him to join in the agreement for purchase of the lots. The defendant states that he was influenced by the fact that Maveety, Cameron and Thompson were going into the purchase. On being asked to explain how it would influence him, he replied "I had been doing my financial dealings with bank manager Maveety, being

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my banker influenced me in going into it." Maveety admits that he received from Brant a percentage on the commission earned by Brant in respect of sales made in the district. This was in return for Maveety's services in introducing Brant and Simons to possible purchasers, the defendant and Thompson being two of the persons so introduced. Simons and Brant urged Maveety to join in the purchase in question in this suit. He refused at first but afterwards consented on the condition, which was duly carried out, that he should be relieved from liability to make the cash payment of $1,250. Maveety admits that he concealed this arrangement from the defendant and from Cameron and Thompson who were joining with him in the purchase. The defendant states that he had no knowledge of the special terms accorded to Maveety until about 6 weeks before the trial of the action. I think it is established by the evidence that Hannah was induced to join in the purchase in the belief that Maveety was to be a co-purchaser with him on the same terms that were granted to the others. The four purchasers were partners as to this particular transaction or adventure and their rights and liabilities as partners are governed by the same principles as those which apply to ordinary partnerships. See *Manitoba Mortgage Co.* v. *The Bank of Montreal* (1889), 17 Can. S.C.R. 692, 699; Lindley, 7th ed., p. 67; *Smith* v. *Thiesen* (1910), 20 Man. L.R. 120; Partnership Act, R.S.M., 1913, c. 151, s. 35 (b). Being a partnership, the utmost good faith was due from every member of the partnership towards every other member.

This obligation to perfect fairness and good faith, is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists. Lindley, 8th ed., p. 364.

The concealment from the defendant of the special advantage that was obtained by one of the associates over the others would have justified the defendant in withdrawing from the transaction, except in so far as the rights of third parties were affected. The plaintiff company is bound by the acts of its agents Simons and Brant in connection with the sale, the benefit of which the company has adopted. The special inducement to Maveety, by which he became one of the purchasers, and the concealment practised upon the other purchasers, were acts which were instrumental in influencing the defendant to join

in the transaction. For these acts the company through its agent is responsible.

The legal principles involved in this case are dealt with in *Kildonan Investment* v. *Thompson* (1915), 21 D.L.R. 181, 25 Man. L.R. 446, affirmed (1917), 38 D.L.R. 96, 55 Can. S.C.R. 272. This action is brought on a promissory note given by the defendant for the payment of an instalment of purchase money payable under the agreement. It is not shewn that the plaintiff Morran as the indorsee of the note is in any better position than the company as against the defendant.

The appeal should be allowed and judgment entered for the defendant with costs in both Courts.

Cameron, J.A.

CAMERON, J.A.:—It is established on the evidence that Simons, the president of the plaintiff company, after some months of negotiations, finally succeeded in forming the partnership or syndicate that agreed to purchase the lands in question, by making certain representations. One of the four members of this partnership was Maveety, the bank manager, who became such on the understanding that he was not to be liable for any cash payment or, indeed, any payment whatever. Maveety's part in the transaction was, in my opinion, inexcusable, but his evidence is uncontradicted and his true relation to the transaction was concealed from the defendant, who became aware of it only a short time before the trial. That I think is clear on the evidence. It is obvious that Maveety's ostensible joining in the agreement acted as a material inducement to the defendant to become a party to it, and was intended to do so. This was, beyond question, such an outrageously fraudulent representation as to vitiate the agreement and its effect was not considered by the trial Judge. It would be a travesty to allow such a manifest fraud to be perpetrated. The note sued on, which is part of the transaction, cannot be enforced against the defendant and the action must be dismissed.

The appeal must be allowed with costs in this Court and the Court below.

Haggart, J.A., Dennistoun, J.A.

HAGGART and DENNISTOUN, JJ.A., concurred.

Appeal allowed.

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BRAWLEY v. TORONTO R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. June 23, 1919.

EVIDENCE (§ II H—251)—STREET RAILWAY—NEGLIGENCE—BREAKING OF STRAP—EVIDENCE OF WANT OF CARE.

The fact that a strap in a street car by which a passenger was supporting herself broke when the car swerved and her weight was thrown on it, casts upon the railway company the burden of shewing that the breaking was not due to any negligence on its part. The case is one for the application of the maxim *res ipsa loquitur*.

[*Sangster* v. *T. Eaton Co.* (1895), 24 Can. S.C.R., 708; *Toronto R. Co.* v. *Fleming* (1913), 12 D.L.R. 249, 47 Can. S.C.R. 612, referred to.]

Statement. APPEAL by the plaintiff David Brawley and an appeal by the defendant company from the judgment of MEREDITH, C.J.C.P., 44 O.L.R. 568. Reversed.

Gideon Grant, for the plaintiff David Brawley.

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

The judgment of the Court was read by

Meredith, C.J.O. MEREDITH, C.J.O.:—The plaintiff David Brawley appeals from the judgment dated the 30th December, 1918, which was directed to be entered by the Chief Justice of the Common Pleas on the findings of the jury at the trial at Toronto on the 22nd and 25th days of the previous month of November.

The ground of this appeal is that the appellant was not awarded any damages, although he had expended $768.07 for medical and other treatment for his wife, and had lost her society and companionship for about a year, in consequence of the injuries she had received, in respect of which the jury assessed her damages at $1,000. The defendant also appeals, on the ground that the negligence charged was not proved, and that the answers of the jury were not such as to warrant judgment being entered, as it was, in favour of the female plaintiff for $1,000.

The female plaintiff was a passenger on the appellant company's railway, and was injured owing to the breaking of a strap with which the car in which she was travelling was supplied, and which was intended to be used by standing passengers, as it was used by her, for the purpose of supporting themselves. And the allegation of her pleading is that, owing to the car having swerved violently, her weight was thrown upon the strap, which broke and gave way in her hand from the rod upon which it was mounted, causing her to fall violently upon the floor of the car.

In his charge to the jury, the learned Chief Justice directed

them, if they found that the appellant company was guilty of negligence, to state in what particulars the negligence consisted; that, if they thought lack of inspection was the cause, they should indicate what kind of inspection they should find to have been reasonable under all the circumstances of the case; and he also directed them, if they found negligence, to "state fully and clearly what it is."

The second question was: "If so, what was that negligence? State fully and clearly." And the answer to it was, "Caused by broken strap."

In my opinion, the fact that the strap broke, when it was called on to bear the strain put upon it by the female plaintiff, cast upon the appellant company the burden of shewing that the breaking was not due to any negligence on its part.

The case was, I think, one for the application of the maxim *res ipsa loquitur*. Where an accident happens from an inanimate object, and is one that does not ordinarily happen if the persons who have the management of it use proper care, it may be inferred, in the absence of any explanation from them, that it has happened through their want of care.

In *McPhee* v. *City of Toronto and Bulmer*, (1915), 9 O.W.N. 150, the plaintiff was injured owing to the breaking down of a bench in a public park, intended to provide seating accommodation for 25 persons. Delivering the judgment of a Divisional Court, Hodgins, J.A., referring to this, said at p. 150:—

"As no evidence as to its condition" (i.e., the condition of the bench), "except that afforded by the accident itself, was given, the appellant must be held to be responsible for its failure to serve its purpose."

In the earlier case of *Sangster* v. *T. Eaton Co. Ltd.*, (1894), 25 O.R. 78, 21 A.R. (Ont.) 624, affirmed by the Supreme Court of Canada, *T. Eaton Co.* v. *Sangster* (1895), 24 Can. S.C.R. 708, the facts were that a child, who was lawfully in the defendant's shop, was injured by an unfastened mirror standing against the wall, falling upon it, the cause of the fall being unknown, and it was held that this of itself afforded sufficient evidence of negligence to justify the case being submitted to the jury.

Toronto R.W. Co. v. *Fleming* (1913), 12 D.L.R. 249, 47 Can. S.C.R. 612, is another case in which the maxim was applied. In

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that case the injury was caused by the explosion of the controller of an electric car in which the plaintiff was travelling.

The appellant company adduced evidence for the purpose of rebutting the *primâ facie* presumption which arose from the breaking of the strap, but made no attempt to shew that the strap had been inspected or tested, or that any system for the inspection or testing of the straps was in use by the appellant company, nor to shew how long the strap which broke had been in use.

In *Murphy* v. *Phillips* (1876), 35 L.T.R. 477, 478, Kelly, C.B., speaking with reference to chains used for the purpose of lifting heavy girders, said that the defendant was bound from time to time, as the occasion might require, to have the chains used in his business properly and duly examined and tested periodically.

It is obvious that a strap will not last for ever, and it was shewn by a witness called by the appellant company—Charles Adams—that the strap which broke shewed signs of deterioration and that it was beginning to wear, though he added that there did not "seem to be such an enormous amount of wear," and for that reason the case differs from *Ferguson* v. *Canadian Pacific R.W. Co.*, (1908), 12 O.W.R. 943. There the evidence made it clear the derailment of the car, which was the cause of the injury complained of, was caused by an *apparently perfect rail* breaking, and because that was the case, and there was no evidence of negligence on the part of the defendants in buying the rail and placing it on the track, the action failed and was dismissed.

The learned trial Judge was evidently of opinion that the maxim *res ipsa loquitur* was not applicable, and the jury were not instructed—as in my opinion they should have been—that the burden rested upon the appellant company of rebutting the presumption of negligence which arose from the breaking of the strap, and that unless that burden had been satisfied the plaintiffs were entitled to succeed.

In view of this, and the unsatisfactory nature of the answer to the second question, the ends of justice will best be served, I think, by setting aside the judgment and directing that a new trial be had.

The complaint of the plaintiff who appeals that the jury improperly disregarded his claim to be allowed the expenses he had been put to is not well-founded. Without objection these

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expenses were dealt with as part of the damages sustained by the female plaintiff, and must therefore be taken to have been included in the $1,000 awarded to her. It seems strange that nothing was allowed to the appellant plaintiff for the loss of the society and companionship of his wife while she was laid up in consequence of the injuries she received; and, if any injustice has been done in that regard, it can be remedied upon the new trial.

The result is that I would allow both appeals, set aside the judgment, and direct that a new trial between the parties be had, and I would direct that the costs of the last trial and of the appeals be costs in the cause to the party who is ultimately successful, unless the Judge before whom the new trial takes place otherwise directs. *Appeals allowed and new trial ordered.*

LARUE and TRUDEL v. THE MOLSONS BANK.

QUE.

K. B.

Quebec King's Bench, Archambeault, C.J., and Lavergne, Cross, Carroll and Pelletier, JJ. June 15, 1918.

PARTNERSHIP (§ II—6)—PARTNERS—IMPLIED AUTHORITY—BILLS AND NOTES —ABUSE OF TRUST—LIABILITY OF CO-PARTNER.

In an ordinary trading partnership a partner has implied authority to draw, accept, make and endorse bills of exchange and promissory notes in the name of the firm. Even though the partner exercising such power abuses his trust for his individual benefit, his co-partner will be bound unless the holder is chargeable with notice of the facts.

APPEAL from the judgment of the Superior Court, 53 Que. S.C. 524. Affirmed. Statement.

Galipeault, St. Laurent, Gagné and *Métayer*, for appellants; *Taschereau, Roy, Cannon & Co.*, for respondents.

The judgment of the Court was delivered by

CROSS, J.:—The appellants are curators upon an abandonment in insolvency made by Frank W. McKeen. They contest the respondent bank's claim, and allege that it is not a creditor of Frank W. McKeen. Cross, J.

The respondent's claim is upon a promissory note for $87,000 whereby "C. E. McKeen Western" promised to pay that sum to the order of the C. E. McKeen Co., and upon which there is the endorsement of the C. E. McKeen Co. It is as having been a member of this co-partnership, the C. E. McKeen Company, that F. W. McKeen is held liable.

The appellants, in their contestation, allege in substance that the note in question and others of which it is a renewal were

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given to the respondent by C. E. McKeen as collateral security for payment of his personal debt; that Frank McKeen had been in partnership with C. E. McKeen, but that the notes, to the respondent's knowledge, were made and indorsed by and for C. E. McKeen and not for the partnership; that the respondent is not a holder in due course. They also allege that, since June 24, 1911, Frank W. McKeen has not been a member of any partnership known by the name of the "C. E. McKeen Co."

In answer to the contestation, the respondent, besides joining issue, alleges that Frank W. McKeen knew of the existence of the notes and held out C. E. McKeen as a person authorised to sign notes in the partnership name and to pledge its credit; and, in particulars of the answer, it further sets forth that C. E. McKeen was interested in the business of the C. E. McKeen Co., that the business of the latter and that of C. E. McKeen Western had been carried on as a united enterprise and for the common benefit, and that C. E. McKeen acted for both and openly transacted business in the names of both.

The Chief Justice who heard the case in the Superior Court came to the conclusion that Frank W. McKeen was bound by the indorsement, and gave judgment in favour of the respondent, maintaining the claim to the extent of $40,600, a balance arrived at after deduction of the value of certain securities held by the respondent.

The curators have brought this appeal from that judgment.

The question to be decided is whether Frank W. McKeen was bound by the indorsement "The C. E. McKeen Co." put upon the note by C. E. McKeen or not.

The relevant facts may be summarised as follows: About the year 1897, C. E. McKeen engaged in business at Quebec as manufacturer of boots and shoes. On and after December 1, 1904, that business was carried on under the style of the C. E. McKeen Co., by C. E. McKeen, Alice M. Beardsell (wife of C. E. McKeen), Frank W. McKeen and John McKeen. In November, 1909, Alice M. Beardsell (Mrs. McKeen), retired and the partnership continued under the same name and style between the three other partners. In June, 1911, John McKeen retired from the partnership, and in the deed of dissolution which took effect at that date, (though only executed on October 17, 1911), it was provided that

the partnership would continue to exist and the deed have effect between C. E. McKeen and Frank W. McKeen.

The business was in fact so continued to be carried on by these two men, though, in their registered publication of notice of partnership, it is said that the business is to be carried on under the name and firm of "C. E. McKeen, Regd." The name "The C. E. McKeen Co." was in fact continued in use, and to avoid having to refer again to it, I would say at once that the point raised by counsel for the appellants to the effect that Frank W. McKeen was not a member of any firm known as "The C. E. McKeen Co." after the year 1911, is without substance. C. E. McKeen is father of John and Frank W. McKeen and was owner of the factory premises at Quebec. He exercised a dominant authority in the business, and the partnership articles left him free to engage in other business.

About the year 1904, he decided to increase the factory output with the view of making the cost of production relatively less. The goods were being marketed mainly in Western Canada and he proceeded to Vancouver and afterwards made his home there. To market the increased output he set up retail stores which he carried on for his own account under the name "C. E. McKeen Western." In the year 1913 he did certain business under the name of "The C. E. McKeen Shoe Stores, No. 1 Store" and "The C. E. McKeen Shoe Stores, No. 2 Store."

It is opportune to observe that in the partnership articles signed by C. E. McKeen, Frank W. McKeen, and John McKeen on March 11, 1911, before Boily, N.P., there are covenants as follows:

> The signature of the partnership is "The C. E. McKeen Co", and will be at the sole use of the said C. E. McKeen and of the said Frank W. McKeen and to each of them separately, but only of course for the affairs of the said partnership.
>
> The chief place of business of the said partnership is at the city of Quebec, the interest of the said C. E. McKeen in the capital of the said partnership consists in the entire assets of the partnership which assets are composed of all what is used to carry on the business of the partnership such as immoveable and moveable properties, such moveable properties comprising also stock manufactured or not.
>
> The interest of the said Frank W. McKeen and of the said John McKeen consists in the rights accorded to them by the said C. E. McKeen to acquire for the price and considerations hereinafter mentioned and in the proportion hereinafter stated the whole rights of the said C. E. McKeen in the said assets of the said partnership.

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The said C. E. McKeen moreover undertakes to back by his personal responsibility the financial position of the said firm.

These covenants, as we have already said, were made applicable to the last partnership, namely, the one between C. E. McKeen and Frank McKeen.

The Quebec establishment was dependent upon the personal credit and *backing* of C. E. McKeen.

It was in these circumstances and conditions that McKeen obtained advances from the respondent at its branch in Vancouver. His banking account was in the name of "C. E. McKeen Western."

An attempt was made at the trial by the appellants to prove that the $87,000 in question had been applied by C. E. McKeen to the extent of about $43,000 in establishing and financing the retail stores at Vancouver and to the extent of about $44,000 in real estate speculation.

What in reality was done was that C. E. McKeen spent his earnings or income of $10,000 or $12,000 per year, the proceeds of sale of his wife's dwelling house at Quebec and his borrowings from the respondent on three objects, namely: about $43,000 on the retail shops at Vancouver and the business carried on therewith in the course of about 7 years, about $46,000 in real estate ventures at later dates, and C. E. McKeen at times helped the Quebec establishment with advances procured from the respondent and afterwards repaid by the Quebec establishment. From all the operations there result the debt of $87,000 to the respondent, but it cannot be said what parts of that sum represent advances for any of the particular objects above enumerated.

The note claimed upon is a renewal of or a demand note for the amount of 18 overdue notes, the first of which is dated October 11, 1912, and was for $16,500. The amounts of the other 17 vary between $1,500 and $8,500. They all fell due in January, February, March, and April, 1912.

Two of these notes are notes of the C. E. McKeen Shoe Stores (No. 1 Store) for $8,000 dated January, 10, 1913, and of the C. E. McKeen Shoe Stores (No. 2 Store) for $3,000, dated January 10, 1913, both to the order of "C. E. McKeen (Western)."

In the other 16 the maker's signature is "C. E. McKeen Western per C. E. McKeen"—in one case "per A. M. B. McKeen," and the payee and indorser is "the C. E. McKeen Co."

The indorsements were written by C. E. McKeen and I take it that this was known to the respondent.

I also take it as proved that, before the year 1911, the respondent's Vancouver branch had been making advances on notes made and indorsed in the same way by "C. E. McKeen Co.," as payee and indorser.

In the business operations, when goods would be shipped from Quebec, drafts for the wholesale price of them were drawn by the C. E. McKeen Co. upon "C. E. McKeen Western," and either then, or when the goods were sold by retail, C. E. McKeen was credited at Quebec with a sales-agent's commission for which he would make drafts on the C. E. McKeen Co. I regard these operations as matters of internal arrangement and accountability, seeing the contract relations between the partners; in particular the covenant that manufactured and unmanufactured stock at Quebec belonged to C. E. McKeen. The statement of C. E. McKeen in his testimony to the effect that the Quebec operations and the business of the retail shops at Vancouver were carried on as a sort of community business for the benefit of both, appears to me to be an accurate characterisation. The question whether Frank W. McKeen is not liable as a partner for the debts contracted in the name of C. E. McKeen Western is one upon which much might be said but, as it was not debated at the hearing, I do not treat of it now.

In January 1912, C. E. McKeen submitted to the respondent a statement of his affairs in which "Factory at Quebec, $35,000" is shewn as an asset, and in the summary an item is inserted of equity "In business at Quebec over liability $82,806.81."

I infer that the details by which these items were arrived at must have been procured from the Quebec office, and that Frank W. McKeen would have known of the preparation of them and the object of them.

In May, 1914, the respondent, having learned that the partnership between C. E. McKeen and Frank W. McKeen had been dissolved, addressed a demand of payment to C. E. McKeen Co., and to this demand Frank W. McKeen wrote in answer:

> Your letter of May 7 received and contents noted, I have forwarded a copy of your letter to my father (Mr. C. E. McKeen) who is at present on the road, and who will take this matter up with you. In reference to the dis-

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solution, I might say that my father did not transfer the factory property to me and that he still holds the property.

In this state of facts, I consider that Frank W. McKeen was made responsible to the respondent by the act of C. E. McKeen in giving the indorsement in the name of the C. E. McKeen Co.

No doubt in general a partner who gives an indorsement in the name of the partnership to an indorsee for payment of an advance to him self does not bind his co-partner.

Can it be said that that is what C. E. McKeen did?

The appellants, in their contestation, set out with the assertion that the note claimed on was given as collateral security for payment of C. E. McKeen's debt to the respondent. That assertion is not altogether accurate. The note was the direct contract of the borrower in favour of the payee, first, and next in favour of the banker. That, at least, is so of the originals of which the one claimed on is a renewal. The assertion is erroneous as respects the maker. Neither is it wholly accurate as respects the indorser "the C. E. McKeen Co.," and this brings us to consider the extent of the mandate from the C. E. McKeen Co. to C. E. McKeen.

The fact that a note already indorsed is in the hands of the maker and is offered to a bank to procure an advance is sometimes taken to involve an intimation to the bank that the indorsement is for accommodation, and if the indorsement purports to be that of a partnership of which the intending borrower is a member, there is reason to say that the indorsement would not be binding upon other partners, and that conclusion might the more readily be arrived at, if to the knowledge of the bank the indorsement itself was written by the hand of the maker as in the case before us.

A real authority to indorse may nevertheless exist and be susceptible of being proved directly or by inference from attendant circumstances.

In the matter now before us I draw the conclusion from the accumulated effect of all the circumstances that C. E. McKeen created a binding obligation on the part of what (for convenience rather that strict accuracy) I will call the Quebec firm. When the respondent was applied to by C. E. McKeen for advances and was made aware that his object was to establish outlets at Vancouver for the products of the Quebec firm, the respondent

was in a position to say to him: "If we lend you money with which to extend the Quebec firm's business, we will look to the Quebec firm to be responsible for repayment."

C. E. McKeen procured advances on that footing—leaving aside, for the moment, the matter of land speculation which arose later—and if there had been no promissory notes at all, there is reason to say that the respondent could have recovered for its advances upon *assumpsit* counts against the Quebec firm. It is unnecessary to go quite so far as to say that, however, C. E. McKeen clearly had authority to bind the Quebec firm for obligations for extension of its business. He threw that obligation into the form of an indorsement of notes, but when we go behind the form and wording of the instruments, we find existing an obligation which C. E. McKeen had ample mandate from the Quebec firm to create or acknowledge.

This fact serves to make clear the further inaccuracy on the part of the appellants in representing the notes as merely collateral paper or the indorsements as being for accommodation. The Quebec firm was not an accommodation party.

The fact further suffices to shew that the respondent has discharged the burden of explanation which rested upon it in consequence of the consideration that it was the maker of the note who signed the indorsement in the name of the Quebec firm. It is true that counsel for the appellants criticise the Chief Justice of the Superior Court as erroneously placing upon them a burden of proof which they say really rested upon the respondent; but I regard that criticism as misdirected. What the Chief Justice had in view was the failure of the contestants to examine F. W. McKeen as a witness.

What burden of proof or explanation really rested upon the respondent was discharged by disclosure of the facts above recited.

When once the scope of the mandate which C. E. McKeen really had from the Quebec firm is understood and it is realised that this is not a case wherein the Quebec firm stands as a mere guarantor or as an accommodation party, but is a simple case of a member of trading partnership who has borrowed money with which to extend its field of operations, in the firm name, and who, in addition to having the ordinary mandate of a partner, was owner of the factory and of the stock in trade besides having other

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power of control, the difficulty in the case disappears and the rule as to a co-partner's power to bind his co-partners should be applied. That rule has been well explained by the Chief Justice and illustrated by the authorities cited in his notes and notably by passages from the work of Story. To them might be added the following:

As to negotiable paper. Trading Partnerships: In an ordinary trading partnership, a partner has implied authority to draw, accept, make and indorse bills of exchange and promissory notes in the name of the firm. Even though the partner exercising such power abuses his trust for his individual benefit, his co-partner will be bound unless the holder is chargeable with notice of the facts, *National Exch. Bank of Boston* v. *White* (1887), 30 Fed. Rep. 412.

And, as respects the fact that it was C. E. McKeen the maker who also wrote the indorsements:

It has been held that the fact that a note made by a partner in favour of his firm, is in the hands of the maker, indorsed by the firm, is not conclusive of the accommodation character of the indorsement, but the question of the character of the paper is for the jury: A. & E. Enc. of Law, *verbis* Accommodation Paper, 2nd ed., 367 (note.).

Now, as respects the land speculation, two answers to the appellants' contention can be given: (1) the appellants have not proved what part if any of the amount of $40,600 for which the claim has been sustained was procured for land speculation. (2) There is no evidence that the respondent's manager knew that any part of the advances was to be used in land speculation.

It might also be added that the knowledge which Frank W. McKeen must have had of the fact that C. E. McKeen had for some years been signing or indorsing notes in the name of the Quebec firm makes against the appellant's contention on this point.

It is said in A. & E. Enc. of Law: *verbis* Accommodation Paper, 2nd ed., p. 347 (note).

The holder of a note indorsed by a firm, between which and the maker there have been frequent interchanges of accommodation upon bills and notes for a long time, has a right to presume the assent of all the partners.

Having also regard to the fact that the respondents' claim has been reduced by $37,000 upon a ground which under our law does not seem to have necessitated the making of that reduction, the appellants cannot be said to have made out their contention as respects the element of land speculation.

On the whole, I would dismiss the appeal.

Appeal dismissed.

CAMPBELL v. HALVERSON.

SASK.

C. A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands and Lamont, JJ.A. October, 22, 1919.

1. ELECTION OF REMEDIES (§ 1—2)—STRAY ANIMALS ACT (SASK.)—ANIMALS DAMAGE FEASANT—REMEDY UNDER ACT—AT COMMON LAW.

The Stray Animals Act (Sask. stats. 1915, c. 32), provides that the owner of animals distrained *damage feasant* may proceed under the provisions of the Act to have a justice of the peace assess the damages but he is not bound to proceed under the Act and failure to do so does not deprive him of any other remedies he may have at common law.

[*Six Carpenters Case*, 8 Co. Rep. 146a, 77 E.R. 695; *Lindon* v. *Hooper* (1776), 1 Cowp. 414, 98 E.R. 1160; *Sheriff* v. *James* (1823), 1 Bing 341, 130 E.R. 138, *Johnson* v. *Upham* (1859), 2 El. & El., 121 E.R. 95, referred to; *Maskel* v. *Horner*, [1915] 3 K.B. 106, followed.]

2. PAYMENT (§ IV—35)—IMPOUNDED GOODS—DAMAGE—PAYMENT TO SECURE RELEASE—INVOLUNTARY—RECOVERY BACK.

A payment made to release impounded goods under circumstances which shew that it was not voluntarily made may be recovered back as money had and received.

[*Fogde* v. *Parsenau* (1917), 37 D.L.R. 758, 10 S.L.R. 423, followed.]

Statement.

APPEAL from the judgment of Elwood, J., 11 S.L.R. 58, in an action brought to recover back money paid to a poundkeeper to secure the release of horses impounded, the money having been paid over by the poundkeeper to the defendant. Affirmed.

W. A. Beynon, for appellant; *J. A. Allan*, K.C., and *G. N. Broatch*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

Newlands, J.A.

NEWLANDS, J.A.:—On March 6, 1917, the defendant distrained *damage feasant* the plaintiff's horses and took them to the pound, leaving with the poundkeeper a written claim for $1,000 damages. On March 8, the plaintiff paid $1,000 to the poundkeeper, under protest, and regained possession of his animals. Subsequently the poundkeeper paid this money over to the defendant.

This action is brought by the plaintiff to recover back said $1,000 or so much thereof as was in excess of the damage done by his horses, on the ground, amongst others, that the amount claimed by defendant was grossly in excess of the damage done.

The trial Judge found that the damage done amounted to only $50, and gave judgment to plaintiff for the excess $950. From this judgment the defendant appeals upon several grounds.

The first that I will consider is, that this action will not lie; that plaintiff should have proceeded under the provisions of the Stray Animals Act, Sask. stats., 1915, c. 32, to have a Justice of the Peace assess the damages. The evidence shews that plaintiff

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did take out a summons before a Justice of the Peace under the Act, but the same was never served and the proceedings were dropped.

This Act provides that "the owner of an impounded animal may give notice in writing to the poundkeeper that he intends to complain to a Justice against the person impounding such animal," s. 32. "Such complaint may be upon one or both of the following grounds: (a) That the impounding was illegal, or, (b) That the damages claimed are excessive. S. 32, sub-s. (2).

The Justice may thereupon institute like proceedings as are authorized by Part XV. of the Criminal Code, R.S.C., 1906, c. 146, for Justices making orders for the payment of money.

The appellant claims that plaintiff should have proceeded as above, and not having done so he has no remedy in law.

Cockburn, C.J., in *Vestry of St. Pancras* v. *Batterbury* (1857), 2 C.B. (N.S.) 477, at p. 486, and 140 E.R. 502, at p. 506, says:

> Where an Act of Parliament creates a duty or obligation and gives a remedy for a breach of it by a peculiar proceeding, a question arises whether the remedy so provided is the only one to be had recourse to, or whether it is cumulative.

In a note to this case it is stated:

> The law seems well settled in the United States as it is in England, that when a right, with its appropriate remedy, existed at common law, if a statute gives a new remedy in affirmative words, or rather without a negative express or implied, this does not take away the common law remedy.
>
> But if the right be conferred or created by the statute, the remedy prescribed by the statute and no other can be pursued.

As the defendant in this case says that he distrained the horses *damage feasant*, the statute cannot be said to have created the right, particularly as the statute in giving the right to distrain only incidentally deals with animals doing damage.

S. 13 of that Act provides that any proprietor may distrain any animal

> (a) running at large contrary to a by-law; (b) owned by a non-resident running at large during a prohibited period; (c) running at large in a herd district between May 15 and October 31, and (d) an estray.

An estray means—s. 2, sub-s. 15—any animal found in or around the yards, buildings, corrals, or in the herd, band or flock of any person other than its owner during the period of the year when animals may run at large. Although no mention is made of animals doing damage in the section authorising distraint, it is mentioned in the provisions for impounding, and when a dis-

trainor impounds an animal he must leave with the poundkeeper a statement of the nature and extent of the damage and the amount claimed.

It will therefore be seen that the remedy provided by the statute is one that can be adopted by a oerson whose animals were distrained *damage feasant*, but there is nothing in the statute that confines such a person to such remedy.

In the first place the Act is silent as to animals being distrained *damage feasant*; it therefore creates no new right which would be applicable to the circumstances of this case. Next, the language of the statute is not as it was in *Vestry of St. Pancras* v. *Batterbury*, *supra*, peremptory. The Act says he may give notice that he intends to proceed before a Justice. The remedy is therefore in addition to other remedies he may have.

This seems to me the intention of the Legislature, because, while such a remedy would be both cheap and expeditious when the damages are small, it would be far beyond the ordinary jurisdiction of a Justice where the amount was large, as in this case, and it would not seem likely that the Legislature would in such a case oust the ordinary jurisdiction of the civil Courts and confer the same upon a Justice of the Peace. It would require peremptory language in the statute before I could come to such a conclusion.

The fact that these proceedings were commenced but dropped before service on defendant, leaves the matter as if they were never commenced.

Having come to the conclusion that the Stray Animals Act does not take away any remedy the plaintiff had at common law, the next question to consider is, had he any remedy.

It is contended on the part of the appellant that he had not, because he did not tender to the defendant the amount of damages done by his horses before distress, in which case the distress would have been unlawful and he could have brought replevin, nor did he tender these damages before impounding but after distress, in which case the detention would have been unlawful and he could have brought detinue. These, the appellant claims, were his only remedies, and as he did not bring himself within either of them he has no remedy at law.

For this proposition the principal case he cites is *Gulliver* v.

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Cosens (1845), 1 C.B. 788, 135 E.R. 753. The facts in that case are similar to this. I think that the opinions of the Judges in that case are to the effect that debt would not lie. It was decided on the principle that the owner of the cattle being the wrongdoer, the burden was on him to tender a sum sufficient to cover the damages before the distrainor would become a wrongdoer. Tindal, C.J., 1 C.B. at p. 796, says:

> It has been urged that here a tender was unnecessary in as much as the sum demanded for compensation was exorbitant: that argument, however, it seems to me, is answered by saying that the risk of determining the real amount of damage is not by law imposed upon the defendant. This I should be disposed to hold upon principle and independently of the authority of *Lindon* v. *Hooper* (1776), 1 Cowp. 414, 98 E.R. 1160, which I am unable to get over, and which I am not aware has been overruled: and though cases have occurred in which it has been decided that an excessive demand dispenses with a tender, yet those were cases where the law made it incumbent on the defendant correctly to ascertain the amount of his demand.

S. 16 (2) of the Stray Animals Act, Sask. stats., 1915, c. 32, under which the defendant impounded these animals, provides that the distrainor leave with the poundkeeper a written statement containing a description of the animal distrained, the name of the owner, if known, the place where such distraint is made, the nature and extent of the damage, if any, the amount claimed, and reasonable fees for driving such animal and delivering same to the poundkeeper.

The law therefore required the defendant in this case to state the nature and extent of the damage and the amount claimed, and it would, therefore, bring this case within that class of cases referred to by Tindal, C.J., where, when the amount claimed was exorbitant, as it was in this case, where $1,000 was claimed and only $50 damages done as found by the trial Judge, a tender was unnecessary.

Now in the words of Lord Coke in the *Six Carpenters Case*, 8 Co. Rep. 146a, at p. 147a, 77 E.R. 695, at p. 698:

> Tender after the impounding makes neither the one nor the other wrongful (*i.e.*, the distress or impounding) for then it comes too late, because then the cause is put to trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender he may have an action of *detinue* for the detainer after, or he may upon satisfaction made in Court have a writ for the re-delivery of his goods.

There was therefore a remedy at law in a case like the present, and, although the plaintiff made no tender, that tender was in

my opinion dispensed with because the amount claimed was exorbitant. I would say that we could take it for granted that where the claim was for $1,000 a tender of $50 would have been refused. In these old cases the form of action was most important. Under the present practice it is not, and as long as the facts of the case are stated and the plaintiff has a remedy, he will be given it on proving his case.

The only other questions raised were: (1) that it was *res judicata* the plaintiff having paid the money by virtue of the Stray Animals Act. This is answered by the fact that plaintiff dropped his proceedings under that Act and there never was a decision; and (2) that the money was paid voluntarily and not under duress and therefore cannot be recovered. This argument is answered by the words of Lord Reading, C.J., in *Maskell* v. *Horner*, [1915] 3 K.B. 106, at p. 118:

> If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity, or of seizure actual or threatened, of his goods, he can recover it as money had and received.

The plaintiff paid the money under protest to release his horses from seizure; this money was paid to defendant: the plaintiff is, therefore, entitled to recover it from him, he having been found by the trial Judge not to be entitled to it.

The appeal should therefore be dismissed, with costs.

Lamont, J.A.

LAMONT, J.A.:—On March 6, 1917, the defendant discovered 16 of the plaintiff's horses in his flax field doing damage. He drove them to the nearest pound and impounded them. While at the pound, he gave to the poundkeeper, as required by the Stray Animals Act, Sask. stats., 1915, c. 32, a statement in writing of the damage he had suffered, which he placed at $62.50 per head, or $1,000 in all. On being informed that his horses had been impounded, the plaintiff went to the poundkeeper and paid under protest the said sum of $1,000, together with the poundkeeper's fees, and obtained his horses. The poundkeeper paid the $1,000 over to the defendant. On April 7, the plaintiff laid an information before a Justice of the Peace, claiming that the damages were excessive, but as the defendant did not appear before the magistrate on the day fixed, the matter appears to have been dropped. The plaintiff then brought this action, in which he claimed a return of the said $1,000, or so much thereof as was in excess of

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the damage actually suffered by the defendant. The action came on before my brother Elwood, who found that the damage suffered by the plaintiff for which he was legally entitled to impound the horses amounted to only $50, and he gave judgment against the defendant for the return by him of $950. From that judgment the defendant now appeals.

On behalf of the defendant two grounds were argued for a reversal of the judgment; (1) that an action for money had and received will not lie where money has been paid to a poundkeeper to release cattle impounded *damage feasant*, even although paid under protest and the amount paid is in excess of the damage done; and (2), in any case, the money was paid under legal compulsion and consequently is not recoverable.

A number of old English cases certainly lend some support to the defendant's first contention.

In *Lindon* v. *Hooper* (1776), 1 Cowp. 414, 98 E.R. 1160, it was held that "an action for money had and received does not lie to recover back money paid for the release of cattle *damage feasant*, though the distress were wrongful." See headnote. The ground of this decision appears to be that, according to the forms of pleading then existing, the claim would be simply for moneys had and received and this would not give the defendant any information as to the case he might be called upon to meet at the trial.

In *Sheriff* v. *James* (1823), 1 Bing. 341, 130 E.R. 138, it was held that an action on the case would not lie for detaining distrained cattle *damage feasant* although a tender of sufficient amount was made to cover the damage done, if the tender was not made before the impounding.

In *Gulliver* v. *Cosens* (1845), 1 C.B. 788, 135 E.R. 753, the facts were practically on all fours with the case at Bar. The plaintiff's sheep strayed on to the defendant's land and were doing damage. The defendant impounded them, and claimed as damage £2.15s. 9d. The plaintiff paid the money, under protest, and then brought an action to recover it back less the damage actually done. The jury found that the damage done amounted to only five shillings. The Court held that the plaintiff could not recover the excess. Tindal, C.J., and Coltman, J., base their judgments on the ground that it was the duty of the plaintiff to ascertain the exact amount of the damage his sheep had done

and to make a tender of that amount, then, in case the defendant refused to accept it, he would be entitled to bring an action for the detention of his sheep. They seem to hold the view that, after the impounding takes place, a tender of the actual damage suffered comes too late because "the cause is put to trial to be there determined."

Creswell, J., based his judgment on less technical grounds. He held that the payment was made for the purpose of avoiding all questions of dispute as to the right to distrain and was, therefore, voluntarily made and could not be recovered.

If these cases are still good law the plaintiff cannot recover, no matter how unconscientious it may be for the defendant to keep the money. The authority of these cases has, however, not remained unquestioned. At common law a distrainor of cattle *damage feasant* and a distrainor for rent were in the same position. Both could hold the distrained goods till paid, but neither could sell the article seized. In the 1st session, 2 Wm. and Mary, c. 5, it was enacted that "where any goods or chattels shall be distrained for any rent . . . and the tenant or owner of the goods so distrained shall not within five days replevy the same the distrainor may sell the goods."

In *Johnson* v. *Upham* (1859), 2 El. & El. 250, 121 E.R. 95, the landlord seized for £108 while only £98 were due. The tenant tendered the £98, which amount was refused and the landlord proceeded to sell. It was held that a tender after seizure was good and that the sale was illegal. In giving the judgment of the Court, Wightman, J., said, 2 El. & El. at p. 262, and 121 E.R. at p. 99:

> There is no doubt but that at common law a tender after the impounding availed nothing, either in the case of a distress for rent, or for *damage feasant*.

2 El. & El. at p. 264, and 121 E.R. at p. 100.

> The landlord's alleged right to reject payment and proceed to sale after tender is founded upon an old and technical rule which might be applicable to the law of distress as it was before the passing of statutes 2 Wm. and Mary, sess. 1, c. 5 . . . but can hardly have any reasonable application to cases arising since those statutes.

Judgment was given for the plaintiff.

In *Fell* v. *Whittaker* (1871), 7 Q.B. 120, a landlord sued for £18 rent, when only £9 was in arrear. The tenant offered him the £9. The offer was refused and a bailiff was kept in possession

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until the tenant gave an undertaking to pay the whole £18, and had actually paid a part thereof, amounting to £2.7s. The tenant brought an action for money had and received. The case of *Gulliver* v. *Cosens*, *supra*, was cited as an authority that such an action would not lie, that the tenant's proper remedy was replevin. The Court held that the tenant was entitled to recover. Lush, J., pointed out that under pressure of seizure the tenant had paid, or had done what was equivalent to paying, and that was sufficient to make up his cause of action.

This was followed by the case of *Green* v. *Duckett* (1883), 11 Q.B.D. 275. There the plaintiff's bull trespassed upon the defendant's property and was distrained *damage feasant* and impounded upon the defendant's own land, there being no proper or convenient pound in the locality. The defendant claimed £2 damage. The plaintiff tendered the sum of 1s. 6d. The tender was refused and the plaintiff paid the £2, but under protest as to the amount above his tender. The plaintiff sued for money had and received. The County Court Judge found that the plaintiff had tendered the full value of the damage sustained by the defendant and gave judgment for the excess. On appeal it was argued that the action would not lie, and the old cases above referred to were brought forward as authorities in support of the argument. The Court held that an action for money had and received would lie; Denman, J., at p. 279, stating that, independently of the cases already decided, he would be prepared to hold that,

> where there is the element of pure extortion which clearly exists here, in impounding and keeping the animal without a colour of right to the sum demanded, the law would not at the present day leave the plaintiff to replevy as his only remedy. I think the element of extortion is so clearly shewn that an action for money had and received will lie even if in the absence of that element it might not do so,

and Hawkins, J., at p. 281, said:

> The consequence of adopting the argument for the defendant would be that a man by falsely, fraudulently, and extortionately pretending that he has sustained damages to a large amount, when he knows he has not sustained damage to any amount, might obtain payment of sums by means of extortion, under circumstances which might possibly render him liable to the criminal law, and yet be able to retain the money.

Commenting upon this judgment in the notes to *Marriott* v. *Hampton*, in Smith's Leading Cases, vol. 2., p. 431, the author says:—

> The observations of the Judges in that case make it doubtful how far the

doctrine of *Lindon* v. *Hooper* (*supra*), and *Gulliver* v. *Cosens* (*supra*), would now be acted upon.

And in Bullen on Distress, 2nd ed., at p. 224, referring to the old cases above cited, I find the following:—

At the present day it may be questioned whether these authorities would upon this point be followed, the former strictures as to the forms of action being no longer applicable, and the practical objection of want of notice of the grounds relied on being met by the right of the defendant to have particulars, . . .

The matter however seems to me to be conclusively set at rest by the decision of the English Court of Appeal in *Maskell* v. *Horner*, [1915] 3 K.B. 106, 84 L.J.K.B. 1752. In that case the plaintiff in 1900 commenced to carry on business as a dealer in produce in the vicinity of Spittalfields Market. As soon as he commenced business the defendant, who owned the market, demanded toll of him under threat of seizure of his goods. The plaintiff at first refused to pay, and his goods were seized. Then he paid the tolls under protest, and continued paying them, but under protest, until 1912, when it was determined in another matter that the owner of the market had no right to charge tolls. The plaintiff brought his action as for money had and received, for a return of the tolls paid. It was held that he was entitled to recover on the ground that the payment of the tolls had not been a voluntary act on his part. Lord Reading, C.J., in his judgment, [1915] 3 K.B. at p. 118, stated the principle applicable as follows:

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received.

Referring to the cases of *Knibbs* v. *Hall* (1794), 1 Esp. 84; *Lindon* v. *Hooper* (1776) 1 Cowp. 414, 98 E.R. 1160, and *Gulliver* v. *Cosens*, 1 C.B. 788, 135 E.R. 753, his Lordship, at p. 122, said:

Upon examination it will be found that they were decided in the main upon points of pleading and procedure. So far as they may be said to establish a proposition of general application, it is that where the distress levied has been for an excessive amount the appropriate remedy is by replevin and not by action for money had and received. In any event I do not think that these cases modify the broad and general principle of law stated by such eminent authorities in the cases to which I have already called attention.

This case seems to me to establish clearly that a payment made to release impounded goods, under circumstances which

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shew that it was not voluntarily made, may be recovered back as money had and received.

In the case at Bar, the circumstances under which the plaintiff paid the $1,000, shew clearly that he was not giving up his right to any excess over and above the amount of the actual damage suffered.

In this Province, the question came before the Court *en banc* in *Fogde* v. *Parsenau* (1917), 37 D.L.R. 758, 10 S.L.R. 423, and the Court there directed the return of $25 damages paid to a poundkeeper in respect of animals impounded *damage feasant* when it was established that the defendant had no valid claim to such money.

The first contention, therefore, made on behalf of the defendant is not, in the light of the more recent authorities, maintainable. His second contention, that in a case of this kind the payment was made under complusion of legal process, is, in my opinion, equally untenable. This I think is established in the *Maskell* case, where at p. 122, Lord Reading, C.J., says:

> It is argued that as unpaid tolls can be recovered by distress levied upon the goods of the person who fails to pay, the seizure is to be regarded like the issue of a writ, and therefore that a payment of tolls on seizure must be treated as a voluntary payment. I cannot agree with this contention.

It was further contended that as the Stray Animals Act, Sask. stats., 1915, c. 32, made provision by which the owner of impounded animals could pay the sum demanded and by giving a notice that he was going to complain of the impounding on the ground that excessive damages had been charged, could have the damages assessed before a Justice of the Peace, such procedure was his only remedy.

I do not agree with that contention. The Act does provide a simple and inexpensive method of having the amount of damage done ascertained before a Justice of the Peace, but, apart from the Act, as I have already held, the plaintiff has his action for money had and received. In order to take away from him that right of action clear and more explicit language to that effect must be found in the Act; I do not find it here. I am therefore of opinion the plaintiff is entitled to recover. The payment made by him was not a voluntary payment and the amount claimed was grossly excessive and extortionate.

The appeal should be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee and Hodgins, JJ.A. and Latchford, J. June 23, 1919.

MUNICIPAL CORPORATIONS (§ II C—62)—BY-LAW—BUILDINGS FOR DESIGNATED PURPOSE—RIGHT TO PRESCRIBE LOCALITIES—MUNICIPAL ACT (ONT.)—REASONABLE CONSTRUCTION.

While the Municipal Act (Ont.) contains no express power to limit the operation of a by-law passed under the authority of s. 541a to a defined area of the municipality, the power conferred, to prevent, regulate and control the location, erection and use of buildings for a designated purpose; reasonably construed, in its very nature carries with it the right to prescribe in what localities they may be located, erected or used and in what localities they may not.

A permit by a corporation official to do something prohibited by by-law is of no force or validity.

Statement.

APPEAL by the defendants from the judgment of MULOCK, C.J.Ex., at the trial, in favour of the plaintiff, the Corporation of the City of Toronto, enjoining the defendants from using any building upon the premises No. 50 Lakeview avenue, Toronto, as a stable for horses for delivery purposes, contrary to by-law No. 6087, passed by the city council on the 28th May, 1912. Affirmed.

Gordon Waldron, for the appellants.

C. M. Colquhoun, for the plaintiff corporation, respondent.

The judgment of the Court was read by

Meredith,C.J.

MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment of the Chief Justice of the Exchequer, dated the 11th February, 1919, which was directed to be entered after the trial of the action before him sitting without a jury at Toronto on that day.

The action is brought for the purpose of obtaining an injunction restraining the appellants from using any building on the premises No. 50 Lakeview avenue, in the city of Toronto, as a stable for horses for delivery purposes, contrary to the provisions of by-law No. 6087, passed by the council of the respondent corporation on the 28th day of May, 1912.

The by-law provides that:—

"No building shall be located, erected or used for a stable for horses for delivery purposes . . . upon any of the properties fronting or abutting on either side of Lakeview avenue from Dundas street to Churchill avenue, in the city of Toronto, except on the properties fronting on Dundas street at the north-east and

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north-west corners of Dundas street and Lakeview avenue: Provided, however, that the provisions of this by-law shall not apply to any building erected or used on the day of the passing hereof for any of the purposes aforesaid so long as it continues to be used as it was then used."

The appellants, by their statement of defence, allege that a permit was obtained by the female appellant on the 30th May, 1912, for the erection of a private stable on the premises No. 50, and that it was granted under conditions requiring the male appellant "to make outlays for drainage and the like, amounting to $400," and that these outlays were made, and that on the 18th August, 1916, the female appellant obtained a permit for underpinning and other work about the stable, and that in these circumstances the respondent is "not entitled to ask for equitable relief."

The appellants also attack the validity of the by-law because "it exempts buildings existing in the area of prohibition on the day of the passing of the by-law, that is, on May 28th, 1912, whereas the statute from which the respondent derives power, that is, the Municipal Act, R.S.O. 1914, ch. 192, sec. 20, expressly declares that exemption shall be of buildings existing on the 26th day of April, 1904;" and they also attack its validity because "it tends to create a monopoly in respect of the buildings erected or used for the forbidden purposes between the 26th April, 1904, and the 12th May, 1912."

The male appellant also claims by counterclaim that, in the event of the injunction being granted, he be paid his outlays which the respondent required to be made and all his outlays in and about the stable.

The legislation under the authority of which the by-law was passed was 4 Edw. VII. 1904, ch. 22, sec. 19, as amended by 5 Edw. VII. 1905, ch. 22, sec. 21. Section 19 of the Act of 4 Edw. VII. provided that:—

"The Consolidated Municipal Act, 1903, is amended by inserting therein the following as section 541 *a*.:—

"541 *a*. The councils of cities and towns are authorised and empowered by a vote of two-thirds of the whole council to pass and enforce such by-laws as they may deem expedient;

"(*a*) . . .

"(*b*) And in the case of cities only, to prevent, regulate and control the location, erection and use of buildings for laundries, butcher shops, stores and manufactories.

. . . . . .

"Provided that this section shall not apply to any buildings now erected or used for any of the purposes aforesaid so long as they continue to be used as at present" (i.e., 26th April, 1904).

The amending Act (5 Edw. VII. ch. 22, sec. 21) provided that section 541 *a.* be amended by inserting the words "stables for horses for delivery purposes" before the word "laundries."

The stable in question was erected after the passing of the by-law, and the permit which was issued was for a "private stable for one horse and driving shed."

Upon the argument before us it was contended by Mr. Waldron that the by-law was invalid because:—

(1) There was no power to pass such a by-law limited in its application to a defined area.

(2) It does not contain the statutory proviso.

(3) It discriminates in favour of persons who, after the 26th April, 1904, and before the passing of the by-law, had erected stables for the purposes mentioned in it, which were being used for those purposes when the by-law was passed.

I am of opinion that these objections are not well-founded. While the Municipal Act contains no express power to limit the operation of a by-law passed under the authority of sec. 541 *a.* to a defined area of the municipality, the very nature of the power conferred carries with it the authority to do that: the power is to prevent, as well as to regulate and control, and this power may be exercised as to stores and manufactories as well as to laundries, butcher shops, and stables for horses for delivery purposes. Applied to the case of stores and manufactories, it would be absurd to give such a power if the by-law must be applicable to the whole area of the city, as indeed it would be as applicable to most, if not all, of the industries to which sec. 541 *a.* applies.

In my opinion, the power to prevent, regulate, and control the location, erection, and use of buildings for a designated purpose, reasonably construed, in its very nature carries with it the right to prescribe in what localities they may be located, erected, or used, and in what localities they may not.

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The by-law is not, I think, open to the objection that it discriminates. It is general in its application in the future, as it applies to every one who desires to locate or to erect a building for the purposes mentioned in the by-law, and it is also general in its application to buildings previously erected which were then in use. It would, I think, have been an unreasonable exercise of the powers of the council if the by-law had made unlawful the use, for the purposes of stabling horses for delivery purposes, of buildings which had been erected and were then being used for that purpose. If the contention of the appellants were well-founded, a council which desired to exercise the powers conferred by sec. 541 *a*. in regard to stores and manufactories would be bound to make the prohibition it desired to impose applicable to buildings then in use as stores and manufactories, which would be most unjust.

The argument that the by-law tends to create a monopoly falls to the ground if, as I think, the council had authority to limit the scope of its prohibition to a defined area in the municipality and to exempt stables then in use.

The contention that the respondent was not entitled to the injunction because of the permit that had been granted and the outlay consequent upon the requirement as to drains and the like, to which reference has been made, is not well-founded. The permit that was issued was for a private stable for one horse and a driving shed, and not for a building for stabling horses for delivery purposes, and in any case a permit by a corporation official to do something that was prohibited by the by-law is of no force or validity.

Upon the whole, I am of opinion that the appeal fails and that it should be dismissed with costs. *Appeal dismissed.*

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HUDSON and HARDY v. TOWNSHIP OF BIDDULPH.
Annotated.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 21, 1919.

STATUTES (§III—134)—CLAIM AGAINST TOWNSHIP FOR INJURY TO SHEEP—DOG TAX AND SHEEP PROTECTION ACT, R.S.O. 1914, c. 246—ACT REPEALED BY 8 GEO. V. c. 46—CAUSE OF ACTION ARISING BEFORE REPEAL—EFFECT OF REPEAL—DAMAGE ASSESSED BY CORPORATION—APPLICATION FOR MANDATORY ORDER TO AWARD—APPEAL.

The repeal of a statute does not affect the rights of complainants which arose before such repeal, but the prerogative writ of mandamus

cannot be awarded in an action to enforce the rights in question. On a proper application the complainants are entitled to a mandamus to the members of the Township Council ordering them to make the necessary inquiry and award under the statute (R.S.O. 1914, c. 246, s. 18).

[*Rich* v. *Melancthon Board of Health* (1912), 2 D.L.R. 866; *Eastview Public School Board* v. *Township of Gloucester* (1917), 40 D.L.R. 707, referred to.]

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Statement.

APPEAL by defendants from the judgment of Rose, J., 45 O.L.R. 432, in action for a mandatory order to the Township Council for damages under a statute. Reversed.

T. G. Meredith, K.C., and *W. R. Meredith*, for appellants; *J. M. McEvoy*, for respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said, after stating the facts, that the Act in force when the injury to the sheep occurred was the Dog Tax and Sheep Protection Act, R.S.O. 1914, c. 246, as amended by 6 Geo. V., 1916, c. 56, s. 3. The principal question on the appeal was as to the application of the Act, 8 Geo. V., 1918, c. 46, which repealed the former Act. The trial Judge held that it was applicable, basing his conclusion upon the provisions of s. 15 (*b*) of the Interpretation Act, R.S.O. 1914, c. 1. The Chief Justice was unable to see how any of the provisions of the Act of 1918 could be applied to the claim of the plaintiffs, which arose before the passing of the Act.

Meredith, C.J.O.

The provisions of the Interpretation Act which, in the Chief Justice's opinion, were applicable, were those contained in s. 14 (*c*):

> Where an Act is repealed or wherever any regulation is revoked, such repeal or revocation shall not, save as in this section otherwise provided . . . (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment, regulation or thing so repealed or revoked.

When the revised statute with its amendments was repealed, the plaintiffs had a vested right to be compensated for the loss they had sustained to the extent to which the council was bound to award compensation, and the defendants were under a liability to award and pay compensation, and this right of the plaintiffs and this liability of the defendants was not affected by the repeal of the earlier legislation.

Reference was made to the recent decisions in *Re Hogan* v. *Township of Tudor* (1915), 34 O.L.R. 571; *Hogle* v. *Township of Ernesttown* (1917), 41 D.L.R. 123, 41 O.L.R. 394; and *Noble* v *Township of Esquesing* (1917), 41 D.L.R. 99, 41 O.L.R. 400;

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HUDSON AND HARDY v. TOWNSHIP OF BIDDULPH.

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and the Chief Justice said that in coming to his conclusion he was not differing from the reported opinion of any Judge except that of the trial Judge in this case.

There remained the question of the right of the plaintiffs to the mandatory order which they claimed. It was contended by the appellants that such an order could not be made in an action. The weight of judicial opinion was against the right to invoke the remedy of the prerogative writ in an action: *Toronto Public Library Board* v. *City of Toronto* (1900), 19 P.R. 329; *Rich* v. *Melancthon Board of Health* (1912), 2 D.L.R. 866, 26 O.L.R. 48; *City of Kingston* v. *Kingston, etc., R.W. Co.* (1898), 28 O.R. 399, 25 A.R. (Ont.) 462; *Eastview Public School Board* v. *Township of Gloucester* (1917), 40 D.L.R. 707, 41 O.L.R. 327.

The mandamus ought not to be awarded, for two reasons: (1) because it cannot be awarded in an action; and (2) because the members of the council, to whom, if issued, it would be directed, were not parties to the action.

The only mandamus which the plaintiffs would be entitled to, on a proper application, would be a mandamus to the members of the council to make the inquiry and the award which, by s. 18 of R.S.O. 1914, c. 246, the council is required to make, and the members of the council would be the respondents in any such application, and not the corporation. That being the case, no declaration of the right of the plaintiffs to such a mandamus could or ought to be made in a proceeding to which the members of the council were not parties.

The appeal should be allowed and the action dismissed without prejudice to any other proceedings which the plaintiffs might be advised to take in respect of their claim for compensation.

There should be no costs of the action or of the appeal to either party. The plaintiffs had failed, but the merits were with them to some extent at least, and the council was at fault for not having performed the duty which rested upon it under s. 18 of the revised statute. *Appeal allowed.*

Annotation.

ANNOTATION.

Mandamus.

By A. D. ARMOUR, of the Ontario Bar.

Before the present Rules of Practice and Procedure came into force, a writ of mandamus might be obtained in either of three ways:—(1) The High Prerogative Writ, granted only upon motion made in Court; (2) By Statutory

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Writ, granted summarily on motion under R.S.O. 1877, c. 52, s. 17, and later under former Rules 1091-1093, and (3) Under R.S.O. 1877, c. 52, s. 4, and later under former Rules 1081 and 1082, in any action. The first mentioned form of writ was described by Lord Mansfield in *Rex* v. *Barker* (1762), 1 Wm. Bl. 352, 96 E.R. 196, as "a prerogative writ, flowing from the King himself, sitting in this Court (King's Bench) superintending the police and preserving the peace of this country; and will be granted wherever a man is entitled to an office or a function and there is no other adequate legal remedy for it." The writ issued out of the King's Bench Division as a matter of the Sovereign's grace and discretion when the applicant had a right to have anything done, and had no other specific means of compelling its performance. The general objects of the writ are given in Encyclopaedia of the Laws of England, 2nd ed., vol. viii, p. 531, as follows:—"To enforce the performance of duties of a public nature. The more important cases to which mandamus is applicable are those in which it is necessary to compel the proper exercise of jurisdiction of the inferior Courts and tribunals, to enforce the performance of duties by public bodies and public officers, and to compel the election, admission, or restoration to offices and franchises of a public nature." But the writ was never issued where there was another appropriate legal remedy, as by action, *Reg.* v. *The Commissioners of Inland Revenue, In re Nathan* (1884), 12 Q.B.D. 461, at p. 471; *Re Whitaker* v. *Mason* (1889), 18 O.R. 63, or by Petition of Right, *In re Nathan (supra)*, or where a specific remedy was provided by statute for the person aggrieved, *Re Marter & Gravenhurst* (1889), 18 O.R. 243, at p. 255. But where the alternative remedy was inadequate, a prerogative writ was sometimes granted, *Rex* v. *Stepney*, [1902] 1 K.B. 317; *Munro* v. *Smith* (1906), 8 O.W.R. 452. This extraordinary remedy was available only to compel the performance of some imperative public duty. It could not be obtained to enforce a private right or specific performance of a contract, *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Ry.* (1897), 25 A.R. (Ont.) 462, 28 O.R. 399, "granting that a public right may arise out of a private contract and be enforceable by means of the prerogative writ of mandamus, the public duty is owed to the public and not necessarily to the party to the contract. The latter must for the purpose of obtaining the writ be able to shew that he is directly interested in the fulfilment of the public duty not as a party to the contract but as one of the public." *Per* Moss, J.A., at p. 469 (25 A.R.). This writ was never obtainable in an action, but only upon motion; *Smith* v. *The Chorley District Council*, [1897] 1 Q.B. 532; *Toronto Public Library Board* v. *City of Toronto* (1900), 19 P.R. 329. But, in this latter case, Boyd, C., permitted the plaintiffs to have the affidavits re-sworn and further intituled as they would be in an application (not in an action) for the prerogative writ, and in *Eastview Public School Board* v. *Township of Gloucester* (1917), 40 D.L.R. 707, 41 O.L.R. 327, though the Court doubted the right of the plaintiffs to a mandamus in an action, they made a declaratory judgment that the plaintiffs were entitled to the writ, and intimated that one of the members of the Court would sit in Chambers and order the issue of the writ, unless the defendants would consent to the issue of the writ in the action. To entitle the applicant to a prerogative writ, the duty whose performance he seeks to enforce must be imperative and not only discretionary, *Re McLeod* v. *Amiro* (1912), 8 D.L.R. 726, 10 O.W.R. 649, 27 O.L.R. 232. This form of mandamus was not as a rule made peremptory in the first instance, but was made a rule *nisi*, and on the return of the motion

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the respondent was given an opportunity of shewing cause why the writ should not issue. The application was made in Court, and could only be heard in term; consequently delay often occurred in obtaining the writ. R.S.O. 1877, c. 52, s. 17, was accordingly passed, providing for a summary application before a Judge in Chambers at any time, upon notice to the opposite party, and for a peremptory order in the first instance. The provisions of this enactment were carried into rr. 1091 to 1093 of the Rules of Practice of 1897. These rules are now repealed and a prerogative mandamus is always obtained upon a summary application by originating notice (r. 622) returnable before a Judge in Chambers (rr. 207(11) and 208(9)). No writ of mandamus issues; all the necessary provisions are made in the judgment or order (r. 623). Another form of mandamus was obtainable under former r. 1081, in any action. The plaintiff might indorse upon the writ a notice that he intended to claim a mandamus, and might claim in the statement of claim, either together with any other demand which might be enforced in the action, or separately, a mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff was personally interested. This remedy was not the prerogative writ, jurisdiction to grant which was inherent in the Sovereign, but was conferred upon the Courts by R.S.O. 1877, c. 52, s. 4. These provisions were not consolidated in the Statute Revision of 1877, but were embodied in r. 1112, and appeared in the Rules of 1897 in rr. 1081-1083. The Act of 1877 was followed by the Judicature Act, 44 Vict. (1881), c. 5, s. 17(8), providing that a mandamus might be granted by an interlocutory order of the Court in all cases in which it should appear to the Court to be just and convenient that such order should be made. The result of these enactments was that the powers of the Court were enlarged to grant a mandamus in an action in cases where the prerogative writ would not be granted. The remedy was not intended to be available for the enforcing of public duties only. Day, J., in *Baxter* v. *London County Council*, 63 L.T. 767, at p. 771, described the jurisdiction as follows: "The action for a mandamus is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance. When private persons had rights one against the other, the Court had power to grant a mandamus or direct specific performance or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other. But it was never contemplated that the action for a *mandamus* was to supersede the prerogative writ of mandamus." The privilege of claiming such a mandamus is that right to claim a mandamus in an action where the litigant is personally interested in the fulfilment of a duty of a quasi public character, as for instance where a statute gives a right to a person to have an act or duty performed by another, and that other does not perform it, *Young* v. *Erie* (1896), 27 O.R. 530. The intention of the Legislature was to confer upon Courts of law the power of acting in *personam* possessed by the Court of Chancery, practically to give to them the equity powers of injunction and enforcing specific performance of a duty in the nature of an execution; *Smith* v. *The Chorley District Council*, [1897] 1 Q.B. 532 at p. 539. The jurisdiction probably extended as far as enforcing specific performance of a contract by a mandamus in an action; *Grand Junction Rly. Co.* v. *Peterborough* (1883), 8 Can. S.C.R. 76 at p. 123. The chief difference between this remedy and the prerogative writ was that the former might be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie.

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Whereas the prerogative writ is only granted in cases where the performance of the duty sought to be enforced could not be compelled by action; *Glossop* v. *Heston* (1879), 12 Ch.D. 102 at p. 122. The enactment of 44 Vict. is now found in the Judicature Act, R.S.O. c. 56, s. 17, but the former rr. 1081-1083 have been repealed. The question therefore arises whether a mandamus may now be claimed in an action. No provision for claiming such relief in an action is contained in the rules. It would seem that the jurisdiction to entertain such an action being purely statutory, and not inherent, and the enabling statute and rules having been repealed, there is now no such jurisdiction. On the other hand, r. 552 provides that "if a mandamus granted in an action or otherwise," is not complied with, the Court may direct that the Act required to be done may be done so far as practicable by a person appointed by the Court. It is true that a mandamus may be granted by an interlocutory order under s. 17 of the Judicature Act, if the Court deems it just and convenient. But an interlocutory order is any order other than final judgment, whether before or after final judgment; *Smith* v. *Cowell* (1880), 6 Q.B.D. 75; and the enactment does not enable the Court to include a mandamus as relief in the final judgment. Apparently the litigant having established his right to this relief at the trial, must make a further and substantive application by motion. There is still another remedy which the Courts may apply in order to enforce the performance of an act, namely a mandatory order under the Court's equitable jurisdiction to grant an injunction. Originally all injunctions were negative in form, restraining the defendant from performing some act, and so preventing the recurrence of the injury. But when the granting of relief involved the compelling of the performance of some positive act, as, for instance, the removal of work already executed, and the person to whom the order was directed was illiterate, orders in affirmative form, or mandatory injunctions began to be issued; *Bidwell* v. *Holden* (1890), 63 L.T. 104, and now the direct mandatory form instead of the indirect form is commonly and properly used: *Jackson* v. *Normanby Brick Co.*, [1899] 1 Ch. 438. The distinction between a mandamus and a mandatory order must be carefully drawn. A mandamus compels the doing of an act which ought to have been done; while a mandatory order compels the undoing of an act which should not have been done. Moreover, a prerogative mandamus is a legal remedy, while a mandatory order is an equitable remedy. The mandamus claimed in an action, if such an action is now maintainable, is hard to define. It was originally statutory and legal. If it now exists, it does so by virtue of s. 17 of the Judicature Act, and is therefore equitable. In *Rich* v. *Melancthon Board of Health* (1912), 2 D.L.R. 866 at p. 870, 26 O.L.R. 48, the judgment of the Court says in part: "The great weight of modern authority is in favour of the view . . . that the mandamus which may be awarded in an action is either in the nature of the old equitable mandatory injunction or is merely ancillary to the enforcement of a legal right for which an action might be maintained at law." In other words, it is one or the other, and seems to be aptly defined in the language of Kipling as a kind of a giddy harumfrodite. Whenever the evidence justifies an order directing the performance of an act there seems to be ample jurisdiction in the Court, whatever the procedure may have been. In *Stothers* v. *Toronto General Trusts Co.* (1918), 47 D.L.R. 176, 15 O.W.N. 253, the case arose of parties acting under an order made in 1911, before the present rules came into force. The order had been

Annotation. made although no writ had issued and no notice of motion had been served. It was held that the order was valid, because service of a notice of motion was not essential to give jurisdiction to the Court to deal with an application as upon originating notice under the rules then in force. The thing to be done was to bring the motion before a competent tribunal and the notice of motion was only the form by which that was to be accomplished. If the person who, under this rule (938), is the person to be served, is willing to waive that formality and to go before the Court in order that the motion may be made and dealt with, that course may be properly taken. If this case is still law under the present rules, it seems logical to conclude that if the parties are before the Court, no writ or notice of motion is necessary. If no preliminary process is necessary to give the Court jurisdiction, then the method by which the parties are brought before the Court seems immaterial to give the Court jurisdiction to grant the relief of mandamus, whatever the form of proceeding may be. This view is supported by the provisions of s. 16 (8) of the Judicature Act: "The High Court of Justice and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." Rule 10(1) however now provides that every proceeding in the Court other than an action or a proceeding that may be taken *ex parte*, shall, unless otherwise specially provided, be commenced by a notice of motion called an originating notice. It is possible, therefore, that *Stothers* v. *Toronto General Trusts Corporation*, *supra*, is no longer authoritative. Whatever may be the proper method of procedure, if the wrong procedure is adopted it is open to the Court to grant relief in a proper case as was done in *Toronto Public Library Board* v. *City of Toronto*, *supra*, or in *Eastview Public School Board* v. *Township of Gloucester*, *supra*.

N. S.

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BLACKBURN v. THE KING.

Nova Scotia Supreme Court, Harris, C.J., Longley, Drysdale and Mellish, JJ. November 22, 1919.

INTOXICATING LIQUORS (§ III J—94)—HABEAS CORPUS—SECOND OFFENCE—EVIDENCE OF PREVIOUS CONVICTION.

A certificate with a person of the same name mentioned as having been convicted in a locality is some evidence of the identity of the defendant and in the absence of proof to the contrary the Magistrate is justified is taking this evidence of a previous conviction.

[*Rex* v. *Leach et al.* (1908), 14 Can. Crim. Cas. 375; *Ex Parte Dugan* (1893), 32 N.B.R. 98, followed.]

Statement. APPLICATION for a writ of *habeas corpus* for the discharge of defendant from custody under a conviction made by a stipendiary magistrate for unlawfully keeping for sale intoxicating liquor

contrary to the provisions of the Nova Scotia Temperance Act he having been previously convicted of a similar offence.

R H. Murray, K.C., opposed the application.

The judgment of the Court was delivered by

HARRIS, C.J.:—The accused in the name of Samuel Blackburn was convicted by the stipendiary magistrate of the city of Halifax on November 4, 1919, for unlawfully keeping for sale at Halifax intoxicating liquor contrary to the provisions of Part I. of the Nova Scotia Temperance Act. The conviction was for a second offence and the accused was committed to jail for the period of 4 months. He applied for a writ of *habeas corpus* and a writ of *certiorari* in aid thereof and the matter was referred by the Chambers Judge to the full Court.

It appears that on the trial after the accused was adjudged guilty of the offence of keeping for sale, he was asked the usual questions with regard to his previous conviction but declined to make any statement and thereupon a conviction made by the same stipendiary magistrate of the city of Halifax dated July 11, 1919, whereby Samuel Blackburn was convicted for unlawfully keeping for sale intoxicating liquor in the city of Halifax contrary to the provisions of Part I. of the Nova Scotia Temperance Act, etc., was proved and put in.

The motion for the release of the prisoner is made on the ground that there is no evidence of the identity of the accused with the person previously convicted.

The contention is that the identity of name in the two convictions both for the same offence committed in the city of Halifax is not evidence of the identity of the person. The accused was present when the conviction for the first offence was put in evidence but gave no evidence to shew that he was not the Samuel Blackburn referred to.

The short question to be determined is whether it can be said that there was no evidence upon which the stipendiary magistrate could find the identity proved.

It must be admitted that if there was any evidence we cannot say that it is insufficient; that is a question for the stipendiary magistrate and we cannot inquire whether he came to the right conclusion. See *per* Riddell, J., in *Rex* v. *Leach et al.* (1908), 14 Can. Cr. Cas. 375, at p. 396; *Regina* v. *Brown* (1888), 16 O.R. 41, at 48.

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The counsel for the accused relied largely upon the decision of the Supreme Court of Manitoba in the case of *Regina* v. *Herrell* (1898), 1 Can. Cr. Cas. 510, but this case was not followed by the Court of Appeal in Ontario in *Rex* v. *Leach et al.*, 14 Can. Cr. Cas. 375, and is in conflict with other cases.

In *Rex* v. *Leach et al.*, Britton, J., said at p. 382:

> I am of opinion that the certificate with a person of the same name mentioned as having been convicted in the locality is some evidence.

And Riddell, J., after discussing many authorities, at p. 396, said:

> Upon principle it is plain, I venture to think, that the identity of names is some evidence of the identity of person.

In *Ex parte Dugan* (1893), 32 N.B.R. 98, at 99, Palmer, J., said:

> The same name in the previous convictions is some evidence of the identity of the defendant and, in the absence of proof to the contrary the Magistrate was justified in making the conviction.

(See also Tuck, J., to the same effect.)

See also Wigmore on Evidence, 2529; *Thayer* v. *Vance* (1847), 3 N.S.R. 269.

It was suggested on the argument that the decision in the Manitoba case could be justified on other grounds. This may be so but the decision is not binding on this Court and I find myself unable to follow it in so far as it deals with the question under consideration.

I think there was some evidence of identity here and, that being so, the conviction must stand.

The application for the discharge of the accused will be dismissed. *Application refused.*

[A motion to have the application dismissed with costs was refused on the ground that the defendant had the right to come to the Court to have the legality of his conviction determined.]

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S. C.

GOULET v. WINTERS.

Quebec Superior Court, Gibsone, J. April 2, 1919.

PROHIBITION (§ IV—24)—COURTS MARTIAL—JURISDICTION—C.P. (QUE.) ART. 1003—ARMY ACT—RULES OF PROCEDURE.

Courts Martial are Courts of inferior jurisdiction under C.P. art. 1003. They require to be legally constituted, and the accused should be persons subject to military law.

A writ of prohibition may be issued only where there is absence of jurisdiction or where the tribunal exceeds its jurisdiction and will not lie for alleged breaches of the Rules of Procedure or alleged errors by the Court in its findings on the pleas of the accused.

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PETITION for writ of prohibition. The legal questions raised by the petition are fully set out in the following remarks.

Armand Lavergne, K.C., for appellant; *L. G. Belley*, K.C., for respondents.

GIBSONE, J.:—This matter comes up on application for a writ of prohibition to prohibit the president and members of a General Court Martial from proceeding with the trial of the petitioner upon certain charges set out in the petition and on which he was arraigned before the Court Martial.

The petitioner seeks an *interim* writ contending that when he has proved the allegations of his petition, the writ will be made absolute.

The writ is asked for under art. 1003, C.C.P. Necessarily the ground of the application is that the General Court Martial is without jurisdiction, as that is the only ground on which a writ of prohibition may be obtained. I will deal succinctly with the different grounds alleged by petitioner to establish the absence of jurisdiction.

I must first consider a question raised as to the issue of writ put forward on behalf of the respondents, namely, as to whether a Judge of this Court has jurisdiction to issue the writ with respect to a Court Martial.

I entertain no doubt that this Court has jurisdiction.

The existence of jurisdiction on the part of the civil Courts to prevent the assumption or exercise by a Court Martial of jurisdiction, in excess of that conferred by law, whether the excess has reference to the subject matter or to territorial limits, or as to the person, has, I think, been admitted in England since 1782, and though remarks may have been made in 1833, questioning to some extent the exercise of this power as to Naval Courts Martial, no doubt, so far as I know, has been expressed as to the jurisdiction in the case of Military Courts Martial. Halsbury, vo. *Crown Practice*, vol. 10, No. 299 and vo. *Royal Navy*, vol. 25, No. 28.

That is what would be expected, namely, that the Courts whose jurisdiction and duty extend to the whole *corpus* of the law of the country should be empowered to prevent the violation of a statute, namely, to prevent the exercise by some special Court of restricted jurisdiction and authority (such as a Court Martial) of power which the statute has not conferred upon it.

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The jurisdiction of this controlling Court, however, must be exercised in the manner that statutory law provides; and, in cases such as the present, where the special tribunal has a definite and circumscribed jurisdiction granted to it, the supervising Court must not assume to interfere with the proceedings of that special Court, while it acts within the jurisdiction granted to it. The supervising Court may interfere when such special Court has exercised or is about to exercise powers beyond those conferred upon it by law. I consider the law to be undoubted that the writ of prohibition may be issued only in case of absence of jurisdiction or of exceeding its jurisdiction by the special tribunal.

As soon as it is admitted that jurisdiction exists in a special tribunal, the exercise of that jurisdiction cannot be interfered with from outside, the only recourse against its judgment are the appeals or other remedies specially provided for that tribunal by law or by procedure.

The rules of practice prevailing in that tribunal would be beyond the power of a supervising Court to interfere with, provided these rules were operating entirely within the jurisdiction of such tribunal.

The writ of prohibition is a prerogative writ, it is an extraordinary recourse and it will be issued only in a substantially clear case of want of jurisdiction and of imminent danger of injustice. *In re John F. Gaynor* (1905), 7 Que. P.R. 115; *Champagne* v. *Simard, et al.* (1895), 7 Que. S.C. 40;—High, *Extraordinary Legal Remedies*, p. 709.

And it is uniform jurisprudence in this Province that writ is to be issued only when there is no other remedy equally convenient, beneficial and effectual.

While the issue of the writ is to be subject to these precautions, I must add that it is a writ that must be granted *ex debito justitiae* when the wrong is shewn to exist; the mere fact that the matter might not be important would not of itself be sufficient ground for withholding it. Halsbury, vo. *Crown Practice*, vol. 10, No. 288.

I consider the above to be the rules which must guide me in this matter.

I must say at once that there is no allegation of illegality in the constitution of this Court Martial. Its having been convened by legal authority is not one of the questions raised and is, I consider, admitted.

Some of the petitioner's grounds may, for convenience, be classified under the heading of failure, on the part of the Court Martial, to observe essential forms of procedure laid down by military law and the inobservance of which, it is contended, has had the effect of vitiating the proceedings *in toto*; other objections are the misdescription of the accused in the charge sheet, the erroneous findings of the Court Martial upon the defendant's pleas in bar.

With regard to the defects in procedure which the petitioner alleges brought about loss of jurisdiction to the Court Martial, I refer to my remark above that I consider matters of procedure before the Court Martial to be matters within its exclusive jurisdiction, this, of course, to be qualified by the rule that in assuming to act upon a rule of procedure, the Court Martial does not apply the rule in a manner or to a matter beyond its powers.

The defects in procedure which the petitioner alleges, are these:

1. The Rule of Procedure 14, as laid down for Courts Martial, requires that when an accused is for trial before Court Martial he must within a reasonable time before trial be given "a true copy of the summary of evidence." The petitioner admits that a document purporting to be copy of the summary of evidence was given to him, but declares (and it is not contested by the respondents), that there was no signed certificate on this document declaring that it was a true copy. He complains that this is not compliance with the rule. I quite fail to see how the absence of this certificate could affect jurisdiction of the Court Martial. The Rule of Procedure does not mention "certified copy," but "a true copy," so it is left as a question of fact and is for the Court Martial to remedy in accordance with its own practice.

The petitioner alleges also that the summary given to him was not complete, but no further particulars of this allegation are mentioned in the petition, nor were dealt with by counsel. I make the same remark with respect to this ground, namely, that it is one within the procedure of the Court Martial, and not one affecting jurisdiction.

2. That with respect to the petitioner's pleas in bar, a member of the Court, Lt.-Colonel Girouard, was examined as a witness, and while Lt.-Col. Girouard was being so examined, the member-

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ship of that Court was reduced from five, the legal minimum, to four members. Petitioner contends that Lt.-Col. Girouard then gave evidence as a witness for prosecution, a circumstance which would be illegal under sec. 50 of the Army Act. The respondents affirm that on the contrary, Lieut.-Col. Girouard was heard exclusively as petitioner's witness and to prove his pleas in bar. This is not a matter that, in my judgment, would affect the jurisdiction of the Court Martial, or would justify the issue of the writ applied for.

The members of the Court knew the circumstances under which Lt.-Col. Girouard gave evidence and, in the absence of some very special allegations, it is to be presumed that they based their decision upon what was a matter of knowledge with them. Their decision was on a matter within their jurisdiction and this Court would have no jurisdiction to revise it.

S. 50 of the Army Act specially provides that a member of the Court may be heard as a witness for the defence, and the note in the Manual of Military Law under R.P. 77 calls attention to this provision.

3. The petitioner alleges that the Court became *functus officio* owing to the fact that the trial being fixed for March 27, an adjournment was made in the absence of the president and of another member to March 31.

I consider that the Rules of Procedure 65 quite cover the regularity of the adjournment.

4. S. 45 of the Army Act provided that when a person subject to military law is in arrest awaiting trial and remains in custody for more than 8 days without a Court Martial being ordered to assemble, a report must be made by his C.O. to higher authority and a similar report renewed every 8 days, while this state of affairs continues; R.P. 1, provides that this report may be by letter.

The petitioner contends that such reports were not made in his case, and, therefore, that under King's Regulations 441, he is entitled to his liberty.

This proposition is quite untenable. In the first place, s. 45 of the Army Act does not make the custody illegal by reason of this report not being made; on the contrary, it assumes its legality, but imposes the obligation upon the prisoner's C.O.; the obligation

is a matter of discipline between the C.O. and higher authority. King's Regulation 441 has no reference to par. 1 of s. 45, Army Act, by its terms; it has reference to par. 4 of s. 45, Army Act, namely, it has to do with the written charge to be delivered to the commander of a guard when a prisoner is put in custody.

The provisions of this s. 45 are declared not to be applicable in case of active service and the petitioner contends that as he was not on active service at any time before or after his arrest, the section applies to his case. In view of my interpretation of the par. 1, this contention need not be passed upon.

Such are the defects of procedure alleged.

Next is the contention that the writ should be granted because the petitioner is incorrectly described in the charge sheet. This misdescription, however, which is alleged, does not amount to an allegation that the accused is not a person subject to military law; I must find that so long as this latter quality is not called in question, the jurisdiction of the Court Martial cannot be affected by misdescription. R.P. 33 provides for corrections in the description of the accused and it will doubtless be acted upon by the Court Martial, if there be occasion for it.

The remaining grounds for the application are that the Court Martial erroneously dismissed the petitioner's pleas in bar.

He pleaded *autrefois acquit* and pardon, and in support of these alleged that this whole matter, so far as military jurisdiction is concerned, had been disposed of by his commanding officer. He recites that he was arrested on November 4, that a summary of evidence was made by his C.O. on November 21; Court Martial to try him on the charges was ordered to assemble on December 2, and later this Court Martial was dissolved, and, on January 31 he was handed over to the police authorities, because he was under accusation there, and had been committed for trial. As further evidence of pardon or condonation he alleges that he has been borne on the parade states of his unit, from February 1 to March 19.

In view of the fact that his C.O.'s summary of evidence brought about the order for the Court Martial, which assembled on December 2, how can it be said that his C.O. condoned or disposed of the offence?

In view of the fact that this first Court Martial never tried the

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accused, but was dissolved, how can it be said that he was *autrefois acquit*, if there was no trial?

I mention the circumstances represented by the petitioner with regard to these pleas in bar, but I consider there is a peremptory reason against admitting them as grounds for the issue of the writ (not only in the case of these two *autrefois acquit* and pardon, but also in the case of the one next to be dealt with *autrefois convict*) namely, that disposal of these pleas in bar is part of the judging of the charge against the accused; if a Court has jurisdiction to deal with a case, it necessarily follows that it has jurisdiction to deal with all the defences and all pleadings that may be raised. Alleged incorrectness of a judgment on any of these matters cannot be classed as an excess of jurisdiction.

As to the plea of *autrefois convict*, the petitioner complains that the Court Martial wrongly dismissed it. The essential requirement for this defence is that the accused should have been on trial. It must be admitted that the accused has not been on trial; he has been before the magistrate and has been committed to stand trial, but no trial has taken place. That is sufficient to dispose of this plea.

The accused complains that if called upon to plead before the Court Martial in advance of his trial before the Criminal Court, he will suffer prejudice. That of itself is no ground for denying jurisdiction to the Court Martial.

It is quite true that trial by Court Martial does not secure an accused from trial again on the same facts by the Civil Courts, Army Act, s. 162, but that is all that this s. 162 provides, it does not direct the Civil Court to try him. The Civil Court may admit the plea of *autrefois acquit* or *autrefois convict* based on the military Court's trial; and, in a proper case, I have no doubt it would. The Army Act is dealing only with the rules for Courts Martial; the rules for Criminal Courts are elsewhere.

In dealing with the petitioner's contentions as to his pleas in bar, I have assumed that the charges on which he is committed to trial to the Court of King's Bench and those before the Court Martial are the same; the affidavit filed by the respondents declares that they are not. If the charges were identical, the most that could be said in the petitioner's favour would be that

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there was concurrent jurisdiction in the military and in the civil Court. A writ of prohibition addressed to one would not lie in such case.

I conclude therefore that no *primâ facie* case for a writ of prohibition has been made out, and I must dismiss the petition.

Petition dismissed.

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REX v. LIGGETTS-FINDLAY DRUG STORES, Ltd.

Alberta Supreme Court, Appellate Division, Stuart, Simmons and McCarthy, JJ. December 4, 1919.

MUNICIPAL CORPORATION (§ II C—63)—BY-LAW—POWER TO PASS GIVEN BY STATUTE—LANGUAGE OF BY-LAW—AUTHORIZATION.

A by-law containing language which means the same to the ordinary person as the language contained in the authorizing statute, is an effective and enforceable by-law.

Statement.

APPEAL from the trial judgment in an action for infringement of a municipal by-law. Affirmed.

J. McKinley Cameron, for defendant; *C. J. Ford*, K.C., for respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—I think this appeal should be dismissed. The only questions we can deal with, on the material supplied us, are the questions of the proper interpretation of the by-law and of the material statutes.

The material statutes gave the council power to pass a by-law fixing "the hours of the several days of the week at and after which" the shops are to be closed for serving customers. The by-law enacted that "all drug shops in the city of Calgary shall be closed for the admission of customers at 10 p.m. on each and every day of the week."

It is contended that by the omission of the words "and after" which are used in the statute the by-law was unauthorized and that in any case the by-law as drawn should be interpreted as meaning only that the shops should be closed for an instant at ten o'clock but not as forbidding their re-opening for customers shortly thereafter.

I cannot agree with either of these contentions. I think no one but a lawyer, I mean a person trained in legal technicalities, such as a Judge or a lawyer, would ever think of imputing such a meaning to the by-law. Everyone knows what is meant by

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closing a shop at 10 p.m. The meaning conveyed by the words used is too obvious for doubt. The rule, of course, is that the grammatical sense must in general be adhered to but with this limitation that if it leads to an absurdity or to something meaningless an effort must be made to give some sensible meaning unless the language is absolutely intractable, *Esquimalt Water Works Co.* v. *Victoria* (1904), 10 B.C.R. 193. Here the sense contended for by the appellant leads to an absurdity. I think we should take the words to mean what they would quite clearly mean to the ordinary person and that is that shops should be closed not only at the moment of 10 o'clock but for the rest of that day. In this sense the words of the authorising statute are complied with.

There is no doubt that the statute of 1919 in express words made the consent of the Lieutenant-Governor in Council unnecessary for a by-law "theretofore" passed.

These are the only points raised that we can deal with on the material before us and the appeal must therefore be dismissed. But as there is some doubt as to who is responsible for the loss of the file which has deprived the appellant of a recourse to the other grounds, I think there should be no costs.

Appeal dismissed.

AIMER v. CUSHING BROS., Ltd.

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Saskatchewan King's Bench, Bigelow, J. November 20, 1919.

MASTER AND SERVANT (§ II B—144)—DANGEROUS MACHINERY—NEGLIGENCE OF EMPLOYEE—NEGLIGENCE OF EMPLOYER—INJURY—DAMAGES.

A plaintiff cannot recover damages for injuries received where both the plaintiff and defendant are at fault, and the responsibility of the accident has been placed on both, the loss cannot be shared; it must be borne by the injured party.

[Notes to *Herdman* v. *Maritime Coal Railway and Power Co.*, (1918), 40 D.L.R. 96 at 103, referred to.]

Statement.

ACTION to recover damages for injuries received while employed in defendants' factory. Dismissed.

P. E. Mackenzie, K.C., for plaintiff; *F. F. MacDermid*, for defendant.

Bigelow, J.

BIGELOW, J.:—The plaintiff was employed in the defendant's woodworking factory at Saskatoon from March, 1916, and on January 8, 1919, when operating a machine known as a shaper, had four of his fingers injured so as to necessitate amputation.

A blue print was put in evidence, shewing the nature of the machine. It had two spindles and two knives on each spindle, the knives revolving very rapidly. The machine was used for

doing a variety of work, particularly moulding. There is nothing particularly difficult or dangerous about operating the machine. As Wormleighton (a witness for the plaintiff) says: "It is not difficult for any bench man to operate it. The difficult part is getting the machine ready." The plaintiff had got the machine ready by himself, and the accident happened while he was operating it. There was nothing latent or concealed about the danger, and it required no special skill or training to operate it. The plaintiff was employed first as a bench carpenter. As such he would no doubt become familiar with the grain in wood, so as to know how to put the knife against the grain. The plaintiff says he had operated the same machine about six times before the accident, and that he began to use it in July, 1918. In cross-examination he said that it might have been before June that he first operated it. Reid, a witness for the plaintiff, said he saw the plaintiff operating the machine at different times during the summer of 1918.

There was no one in the factory whose sole duty was to operate this machine. The reason for this was that there were only two or three hours' work a day for this machine. When the plaintiff was first given work that involved using the machine he made no objection. As he says, "I thought I knew the nature of it and how to operate it. I did not consider it particularly dangerous."

The plaintiff contends that the injury was caused by the defendant's negligence because the machine was not securely guarded. S. 19, sub-s. (a) of The Factories Act, R.S. Sask., 1909, c. 17, provides:

> All dangerous parts of mill gearing, machinery, vats, pans, cauldrons, reservoirs, wheel races, flumes, water channels, doors, openings in the floors or walls, bridges and all other like dangerous structures or places shall be so far as practicable securely guarded.

Breach of such statutory duty would constitute negligence. *Hilton* v. *Robin Hood Mills Ltd.* (1918), 11 S.L.R., 370; affirmed by (1919), 47 D.L.R. 282, 12 S.L.R. 245.

Was the dangerous part of the machinery securely guarded as far as practicable? The defendant installed with the machine duplicate guards for the two arms of the machine. These guards were up-to-date, and in my opinion securely guarded the machine as far as practicable. At the time of the accident one of the guards had been broken, but that did not make any difference to the

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accident in question, because only one of the arms was in use. This guard or springer was used for the double purpose of guarding the knives and holding down the piece of wood on the table. Some of the workmen used this guard or springer, and some did not. It could be detached from the machine, and was detached at the time of the accident. The plaintiff did not know that there was any guard for the machine. The device that was intended for a guard and a springer he only knew as the springer; he thought it was intended to hold the piece of wood on the table. The defendant never instructed the plaintiff as to the use of the guard or springer. I think, then, that although the machine was securely guarded as far as practicable, the defendant was negligent in not instructing the plaintiff as to the use of the guard. Labatt, Master & Servant, 2nd ed., vol. 3, p. 3043, par. 1146:

> When the servant is thus required to work amidst new surroundings, or to undertake new duties, the master becomes at once chargeable with the obligation of giving him instructions in any case where there is a real augmentation of the risks, owing to the fact that the servant has not sufficient experience or intelligence to enable him to safeguard himself.

Weppler v. *Canadian Northern R. Co.* (1913), 14 D.L.R. 729, at 735: Perdue, J.A.:

> The judgment of Lord Wensleydale in *Weems* v. *Mathieson*, 4 Macq. 226, clearly shews that the noble and learned Lord was also of opinion that a master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

I find, however, that there was contributory negligence on the part of the plaintiff, and that this was the cause of the injury. This consisted in (a) putting the wood up to the knives against the grain of the wood; (b) the way he had his hands on the wood. At the trial he shewed the way he had hold of the wood, *i.e.*, with his fingers projecting over the wood on the side towards the knives. This was inviting disaster. (c) His omission to attach the tomplate to the piece of wood he was working with. (d) In not using the stud. This was a part of the machine to the knowledge of the plaintiff, and could be used as a pivot against which the piece of wood would be placed so as to feed it gradually to the knives.

Where both the plaintiff and the defendant are at fault, there is no sharing the loss, but the injured person bears it all. See notes in 40 D.L.R., at p. 103.

The plaintiff's action is dismissed with costs. *Action dismissed.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. December 4, 1919.

SECRET COMMISSIONS (§ I—1)—APPLICATION TO RESTRAIN MAGISTRATE—SECRET COMMISSIONS ACT—SUMMARY CONVICTION—JURISDICTION OF MAGISTRATE.

An application for a writ of prohibition will not be granted, where its effect would be to negative or nullify parts of a section of a statute, the right of a Police Magistrate to proceed under Part XV. of the Criminal Code (Summary Conviction Part) on a charge under the Secret Commissions Act is upheld.

Statement.

APPLICATION for prohibition to restrain a Police Magistrate from proceeding under the summary conviction part of the Code on a charge under the Secret Commissions Act, 1909. Dismissed.

A. A. McGillivray, K.C., for defendant; *James Short*, K.C., and *G. A. Walker*, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—This is an application for prohibition to the Police Magistrate to restrain him from proceeding under the summary conviction part of the Criminal Code, R.S.C., 1906, c. 146, on a charge under the Secret Commissions Act, 8-9 Edw. VII., 1909, c. 33. The section (3) provides that the person committing any of the acts specified is guilty of an offence and liable upon conviction on indictment to the prescribed penalty and liable upon summary conviction to a smaller penalty.

The only question raised is the magistrate's jurisdiction to proceed by way of summary conviction without asking for the consent of the accused or against his wish. It is true that in many cases the accused is given the option of a summary trial instead of a trial on indictment but if without any statutory authority for it we were to hold that in this case, he is entitled to the same option we must negative or nullify one part of the section. If he says "I will not be tried on indictment" then he repeals that portion of the section which says he is liable on indictment and if he says: "I will only be tried by indictment" then the other portion of the section has no application to him.

I cannot see how the jurisdiction of the magistrate to proceed in either way can depend on the will of the accused. I would dismiss the application.

Stuart, J.

STUART, J.:—The defendant, a conductor in the employ of the Canadian Pacific R. Co., was brought before G. E. Sanders, Police Magistrate of the City of Calgary, and there charged upon an information laid by one Carpenter with having, while employed

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as such conductor, corruptly accepted the sum of $4.50 from two certain persons as a bribe for permitting those persons to ride on his train, contrary to the Secret Commission Act, 8-9 Ed. VII., 1909, c. 33.

S. 3 of the Act declares that

> everyone is guilty of an offence and liable, upon conviction or indictment, to two years' imprisonment, or to a fine not exceeding $2,500, or to both and upon summary conviction to imprisonment for six months with or without hard labour or to a fine not exceeding one hundred dollars or to both who

does certain prohibited acts of which the act charged is one.

It appears that the Police Magistrate proposed to deal with the case under Part XV. of the Criminal Code, R.S.C., 1906, c. 146, respecting summary convictions instead of under Part XIV. relating to preliminary enquiries, and that counsel for the accused objected upon the ground that the offence being one triable either by indictment or summarily under Part XV., the accused had a right, if he so desired, to be tried by indictment and not summarily. As the magistrate insisted upon his jurisdiction to proceed summarily the defendant moved, in Chambers, before Walsh, J., for a writ of prohibition, but there being conflicting decisions on the point in the different Provinces the motion was referred directly to the Appellate Division.

None of the cases to which we were referred arose under the Secret Commissions Act. They all arose under ss. 169 and 773 of the Code, the former of which enacts in substance that everyone who obstructs a peace officer in the execution of his duty

> is guilty of an offence punishable on indictment or on summary conviction and liable if convicted on indictment to two years' imprisonment, and, on summary conviction before two Justices to six months' imprisonment or to a fine of one hundred dollars.

The cases were, however, complicated by the fact that s. 773 gives "a magistrate" power, *with the consent of the accused*, to hear and determine the charge in a summary way, that is, under Part XVI. of the Code dealing with summary trials.

In the present case we are not necessarily either assisted or confused by a consideration of s. 773, or of Part XVI. The offence charged is not referred to in Part XVI. at all. We have presented to us the simple, but I fear rather difficult, problem of deciding whether when a statute or a certain section of the Code makes a certain act an offence and triable either by indictment or by way of summary conviction under Part XV. (not Part XVI.),

and provides a heavier penalty upon indictment, and a lighter one upon summary conviction, there is an option given to the accused to ask to be tried by indictment rather than under Part XV.

Clearly there are two tribunals provided, by either of which the accused may be tried. The question is, who has the right to decide upon the method of trial?

I confess that the reasoning in the analogous cases under ss. 169 and 773, is not convincing to my mind, neither on the one side nor on the other. Take the case of *Rex* v. *West* (No. 2) (1915), 25 Can. Cr. Cas. 145, 35 O.L.R. 95, in the Ontario Court of Appeal. The Court there merely affirms that the choice rests with the prosecution without really giving any reason therefor.

The reference in that case to s. 706 of the Code, which was also pressed upon us by Mr. Walker, does not seem to me to advance the case very far. No one doubts the jurisdiction of the Justice to try the case once it is properly decided that the case is to proceed in his Court. The reference to s. 706 might be met by a corresponding reference to s. 668 of Part XIV., dealing with preliminary hearings. That section says:

> When any person *accused of an indictable* offence is before a Justice . . . the Justice SHALL proceed to inquire into the matters charged against such person *in the manner hereinafter directed.*

S. 28 of the Interpretation Act, R.S.C., 1906, c. 1, says:—

> Every Act shall be read and construed as if any offence for which an offender may be (a) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence; and (b) punishable on summary conviction were described, or referred to as an offence, and
>
> All provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence.

Clearly therefore the present offence is an indictable offence and comes within s. 668. The accused was before the Justice "accused of an indictable offence," and s. 668 says that the Justice *shall* proceed by preliminary hearing.

But, just as clearly, the accused was suspected (in the words of s. 706), "of having committed any offence or act . . . for which such person is liable on summary conviction to imprisonment, fine, etc." The Justice, therefore, had jurisdiction to proceed summarily.

That seems to me to present the *impasse* in its clearest light.

Another circumstance worthy of note is this, that under

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Part XVI. relating to summary trials of indictable offences, the Justice, even after receiving the accused's consent to be tried summarily, may at any time before the defence is entered upon refuse to try the case summarily, and may commit the accused for trial (s. 784). On the other hand, there is no provision, in Part XV. relating to summary convictions, for the magistrate changing his mind and, deciding to commit for trial. The obvious reason for this is that Parliament in enacting Part XV. had in mind only offences which were punishable by summary conviction alone, and not those comparatively few offences of which the present is one, which are triable either by indictment or summarily, *i.e.*, by the summary conviction procedure.

Once the Justice has taken what amounts to a plea from the accused under s. 721, it would appear that he *must* proceed and try the case and convict or acquit accordingly. No doubt if he should discover that he had made a mistake, and that the case was triable only by indictment and not under Part XV. at all, he could correct his mistake, if not too late, and commit for trial. But, where the offence is declared to be triable either by indictment or by way of summary conviction, it is clear that the decision or choice as to the method, whoever is to make it, must be made *at the beginning* and not after the witnesses have been examined, because under Part XV., by s. 721, the first thing to be done is to ask for a plea in the words there provided. If that is done the decision is then thereby made to proceed summarily.

Who then has the right to make that decision? Has the Justice a discretion? Or has the prosecutor the right to say to the Justice "I want this man tried by you summarily," or "I want you to take a preliminary hearing and commit this man for trial for an indictable offence"? Or has the accused the right, when before the Justice, to decide the capacity in which the Justice is to act?

Under our procedure criminal cases in their inception at any rate take the form of a contest between two private parties. One accuses and the other defends. For myself, I see no very good reason why one of the parties any more than the other should have the right to select the nature of the tribunal. Of course there are, no doubt, to be found cases in civil matters where the "actor" or plaintiff may decide into what Court he is going to

summon the "reus" or defendant, provided he selects a Court which has jurisdiction. An example may be found in the provision of our law by which a plaintiff may waive enough of his claim to bring it down to $600 and so summon his defendant to the District Court. And I imagine that a plaintiff in the old days could choose any one of the three common law Courts wherein to sue his defendant. All he had to do was to allege the fiction necessary to establish jurisdiction. But into criminal matters other considerations enter, one of which is the interest of the public of which the Justice of the Peace is the guardian. To give the choice to the prosecutor is open to the one obvious objection, that to save an obviously guilty person, one secretly a friend, might hasten to lay a charge and demand a summary trial so that only one-quarter of the otherwise possible term of imprisonment could be imposed. On the other hand, to give the option to the accused himself might operate in the same way, because if he has a right to choose trial by indictment he surely would have the right to choose also a summary trial. The possible answer to this is that it might be that he could have the right to choose trial by indictment, that is, in a higher Court, but not a right to choose the summary trial and thus the lesser punishment.

Really, the argument for the right of choice in the accused rests upon two grounds. 1. It is said that ss. 66 and 67 of the North-West Territories Act preserve the right to a trial by jury to the accused in such a case as this. But, as was pointed out at the hearing, those sections clearly deal merely with a right of choice when and after the accused has been sent up to the Supreme Court for trial, not with any right of choice when he is before the Justice of the Peace. 2. There is the argument that the usual method of trial, the first and original method, in a criminal case is trial by jury, that the accused has *primâ facie* this fundamental right, and it must be taken away from him specifically or otherwise he still enjoys it. This argument was used by Cross, J., in *Rex* v. *Van Koolberger* (1909), 16 Can. Cr. Cas. 228.

The answer to this last contention seems to me to be that there is no doubt that jurisdiction has been given to either of two tribunals to try the accused, and that unless the jurisdiction given to the lesser tribunal has, by some apt words, been made conditional, then it must be held to be unconditional. I can find

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nothing which makes the jurisdiction of the Justice of the Peace to try summarily conditional upon the consent of the accused.

My opinion is that the Justice of the Peace has a discretion and that as guardian of the interests of the public, he can and must decide in which way he is to proceed.

There is a section in the Code to which I think reference ought to be made. This is s. 15 which reads as follows:

> Where an act or omission constitutes an offence punishable on summary conviction or on indictment under two or more Acts, or both under an Act, and at common law the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence.

It seems to me that that section covers not only the case where the same act is made an indictable offence in two or more statutes, or is punishable under summary conviction under two or more statutes, but also the case where it is made punishable by one statute under summary conviction and by another statute under indictment. In the latter case it provides that he may be proceeded with under either of such Acts. The present case, I think, is just the same as if there had been one Act making the taking of a secret commission or bribe punishable under summary conviction and another Act making it punishable by indictment. This may indeed be said to constitute an argument for a right of choice in the prosecutor, because, it may be said, he could surely choose the form of information which he proposed to lay, and by mentioning therein one statute rather than the other he would thereby decide the form of trial. But even then it does seem to me that a Justice of the Peace, whose duty it is to make enquiries and, if necessary, to inform himself properly, to hear a witness or two before taking an information at all, ought, as the protector of the public interests, have at any rate an ultimate power of deciding whether the case is serious enough to justify an indictment. Particularly when there are two courses open there seems to me to be a special duty upon him to enquire as far as possible into the circumstances before making his decision. Unless there are good reasons for committal, no doubt the desire of the prosecutor ought to be given considerable weight.

It may be said that in the present case it is not necessary to decide as between the right of the Justice and that of the prosecutor because all that is necessary to decide is whether the accused has

or has not a right of election. But in my opinion the only satisfactory principle which would exclude the option of the accused, viz: the ultimate duty of the Justice to decide what is best in the public interest would also exclude the absolute option of the prosecutor. I do not think the Justice is absolutely bound to follow the direction of the prosecutor as to the capacity in which he has to act.

It may also be said that there could be no prejudice to public interest in a trial by indictment. But there is at least the question of trouble and expense. I think the Justice is the person to say whether the case justifies the incurring of such trouble and expense. Parliament has undoubtedly said that a Justice is a proper and fit person to try the offence created by the statute and I cannot see that, in the face of that and when there is no condition of consent attached, the accused has any right to question the wisdom of Parliament. He must, I think, submit to the tribunal created by Parliament with power to try him provided that tribunal in its discretion decides to do so.

I do not think the case shews that the magistrate accepted without question the preference of the prosecutor. He merely said that that circumstance had some weight with him. If that meant that the prosecutor's desire that the less severe penalty should be imposed then I think, within limitations, the magistrate could, not improperly, take that into account. If, however, it meant that the prosecutor thought the chances of conviction were better before the magistrate than upon indictment then of course the desire of the prosecution should not have been regarded but I see nothing to justify an inference that this was what the magistrate had in mind. In any case there should be no manœuvring allowed for or against the trial by jury so far as the magistrate is concerned. If Parliament has expressed any opinion at all as to the respective merits of the two methods of trial it would rather seem to be in favour of indictment because then the heavier penalty can be imposed and there is an appeal from the Justice. All the more serious crimes are triable by jury and as long as Parliament has confidence in that method it ought to be sufficient.

I would, therefore, dismiss the application but in the circumstances without costs.

Simmons, J.

SIMMONS, J.:—The defendant J. R. McNabb was charged

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under s. 3 of the Secret Commissions Act, 1909, before G. E. Sanders, Police Magistrate, with receiving a secret commission or bribe to allow a passenger to ride on the Canadian Pacific R. Co.'s train. This section provides that

> Every one is guilty of an offence and liable on conviction on indictment to two years' imprisonment, or to a fine not exceeding $2,500 or to both; and, upon summary conviction, to imprisonment for six months, with or without hard labour, or to a fine not exceeding $100 or to both.

Counsel for defendant asked the Police Magistrate at the opening of the case, to reserve a case for the Court of Appeal as to whether the magistrate had jurisdiction to proceed to try the defendant summarily under Part XV. of the Code.

The magistrate decided that he would proceed by way of indictment if the prosecution indicated they wished to proceed in that way, but as they were proceeding in a summary way he would proceed in that way.

Counsel for defendant now applies to this Court for a writ of prohibition against the magistrate proceeding in a summary way to try the defendant.

The basis of the defendant's claim is that the defendant has a right of election as to whether he should be tried summarily or by way of indictment, and in any case that the magistrate can not proceed with a summary trial in the absence of the consent of the defendant.

S. 169 provides that the offence of obstructing a peace-officer is punishable on indictment or on summary conviction before two Justices of the Peace. There is a divergence of judicial opinion in six of the Provinces of the Dominion in regard to this s. 169.

Dealing with the section under which the charge is laid it clearly provides for alternative methods of procedure. So far as the words of the section are concerned it would be quite as logical to say that the defendant could elect for summary trial as to say he has right of election to have the prosecution proceed by way of indictment.

The argument on this head, however, is founded upon the common law right of jury trial unless the same is taken away by statute. The statute has, however, taken away this right to the extent of providing that the offence may be dealt with in a summary way under Part XV. of the Code.

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S. 66 of the N.W.T. is invoked however, but it must be noted that this section deals only with charges made in the Supreme Court after commitment by a magistrate holding a preliminary inquiry.

Simmons, J.

In regard to the second contention that the accused could not be tried summarily without his consent, I agree with the reasons of Meredith, C.J.O., in *Rex* v. *West* (No 2) (1915), 25 Can. Cr. Cas. 145, 35 O.L.R. 95, that to maintain this view would result in making Part XVI. applicable in every case when the charge is the commission of an indictable offence and would result in reading out of the section the provision that the offence could be dealt with upon summary conviction.

I would, therefore, dismiss the application with costs.

McCarthy, J.

MCCARTHY, J., concurred with HARVEY, C.J.

Application dismissed.

COOK-HENDERSON Co., Ltd. v. ALLEN THEATRE Co., Ltd.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. October 16, 1919.

COSTS (§I—2c)—MONEY PAID INTO COURT BY DEFENDANT—APPLICATION FOR COSTS UNDER RULE 18 DISTRICT COURT RULES.

A defendant paid a certain sum of money into Court with his defence and denied liability. Judgment was subsequently given to the plaintiff for this amount and costs. On motion to vary the judgment on appeal and have the costs of the action governed by Rule 18 District Court Rules, costs were awarded to the defendant in the action subsequent to the delivery of the defence.

[*J. R. Munday Ltd.*, v. *London County Council* [1916], 1 K.B. 159, [1916] 2 K.B. 331, referred to.]

Statement.

Motion to vary judgment on appeal (1919), 47 D.L.R. 357. Varied.

H. J. Schull, for appellant; *E. F. Collins*, for respondent.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This is a matter that came before the last sittings of the Court, and, on June 19, 1919, judgment was given allowing the appeal and reducing the respondent's judgment to $99.79 and costs. This $99.79 represents the sum which was paid into Court by the appellant with a denial of liability. On the hearing of that appeal the appellant was not represented, and the question of the costs of the action subsequent to such payment into Court was not argued.

The appellant, at the present sittings of the Court, has moved

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for an order to vary the judgment pronounced on June 19, 1919, in so far as the same relates to the trial of the action, and directing that the costs of the action prior to the delivery of the defence by the defendant be governed by r. 18 of the District Court rules and awarding to the defendant its costs incurred subsequent to the delivery of its defence.

It appears that no formal order has been taken out and nothing done under our judgment of June 19, last.

I am of the opinion that it is unnecessary to make any direction with regard to the costs of the action prior to the delivery of the defence. Those costs are governed by the rules of the District Court. So far as the costs of the action subsequent to the delivery of the defence, I am of the opinion that the defendant is entitled to those costs.

J. R. Munday Ltd. v. *London County Council*, [1916] 1 K.B. 159, [1916] 2 K.B. 331.

The judgment of the Court in this appeal, delivered on June 19, 1919, will be varied by adding after the words and figures "the respondent's judgment reduced to the sum of $99.79 and costs," the following, namely: "of action up to and including the delivery of the defence, and the appellant should have its costs of the action subsequent thereto."

As this motion was made necessary through the appellant not being represented by counsel on appeal before us, I am of the opinion—and, in fact, it was admitted on the argument before us—that the appellant should pay the respondent's costs of this motion. *Judgment accordingly.*

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Ontario Supreme Court, Appellate Division, Maclaren, Magee and Hodgins, JJ.A., and Latchford, J. June 23, 1919.

WILL (§ I A—36)—CAPACITY OF TESTATOR—EXECUTION OF DOCUMENTS THREE DAYS AFTER INSTRUCTIONS GIVEN—EVIDENCE.

A will may be established when the testator, at the time of dictating the will, has sufficient discretion for that purpose, and on execution of the same remembers that instructions had been given, and accepts the document to be signed as containing such instructions.

[*Murphy* v. *Lamphier* (1914) 31 O.L.R. 287, distinguished; *Parker* v. *Tilgate* (1883), 8 P.D. 171, approved in *Perera* v. *Perera* [1901], A.C. 354, followed.]

Statement.

APPEAL by the defendant from the judgment of MIDDLETON, J. (1919), 44 O.L.R. 634. Reversed.

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H. H. Dewart, K.C., for the appellant.

H. E. Irwin, K.C., for the plaintiff, the respondent.

MACLAREN, J.A.:—This is an appeal from a judgment of Middleton, J., of the 7th January, 1919, annulling and setting aside the probate of the will of Hugh Faulkner, of Toronto, for want of testamentary capacity.

The plaintiff and the defendant are brothers, and were the sole next of kin of the deceased.

The trial Judge rested his decision almost entirely on the judgment of the late Chancellor Boyd in the case of *Murphy* v. *Lamphier* (1914), 31 O.L.R. 287, especially upon the law on the subject as laid down in pp. 317 to 322 of that report. I have carefully read and re-read the judgment referred to, and, with great respect, I am wholly unable to find in it authority for the judgment now in appeal. The facts of the two cases are, to my mind, so very dissimilar that the law laid down by the learned Chancellor, in which I fully concur, is quite inapplicable, in my opinion, to the present case.

The editor of the reports in the head-note of the *Lamphier* case has made the following summary of the things out of the common considered by the Court in that case: "(a) The will was made during the temporary absence of the testatrix from her husband; (b) made without reference to or communication with her natural protectors; (c) made while she was in the hands and under the care of two married daughters who were dissatisfied with a former will and had recently sought to have it changed; (d) made by an old lady verging on eighty years of age, suffering a double process of deterioration from the impairments of senility and the inroads of a progressive disease affecting her brain; (e) drawn by a solicitor who could not be regarded as an independent adviser and who was not chosen by the testatrix; (f) made on the spur of the moment, where the method of testamentary disposition, originating nine years before and carried through a series of wills down to that made in 1911, was displaced and superseded by a method of equal distribution desired by the two daughters referred to and the other dissentients in the family."

It further appears from the judgment of the Chancellor that there were in existence four other wills of the testatrix, executed respectively in 1903, 1905, 1909, and 1911—all drawn on the same

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general lines, and all making ample provision for her husband; while the one in question, executed in 1912, was entirely on different lines, and made no mention of her husband whatever. Indeed shortly before she made this last will she could not remember that she had a husband, and "she did not even recognise his existence when he was present and spoke to her." Her two spiritual advisers and her attending physicians speak of her two strokes in 1909 and 1910, and of the "senile decay" and "mental imbecility" which followed these attacks.

Hugh Faulkner, the testator in this case, was a cattle-buyer, and was unmarried. Prior to 1903 he had lived for some years with his brother George, the plaintiff, a farmer in the county of Halton, who had a wife but no children. On account of a difficulty over money matters, Hugh left and went to live in Owen Sound. They met at different times after that on the train, but neither ever visited the other. On the 16th August, 1912, just before going into the Owen Sound hospital for an operation, Hugh had Mr. Cameron, a solicitor, prepare a will which he executed. It was left with Mr. Cameron, who gave it to Mr. Faulkner with his other papers when the latter was moving to Toronto in 1915. This will, as he afterwards told his landlady and doctor in Toronto, he tore up and destroyed. Mr. Cameron had not a clear recollection of the contents, but thought the bulk of his estate was left to two nephews, and some of it to lady relatives, four or five in number, the amounts ranging from $100 to $500.

On the 18th and 24th January, 1918, the testator wrote two letters to his brother Archie, the defendant, a farmer in the county of Peel, saying that he was ill with grippe, and in the latter urging him to come and visit him, which he did on Monday the 28th January. He reached Hugh's lodging-house about three in the afternoon, and found him lying on his bed, dressed. Hugh complained of feeling chilly, and, when he went to bed in the evening, had extra bedclothes and hot water bottles. He got up on Tuesday morning, washed and dressed, went down stairs, and had breakfast. Dr. Forrest, whom he had consulted a number of times for minor ailments, and who had at his request come to see him on Monday, came between one and two on Tuesday and found a red spot on his nose, which he pronounced to be erysipelas. After a discussion it was decided to take him to the Parkdale hospital, and arrange-

ments were made for this. During the day the landlady spoke about Hugh not having made his will. Archie said he thought he had. He was asked and he said he had torn it up. Before going to the hospital, he gave instructions to the landlady to have Mr. Anderson, his solicitor, called up, and to have him come to the hospital to make his will. He arrived about three o'clock, and was shewn up to Faulkner's room. The defendant was in the room, but left as Mr. Anderson was taking the instructions for the will.

Mr. Anderson knew that Faulkner was not married, but did not know about his near relatives. After conversation about his illness, he asked him whom he wanted as executor, and he named his brother Archie. Asked as to how he wanted to dispose of his property, he said: "I want to give it to Archie, I want Archie's family to benefit." After some discussion as to how this could be carried out, he said, "I will give it to Archie." Asked if he meant that he would trust Archie to do what was right by his children, he answered "Yes" without any hesitation. Asked if he had any other brothers or sisters, he said: "I have one brother, George: I am going to leave him a dollar." He said that George had done him out of a lot of money.

Mr. Anderson then wrote out the will, read it over slowly to Faulkner, and asked him if he was satisfied. He said "Yes." Mr. Anderson went out to get a witness, and the nurse in charge agreed to act. The will was again read over to him slowly, and he was asked if it was satisfactory, and he answered "Yes." He was lying in a position with his arm under him, in which he could not write, and it was suggested that he make his mark; but he said, "No, I will write my name." When they had raised him up and in a position to write, he seemed to become drowsy and tired and unable to write, and it was decided not to press him, and Mr. Anderson left the will with the nurse, with instructions to notify him (Anderson) when the patient became brighter.

On Friday morning, Anderson received a message from the superintendent to come to the hospital. There he met the superintendent, who told him that Dr. Forrest was expected. After the doctor had seen Faulkner, Mr. Anderson asked him and the superintendent if they thought he was capable of making a will, and they both said they thought he was. Conductor Milne, an

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old friend of Faulkner's, had called to see him, and went into his room with the others, and his name was mentioned. Faulkner recognised him, but said he could not see him, both of his eyes being affected. Mr. Anderson reminded him of his being unable to sign the will on the Tuesday, and asked him if he would make his mark to that will, as he could no longer see. He said he would. The will was read over to him slowly, clause by clause, and at the end of each he gave an affirmative answer. After the reading, Mr. Anderson went back to the clause giving his brother George one dollar, and asked him if that was what he wanted, and he answered "Yes."

Mr. Anderson asked him if he would make his mark, and he answered "Yes." His name was written out, and a pen put in his hand. He pressed it firmly, and, guided by Mr. Anderson, made the cross, and Mr. Anderson, Dr. Forrest, and Mr. Milne signed as witnesses, the name of each being mentioned as he signed.

In my opinion, the trial Judge has not attached sufficient importance to what took place on Tuesday afternoon, when the instructions for the will were given, and he does not allude to the fact that Faulkner, before his last illness, had told Dr. Forrest that he was going to leave his property to the defendant, which to my mind is significant.

I am also of opinion that too much importance was attached to the fact that certain female relatives, to whom small legacies were left in the will drawn by Cameron, were not mentioned in the will now in question. In the first place, he must have been dissatisfied with the first will when he destroyed it. We do not know who they were, or how many they were, or whether they were still living or may have been married during the intervening six years. It was suggested that some of them were nieces, but he had only one niece, Mary, the twelve-year old daughter of the defendant. The others could not have been nearer relatives than daughters of his cousins. As to the niece, he was satisfied that her father would do his duty by her. They are spoken of as "needy relatives," but there is no evidence as to their circumstances, any more than as to their number or relationship; and, if they were "needy," legacies ranging from $100 to $500, as stated by Mr. Cameron, would not go far to relieve them, and would be a petty amount out of an estate of over $23,000.

I do not consider that it was the duty of Mr. Anderson to have inquired what wills Faulkner might previously have made and destroyed. He appeared to have a clear idea as to how he wanted to dispose of his property and whom he wanted to be benefited by it.

The learned trial Judge has, in my opinion, confused the evidence as to the condition of Faulkner on Tuesday, both physically and mentally, with his condition on the following Friday. He speaks of his having taken no nourishment after the first attempt to execute the will. In this he is quite mistaken. The day-nurse who attended him, a witness called by the plaintiff and not at all favourable to the defendant, being asked by the plaintiff's counsel as to his taking nourishment, says, "At first he took it good, the first couple of days," and this was not contradicted. He was a strong, vigorous man, weighing over 200 pounds, and, although 69 years of age, looked years younger.

As already stated, he had risen early that morning, had washed and dressed himself, and had gone downstairs to his breakfast, and again gone upstairs; had taken part in the discussion as to going to the hospital; had given instructions as to having Mr. Anderson come to make his will; and had walked downstairs and out to the taxi cab. Notwithstanding all this, he seems to have had so much physical and mental strength left that Mr. Anderson, a competent and careful solicitor, had no hesitation in taking the instructions for his will, which he appears to have given with great clearness, and, so far as concerned the bequest of a dollar to the plaintiff, with considerable emphasis. After he had gone through all this, and the excitement of his being raised to write his name, it is little wonder that he finally became tired and drowsy, when Mr. Anderson decided not to trouble him further at that time.

On the Friday morning, Mr. Anderson did not proceed until after the doctor had made his examination; both the doctor and the superintendent pronounced him competent. Although he was weaker than on Tuesday afternoon, he recognised Conductor Milne, and gave his answers clearly and distinctly, and was not at all affected with drowsiness as on the Tuesday. Dr. Forrest states that, although the disease had affected his eyes and had gone up his forehead, it had not affected his brain, and this is corrobo-

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rated by Dr. Howland, one of the plaintiff's experts, who says that there was no delirium.

As usual, there are shades of difference between the doctors called as experts. The testimony of Dr. Silverthorne commended itself to the learned trial Judge. He describes the two kinds of erysipelas, that in which the patient has high fever and in which he becomes lethargic from the fever, and the other in which there are grave constitutional symptoms, such as delirium and mental unrest. Faulkner's was of the former kind, and he died from heart failure before the crisis set in. After having heard the evidence, and at the end of a very exhaustive cross-examination by the plaintiff's counsel, he expressed himself very strongly as to his opinion that on the Tuesday the testator was in a condition to dispose of his property and to remember and call to mind those whom he wished to benefit.

We were not referred to any case in our own Courts where the facts and circumstances and points to be decided very closely resemble the present; the *Lamphier* case, as I have already stated, being to my mind not at all in point. There is an English case very much like it, but less favourable to the defendant than the present: *Parker* v. *Felgate*, (1883), 8 P.D. 171, tried by Sir James Hannen and a jury, where the following questions were put to the jury and considered:—

"1. Did the deceased when the will was executed remember and understand the instructions she had given to Mr. Parker (her solicitor)? A. No.

"2. Could she, if it had been thought advisable to rouse her, have understood each clause if it had been put to her? A. No.

"3. Was she capable of understanding, and did she understand, that she was engaged in executing the will for which she had given instructions to Mr. Parker? A. Yes."

On these questions and answers, the Court pronounced in favour of the will.

This case, being the decision of a single Judge, would not be binding upon us. However, the case was considered in the Privy Council in *Perera* v. *Perera*, [1901] A.C. 354, where it was contended that it must be shewn that a testator was capable of understanding the provisions of a will at the time of signature. Lord Macnaghten says, at p. 361:—

"That, however, is not the law. In *Parker* v. *Felgate*, 8 P.D. at p. 173, Sir James Hannen lays down the law thus: '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."

I am of opinion that the judgment in this case should be reversed, and the action dismissed with costs.

Magee, J.A.
Latchford, J.
Hodgins, J.A.

MAGEE, J.A., and LATCHFORD, J., agreed with MACLAREN, J.A.

HODGINS, J.A.:—I agree with the conclusion to which my brother Maclaren has come, that the will must be established.

I wish to draw attention to two cases in Canada where the Court has, in circumstances not entirely dissimilar, upheld wills. One is *Menzies* v. *White* (1862), 9 Gr. 574, in which, although the testator was influenced by a friend, fortunately a disinterested one, Vankoughnet, C., treated the will as validly made in view of "his clearly understanding it at the time, and of his memory of it the following day" (pp. 593, 594). In *McLaughlin* v. *McLellan* (1896), 26 Can. S.C.R. 646, the Supreme Court of Canada refused to set aside the will. The head-note sufficiently expresses the view of the Court, as follows:—

"A testator, during the time he gave the instructions for drafting and when he executed his will, was suffering from a disease which had the effect of inducing drowsiness or stupor but, as the evidence shewed that he thoroughly understood and appreciated the instructions he was giving to the draftsman as to the form his will should take, and the instrument itself when subsequently read over to him, it was held to be a valid will."

In an early case in Massachusetts, *Hathorn* v. *King* (1811), 8 Mass. 371, where the will was drawn at 11 o'clock a.m. and executed at 6 p.m., and during the interval the testatrix is described as gradually sinking, the charge to the jury, upheld by the full Court, was as follows:—

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"If they should be of opinion, that the testatrix, at the time of dictating the will, had sufficient discretion for that purpose, and that, at the time of executing the will, she was able to recollect the particulars which she had so dictated, they might find their verdict that she was of sound and disposing mind and memory at the time of executing the will."

Upon this case, Schouler in his book on Wills, 1915, founds this remark (sec. 73): "Where the act of execution *in extremis* relates not to a will just framed in the mind, but to one which has reduced to writing the results of the testator's previous deliberation and direction, at an earlier stage of illness, it deserves peculiar indulgence, when drafted correctly and then executed in due form."

This decision another American writer considered "very reasonable:" Redfield on Wills, 1869, p. 132.

Appeal allowed.

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WRIGHT v. JONES.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

INTERPLEADER (§II—20)—GOODS SEIZED—PARTNERSHIP PROPERTY—PARTNERSHIP ACT (R.S. SASK. 1909, c. 143).

An execution creditor must prove in an interpleader action that the goods seized are the property of the execution debtor, and if that debtor be a partner of the claimant, and the goods seized under the execution partnership property, the Partnership Act R.S. Sask (1909), c. 143, s. 25, forbids their seizure.

Statement.

APPEAL from the trial judgment in an interpleader issue. Affirmed.

M. A. Miller, for respondent.

The judgment of the Court was delivered by

Newlands, J.A.

NEWLANDS, J.A.:—This is an interpleader issue. Wright, the execution creditor, is the plaintiff, and J. R. Jones, the claimant, the defendant.

The issue is, that the plaintiff affirms that the goods seized were at the time of the seizure the property of W. W. Jones, the execution debtor, as against the defendant, the claimant.

The evidence shews, and the trial Judge so found, that the execution debtor and the claimant were partners, and that the goods in question were the property of the partnership, and that the claimant purchased from the execution debtor his interest in the goods before the seizure under plaintiff's execution.

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I agree with all the reasons of the trial Judge, excepting where he holds that defendant cannot rely upon the finding that the goods in question were partnership property, because he has set up title to himself in the goods.

The burden of proof being on plaintiff, he has to make out a *primâ facie* case before the defendant is put to the proof of his defence. He can therefore rely upon the weakness of the plaintiff's case as well as upon the strength of his own.

Now it having been proved that the goods in question were originally partnership property, and as, by s. 25 of the Partnership Act, R.S. Sask., 1909, c. 143, partnership property is not seizable under an execution against one partner, the goods in question could not have been seized under an execution against the execution debtor. The plaintiff therefore failed to prove that the goods were the goods of the execution debtor, and the plaintiff must fail.

As the defendant cannot be estopped from taking advantage of this fact, the Judge was wrong in so holding. This, however, does not affect his judgment, and the appeal must be dismissed with costs. *Appeal dismissed.*

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Alberta Supreme Court, Hyndman, J. November 14, 1919.

DAMAGES (§III A—62)—AGREEMENT FOR SALE OF LAND—PREVIOUS OPTION TO THIRD PARTY—EXERCISED BY HIM—EFFECT OF DOWER ACT, 7 GEO. V. (ALTA.) 1917, c. 14—NO CONSENT OF WIFE—DAMAGES.

Actual damages will be awarded to a purchaser of land under an agreement for purchase who is unable to complete his purchase because of the owner having given a previous option to a third party which he might have cancelled by notice, but did not do, the option being exercised by the party holding it.

The wife of the owner did not consent to the agreement with the purchaser, but as the land in question was not the "residence" or "homestead" of the owner, the Dower Act, 7 Geo. V., Alta., 1917, c. 14, had no application.

[*Bain* v. *Fothergill* (1874), 31 L.T. 387, distinguished.]

Statement.

ACTION for damages for breach of option agreement for the sale of lands.

J. W. Hefferman, for the plaintiff; *R. D. Tighe*, for defendant.

Hyndman, J.

HYNDMAN, J.:—The defendant was the registered owner free of incumbrances of the S.E. quarter of sec. 36, Tp. 51, Range 21 West of the 4th Meridian in the Province of Alberta and on August 16, 1919, signed, in conjunction with his wife, the following instrument:

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In consideration of the sum of One Dollar receipt of which is hereby acknowledged, I, Walter E. Langton, of Country Club, Edmonton P. O., do grant the Soldier Settlement Board the exclusive right to purchase, for the term of . . . months from August 16, 1919, the following land: S.E. ¼ 36-51-21-W. 4th and I hereby bind myself to deliver title of the above mentioned lands to the aforesaid Soldier Settlement Board, free of all encumbrances upon the payment of the sum of One thousand dollars, it being understood that I reserve the right to withdraw this offer at any time, giving 30 days' previous notice, of my intention to do so, such notice to be in writing and forwarded by registered mail, addressed to the Soldier Settlement Board at . . . . .

And I, Diannah Langton, the wife of W. E. Langton, hereby agree to the sale of the above land on the before mentioned terms.

Should further improvements, such as additional breaking, fencing, or putting the place in crop, be carried out subsequent to the granting of this option, value of such improvements, to be adjusted as affecting the purchase price.

The answer to the following questions are true and correct, to the best of my knowledge and belief.

To be signed in every case by the wife of the vendor where the property is his homestead within the meaning of the "Dower Act," 7 Geo. V. 1917, c. 14.

Note—During the winter months, or when snow is on the ground, please make option for as long a period as possible.

This option was procured from the defendant through and for the benefit of one H. A. Kidney, a returned soldier, who owned the adjoining quarter section and was desirous of purchasing it with the aid of the Soldier Settlement Board. Up to September 6 following, so far as the evidence reveals, nothing further transpired as between Kidney and Langton and on September 5, the plaintiff telephoned defendant and in effect asked if he wanted to sell the land and that he was willing to purchase it for $1,000. It was mentioned in the conversation that Kidney had obtained "some kind of a document" with relation to the land, Langton testifying that, after he had told Morrow what he had signed, that Morrow said such a document was "not binding" and would not stand in the way of a bargain with him. Morrow, whilst not denying that the Kidney matter was mentioned, says that he put it up to Langton to say whether or not he would sell, that Langton retired for a few moments to consult his wife and returning to the telephone said it would be all right; to come to Edmonton and complete the bargain and that in consequence plaintiff came to Edmonton next day and the following agreement was entered into, viz.:—

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Received from J. Morrow the sum of $300.00 for part payment on ¼ sec. S.E. of 36-51-21-W. of 4th and said John Morrow, of Deville, Alberta, agrees to pay Walter E. Langton balance of $700.00 without interest on or before Nov. 1, 1919, and said W. E. Langton agrees to furnish title without encumbrances to said J. Morrow after completion of payments. Total purchase price to be $1,000.00.

The $300 mentioned in the agreement was paid at the time.

On or about September 14 Kidney called upon the defendant and informed him that the Soldier Settlement Board had refused to entertain the transaction but that he had raised the money himself and was then prepared to complete the purchase. Langton advised him that he had in the meantime entered into another agreement with plaintiff, being of the impression that nothing would come of the option, and admitted that he found himself in a "bad fix" but the result of the meeting was that Langton agreed to let Kidney have the property and on the following day Langton executed a transfer from the defendant and his wife upon which Kidney became the registered owner of the land free from encumbrances.

Immediately after his decision to transfer to Kidney defendant wrote the plaintiff a letter enclosing a cheque for $300 and stating that he was legally responsible to Kidney under a prior option. Plaintiff refused to accept the money and returned it which resulted in another letter from defendant again remitting the $300 and setting up further reasons including absence of consent of Mrs. Langton to the agreement. The $300 was refused by the plaintiff and returned to him.

Plaintiff subsequently brought action for specific performance or in the alternative damages in the sum of $1,000 and return of the moneys paid.

The defence in addition to the usual formal pleas sets up (1) Lack of consent by wife under the Dower Act; (2) Absence of right to convey owing to option to Kidney; (3) Absence of damage save and except nominal damage and the plaintiff's costs in investigating title and paid into Court the sum of $5 as ample compensation for damages and expenses and $10 for plaintiff's costs.

It is clear that but for the option to Kidney plaintiff would be entitled to such damages as he may have sustained by reason of defendant's failure to carry out his contract and one question

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to consider is whether or not the option in question is a document binding on defendant to sell to another at the time of the transaction with plaintiff. A careful perusal of the option reveals that it is not for any definite time; that it is not under seal; and although $1 is expressed as the consideration as a matter of fact nothing was paid for it.

It seems to me therefore that the defendant might at any moment have revoked his offer by notice to that effect. Such being the case at the time of the agreement with Morrow he might easily have removed the defect, if any, in his title and been in a position to carry out his contract. This he did not do.

Under such circumstances therefore I am of opinion (subject to the effect of the Dower Act) that the rule in *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158, 31 L.T. 387, is not applicable and the plaintiff is entitled to the actual damages which resulted as a consequence of defendant's failure to carry out his agreement.

Whether or not the Dower Act, 7 Geo. V., 1917, Alta., c. 14, can be taken advantage of must depend on the circumstances of each case.

The expression "Homestead" is defined as:—

(a) Land in a city, town or village, consisting of not more than four adjoining lots in one block, as shewn on plan duly registered in the proper registry office in that behalf, on which the house occupied by the owner thereof as his residence is situated;

(b) Lands, other than referred to in clause (a) of this section on which the house occupied by the owner thereof as his residence is situated, consisting of not more than one quarter section.

I do not think it can reasonably be argued that the land in question was at the time of the contract the "residence" of the defendant and his family. The buildings according to the evidence are quite unfit for human habitation and have been so for some years and the defendant and his wife have resided in the City of Edmonton or environs for 5 or 6 years at least.

As I see it therefore the Dower Act can have no application to the case.

As to the amount of damages; plaintiff is entitled to the reasonable costs incurred in connection with the agreement which I fix at $25. He is also entitled to the difference between what he agreed to pay for the property and its value.

Evidence on this point between the plaintiff and the other witnesses is conflicting and a wide margin exists. Had the bar-

gain been carried through it would have cost plaintiff $1,000 and the taxes outstanding amounting to $122 making a total of $1,122. Plaintiff says he thought, the place worth $2,000 and expected he would have been asked $10 per acre for it. It was close to his own farm; he could have run 30 or 40 head of cattle more, if he had had it; and it would have been of greater value to him than perhaps to others. On the other hand, there is the evidence of the valuator for the Soldier Settlement Board and Julian Garrett, both experienced land appraisers and so far as I can see disinterested persons who value the property at $920 and $954 respectively. These valuations were made quite independently of one another but are approximately the same. This fact coupled with the amount of the purchase price is very strong evidence that $1,000 is fairly close to the real value. As the plaintiff assumed the taxes of $122 however I think it not unfair to conclude that the defendant himself must have thought the value about $1,000 plus the taxes. Everything considered including the plaintiff's peculiar interest, being the owner of the adjoining property, I think damages under this head to the amount of $122 would be fair to both parties.

The plaintiff will therefore have judgment for $147, costs to follow the event according to the rules of Court.

Judgment accordingly.

TOWN OF RADISSON v. AMSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

DAMAGES (§ III I—279)—ASSESSMENT BY ARBITRATOR—WRONG PRINCIPLE—MATTER REMITTED BACK TO ARBITRATOR.

In assessing damages to property by reason of the construction of a concrete sidewalk lower than the property in question—the principle to follow in estimating these damages is how much (if any) has the property decreased in value by reason of the lowering of the sidewalk. [*Green* v. *C.N.R.* (1915), 22 D.L.R. 15, followed.]

Statement.

APPEAL from the award of an arbitrator (1919), 45 D.L.R. 597, appointed to assess damages suffered by the respondent by reason of the construction of a concrete sidewalk in front of and contiguous to her store. Reversed and matter remitted to the arbitrator to ascertain damages.

A. L. Gordon, K.C., for appellant; *C. M. Johnston* and *G. A. Ferguson*, for respondent.

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TOWN OF RADISSON v. AMSON.

Lamont, J.A.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an appeal from the award of an arbitrator appointed by the Court to assess the damages suffered by the respondent by reason of the construction by the town of a concrete sidewalk in front of and contiguous to the respondent's store building on Lot 1, Block 7, Radisson, of which lot she was the owner.

The damage complained of resulted from lowering of the sidewalk in front of the store entrance some 21 inches, which, it was claimed, seriously interfered with the access thereto. The arbitrator fixed the damages at $925. From this assessment the town now appeals.

The chief ground upon which the appeal is based is, that the arbitrator assessed the damages on a wrong principle. He stated, correctly enough, that the respondent was entitled to be placed as nearly as possible in the same position as she would have been had the excavation not been made and the concrete sidewalk not constructed. But to place her in that position, he considered she was entitled to have the store floor lowered 21 inches, so that it would be in the same relative position to the concrete sidewalk that it occupied towards the original sidewalk. The cost of this operation, together with the cost of constructing a run-way to connect the floor as it then would be with the respondent's warehouse, he found to be $925, and accordingly awarded that sum as damages.

In my opinion this is not the proper method of estimating the damages suffered by the respondent. Her loss consists in the decreased value of her property by reason of the lowering of the sidewalk. This loss should be determined by ascertaining the market value of the property after the concrete sidewalk had been put down and the value it would have had if the town had not made the improvements. The difference between these values, if the latter is the greater, will be the damage done to the respondent's property. *Green* v. *C.N.R.* (1915), 22 D.L.R. 15, 8 S.L.R. 53.

As the amount of the award was determined upon a wrong principle, the award should be set aside, and the matter remitted to the arbitrator to ascertain the damages in accordance with the principle above indicated. *Judgment accordingly.*

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Alberta Supreme Court, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. December 8, 1919.

RAILWAYS (§ II D—72)—HORSE KILLED ON RAILWAY—GATE TO RIGHT-OF-WAY BROKEN—FASTENED BY ROPE—PROPER CHAIN GONE—DUTY OF RAILWAY—RAILWAY ACT.

It is the statutory duty of a railway company under s. 254 of the Railway Act to maintain proper fastenings on gates opening on its right-of-way.

Evidence shewing a lack of the proper fastenings establishes a breach of this duty.

[*Dunsford* v. *Michigan Central* (1893), 20 A.R. (Ont.) 577, followed.]

Statement.

APPEAL by defendant from the judgment of Jennison, Dist. Ct. J., in an action for damages. Affirmed.

George H. Ross, K.C., for appellant; *Lynney & Lannan*, for respondent.

Harvey, C.J.

HARVEY, C.J. (dissenting):—The action is for the value of a horse killed on the railway, having got on the right-of-way through a gate at a farm crossing which had been fastened with a rope.

The trial Judge, Jennison, Dist. Ct. J., said:

My conclusion is that the rope was insufficient, and the horses becoming frightened at the train in their confusion, and pushing against the gate, and the rope fastening broke.

This is only an inference, as there is no direct evidence as to how the gate became open. Less than an hour before the train passed it had been seen by a man who swore that it was then shut and securely tied by a rope and that he climbed over it.

Another witness reports having seen all the horses in the filed only 10 or 12 minutes before the accident. The evidence of the fireman on the train which killed the horse was that half a mile before reaching the gate the train passed several of plaintiff's horses on the right-of-way, which ran ahead of and alongside of the train, while three others, of which the one killed was one, were inside the field and ran along the fence keeping up with the other horses until they came to the gate which was open, and then they ran through it on to the right-of-way, and one of them then ran in front of the train and was killed. There is no suggestion that the trial Judge questioned the correctness of this evidence, nor can I see any ground upon which it should not be accepted, as it is quite consistent with the other evidence, but, in my opinion, it makes it impossible to conclude that the horses broke open the gate by

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reason of fright from the approaching train, because it had been opened long enough for several of them to get on to the right-of-way and some distance down the track before the train came near. It is then necessary to consider what was the cause of the gate becoming open. Under the Act the duty is on the defendant to provide and maintain a swing gate with proper hinges and fastenings (s. 254), and the duty is on the person for whose use the gate is provided to keep it closed when not in use (s. 255).

The plaintiff's horses were pasturing in the field by permission of the owner. The owner used the gate only about twice a year, and the last time he had used it was about 3 months before the accident. The gate in the spring had been provided by the railway company with an iron chain to fasten it. The owner subsequently found this gone and he put on a wire fastening. At the time he last used it the wire was gone, but the gate was shut being held by its own weight resting on the ground. He then tied it up with a rope which he observed still there, 3 or 4 days before the accident. The owner says that at the time he tied it up with the rope the gate was dragging on the ground, and to open it "you had to drag it round."

Even if the rope were not a proper one, and it were open to take that objection notwithstanding that it had been put there by the owner himself, yet, unless that caused the accident, the defendants would not be liable. The burden is on the plaintiff of shewing what was the cause of the gate getting open. From the evidence given it does not seem to me to be a reasonable inference that this was due to any defective fastening. It seems to me by no means probable that the horses pushed against the gate without being frightened, until they broke the rope, and then pushed the gate along the ground until they got through. I think it is much more likely that someone, who wanted to go through, broke the rope and opened the gate and left it open, for as I have indicated other people beside the owner did use or interfere with the gate.

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

Stuart, J.

STUART, J.:—I think the Judge who tried this case was quite correct in the view he took that the defence had not fulfilled their statutory duty with respect to the gate. There is no doubt

they did not keep a proper fastening on the gate, and, as it appears that their section foreman was accustomed to go past the gate every day, there is no reason why he should not have noticed that the original chain fastening was gone. To examine the farm crossing gates only twice a year does not seem to me sufficient vigilance on the part of the company, particularly when very little extra labour or trouble would be involved in examining the gates at least once a week, although I am not satisfied that even that would be frequently enough, or that the company would be absolved from liability if they did examine them as frequently as that.

Neither do I think that the action of the owner of the land, in putting first the wire and then the halter shank made of rope upon the gate as a fastening, is sufficient to raise an estoppel against him in favour of the company. He was not bound to notify the company of the absence of the chain, because it was their duty to discover that by constant inspection, and, I cannot see how, merely because he took some precaution in the meantime to protect himself, he could be said to have misled the company or its officials, or even to have undertaken the duty himself of putting proper gate fastenings on. In the statute his obligation to keep the gate shut only applies, in my opinion, when the company has itself complied with its duty to furnish proper fastenings.

There then comes the question whether the absence of the proper fastening was the cause of the damage. The trial Judge held that it was, and I think there was evidence that he could properly come to that conclusion, although I am not quite prepared to concur in the exact method of reasoning by which he reached that conclusion. I think that his finding, that the gate was found opened inward towards the railway, or outward with relation to the field, cannot be disturbed, but it does appear to me to be a little difficult to understand how the horses in the field would, through fright at the train, press against the gate from the inside of the field, and shove or push towards the railway track where the thing that was frightening them was moving. Of course, even that might occur if they ran far enough ahead of the train in their fright so that they might imagine that they could run round ahead of it and in their chase might endeavour to push through the gate. But it does seem to me that a more probable explanation

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of the occurrence is that which is suggested to some extent by the evidence of the railway employees, who testified that the larger number of horses was already upon the right-of-way when they came along, and that only 2 or 3 of the horses, including the one killed, were still in the field, and that this latter ran along inside the field in the same direction as those on the right-of-way with only a wire fence between them, and thus, when they got to the gate, found it open and turned in in order to reach their companions. This, of course, raises the question: How was the gate opened? I see no reason at all to doubt the testimony of Lanz, who said that he jumped over the gate and found it fastened with a rope, less than an hour before the occurrence. Upon appeal, I think we have no right at all to conjecture anything about the validity of this man's testimony, where no doubt whatever has been cast upon it, either by cross-examination or by opposing testimony, or by the opinion of the trial Judge and it is neither inherently probable nor inconsistent with the other facts. Then, what happened between that time and the time of the accident to open the gate? It must be remembered that this occurred out in the country, and there is no evidence that people were very frequently passing that way. At such a place I think it would be a rather remarkable coincidence if two different men should pass there within an hour.

To my mind the probabilities of the case point very strongly indeed, not quite to what the trial Judge inferred, but to the conclusion that between the time of Lanz's passing by and the accident the horses in the field had pushed against the gate for the purpose of getting on the right-of-way for pasturing, had broken the rope, shoved the gate open somewhat, and passed through.

The trial Judge found on quite sufficient evidence, that the rope was broken and not cut. I do not think that any human agent would have broken the rope unless it was then hanging on so slender a thread as to amount to complete disconnection substantially.

The facts, that all the horses were in the pasture, that shortly before Lanz saw the gate closed, that some of the horses were then shortly after found on the right-of-way, that the rope was broken and not cut and that there appears to have been no other break in the fence separating the field from the right-of-way

through which the horses could have passed, seem to me to point altogether too strongly to the probability that the first of the larger bunch of horses had crowded against the gate, broke the rope and got through. The fact that the gate rested upon the ground and had to be dragged, does not seem to me to cause any difficulty; for all that appears in the evidence, the ground may have dropped away suddenly towards the railway track, within even a foot or less from the place where the gate rested at the post, and the gate might have been a foot or so out of line of the fence, so as to tempt the horses to crowd against it.

A plaintiff who is not near enough to see what occurred himself, or to have a witness who saw it, must present all the surrounding circumstances and ask the Court to draw its conclusion by way of inference, and where there is so extremely probable a cause to be inferred for what happened, as exists in this case, which indeed is quite consistent and in conformity with common experience of animals in fields, it seems to me that the plaintiff has satisfied the burden of proof.

I should not, if I were sitting on a jury with the facts that were given in this case, have any hesitation in saying that the first bunch of horses broke the rope, shoved the gate open and let the horse, which was killed, get through.

For this reason I think the appeal should be dismissed with costs.

Simmons, J.

SIMMONS, J.:—The plaintiff's horse was killed by the defendant's train, and the plaintiff claimed damages in the amount of the value of the horse killed, and the same was assessed against the defendant company.

The trial Judge found in effect that there was a breach by the defendant company of a statutory duty to maintain a proper fastening on a gate at a farm crossing, and, on account of this omission, some horses in the field of which this horse was one, got upon the railway company's right-of-way, with the result that the horse in question was killed.

One Westerholm was the owner of the land in question, and the plaintiff, as licensee of the owner, pastured his horses on Westerholm's land.

The horse was killed on or about November 13, 1918.

In August of the same year Westerholm found the gate shut

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but no fastening on it, and he fastened it with a halter rope. Three or four days before the accident he had occasion to examine the gate, and it was still tied with a rope. The gate was placed there in 1912, and had a proper chain fastening placed upon it then. The gate was only used occasionally. There was no chain on the gate in June, 1918. The chain fastening was there in the previous fall. In June, 1918, he found the chain absent, and he fastened the gate with a wire. In August of the same year he found the wire on the ground, and it was then that he fastened it with a rope.

I am of the opinion that this evidence establishes a breach by the company, of its statutory duty under s. 254 of the Railway Act, to maintain a proper fastening. The only ground upon which the company could claim to be relieved from this breach would be failure on the part of the owner to notify the company of the condition of the gate.

The Court of Appeal of Ontario did not accept this view in *Dunsford* v. *Michigan Central R. Co.* (1893), 20 A.R. (Ont.) 577, at 581, affirming *McMichael* v. *G.T.R. Co.* (1886), 12 O.R. 547.

> The company are bound not only to erect, but to maintain the fences and gates, and to give s. 198 (51 Vict., c. 29, 1888), the construction which the defendants ask us to give it, would be to throw upon the owner a duty which I am of the opinion was never intended to be thrown upon him of continuous oversight and inspection of the gates, and of seeing that they are kept shut no matter what their condition.

The second feature of the case is this: Was the absence of the defective fastening the cause of the horses getting on the right-of-way? I am of the opinion there is evidence to justify this finding.

A witness says the gate was fastened with a rope about three quarters of an hour before the accident. On conflicting evidence the trial Judge found that at the time of the accident the gate had opened in the direction of the right-of-way of the railway company. The rope fastening was found to have separated, allowing the gate to open.

A witness, Eckholm, saw plaintiff's horses (9 of them) in the field 10 or 12 minutes before the train came along. His attention was called to the horses by the whistle of the train. He then saw the horses running near the fence. He noticed this particular horse, and another on the track ahead of the engine. He saw the horse before it could have gone through the gate, close to the fence there.

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It is true the trainmen gave evidence to the effect that some of the horses were on the right-of-way when the train was within a quarter of a mile of the gate, and that this horse, that was killed, and two others, were in the field running parallel with the horses on the right-of-way, and two of the three came through the gate with the result that one collided with the train. The trial Judge may not have believed them, but even if he did credit their statement that part of the horses were on the right-of-way a few seconds before the train reached the point on the track opposite the gate, yet there is reasonable ground for the inference of the trial Judge that

the rope was insufficient, and the horses becoming frightened at the train, in their confusion pushing against the gate, and the rope fastening broke.

I would therefore dismiss the appeal with costs.

McCarthy, J.

McCARTHY, J., concurred with SIMMONS, J.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 3, 1919.

DAMAGES (III P—340)—BREACH—SALE OF GOODS—PREVIOUS ARRANGEMENT THROUGH AN AGENT—PLAINTIFFS READY AND WILLING TO COMPLETE—GOODS TAKEN BY THIRD PARTY—REPUDIATION.

Where one party to a contract is ready and willing to fulfil his part, and the other party is unable to do his part owing to a previous arrangement, the former is entitled to damages for breach of the contract. The measure of damages will be the difference between the price under the contract, and the price which has to be paid for other goods in a similar condition.

Statement.

APPEAL by plaintiffs from the judgment of the District Court Judge in an action for damages. Reversed.

P. H. Gordon, for appellants; *J. Feinstein*, for respondent.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—On or about July 10, 1918, one of the plaintiffs and the defendant had a conversation with regard to granting to the plaintiffs a license to cut hay for the season of 1918 on the west half of sec. 5, Tp. 44, Range 21, west of the 3rd meridian. At this conversation the defendant told this plaintiff that he had very little knowledge of the hay, and instructed this plaintiff to see one Hubbard, who was looking after the hay for the defendant, and on July 20 the defendant wrote the plaintiff

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Charles Porter that if he would telephone or see Hubbard he would negotiate a lease of the hay. Porter made an effort to see Hubbard, but was unable to see him. He learned that some of the hay had been cut by some person. On August 8 or 9, Porter again saw the defendant and explained to him that there had been some hay cut, and the defendant then said he did not know what to do for a day or so, as he had not had any word from Hubbard. On August 12 the defendant wrote to Porter as follows:

I have neither seen or heard from Mr. Hubbard and am therefore practically in the same dilemma as when I last saw you. But if you will send me $40 you may have the hay on the North Quarter, or I will make you another proposition. For $75, I will give you a lease on the half, as you know the parties who harvested the crop, and have no lease; you could no doubt get a very satisfactory settlement from them. I could meet you at Saskatoon if the latter deal appeals to you.

On August 19 Robert Porter saw the defendant, concluded a bargain for the hay for $75, and received the following receipt therefor:—

Received from Messrs. Porter Bros. the sum of $75 for hay on West half of sect. 5-44-21 West 3 Mer. for season of 1918. This receipt covers hay lease made July 10, 1918. J. J. BURR.

At the time that the bargain was concluded on August 19, the defendant had a conversation with Robert Porter, and the defendant at that time said that one Ramsay, who was then cutting the hay had no authority to cut the hay and no one had any authority to cut the hay. He said: "You fellows being up there I will sell you the hay" and could settle cheaper than he (Burr) could because he (Burr) couldn't get the hay. Subsequently Hubbard wrote a letter to Charles Porter as follows:—

Mr. Charles Porter, Aug. 9th, 1919.

Cut Knife.

Dear Sir:—

RE HAY ON W. 5-44-21.

Mr. Burr wrote me to dispose of hay on this half reserving the best on S.W. quarter and to give you a chance at it.

When I inspected this hay 2 weeks ago found that most of it had been cut and it would therefore be of no use to you so collected from Hal. Ramsay for what had been cut.

Am exceedingly sorry as this was close to a market and would have been a handy shipping proposition.

This letter was not received until after August 19. After the receipt of this letter the plaintiffs made no attempt to get any hay, and they subsequently received from the defendant the letter of September 14, as follows:—

Upon information I have received I find that Hal. Ramsay had cut and stacked hay, and paid for same prior to my receiving your money. I therefore find it necessary to return your money to you. Kindly inform me where you want this money sent to.

At the conclusion of the plaintiffs' case, the defendant moved for a nonsuit, which was granted by the District Court Judge on the ground that it was not established that any damage had been caused to the plaintiffs.

The District Court Judge also held that the evidence shewed that the plaintiffs could have got the hay if they had so desired; also that it shewed that when they applied to the defendant for leave to cut the hay on the land, they knew that a third party had been cutting it, and that the arrangement between the plaintiffs and the defendant was that they could settle with this third party, that is, that they were clothed with power by the defendant to make Ramsay, who was cutting the hay, account for it. Thereupon the plaintiffs' counsel asked to amend the claim by adding a plea for money had and received and for recovery of the $75 paid.

The District Court Judge, while not stating whether he allowed the amendment, stated that, in any event, the plaintiffs could not recover because there was not an entire failure of consideration, as the hay on one quarter section was uncut.

The evidence I think shews that, at the time the agreement of August 19 was entered into both the plaintiffs and defendant believed that the person who was cutting the hay was a trespasser, and the effect of the conversation between the parties was that this person being a trespasser had no right to the hay, and the plaintiffs were therefore clothed with power to make this trespasser account for the hay which he had cut. At the time of this conversation, however, Hubbard had sanctioned the cutting by Ramsay of the hay and had settled with Ramsay for the hay that he had cut. Hubbard had power to do this. Subsequently the defendant, in his letter of September 14, took the position that he was unable to complete the contract. The plaintiffs on receipt of the letter of August 9 assumed that that letter was a cancellation of the contract and acted on that assumption. The letter of September 14, was a repudiation of the contract.

Under these circumstances the plaintiffs, in my opinion, are clearly entitled to damages for breach of the contract. The measure of damages I apprehend would be the difference between

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the price at which the plaintiffs were buying the hay and the price that they would have to pay for other hay in a similar condition.

The only evidence with regard to other hay is the following:—

Q. Was there any other hay in that vicinity that you could have cut—could have rented? A. Not at that time of year. Q. Was there later? A. No.

That evidence was brought out on cross-examination, but I do not think it goes far enough. The evidence shows that the plaintiffs were cutting hay at various points, and I think that they should have shewn that they could not have obtained hay to cut within a reasonable distance of the places where they were cutting. For all the evidence discloses, they may have gone on cutting hay continuously. The plaintiffs however would be entitled to nominal damages, and in addition to that the return of the $75 paid. For the purposes of this case it is not necessary to decide whether that $75 is damages or money had and received, because the plaintiffs being entitled to nominal damages are entitled to bring their action in the District Court and are entitled to costs on the District Court scale. I am of opinion that this is a case in which, following the principles set out in the case of *Last West Lumber Co.* v. *Haddad* (1915), 25 D.L.R. 529, 8 S.L.R. 407, interest should be allowed to the plaintiffs on the $75.

In my opinion, therefore, the appeal should be allowed with costs, and the plaintiffs entitled to judgment against the defendant for $75, and interest thereon at 5% per annum from August 19, 1918, until judgment, and costs. *Appeal allowed.*

MAN.

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MERCHANTS BANK OF CANADA v. STEVENS.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Haggart, Fullerton and Dennistoun, JJ.A. December 1, 1919.

BANKS (§ VIII B—175)—LOAN OF MONEY TO BUSINESS—BUSINESS HEAVILY INDEBTED TO BANK—GUARANTEE OF PAYMENT BY BANK—AUTHORITY OF MANAGER—SCOPE OF HIS EMPLOYMENT—BANK ACT, 3-4 GEO. V., 1913 (DOM.), C. 9—JUDGMENT AGAINST BANK—APPEAL.

A letter written on the bank's stationery and signed by the bank manager, which guarantees the payment of a debt due a third party is not binding upon the bank.

The bank manager has no authority to give such a guarantee and, in doing so, he is not acting within the scope of his employment.

[Bank Act, 3-4 Geo. V. 1913 (Dom.), c. 9, s. 76, referred to; *Pole* v. *Leask*, 33 L.J. Ch. 160; *Banbury* v. *Bank of Montreal*, 44 D.L.R. 234, [1918] A.C. 626, followed; *Ontario Bank* v. *McAllister* (1910), 43 Can. S.C.R. 338, distinguished.]

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APPEAL by defendant from the judgment of Macdonald, J., in an action on an alleged guaranty. Reversed.

H. J. Symington, K.C., and *W. E. Davison*, for appellant; *I. Pitblado*, K.C., and *E. R. Siddall*, for respondent.

PERDUE, C.J.M.:—The facts in this case are fully set out in the judgment of Macdonald, J., before whom the case was tried. A motor business had been in operation in Winnipeg under the name of "The Winnipeg Motor Exchange Company." The business was owned by a Mrs. Robinson and conducted by her husband. It was not incorporated. In the latter part of the year 1916 it became a customer of the defendant and soon became largely indebted to the bank. The account was kept at the main branch of the bank in Winnipeg, A. C. Paterson being the manager. Almost from the opening of the account the general manager kept urging that the loans to the company should be kept down. The indebtedness, however, increased rapidly and in August, 1917, amounted to from $30,000 to $35,000. During this period the head office had been constantly urging Paterson to get the account reduced. He made many promises but allowed the indebtedness to grow.

In August 1917, Paterson was instrumental in bringing about a sale of the business by the Robinsons to two young men, Baxter and Martin, who were employees of the company. These young men put no money into the business. The consideration for the sale was the assumption of the liabilities of the business by Baxter and Martin. It appears, however, that $5,000 was paid by them to the Robinsons, the bank advancing the money. After the sale the business was conducted under the name of the Winnipeg Motor Co., but there was no improvement in the situation in so far as the bank was concerned. On October 6, 1917, the new business owed the bank on loans $27,693, besides a liability on trade bills of $15,309. On this date the Winnipeg Motor Co. borrowed from C. C. Fields $7,500, giving him as security a note, a chattel mortgage, and a post-dated cheque for the full amount, the cheque being dated October 13, 1917, and bearing Paterson's initials in the lower left hand corner. On the 8th of the same month Baxter approached Dalgleish, a solicitor, as to obtaining a loan. Dalgleish took up the matter with the plaintiff and her husband and after interviews between Dalgleish and Paterson,

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Stevens and Paterson, and the three of them together, a loan of $10,000 was made by the plaintiff to the Winnipeg Motor Co. on October 15. The money was to be repaid as follows: $2,000 on the 15th day of November, 1917, December, 1917, January, 1918, and $4,000 on February 15, 1918. As security for the repayment of the loan, the Winnipeg Motor Co. gave to the plaintiff 4 post dated cheques on the defendant bank bearing the dates of the above instalments and for corresponding amounts. Paterson placed his initials on the lower left hand corner of each cheque. He also signed and gave to the plaintiff the following letter:—

In connection with the loan of $10,000 which we understand you are granting to the Winnipeg Motor Co., to be repaid at the rate of $2,000 per month, and the balance at the end of 4 months, we beg to notify you that this bank is prepared to grant the company a credit sufficiently large to enable them to take up these instalments as they mature, and hereby guarantees payment of the said loan.

The Winnipeg Motor Co. also gave to the plaintiff a cheque on the bank for $1,000 post dated February 15, 1918, as remuneration for the loan. This cheque was also initialed by Paterson in the same manner as the others. The money received from the plaintiff was deposited to the credit of the company in its ordinary chequing account in the defendant's bank. Paterson reported to the head office the receipt of the $10,000 as "new capital invested." His connection with the bank was severed on November 1, 1917. The defendants refused payment of the cheques and denied liability on the alleged guarantee. The company was practically without assets.

The plaintiff brings this action to enforce payment on the guarantee and cheques.

The statement of claim is very lengthy and puts the plaintiff's case in several different ways.

Par. 3 alleges that the plaintiff at the request of the defendant and of Paterson, its manager, at the branch above mentioned, agreed to make the loan and sets out the manner in which it was to be repaid.

Par. 4—That the defendant or Paterson its manager acting on its behalf, in consideration of the plaintiff indorsing the cheques she was issuing for the loan and delivering them to the defendant, promised that they would honour, accept and pay the cheques of the Winnipeg Motor Co., setting out the cheques; the initialing

of the cheques as an inducement and indication of the promise and averring that the defendant thereby represented and warranted that the cheques would be accepted and paid.

Par. 5—That defendant for the consideration aforesaid promised to pay the sum of $11,000, $2,000 on November 15, 1917, or on presentation of a cheque, etc., and so on for each of the 5 cheques.

Par. 6—That plaintiff relying on the promise of the defendant or of its manager delivered her two cheques to the defendant or said manager and the defendant received the proceeds being $10,000.

Par. 7.—Money had and received.

Par. 8.—A claim on the guarantee of October 15, 1917, "from the defendant or from the defendant's said manager on its behalf."

Pars. 9 and 10.—Presentment and refusal.

Par. 11.—Delivery to defendant, at its request, of plaintiff's cheques for $10,000 in consideration of defendant's promising and warranting that it would pay etc., its refusal and consequent total failure of consideration.

Par. 12.—That plaintiff was induced to loan to the Winnipeg Motor Co. $10,000 on representations, warranties and promises by the defendant or by its manager on its behalf, setting out the several warranties etc., relied upon, the plaintiff's reliance on same; breach etc.

Par. 13.—That the Winnipeg Motor Co., being largely indebted to defendant, defendant placed a person or persons in charge of the business in the interests of the defendant and for its benefits; that defendant or such person or persons induced the plaintiff to lend the money ostensibly to the Winnipeg Motor Co., but actually to be paid to defendant, which loan the plaintiff was induced to make "on the representations and warranties of the defendant by such person or persons and by the said manager of the defendant" and on the faith of the initialing of the cheques of the Winnipeg Motor Co. and of the warranty of October 15 aforesaid; that the money was received by defendant, that it repudiates liability, etc.

Par. 14.—That defendant is not entitled to retain the money and not carry out the representations, warranties, etc.

Par. 15.—Estoppel by conduct.

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Pars. 16, 17, 18, 19, 20.—A claim upon each of the post dated cheques given by the Winnipeg Motor Co. as given to plaintiff for value and duly accepted by defendant.

Par. 21.—That plaintiff is the holder of the aforesaid cheques of the Winnipeg Motor Co., that such cheques were signed on behalf of the company by the powers so placed in charge of the business by the defendant and were given for the purpose of such business.

The defendant in its statement of defence denies specifically all allegations in the statement of claim. It denies that the alleged guarantee of October 15, 1917, is binding upon it, not being under its corporate seal. In par. 16 it alleges that if Paterson did request the plaintiff to make the loan to the Winnipeg Motor Co., or if he promised or agreed to do the several things alleged in par. 4 or gave the writing referred to in par. 8 of the statement of claim, or if he promised or warranted that defendant would pay the cheques or if he made the representations, warranties, etc., referred to in par. 12, or if he induced the plaintiff to make a loan to the company or delivered to the plaintiff the cheques referred to in pars. 16-20 of the statement of claim; he

was not acting in the course of his employment as manager of defendant's branch, nor on its behalf, nor within the scope, or apparent scope, of his authority as the plaintiff well knew.

In par. 17 of the statement of defence, it is denied that the defendant had power to enter into the various transactions or to give the promises, agreements, warranties, etc., alleged in the statement of claim, or to carry on the business referred to in par. 13 thereof, or borrow money for the purposes alleged, and the defendant pleads the provisions of The Bank Act, 3-4 Geo. V. 1913, Dom., c. 9.

I have dealt with the pleadings at considerable length as it is necessary to have the issues before us when dealing with the course pursued at the trial and the attitude taken by the plaintiff.

The transactions, promises, representations, warranties, etc., on which the plaintiff relies are alleged to be those of the defendant or of the defendant's manager acting on its behalf. The authority of the manager to bind the defendant is specifically denied in the statement of defence. All the transactions in question in so far as they can affect the bank were carried out by the manager.

The issue then upon which this case turns is, had the manager authority to bind the bank in the acts and matters complained of and in the manner alleged in the statement of claim? The affirmative of this issue is upon the plaintiff. The production of a letter from the general manager of the defendants stating that Paterson had been appointed manager of the branch and the fact that he acted as such, are not enough to shew that he had the extraordinary powers which the plaintiff must establish that he had, in order to render the bank liable in this action.

By s. 29 of The Bank Act

The directors may make by-laws and regulations, not repugnant to the provisions of this Act, or to any by-law duly passed by the shareholders or to the laws of Canada, with respect to (b) the duties and conduct of the officers, clerks and servants employed therein.

By s. 30

The directors may appoint as many officers, clerks and servants as they consider necessary for the carrying on of the business of the bank.

The burden of proving that the bank manager was acting within the scope of his authority is upon the party asserting it. This principle was much discussed in the recent decision of the House of Lords in *Banbury* v. *The Bank of Montreal*, 44 D.L.R. 234, [1918] A.C. 626. In that case the plaintiff, an Englishman, went to Canada on a pleasure trip in 1911 and stayed with the general manager of the defendant bank, who gave him a letter of introduction to the branch managers asking them, if he applied for assistance or advice, to place themselves at his disposal. In 1912 he again visited Canada seeking investments and presented the letter of introduction to Mr. Galletly, the defendant's branch manager at Victoria, upon whose oral advice he invested $125,000 upon a mortgage to secure a loan to a company who were customers and debtors of the bank. The advice which was honestly given involved oral representations as to the credit of the company. The company having failed to pay interest or principal, the plaintiff brought an action against the bank for negligence and breach of duty while acting as his bankers and advisers. It was held by the majority of the Court, affirming the Court of Appeal, [1917] 1 K.B. 409, that there was no evidence upon which the jury could find that Galletly had authority to advise the plaintiff as to his investments, or that the bank owed any duty to advise him carefully or at all. Lord Atkinson in giving his judgment said, at 279:—

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The burden of proving that Galletly, in giving advice, acted within the scope of his authority and in the course of his employment rested, of course, upon the appellant (the plaintiff). And yet one would almost suppose from some of the questions put that the burden was reversed. For instance, a point was made and pressed that amongst the written rules of the bank for the guidance of managers there was no rule forbidding them to advise as to investments.

Lord Parker of Waddington pointed out that the statement of claim alleged that it was part of the bank's business to advise their customers as to Canadian investments, that the appellant was a customer of the bank, that the bank through their manager advised him to make the investment in question, that he made it relying on the advice, that the advice was negligently given and that by reason thereof he lost his money. Lord Parker says at 294:

On this statement of claim the appellant had to prove *in limine* that it was part of the business of the bank to advise their customers with regard to Canadian investments. If he established this, he need not trouble further as to the authority of the manager. The scope of such authority would be coincident with the scope of the bank's business. If such business included advice as to investments, the manager would have a general authority to advise on investments on the bank's behalf.

I would also refer to the judgments in the Court of Appeal in the *Banbury* case, [1917] 1 K.B. 409, particularly that of Cozens-Hardy, M.R., at 420, Warrington, L.J., at 423, Scrutton, L.J., at 437.

In *Pole* v. *Leask* (1863), 33 L. J. Ch. 155, Lord Cranworth said (p. 162):

Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must shew that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.

And again (p. 163):

Where it is sought to make out a constructive agency, or to extend by implication an agency admitted or proved to exist for some purposes, to others, my judicial leaning is in favour of the party sought to be charged. The party who seeks to establish such a case ought to be held to strict proof.

The rule above stated is supported by numerous American authorities: See Corp. Jur., vol. 2, p. 925.

Mr. Symington, counsel for the bank, tendered in evidence at the trial the printed rules and regulations of the bank to be observed by its bank managers and the staff in general. These rules and regulations were in Paterson's possession. R. 104,

described as the rule shewing the limitation of the authority of a branch manager, was specially tendered. The putting in of all or any of the rules was strenuously opposed by *Mr. Pitblado*, counsel for the plaintiff, on the ground that the rules and regulations had not been brought to the attention of the plaintiff. During the long discussion that ensued the trial Judge put two questions to *Mr. Pitblado* and received the answers thus reported in the evidence:

His Lordship: Do you contend, Mr. Pitblado, that there was any actual authority? *Mr. Pitblado:* The authority upon which we rely is the authority we have put in here, that is, the appointment of this man as manager of the bank, and his acting as such manager. *His Lordship:* Any other authority? *Mr. Pitblado:* None other than that.

The trial Judge refused to allow the rules and regulations to be received in evidence. With respect, I think they should have been admitted. In the *Banbury* case, *supra*, the written rules of the Bank of Montreal for the guidance of managers were received as evidence of the authority, or the limitation of authority, of the bank manager: See 44 D.L.R. at 279, [1918] A.C. at 686. The ground of objection taken, that the rules and regulations had not been brought to the attention of the plaintiff was, in my opinion, invalid. The onus was, however, on the plaintiff to prove the manager's authority, and the evidence of authority relied upon by plaintiff's counsel was far from sufficient to bind the defendant in respect of the acts complained of.

I will now consider the letter of October 15, 1917, which constitutes the guarantee alleged in pars. 8 and 12 of the statement of claim. In so far as the writing purports to be a guarantee of the debt of a third party it is not binding on the bank. No authority to the agent to give such a guarantee was proved. I doubt whether the general manager of the bank could have bound the bank if he had signed the letter in the way the local manager signed it. The seal of the bank was not affixed and there is nothing shewn which dispenses with the sealing of the instrument. Sec. 76 of The Bank Act deals with the business and powers of a bank. The first part of the section states what a bank may do. The only clause which by any possible construction could authorize the giving of a guarantee is (d), which provides that the bank may

engage in and carry on such business generally as appertains to the business of banking.

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Now, the nature of the business of banking is part of the law merchant, and will be judicially noticed by the Courts: Falconbridge on Banking, 2nd ed., p. 177. *In re The Southport and West Lancashire Banking Co.* (1885), 1 T.L.R. 204, it was held by the Court of Appeal (Baggally, Bowen and Fry, L.JJ.) that it is not within the ordinary scope of a bank manager's authority to guarantee the payment of a draft. Baggally, L.J., pointed out that there was no evidence to bring this particular line of business within the scope of the business of the company. Bowen, L.J., said that if the giving of the guarantee was not authorised by the memorandum of association the whole thing was at end. He also referred to the necessity of evidence of authority.

In *Bank of Commerce* v. *Jenkins* (1888), 16 O.R. 215, it was held by the Common Pleas Division that the execution of a deed of composition by a bank manager on behalf of the bank was not binding on the bank, the corporate seal not having been used.

In England a bank may have power to guarantee the payment of money if its deed of settlement is broad enough to cover the transaction: *In re West of England Bank* (1880), 14 Ch.D. 317. But under The Bank Act of this country no such power is given to a chartered bank.

I have no hesitation in holding that Paterson had no power to give the guarantee in question.

But *Mr. Pitblado* argues that the letter of October 15, 1917, contained "an original promise" to provide funds to pay the instalments of the loan as they matured and that this was binding on the bank. He cited *Sutton & Co.* v. *Grey*, [1894] 1 Q.B. 285. In that case the plaintiff had accepted bills at the request of the defendant who promised to put the plaintiff in funds to meet the bills, the promise was held to be an indemnity and not a guarantee and so not within the statute.

In the present case the letter of October 15 contains a promise by the bank to provide a credit large enough to enable the Winnipeg Motor Co. to pay the instalments when they become due, but there is added to this promise an unqualified guarantee by the bank for payment of the loan. It is not an indemnity without a guarantee, but a promise to furnish credit and also a straight guarantee.

In *Simpson* v. *Dolan* (1908), 16 O.L.R. 459; *Adams* v. *Craig*

(1911), 24 O.L.R. 490, and *Ontario Bank* v. *McAllister* (1910), 43 Can. S.C.R. 338, and other cases, the bank in each case received some benefit from the transaction, a circumstance which, as I shall show, distinguishes all of them from the case at bar. But the main feature which separates this case from all the authorities cited is the utter folly and improvidence of the transaction in so far as the interests of the bank were concerned. It is hard to understand the conduct of Paterson. In spite of instruction to the contrary from the general manager, he had allowed the Winnipeg Motor Exchange Co. to become heavily indebted to the bank. Then when the prospects of the business were desperate, instead of closing down upon it he loaned Baxter and Martin $5,000 of the bank's money to buy out the bankrupt concern and assume its liabilities, they not putting in any additional capital. Then when the business under its new control and new name of the Winnipeg Motor Co. continued to lose money and become more hopelessly involved, Paterson, in order to help it and at the same time to conceal the advances from the knowledge of the general manager, commenced the practice of initialing postdated cheques of the company to enable it to borrow money. The Fields cheque for $7,500, postdated and initialed by Paterson was outstanding when the transaction with the plaintiff took place, and that cheque was paid, in part at all events, with the plaintiff's money. On October 15 the company was in great need of funds. The Fields cheque was due and there was not enough money in the account to meet it. There were other payments also to be made. Dalgleish, the plaintiff's solicitor, admits that he was told by Paterson that the Winnipeg Motor Co. was heavily indebted to the bank, that they had a line of credit at the bank and did not want to exceed it. Dalgleish then on behalf of the plaintiff arranged the loan to the company. The result was an arrangement whereby the bank, which would not itself lend more money to the company, was to be made liable on the guarantee and the cheques for $11,000, loaned by the plaintiff to the company. Putting it in other words; the bank, which would not lend the company money in the ordinary course of bank business and at the rate of interest allowed by The Bank Act, was to become liable for a loan of $10,000 and for a sum charged by way of interest which works out at over 40% per annum. Paterson acted in a

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very suspicious manner. He concealed the real transaction from the bank. In his report to the head office he designated the transaction as "new capital invested." No copy of the letter or guarantee was kept in a letter book or on the fyles in the bank. He kept a duplicate of it himself but, as he states, when he left the bank he destroyed a lot of papers and supposes that it was amongst them. The transaction was carried out at Dalgleish's office and not at the bank. Paterson there received the plaintiff's cheques for $10,000 and handed over the letter and the postdated cheques of the Winnipeg Motor Co. He then returned to the bank and deposited the cheques to the credit of the company in its ordinary deposit account where the proceeds could be drawn out by Baxter and Martin. No record of the transaction appeared in the bank's books and no entry was made in the bank's books or records of the initialed cheques handed to the plaintiff and outstanding as a liability of the bank.

The plaintiff had her solicitor and her husband, who is an experienced business man, advising her. From what they knew of the transaction and of the parties and of the surrounding circumstances, they must have been aware that something more than suspicious was taking place, that, in fact, something irregular and fraudulent was being perpetrated at the expense of the bank. The form of the transaction—a guarantee by the bank of a loan at 40% per annum, when it would not itself lend any more money to the borrowers, the initialing by the bank manager of cheques for large amounts dated months ahead—was enough to awake the suspicions of any person with ordinary business sense and to warn him or her that there was something unusual, something wrong, and to have nothing to do with it.

Now as to the initialing of the postdated cheques, the burden of proving the authority of Paterson is still upon the plaintiff. The experienced bankers who gave evidence testified that it was not within the ordinary course of banking business in Canada for a bank to agree to cash postdated cheques of a customer in circumstances similar to those in this case. There is nothing said in the letter of October 15 about the cheques or the initialing of them. Dalgleish as solicitor for the plaintiff arranged the conditions of the loan. When he was under cross-examination he was asked by the trial Judge: "Did you lend on the strength

of the letter?" To this he answered: "Yes." Paterson said that putting the initials on the cheques was just a confirmation of what he said in the letter. Then the question was put to him: "And you complied with that object in view?" To this he answered:

And I complied. As a matter of fact I knew that my initials on the cheque would not make the cheque good alone, but I had given him the letter, so I did not see any reason why I should not put my initials on them. Q. Although you felt that the putting on of your initials did not mean anything more than your letter already indicated? A. Yes.

It would appear from this evidence that the guarantee for the payment of the loan, the promise to provide funds to meet the instalments and the initialing of cheques representing the instalments are all part of the same purpose, namely that the bank should be surety for the Winnipeg Motor Co., or guarantor for the repayment of the loan.

The attempt that was made to shew that the business of the Winnipeg Motor Co. was in reality the business of the bank, and that Baxter and Martin were merely conducting it on behalf of the bank, completely fails. The agreement of August 14, 1917, in which Mrs. Robinson, the owner of the business of Winnipeg Motor Exchange, agreed to sell the business to Baxter and Martin and they to buy it on the terms set forth, puts it beyond question that there was an actual sale to these parties. Dalgleish's evidence shows that he negotiated the loan to the Winnipeg Motor Co. at the request of Baxter and for the company. There was no suggestion at the time that the bank was the borrower. A moment's consideration of the proposition shews its futility. Can it be conceived that the Merchants Bank of Canada would take over a business like the one in question and then, instead of the bank itself advancing the necessary money to keep the business going, would borrow money for the purpose from a private person on the terms and at the usurious rate of interest demanded in this transaction? It is safe to say that no Canadian chartered bank would be a party to such an improvident course of business. If a branch manager attempted to commit the bank to such transaction his authority to do so would have to be established by the clearest evidence.

It is said that a postdated cheque is equivalent to a bill payable after date: McLaren on Bills, 4th ed., 89, citing *Forster* v. *Mac-*

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kreth (1867), L.R. 2 Ex. 163; *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q.B. 715. But it follows that in order to bind the bank as drawee the bill must be accepted by the bank. By s. 36 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, the acceptance must (a) be written on the bill and be signed by the drawee, or (b) the signature of the drawee must be written on the bill. Neither of these requirements was complied with. There is nothing on the face of the cheques that could be construed as an acceptance. There is nothing to shew that the manager's initials on a post-dated cheque constitute an acceptance by the bank. Paterson's opinion was that the placing of his initials on the cheques would not of itself make the cheques good, that is to say binding on the bank.

It was argued that the letter of October 15 contained a promise to honour the cheques and that the promise was equivalent to a letter of credit. But I think the difference is obvious. The issue of letters of credit is a legitimate part of the business of bankers and a well recognised means of transmitting money: Falconbridge, 2nd ed., p. 418. There was no such purpose intended in the present case. The letter was given as a security for an advance of money made to a customer of the bank by a third person and repayable in the future. It was a guarantee of a present loan and not a letter of credit.

The trial Judge has found that had the money been paid to Baxter and Martin and the bank had received no benefit, there would be no liability on the part of the bank,

as the manager acted beyond the scope of his authority, a position which the plaintiff must be held to have known.

But the trial Judge finds that, because the plaintiff's money was deposited by the bank manager to the credit of the Winnipeg Motor Co., and because the postdated cheque given to Fields by the company and initialed by Paterson was paid out of the plaintiff's money, the indebtedness of the company to the bank was reduced by that amount. He also finds that the indebtedness of the company to the bank was reduced by the deposit of the $10,000, although this money was paid out almost at once.

The evidence establishes that the plaintiff's money was loaned to the Winnipeg Motor Co. When Paterson received the plaintiff's cheques for the $10,000 at Dalgleish's office he was acting

on behalf of the company. He then deposited the money in the company's ordinary account and within two days the company paid out the whole amount. The bank received no benefit from having the money pass through its hands. It was not liable on the Fields cheque as the trial Judge appears to think. As I have shewn, the mere placing of the manager's initials on that cheque was not enough to make the bank liable. Fields received from the company security for the loan. He states positively that it was not a loan to the bank. He knew it was a loan to the company. He thought the putting of the bank manager's initials on the cheque would operate as a guarantee that the cheque would be paid. His belief as to the effect of the initials on the cheque was erroneous. He had no claim against the bank. There is nothing to shew that the bank received any benefit from the payments made with the plaintiff's money. The rest of the $10,000 was paid out by the company on different accounts but none of it went to the bank and the indebtedness to the bank was in no way reduced by the loan.

I have much sympathy for the plaintiff who was led into making an unwise investment, but I cannot see how her claim against the bank can be supported. The appeal must be allowed and the plaintiff's action dismissed with costs in both Courts.

Cameron, J.A.

CAMERON, J.A.:—This action is brought to recover the sum of $11,000 being the aggregate amount of five cheques, three of which were for $2,000 each, dated November 15 and December 15, 1917, and January 15, 1917, respectively, one for $4,000 dated February 15, 1918, the fifth for $1,000 also dated January 15, all drawn by the Winnipeg Motor Co. upon the defendant and payable to the plaintiff's order. The defendant bank refused payment of the first of these cheques and repudiated all liability in respect of the said sum of $11,000.

The negotiations leading up to the issue of these cheques were had between Baxter & Martin, known as the Winnipeg Motor Co., Dalgleish, the solicitor, Stevens (who acted for his wife, the plaintiff) and the manager of the bank at Winnipeg, and culminated in the letter of the manager, which is as follows:

Mrs Hattie Stevens, Winnipeg. October 15th, 1917.

Dear Madam,—

In connection with the loan of $10,000 which we understand you are granting to the Winnipeg Motor Co., to be repaid at the rate of $2,000 per

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month and the balance at the end of the fourth month, we beg to notify you that the bank is prepared to grant the company a credit sufficiently large to enable them to take up these instalments as they mature, and hereby guarantee payment of the said loan. A. C. PATERSON, Manager.

The cheques, as described, were initialed by the manager, and together with the letter, were given to the plaintiff, who issued her cheques for $7,900 and $2,100, both dated October 18, 1917, on the Bannerman Ave. branch of the defendant bank, payable to her own order and endorsed by her, which she gave to the manager by whom they were deposited to the credit of the Winnipeg Motor Co. The plaintiff also received the promissory note of the Winnipeg Motor Co., dated October 15, 1917, for $11,000, payable to her order, February 15, 1918.

Now this transaction can be fairly characterised as most peculiar. On the face of it the plaintiff was lending to the Winnipeg Motor Co. the sum of $10,000 on the security of the guarantee of the bank that that amount would be repaid with an additional $1,000. That is to say, the plaintiff was to receive $1,000 as interest for the loan of $10,000, the whole $11,000 to be repaid on the maturity of the postdated cheques above described, the bank making itself responsible for these payments.

It becomes necessary to examine the facts particularly with reference, firstly, to the position of the Winnipeg Motor Co., and its relation to the bank and, secondly, to the advance made by the plaintiff and the circumstances in which it was made. These are to a great extent dealt with and considered in the judgment of Macdonald, J., by whom the case was tried, and who found in favour of the plaintiff.

The important evidence on these matters is that of A. C. Paterson, at that time the manager of the defendant's principal branch in this city, who, November 1, 1917, retired from the service of the bank. That evidence was taken at the instance of the plaintiff under the rule in that behalf, and put in at the trial. Whether Paterson was dismissed by the bank or resigned from his position, the fact remains that he was out of its service in consequence of the events involved in the transaction here in question. The evidence, therefore, cannot be considered as satisfactory as it would have been had he gone into the witness box at the trial and been subjected to cross-examination. We have the plaintiff relying for proof of her case on the evidence of the defendant's

former manager, elicited by leading questions framed to bring out favourable answers from a witness whose relations to the bank had terminated in unfavourable circumstances.

Paterson gives an account of the bank's dealing with the Winnipeg Motor Exchange, beginning in 1916. This business was owned by Nellie Robinson and managed by her husband W. A. Robinson and was carried on until August, 1917, when it had become indebted to the bank to an amount between $30,000 and $35,000. Paterson became uneasy about this state of affairs and suggested to two young men Baxter and Martin, the advisability of their going into the business, and the result of these negotiations is shewn in the agreement between Nellie Robinson and W. A. Robinson of the one part and Baxter and Martin, of the other, made August 14, 1917, wherein it is recited that. "Whereas the vendors have agreed to sell and the purchasers to buy the good will, stock in trade, fixtures and book debts of the business of Nellie Robinson as a going concern, the agreement witnesses that in consideration of the assumption by the purchasers of the trade liabilities of the Winnipeg Motor Exchange the vendor assigns unto the purchaser all the interest and good will of the said business with the stock in trade, etc., pertaining thereto and all book and other debts and contracts on account and in respect of said business."

A perusal of this document, prepared by the solicitors of the parties to it, executed under seal, leaves no doubt that the transaction was, as plainly as words could make it, an outright sale and purchase as between the parties of the business and its various assets as a going concern. It contradicts flatly the theory set up on the argument that the transaction was really an acquisition of the business by the bank for the purpose of carrying it on with an object of its ultimate liquidation, and that Baxter and Martin had no interest in it whatever except clerks or agents of the bank. According to this theory Baxter & Martin were figureheads for the bank whose manager was the real controller of the business and Baxter and Martin were his servants and nothing more. This agreement on its face absolutely refutes this contention, which it seems to me is without real support in the evidence, where it is closely examined.

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The following questions and answers are amongst those put in evidence by the plaintiff:

Q. I ask you again, Mr. Paterson, was it not the understanding with you that they were there for the purpose of looking after the bank's indebtedness until it was paid off? A. I asked them to go in for that purpose, yes. Q. And that is the purpose they went in for, to your knowledge? A. Yes, and to get the business for themselves eventually. Q. That is, when the bank's indebtedness was paid off, they would then have the business themselves? A. The bank and other creditors, yes.

This evidence clearly negatives any other conclusion than that established by the document referred to. There is nothing here to indicate that the purchase made by Baxter & Martin was a purchase or acquisition of the business by the bank or so intended to be. There was some control retained by the bank of the expenditures of the new business which was perfectly right and proper.

Q. They (Baxter & Martin) could pay the ordinary accounts by cheque, but any important ones you were to be spoken to? A. That was the understanding.

It was sought on the argument to put a different construction on some of Paterson's evidence where he assented to questions framed with that design. We find these questions and answers put in:

Q. Were they (Baxter & Martin) not holding the assets of the Winnipeg Motor Exchange for the bank? A. It was never spoken of in that way. Q. Was it understood in that way? A. I did not so understand it: they were to work out this debt for the bank and then they would have the business.

Then these questions are asked and answered:

Q. That is, the understanding was that they would go in and work out the debt for the bank and after the debt was worked out they would own the business? A. Yes. Q. But while the debt was being worked out they were to consult you in regard to every payment that was made and every step that was taken? A. They did that as a matter of fact, but there was no formal agreement. Q. But that was the understanding? A. Yes. Q. The idea being this; that here was a going concern, and you, as manager of the bank, thought that if it was put under proper management it would be a good going concern, would pay off the liability and be a good asset to active young men who would take it over? A. Yes.

But as has been seen, the colouring thus attempted to be given to the transaction is not consistent with other portions of Paterson's evidence. He was plainly quite clear as to its real nature and notwithstanding his answers to carefully framed questions had no idea that the business of the Winnipeg Motor Co. was that of the bank. This appears plainly from the remain-

ing portion of his evidence that was put in at the trial by the defendants. I quote the following:

Q. Then what arrangement was made by you with Baxter and Martin when they went into the Winnipeg Motor Exchange business, from the bank's standpoint? A. There was no formal arrangement. Q. What was the understanding then? A. I asked them to go in and said I would assist them as much as I could. Q. That is, as the representative of the Merchants Bank of Canada, you would assist them as much as you could? A. Yes. Q. Were they put in charge when they first went in, for the bank? A. No, that was not my understanding, I asked them to go and take over the business. Q. At any rate, it was at your request? A. Yes. Q. But were they not there in the interest and for the benefit of the bank? A. They were there because I asked them to take it over, the bank was a large creditor.

I think the conclusion to be drawn from the whole evidence is that the agreement of sale sets out the real transaction. The bank was interested as a large creditor and exercised a perfectly legitimate supervision over the financial operations of the new concern. But it is impossible to hold that the new business was that of the bank for which Baxter & Martin acted as agents. There is no doubt of their ownership of it. It is out of the question, in my opinion, to hold the bank bound by Paterson's answers to leading questions as those answers must be read with the rest of his evidence to appreciate their bearing and all his evidence must be considered in its relation to the agreement between the Robinsons and Baxter & Martin and to the other facts of the case as they appear.

The proposed loan by the plaintiff to Baxter & Martin first came to Paterson's attention through Baxter, who told him he could arrange for a loan of $10,000 from Dalgleish, whom he (Paterson) saw several times in the bank's office and in Dalgleish's office some days before October 15, 1917. The substance of the negotiations with Dalgleish is set out at p. 23:

Q. What Dalgleish saw you about was to see, if the loan were made, the bank would be responsible to repay it, was it not? A. It was just the point, I was to give him a letter as manager, guaranteeing him the payment of the loan.

. . . . . .

Q. You knew, however, Mr. Paterson, that what Dalgleish was going to rely on for his client, was the undertaking of the bank? A. Yes.

On the day the loan was made, Paterson saw Stevens, who was acting for his wife, and Stevens said to him that Dalgleish had told him that he (Stevens) was to make the loan of $10,000 and it would be retired as the cheques matured, and that I (Paterson) was

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to give him a letter agreeing that these cheques would be taken up as they matured.

Afterwards the two cheques issued by Mrs. Stevens were endorsed by her and handed to Paterson, who at the same time handed over the 5 cheques of the Winnipeg Motor Co. with the letter above mentioned. On the same day Paterson deposited the 2 cheques to the credit of the Winnipeg Motor Co. in their current account, as shewn by the ledger sheet, Ex. 11. Paterson placed his initials on the 5 cheques before they were transferred. Dalgleish asked him to do this and as to the object of his doing this, he was asked "To indicate, was it not, that the cheques would be paid when they were presented," to which he replied "That was his idea."

Dalgleish gives an account of his connection with the transaction. He states that Baxter told him that the Winnipeg Motor Co. wanted a loan of $10,000 and that he went to Paterson and asked if it was correct that the bank had placed these men in charge and that they were running the business in the interests of the bank and Paterson confirmed this. But he clearly states that the loan was to be made to the Winnipeg Motor Co. Subsequently he saw Paterson and arranged the terms of the loan and these were confirmed with Stevens present. In his evidence the witness repeatedly states his version of the loan transaction as being a loan to the bank but makes an affirmative answer to the trial Judge when asked if he lent the money on the strength of the letter. It is significant that when the change of managers occurred, Dalgleish should arm himself with the letter, or a copy of it and drop into the office of the new manager to interview him and discuss with him this transaction, which he says he considered in no way out of the ordinary. Dalgleish's evidence is patently coloured throughout with a bias in favour of his client. It is to be noted that Paterson's evidence as to what he told Dalgleish dissents altogether from Dalgleish's statement.

Q. Did Dalgleish tell you at the interview that Baxter told him that Martin and he had been placed in charge of the Winnipeg Motor Co. by the bank to run the affair for the bank, and that any transaction would have to be with your consent and under your instructions? A. I did not know that. Q. Did Dalgleish tell you? A. I am sure he did not. Q. What explanation did he give for seeing you? A. It was understood that I was to give him a letter.

. . . . . .

Q. And did you not there tell him that Baxter and Martin were really representing the bank in the business, and were running the business in the interests of the bank and its creditors? A. I don't think so.

Stevens gives his story of the conversations with Paterson when he met him with Dalgleish in the latter's office. He says he was told the loan of $10,000 was to the Winnipeg Motor Co. He says Paterson said that Baxter and Martin were in charge; he said "two live young men are in charge of it in our interests" and when asked what Paterson meant by that he answers "Because they were indebted to the bank and they thought they could bring this business up and probably pay back all the liabilities," which is an entirely different thing and in accordance with the fact of their ownership. And yet later on in his evidence Stevens is asked the very leading question: "And you say you were relying on the statements he made about these young men being in charge for the bank?" to which he answers "Yes." No importance can be attached to this answer to so leading a question.

In the parts of Paterson's examination on discovery which were put in by the defence there are important statements in addition to these mentioned. I quote the following:

Q. And it was at that first interview, was it not, that you stated to Dalgleish that if the loan were made, and times fixed at which payments were to be made to meet it, you would see that money would be put to the credit of the Winnipeg Motor Co. to meet the payments from time to time? A. I told him that I thought they would be able to retire these cheques.

Also this question and answer:

Q. And you knew when putting your initials there that they would indicate that the cheques would be paid when presented? A. It was just a confirmation of what I said in the letter. Q. And you complied with that object in view? A. And I complied. As a matter of fact I knew that my initials on the cheque would not make the cheque good alone, but I had given him the letter, so I did not see any reason why I should not put my initials on them.

One of the singular circumstances in this peculiar case is that Paterson admits there was no letter press copy kept of the letter of guarantee, Ex. 10, and that there was a duplicate but that it was not left on the files. This copy, he says, he supposes was amongst certain papers he destroyed when he left the bank. Moreover, Paterson never reported the $5,000 payment to Robinson or the loan from Mrs. Stevens. He never mentioned these matters or the letter of guarantee to the Western Superintendent of the bank whose office was in the same building. It is curious also that the agreement between Robinson and Baxter & Martin should have been taken away by Paterson and kept by him at the bank.

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My conclusion is that the loan of $10,000 was made to the Winnipeg Motor Co. and not to the Merchants Bank as principal. The written evidence is unassailable. We have the agreement of sale, the 5 cheques, the note for $11,000 and the letter of guarantee, all of which carry the one meaning that the contract of lending was made with the Motor Co. and the other evidence fully substantiates this view. The idea of lending money to the Merchants Bank at 40% is an absurdity and was never entertained by any of the parties to this transaction, until the cheques were repudiated and the necessity for explanations arose. A perusal of the evidence has left this impression most distinctly on my mind.

In the result the advance was made to the Winnipeg Motor Co. and the bank appears as responsible for its guarantee as set out in the letter. That letter embodied the negotiations in their final form and became the contract entered into and into which the previous promises or undertakings made by Paterson were merged.

The action is brought on the letter which is set out in the statement of claim, but the cause of action is put in several alternatives. It is, in one form, based on the cheques which it is alleged were accepted, or promised to be accepted and paid. But while this alters the contract as alleged in form it does not do so in substance. It still remains a contract, on the part of the bank, to become responsible for and to repay the advance made to the Winnipeg Motor Co. if the various amounts are not repaid by the motor company to the plaintiff at the times agreed on. Whatever form is given to the contract in the pleadings does not vary it in its essence. The promise or undertaking or warranty or whatever term may be used to designate the transaction is still a contract purporting to bind the bank to become responsible for the debts or defaults of the motor company in respect of its promises to pay and nothing else and this is what was in the minds of the parties beyond any doubt in my mind.

Was such a transaction as this within the powers of he bank? The circumstances of this case distinguished it from that dealt with in *Ontario Bank* v. *McAllister*, 43 Can. S.C.R. 338. There the McAllisters were heavily indebted to the bank and a settlement was effected by which they were discharged from liability upon

paying the bank $10,000 and transferring to it all their assets. Agreements were entered into for the liquidation of the property and the immediate question to be decided was the liability of the bank for rent under the lease of the mill property held by the defendants. It was held that, in view of the provisions of the Bank Act, the carrying on the business for the purposes provided for was not *ultra vires* of the Act. As I view the facts in the present case there is no such question here. The bank was not in this case carrying on the business of the Winnipeg Motor Co. for the purpose of liquidation or any other purpose. The business was and remained that of Baxter & Martin. The question of *ultra vires* that arises here relates only to the power of the bank to make such a contract as that which forms the basis of action in this case.

In the *McAllister* case, *supra*, it was argued that the transaction came within s. 76 (2) of the Bank Act, prohibiting the bank from buying or selling goods, wares and merchandise or engaging in any trade or business. But it was held that the sub-section did not cover an isolated transaction, such as was involved in the assumption of the lease, entered only for the purpose of settling an overdue debt. Here we have no such set of circumstances and no question as to the right of the bank to carry on a business in them. The question here does not involve any of the prohibitions in s. 76, but is whether or not the bank was authorised to enter into the contract, agreement or undertaking on which it is sought to be made liable by virtue of sub-s. (d) of s. 76, which provides that it may engage in and carry on such business generally as appertains to the business of banking. We can look at all the decisions of the Judges of the Supreme Court in the *McAllister* case as of assistance in arriving at a conclusion.

In the *McAllister* case the Chief Justice held that the assumption of the lease was an isolated transaction entered into to realise an indebtedness legally contracted and therefore within its powers. Davies, J. (now Chief Justice), held that, as the substance of the transaction was the *bonâ fide* settlement of a past due debt, the assumption of the obligation of the lease is impliedly authorised by sub-s. (d) of s. 76, to avoid a possible loss. Idington, J., concurred but did not consider the issue of *ultra vires* raised on the pleadings. Duff, J., dissented. He held, 43 Can. S.C.R. at 361, that there were two questions involved:

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1st. Does the transaction fall within the prohibition found in sub-s. 2 (a); and secondly: Can it, having regard to the provisions of the Act as a whole, be brought within sub-s. 1 (d)?

His opinion is that it is impossible to imply authority in a bank to take over specific property in such circumstances as to involve the bank in the necessity of carrying on the business to enable it to realise its debt under sub-s. 1 (d) when read with sub-s. 2 (a). And at 366:

The ultimate purpose was to realise the debt; but to do so by carrying on the business until it could be sold as a going concern.

The latter he held to be within the statutory prohibition and the purchase of the business with that illegal object in view, was invalid. Anglin, J., also dissenting, says at 374:

I can see no escape from the conclusion that the carrying on of the milling business of the bank was a prohibited engaging in trade or business.

Duff, J., refers to the decision in *Radford* v. *Merchants Bank* (1893), 3 O.R. 529, where it was held that it was *ultra vires* for a bank to take over unfinished goods, finish them, and then sell them, with a view of preventing a loss in respect of a loan, and points out that the Act, though several times re-enacted since the date of that decision, has not been altered in its relevant provisions.

In the result the Chief Justice and Davies, J., held the bank, in assuming the lease as necessarily and properly incidental to the carrying on of the business for the purpose of realising a lawful debt, was acting within its powers. Idington, J., concurred in the result but refrained from discussing the question of *ultra vires*. And Duff, J., and Anglin, J., held the whole dealing, the acquisition of the property and the assumption of the lease, beyond the powers of the bank. It may well be conceived that, had the question of the lease alone been before the Court, separated altogether from the special circumstances in which and owing to which the bank acquired the lease, there would have been a unanimous decision that such a transaction was *ultra vires*. There was here no carrying on of the business of the motor company by the bank to which the contract, the subject matter of this action, can be ascribed as a proper or necessary incident in the effectual carrying out of the liquidation of the motor company's business. This transaction was quite independent of such considerations. The bank's undertaking was given as security for the repayment of the loan made by the plaintiff to the Winnipeg

Motor Co. to enable it to carry on its business as a going concern. As I view the judgments in the Supreme Court in the *McAllister* case they are authority for the contention that the bank had no power to enter into such an undertaking or contract as that on which this action is brought and that the alleged undertaking or contract made by the manager was wholly void and inoperative.

I believe it has been the intention of Parliament, in the interest of shareholders, depositors and the public generally, not to extend unduly the powers of banks but to keep them within well defined and well understood limits. Falconbridge on Banking, 2nd ed. at p. 177 *et seq.*, gives an enumeration of the powers of a bank and they are all well known to the public. But in none of them can we find authority for holding that the giving of guarantees or of undertakings by a bank to become responsible for the debts of others has been part of "such business generally as appertains to banking." If it be conceded that a bank has such power, the bank might be made liable to an enormous extent, through guarantees and other contracts of that kind, and this without that liability being disclosed to the public or to the shareholders or even to the principal officers of the institution. I cannot imagine that it was intended to leave the door open for such dangerous operations. They are so foreign to what is ordinarily considered the legitimate business of banking that if Parliament decided to give them such unusual powers it would have left it no matter of remote and obscure inference, but have set forth the powers in so many words with safeguarding provisions. In my judgment the bank had no power to enter into the contract on which it is sought to be made liable in this action.

I refer to *In re The Southport, etc., Banking Co.*, 1 T.L.R. 204, where Lord Bowen says:

> If the giving of the guarantee was not authorised by the memorandum of association the whole thing was at an end.

In my view, the giving of the guarantee or undertaking in this case was unauthorised by The Bank Act, and that disposes of the whole case. There could be no ratification of such a void contract by the agent or by the bank itself.

On the argument before us it was urged:

> (1) That the bank is liable on the promises or agreements made by its manager, and that the agreements made by him were within his real or ostensible authority; and further, that the cause of action is not a guarantee

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but a direct promise and, even if it be a guarantee, it was within his agency. (2) That the initialing of the cheques constituted acceptance, or, in any event, a promise to accept and pay. (3) That the bank is liable for the representations made by the manager even if these were false or fraudulent. (4) That, independently of the cheques and letter, as the bank had put these men in charge of the business it is liable on the manager's verbal promises, and, *a fortiori*, in view of the cheques and the letter. (5) Also that even if the manager lacked authority there was ratification by the bank in keeping the money and, in any event, the bank is bound to return the money received.

As to the first ground, the facts of the case do not bear it out in the view I take of them. The transaction must be viewed as a whole. The substance of the alleged contract was expressed in the letter of guarantee on which the money was advanced by the plaintiff and the initialing of the cheques was merely auxiliary to it. And I can look at the transaction in no other way than as an attempt to create a guarantee by the bank that it would make good the instalments agreed on if they were not met by the motor company as they matured. A contract, undertaking or agreement of such a character is, as I have stated, in my opinion, beyond the powers of the bank and no authority could be given by it to an agent to enter into it.

We were referred to a number of cases on this branch. *Sutton & Co.* v. *Grey*, [1894] 1 Q.B. 285, deals with a case where a contract was held not to be a guarantee because both parties were interested in the subject matter, and the Statute of Frauds did not, therefore, apply. *Simpson* v. *Dolan*, 16 O.L.R. 459, and *Adams* v. *Craig*, 24 O.L.R. 490, were also pressed on our attention. But in those cases the bank was directly interested in the proceeds of the transactions out of which the liability arose. It is to be noted that *Simpson* v. *Dolan* was decided before the *McAllister* case, which is not mentioned in *Adams* v. *Craig*. These cases and others cited to support the plaintiff's view are, to my mind, clearly distinguishable from the state of facts presented in the evidence before us.

As for the initialing of the cheques, I look on that as a subordinate feature of the matter. Such initialing is usually nothing more than an indication by the manager to the ledger keeper to pay the cheque even if the customer's account is overdrawn. See judgment of Middleton, J., in *Scott* v. *Merchants Bank* (1911), 2 O.W.N. 514. But I cannot see what, if any, significance can be attached to initials on a postdated cheque. And if they do convey

the meaning of a promise to accept and pay, we come back to the real transaction that the bank is to guarantee the payment if the motor company fails to meet the cheques. It was argued that representations made by the agent, even if fraudulent, bind the principal, and, as a rule, this is the law. The word "representations" is used in the pleadings and was used on the argument, but "promise" is what is meant. But if there were representations of facts that affected the plaintiff, they are futile if made in reference to a matter beyond the bank's powers. But it is impossible in my opinion to rely upon the verbal promises of the manager when the contract has been reduced to writing in the form of the letter. Even if they could be relied upon, the plaintiff once again returns to the position of seeking to enforce a guarantee, verbal this time, made by the manager as agent for the bank which had no power to enter into it. From this standpoint there can be no ratification of the manager's action for there can be no ratification of an *ultra vires* contract.

Transactions which are absolutely illegal or *ultra vires* cannot be ratified, or rendered binding by acquiescence.

Brice, Ultra Vires, p. 633.

The claim is urged that, in any event, the money must be returned; and in Brice, p. 648.

A corporation must, in every case of an *ultra vires* engagement entered into in *bona fides* account for any benefit derived by it from the engagement.

But the receipt by the bank of the proceeds of the loan in this case, solely, as I have pointed out, for the purpose of immediate distribution amongst the creditors and nominees of the motor company cannot be deemed a benefit received by it. To my mind such a contention is impossible. It might as well be argued that if the manager had cashed the cheques and personally paid over the bank bills to Baxter & Martin the bank had received the benefit.

Such being the facts as I view them, the cases cited to establish the right to recover moneys advanced in contravention of the statute, such as *Rolland* v. *LaCaisse d'Economie, Notre Dame de Quebec* (1895), 24 Can. S.C.R. 405, and *Canadian Bank of Commerce* v. *McDonald* (1906), 3 W.L.R. 90, have no application.

It was argued that the bank had an interest and received a benefit inasmuch as it was to the advantage of the bank that the business should continue and prosper, and, as Baxter & Martin

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got the money, the bank ultimately got some benefit. But such an interest or benefit is too indirect, remote and speculative to be seriously considered as affecting the legal relations of the parties interested. This case differs entirely from cases cited where a direct interest in the business or benefit received has been held a decisive factor in fixing liability.

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It is not to be overlooked that the burden of proof of the power of the bank, as well as that of the authority of its agent, rests upon the plaintiff. This proposition is clearly laid down in *Banbury* v. *The Bank of Montreal*, 44 D.L.R. 234, [1918] A.C. 626, and in *Pole* v. *Leask*, 33 L.J. Ch., at 160-161. For reasons I have given the plaintiff has failed to meet this just and entirely reasonable rule.

In my opinion the judgment for the plaintiff must be set aside, the appeal allowed and the action dismissed. The bank must have its costs in this Court and in the Court below.

Haggart, J.A.

HAGGART, J.A.:—The statement of claim alleges that the plaintiff at the request of the defendants, and of the defendants' manager at Winnipeg, agreed to make a loan to the Winnipeg Motor Company of $10,000 to be repaid by certain instalments, and the defendants, or their manager, in consideration of the plaintiff endorsing the cheques she was issuing for the said $10,000 promised and agreed with the plaintiff to honour and pay certain cheques to be drawn by the Winnipeg Motor Co.

The defendants' manager, in order to induce the plaintiff to make the loan, placed his initials on the corner of the cheques of the Winnipeg Motor Co. so represented that the cheques of the Winnipeg Motor Co. would be accepted and paid by the defendants.

The plaintiff, relying upon the promise of the manager, delivered 2 cheques of her own to the defendant bank, amounting in all to the sum of $10,000. The plaintiff also sued for money had and received and the letter given by the defendants' manager to the plaintiff at that time is in these words:

Merchants Bank of Canada, Winnipeg, Man., October 15, 1917. Mrs. Hattie Stevens, Winnipeg, Man.: In connection with the loan of $10,000 which we understand you are granting to the Winnipeg Motor Co., to be repaid at the rate of $2,000 per month, and the balance at the end of 4 months, we beg to inform you that this bank is prepared to grant the company a credit sufficiently large to enable them to take up these instalments as they mature, and hereby guarantee payment of the said loan. Yours truly, A. S. Paterson, Manager.

The plaintiff alleges she made the loan of the said $10,000 relying upon the promise, warranty or guarantee of the defendants contained in the said writing.

Upon the trial of the action Macdonald, J., entered a verdict for the plaintiff for $10,000.

In the pleadings, and in their grounds of appeal, the defendants repudiate all liability, and specially allege that it was beyond the power of the defendants or their manager to give any guarantee or make any such contract as that sued upon.

In Falconbridge on Banking and Bills of Exchange, in the second edition, commencing at p. 177, there is a very instructive chapter on the business and powers of a bank, and in that chapter there are references to many of the later cases in our own Courts; and the text writer says:

> A bank chartered under the Bank Act, in addition to being a corporation with certain specified powers and subject to certain specified restrictions, is by s. 76 of that Act authorised to "engage in and carry on such business generally as appertains to the business of banking."

In this case we must take the statute creating the corporation. Bowen, L.J., in discussing this question in his reasons for judgment in *Baroness Wenlock* v. *The River Dee Co.* (1887), 36 Ch.D. 674, at 685 says:

> What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature.

We are told it is no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had.

This bank is one of those named in the Schedule to the Bank Act, R.S.C. 1906, c. 29, s. 4 (see 3-4 Geo. V. 1913, c. 9), and the following provisions of that Act apply to it:

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The Charters or Acts of incorporation, and any Acts in amendment thereof, of the several banks enumerated in Schedule A to this Act are continued in force until the first day of July, 1911, so far as regards, as to each of such banks: (a) the incorporation and corporate name; (b) the amount of the authorised capital stock, if the same has not been increased or decreased, but if increased or decreased, then as increased or decreased before the passing of this Act; (c) the amount of each share of such stock; and (d) the chief place of business subject to the right of each of such banks to increase or reduce its authorised capital stock in the manner hereinafter provided. 2. As to all other particulars this Act shall form and be the charter of each of the said banks until the first day of July, 1911.

Along the same lines when discussing a similar subject, Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87, at p. 94 says:

It is a broad and general principle that companies incorporated by statute for special purposes, and societies, whether incorporated or not, which owe their constitution and their status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned.

At p. 97 Lord Macnaghten further says:

The counsel for the appellants did not, as I understood their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the Legislature. They said it was a power "incidental," "ancillary," or "conducive" to the purposes of trade unions. If these rather loose expressions are meant to cover something beyond what may be found in the language which the Legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use.

As to what the banks are prohibited from engaging in I would refer to s. 76, sub-s. 2:

Except as authorised by this Act, the bank shall not, either directly or indirectly—(a) deal in the buying or selling, or bartering of goods, wares, merchandise, or engage or be engaged in any trade or business whatsoever; (b) purchase or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; or (c) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares or merchandise.

I do not think that the transaction set out in the statement of claim is one which a bank or its manager had any authority to engage in. The objection taken by the defendants in the pleadings and in the notice of appeal is well taken, and I think that the verdict entered by Macdonald, J., should be set aside, and the action dismissed.

I do not think that the giving of this guarantee or the entering into the undertaking by the bank was incidental to the business

of banking. It is plain that the object of the bank manager was to infuse new life into the business concern in which the bank was interested as a creditor. The actions of the parties plainly shew what their intentions were.

For the foregoing reasons and for the reasons set forth by the Chief Justice in his written judgment, I would allow the appeal.

FULLERTON, J.A.:—Apart from the question of ratification the real point involved in this appeal is the power of the bank to give the guarantee.

The powers which a bank may exercise are set out in s. 176 and following sections of The Bank Act, c. 9 of 3 & 4 Geo. V., 1913.

No power to give guarantees is specifically given by The Bank Act. Any such power must be derived by necessary implication from the words of the Act.

The only words in the Act which can possibly be appealed to are the words in s. 76, sub-s. 1 (d): "Engage in and carry on such business generally as appertains to the business of banking."

The question then is whether these words by necessary implication give the bank power to guarantee the repayment of a loan by a third party to a customer of the bank.

When it is remembered that the bank itself is given specific power to loan money and that the loaning of money to its customers is in fact its chief business, it is difficult to discover any ground for implying a power to guarantee the repayment of loans made by others.

The case of *In re The Southport and West Lancashire Banking Co.*, 1 T.L.R. 204, is in point.

There Chadwick and Co. had purchased from Bath & Sons a quantity of copper. Bath & Sons required that the draft they were making for the purchase price should be guaranteed by a bank. Chadwick & Co., who were customers of a branch of the Southport & West Lancashire Banking Co., requested the manager of that branch to give the required guarantee. The guarantee was accordingly given. Bath & Sons claimed to prove in the liquidation of the bank upon the guarantee.

Chitty, J., held that the giving of such a guarantee was not within the ordinary scope of banking business, and refused to admit the claim. An appeal from his refusal was dismissed by

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the Court of Appeal, consisting of Baggallay, Bowen and Fry, L.JJ., Baggallay, L.J., said that at 205, he "had no hesitation in saying that the giving of such a guarantee did not fall within the ordinary scope of banking business."

The case for the plaintiff here was clearly very much stronger than that of the present plaintiff.

It frequently happens that shippers of goods require some guarantee that drafts for the purchase price will be paid, and it would seem to be a most convenient course for banks to give such guarantees for its customers upon being furnished with funds to cover the drafts. As a matter of practice this is frequently done.

The transaction in the present case is, however, absolutely unique. Although counsel for the respondent cited on the argument some 60 odd cases, he could find no case which even by analogy bore the slightest resemblance to the case at bar. Moreover, no case was cited which in any way supported the position that a banking corporation had power to guarantee the repayment of a loan made by a third party to one of its customers.

On October 15, 1917, the Winnipeg Motor Co. owed the bank over $20,000.

Plaintiff proposed to loan the company $10,000 for 4 months. For so doing she was to be paid a bonus of $1,000 and receive the bank's guarantee for repayment of the loan.

The local manager of the bank acquiesced in this arrangement, signed the guarantee and initialed the postdated cheques. The head office of the bank knew nothing whatever about the transaction at the time it was entered into and only learned of it a few days before the cheque payable November 15 was presented.

Dalgleish, who acted as solicitor for the plaintiff in connection with the loan, was called by the plaintiff. On cross-examination he was asked if he did not think it an extraordinary transaction for a banking institution, which was operating a business, to agree to repay his client $11,000 for the loan of $10,000, and his reply was: "Not after it was explained to me."

Now the explanation which he says was made to him by the local manager was: "that they (the Winnipeg Motor Co.) were heavily indebted to the bank, and that they could not exceed their line of credit."

One would have thought that such an explanation would have at once aroused his suspicions. If the manager had permitted the company to draw up to the line of credit fixed presumably by head office what power had he to give the bank's guarantee to a third party who was advancing the company money at over 30% interest. Apart from this the extraordinary character of the transaction itself should have put the plaintiff on enquiry as to the powers of the bank to enter into it, and she has only herself to blame if in the result she loses her money.

The conclusion I have arrived at is that the bank had no power to give the guarantee sued on, and that therefore the plaintiff cannot recover.

It was urged on behalf of the plaintiff, that even if the bank had no power to give the guarantee, it had received the plaintiff's money and must repay it. The money was paid into the bank to the credit of the Winnipeg Motor Co.'s account and all chequed out within a few days. Under these circumstances I cannot see how the defendant can be said to have derived any benefit from the plaintiff's money.

I would allow the appeal and dismiss the action.

Dennistoun, J.A.

DENNISTOUN, J.A.:—The facts in this case are set forth in the judgment of the trial Judge now appealed from. Many grounds are put forward by *Mr. Pitblado*, counsel for the plaintiff (respondent), in his able argument in this case to maintain that judgment, among them the following:

1. The bank is liable for acts of the manager within the scope of his actual or ostensible authority. 2. The initialing of the cheques by the manager constituted an acceptance by the bank. 3. Or at least a promise to accept and pay. 4. The bank is liable for the representations made by the manager, even if fraudulent and untrue. 5. Independently of the letter and initialing of the cheques as the bank had put Baxter & Martin in charge of the business the bank is liable for the amount of the loan. 6. Even if there were no authority in the manager there was a ratification on the part of the bank by keeping the money or retaining the benefit.

In my opinion the plaintiff can recover, if at all, only upon the 1st or the 6th of the grounds above stated.

Unless the local manager of the bank had authority, actual or ostensible, to do what he did in this case there can be no liability under the 2nd, 3rd, 4th or 5th of those grounds.

From the facts as stated it appears that the manager of the local branch of the defendant bank at Winnipeg attempted to do one or more of the following things:

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1. To borrow money on behalf of the bank. 2. To guarantee a loan of money from a third party to a customer of the bank. 3. To bind the bank to pay postdated cheques of a customer at a future date without there being sufficient funds in hand or in prospect with which to make such payment.

The general powers of a bank in Canada are derived from s. 76 of The Bank Act, R.S.C. 1906, c. 29, which is in part as follows:

76. The bank may—(d) engage in and carry on such business generally as appertains to the business of banking.

The limits of a banker's business cannot be laid down as a matter of law. The nature of such business is a question of fact on which the jury are entitled to have regard to their own knowledge of business, and to the evidence in the particular case and it is from that point of view that the present case must be considered. It cannot be treated as if it were a matter of pure law.

Lord Finlay, L.C., in *Banbury* v. *The Bank of Montreal*, 44 D.L.R. 234, at 248, [1918] A.C. 626, 652.

The trial Judge sitting in this case as a jury has found that "the manager acted beyond the scope of his authority, a position which the plaintiff must be held to have known." *Mr. Pitblado* argues that this finding is not applicable to the case as proved but is made in respect to a hypothetical case which the trial Judge first stated and then demolished. I cannot agree. In my opinion the trial Judge finally disposed of the question of "authority" before turning to the question of "benefit" upon which he based his judgment.

I can find no evidence that the bank had authority to do any of the acts which Paterson attempted to do as set forth above and there is ample evidence given by experienced bankers that in any event such acts were not within the ordinary scope of the authority of a branch manager of a bank. *In re The Southport & West Lancashire Banking Co.*, 1 T.L.R. 204; Falconbridge on Banking, p. 136.

Assuming that the bank had power to do these things, it has been argued that Paterson was the bank and could do what the bank could do. I cannot accept this argument. It is a matter of common knowledge that chartered banks in Canada, of which the defendant bank is one, have numerous branches, scattered over a wide extent of country, and separated by long distances from their head offices. Many of these branch banks are in small towns, villages and hamlets and are in charge of young men of limited experience of banking and of general business.

The argument that all such managers have authority to exercise all the powers which pertain to the business of banking including power to pledge the credit of the bank without limit in my opinion needs no answer.

The Winnipeg branch of the Merchants Bank of Canada is a large branch doing business in a city of substantial size, but the rule which should be applied to all branch managers is the same, viz., their powers are such as are delegated to them actually or ostensibly by head office and the onus of proving what those delegated powers may be is upon the plaintiff.

The evidence of authority of the manager in this case is limited to proof that Paterson was duly appointed to that position in the Winnipeg branch of the bank, and it is argued that ostensibly he had all the powers which he attempted to use in this case.

Ostensible authority as applicable here may be stated to be authority which is naturally to be inferred by reasonable persons dealing with a branch bank manager of a city branch in the ordinary course of business. It has to do with the things such managers do from day to day which are known to their customers and to their head office as part of the usual practice of the banking business.

The transaction now under consideration is not only outside the category of ordinary business, but is of so unusual a character as to be startling in its features, and full of menace to banking institutions, putting it into the power of a branch bank manager, if validated, to involve his bank in unlimited liability without any knowledge, or means of knowledge, on the part of the directorate.

The onus of establishing the authority of an agent is upon the person who seeks to bind the principal. The plaintiff in this case not being able to shew any specific authority is forced to rely upon the general or ostensible authority which attaches to the position of manager, but in my opinion something further is necessary: *Pole* v. *Leask*, 33 L.J. Ch. 155.

Ostensible authority may vary in respect to the class of person to whom such authority is apparent. In this case the authority as to which judicial inference is to be drawn has to do with negotiations between a bank manager and persons who by reason of their occupation and professional training are familiar not only with banking methods but with banking law as well. Stevens

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is an active grain merchant of Winnipeg, familiar with banking business; Dalgleish is a solicitor, and the authority of the local manager of the branch bank which was ostensible or apparent to them, is the measure by which in my opinion the responsibility of the bank should be determined.

They knew that the Winnipeg Motor Co. was heavily indebted to the bank and that all parties concerned did not want to exceed openly the line of credit which had been granted to Baxter & Martin. They knew also that the method adopted of giving postdated cheques initialed by the manager, accompanied by a letter undertaking payment by the bank, was most unusual in its terms, and was an indirect and concealed method of doing the very thing, on most usurious terms, that Baxter, Martin and the manager were unwilling to put forward to head office as a straight business proposal on ordinary banking terms.

Stevens admits in his evidence that he never knew of a banking transaction of this kind, and no evidence was given on behalf of the plaintiff to shew that such a transaction had ever taken place previously, or that such a transaction could reasonably be contemplated as within the powers of a bank manager. In the absence of such evidence, how can the Court infer that the transaction in question comes within the ordinary scope of banking business or within the powers of a bank manager? Even if the lender, Stevens, did rely upon the assurance of the manager that Baxter & Martin were running the Winnipeg Motor Co. as representatives of and for the benefit of the bank, there is no evidence that he or his solicitor were justified in assuming that the bank manager had authority to pledge the credit of the bank to postdated cheques spread over 4 months' time to the amount of $10,000 and to pay $1,000 by way of bonus for the use of the money. In such a case the bank would have been the borrower itself and any person with a knowledge of banking customs and practices should have been put upon his guard.

The office of the Western Superintendent of the bank was in the same building as the Winnipeg branch office and all that Stevens or Dalgleish had to do was to refer the matter for confirmation to the superintendent before closing the transaction. They no doubt realised that if they adopted such a course the bank would immediately repudiate the transaction and they

relied on Paterson retaining his position long enough to fulfil his promises which he certainly would have done rather than risk exposure of the scheme.

It was a case of an anxious manager seeking by extraordinary means to infuse a shew of life into a bad account without the knowledge of his head office of the methods adopted, and Stevens and Dalgleish as capable business men must have realised the true position, and the chances they were taking with the plaintiff's money. The sudden removal of Paterson from his position before the first cheque became payable and the disclosure by Dalgleish of what had taken place caused an immediate repudiation to be sent by the bank to the plaintiff. As the trial Judge states, "the inevitable followed" and in my opinion the bank cannot be charged with the loss which has occurred.

It is generally recognised by banking authorities that a local manager has no authority to borrow money on behalf of the bank.

When banks borrow money they do so by means of their note circulation, their customers' deposits, and by the sale of drafts, letters of credit, etc., to be repaid by them at another place and at a future time. That is the general practice of bankers. Falconbridge on Banking, p. 136.

Nor does there appear to be any express or implied authority for a branch manager to guarantee a loan by a third party to the bank's customer even at current rates of interest. In the present case an attempt was made to make a bank, which was probably lending money at not more than 7% per annum, responsible for money borrowed at 40% per annum. If the manager had authority to do this where is the limit to be drawn?

Counsel for the respondent argues that Baxter and Martin took over this Winnipeg Motor Co. business for the benefit of the bank and that the bank was carrying on the business through the agency of its own appointees under direction of the bank manager. The documents filed as exhibits do not shew this to be the case. Ex. 17 is the agreement between Nellie Robinson and W. A. Robinson, vendors, of the one part, and Baxter & Martin, purchasers, of the other part. The bank was not a party to it and there is nothing in the document to indicate that this was other than a sale of a business as a going concern, the

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purchasers covenanting to assume and pay the trade liabilities of the vendors which included the debt to the bank. The purchasers, Baxter & Martin, became the owners of the business. The bank held no liens or hypothecations upon any portion of its assets, and could exercise no control over Baxter & Martin except as creditors for a large sum of money and as financial agents to whom Baxter & Martin were looking for further advances in the ordinary course of business.

The authorities shew that a bank may for certain purposes and under certain circumstances, carry on a business which has devolved upon it and give warranties or undertakings in connection therewith notwithstanding the prohibitions contained in s. 76 of The Bank Act, but such appear to be confined to matters in which the bank is interested directly as the holder of goods, debentures, or other assets which are being liquidated on behalf of the bank and not for third parties: *Ontario Bank* v. *McAllister*, 43 Can. S.C.R. 338; *In re West of England Bank, ex parte Booker*, 14 Ch. D. 317; *Re The Southport Banking Co.* (1885), 1 T.L.R. 204; *Dobell et al.* v. *The Ontario Bank* (1882), 3 O.R. 299; (1884), 9 A.R. (Ont.) 484; *Simpson* v. *Dolan*, 16 O.L.R. 459. The plaintiff is not helped by these authorities as the facts clearly distinguish the present case from those now cited. The undertakings and representations given and made by Paterson were not for the purpose of realising upon assets held by the bank, but for the purpose of securing a loan in which the bank had no direct interest and from which no benefit to the bank resulted.

The loan from Stevens was made to Baxter & Martin—not to the bank. It was secured by a promissory note and 5 post-dated cheques all payable to Hattie Stevens and signed by Baxter & Martin for the Winnipeg Motor Co.

In Paterson's letter of October 15, 1917, to Mrs. Stevens he refers to "the loan of $10,000 which we understand you are granting to the Winnipeg Motor Co.," and he placed the money at the credit of the Winnipeg Motor Co. and permitted it to be chequed out in reduction of their current liabilities. It is clear that the loan was not made to the bank or for the benefit of the bank but to Baxter & Martin for use in their business and not otherwise.

There can be no doubt but that Paterson was deeply interested in the transaction. He knew that an improvement in the affairs

of the motor company would eventually improve the position of the bank, but I cannot find evidence that Baxter & Martin secured this loan as representatives of the bank so as to bind the bank by the terms arranged at the time of its negotiation.

Reference has been made upon the argument to cases on Canadian banking law in the Province of Quebec, and the following cases were dealt with: *The Exchange Bank of Canada* v. *Banque du Peuple* (1886), Montreal L.R. 3 Q.B. 232; *The City Bank* v. *The Bank of Montreal* (1873), 17 Lower Can. Jur. 197; and *Molsons Bank* v. *Kennedy* (1879), 10 Rev. Leg. 110. These cases indicate certain acts of bank officials which were shewn by evidence to be governed by local custom and ostensible authority and held to bind the bank; but there is nothing in any of them which bears directly on the facts involved in this case. The principles upon which they were decided are undisputed.

Having arrived at the conclusion that the bank manager had no authority, real or ostensible, to enter into this transaction so as to bind his bank, there remains but the other point referred to, which, in my opinion, is material to this case, and it was on this latter point that the judgment at the trial was based.

Did the bank get the benefit of the transaction and has it retained the plaintiff's money?

The sum of $10,000 loaned by Mrs. Stevens to Baxter & Martin was deposited by Paterson, the bank manager, to the credit of the Winnipeg Motor Co. on October 15, 1917. This deposit increased the amount at the credit of current account from $5,405.71 to $15,405.71. On the same day the liability ledger of the bank shewed the Winnipeg Motor Co. indebted in the sum of $21,460 for loans and $15,818 for trade bills, a total of $37,278.

Had the manager appropriated the balance at the credit of current account and transferred it to the liability ledger in reduction of the indebtedness there shewn, the plaintiff's case might have been made out, but he did not do so. On the contrary, he permitted Baxter & Martin to cheque out the whole sum in payment of current liabilities of the Winnipeg Motor Co. during the 16th and 17th days of October, leaving the indebtedness to the bank untouched. If the bank had received the money and applied it in reduction of the debt of Baxter & Martin, it would have adopted the loan and so be liable.

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Jacobs v. *Morris*, [1902] 1 Ch. 816, at 832.

It is argued that among the debts so paid was one of $7,500 to C. C. Fields upon which the bank itself was liable by reason of the fact that Paterson had initialed a postdated cheque held by Fields in the same way that he subsequently initialed the cheques in question for Mrs. Stevens, but this is an argument in a circle. If the bank be not liable on the Stevens cheques neither was it on Fields, and in the view now taken it is not liable on any of them. There was also a cheque for $800 payable to the order of the Merchants Bank, which the evidence shews went to the personal credit of Baxter. In neither of these cases as appears from the evidence did the bank receive any benefit from the plaintiff's money, it was applied direct to the current liabilities of the Winnipeg Motor Co., apart altogether from the liability to the bank. The balance of the $10,000 went to pay ordinary trade liabilities of the Winnipeg Motor Co.

The head office of the bank had no knowledge of the matter until it was too late to take action, and the plaintiff's money had passed beyond the bank's control.

Such cases as *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259; *Adams* v. *Craig*, 24 O.L.R. 490; *Richards* v. *Bank of Nova Scotia* (1896), 26 Can. S.C.R. 381; *Simpson* v. *Dolan*, 16 O.L.R. 459, and numerous other cases of a similar character relied on by the respondent do not turn upon the question of authority but upon the ground that the bank having received the benefit of the transaction could not repudiate and retain the benefit. There can be no doubt as to this being the law, but it does not apply to this case.

A perusal of the numerous cases cited by counsel has been a task of no little labour. It leaves the firm conviction that the manager had no authority, real or apparent, for what he did, and that the finding of the trial Judge on that ground should not be disturbed. Upon the other point that the bank received the benefit of the transaction and should repay to the plaintiff the sum of $10,000, with great respect, I am unable to agree, as I can find no evidence to support it.

The principles of law in reference to representation, undertaking, *ultra vires*, acceptance, ratification, adoption and repudiation so ably dealt with in the argument have not been dealt with by me as in my opinion the case for the plaintiff collapses when the

conclusion is reached that the accredited agents of the plaintiff knew that the bank manager had no authority to act as he did, that they appreciated the risk they were running and took the chance with their eyes open.

In my judgment the appeal should be allowed with costs and the action dismissed with costs. *Appeal allowed.*

NATIONAL MORTGAGE Co. v. ROLSTON.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff, and Anglin, JJ. 1919.

MECHANICS' LIENS (§ III—13)—RIGHTS OF LIEN HOLDERS—UNREGISTERED PURCHASER—PRIORITIES—MECHANICS' LIEN ACT—R.S.B.C. 1911, c. 154.

The claim of a mortgagee in respect of advances made subsequently to the commencement of the work done by lien holders is postponed to the rights of the lien holders.

The mortgagee as a subsequent incumbrancee might have been entitled to be given an opportunity in the lien action to redeem the lien holders had it applied for registration at once, but having neglected to do so until after the sale of the land in question, any such right has been lost.

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia (1916), 32 D.L.R. 81, reversing the judgment of Hunter, C.J., and dismissing the appellant's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur, K.C., for appellant.

W. C. Brown, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs. It seems to be abundantly proved that when the appellant company acquired title from Passage, the common auteur, the land was already impressed with the mechanics' liens which are the foundation of the respondent's title. Passage had a certificate of indefeasible title which, under the Land Registry Act dates from May 3, 1912. He conveyed the land to the plaintiffs subject to the Patterson agreement on May 18, 1912, and at that date the work in respect of which the mechanics' liens were created was commenced. The contracts under which the work was done are admitted, the land is identified, and the date at which work started is also proved.

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

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

DUFF, J.:—On two distinct grounds I think this appeal must be dismissed. 1. The services in respect of which the lien-holders acquired their liens were performed in execution of the contract between Passage and certain contractors, dated November 30. The work was begun within the first week in May and whether the appellant company did or did not become, by virtue of the transfers under which it claims, entitled to registration as owner in fee or as mortgagee, admittedly the instruments were not executed until May 18, and no advance was made by the appellant company before that date. By s. 9 a mortgagee is entitled to the benefit of that section or to the status of a mortgagee under it only in respect of the principal sum actually advanced to the borrower at the time the works or improvements in respect of which the lien is claimed, are commenced; the appellant company is therefore not in the position of a mortgagee but of a person "claiming under" Passage and a person "whose rights are acquired after the work or service in respect of which the lien is claimed, is commenced," that is to say, of an "owner."

This is not a case, therefore, in which any difficulty could arise as to compliance with the provisions of s. 19 (a) and the interest of the appellant company was therefore bound by the filing and registration of the affidavit required by that section.

2. The filing and the registering of the lien affidavits on October 15, 1912, established the priority of the lien-holders over the interest the appellant company then had or any right the appellant company then had in relation to the land or the title to the land. I am not at this moment satisfied that the appellant company would not acquire in virtue of the transfers of May 18, 1912, the right to register a charge. It may well, I think, be doubted whether s. 35 of the Land Registry Act has any application to such a case. There is authority for the proposition that a vendor under a contract for the sale of land is not entitled to transfer his title in such a way as to put it out of his power to carry out his contract with the vendee and that the vendee may obtain an injunction to restrain him from doing so. *Echliff* v. *Baldwin* (1809), 16 Ves. 267, *Spiller* v. *Spiller* (1819), 3 Swans. 556, and if

that be the correct view of the vendor's position it is perfectly clear that the registrar having notice of the agreement for sale with Patterson could not properly register the appellant company as owner in absolute fee subject to a charge in favour of Patterson; while on the other hand there could be no doubt of the right of the vendor to charge the interest in the land held by him as security for the payment of the purchase money subject to the rights of the purchaser. However that may be, it is very clear to my mind that the appellant company lost its status with respect to the registered title (which I am inclined to think it might have maintained) by its acquiescence in the registrar's notice of cancellation of July 10, 1913. My reason for thinking so is this. The lien-holders by registration under s. 19 of the Mechanics' Lien Act acquired the status of incumbrancees, a status recognised by s. 22, 1 g., of the Land Registry Act and became at least on the registration of the lien affidavits on October 25, 1912, the holders of a charge or incumbrance on "registered real estate" and therefore by force of s. 28, c. 15, British Columbia statutes of 1912, they were unaffected by any notice, expressed, implied or constructive of any unregistered title, interest or disposition in or relating to the property in question unless an application for the registration of such interest or disposition was then "pending." I have come to the conclusion and in this I concur with what I take to be the opinion of the Chief Justice of the Court of Appeal, that where an application to the registrar has been cancelled under the provisions of s. 108 of the Land Registry Act, the application must be deemed, for the purposes of the Land Registry Act and particularly for the purpose of applying s. 28 of the Act of 1912, to have been void *ab initio;* and it follows, of course, that when the lien affidavits were registered there was, in contemplation of law, no application for registration of the appellant company's interest "pending." We may therefore put aside as having no bearing on the question of law raised for decision, any considerations based upon suggestions of notice by reason of the presence in the Land Registry Office of the application of May 22, and the documents by which it was supported.

The effect of s. 104 seems to be conclusive in point of law against the appellant company. The instruments of May 18 could not in the sense of that section "pass any estate or interest either at law

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or in equity." It is quite true that they confer a right to registration but there can be no manner of doubt, I think, that this right to be registered can only take effect as against registered interests through the instrumentality of an application to register consummated by registration.

It follows that, if the appellant company had been made a party to the proceedings, its claim of priority must have failed; and it has therefore suffered no substantial wrong calling for the intervention of this Court.

Anglin, J.

ANGLIN, J.:—Having regard to the provisions of s. 104 (1) and (2) and s. 108 (1) and (2) of the Land Registry Act, R.S.B.C. 1911, c. 127, as amended by 2 Geo. V. 1912, c. 15, s. 28, and 4 Geo. V. 1914, c. 43, s. 63, the appellant company, in my opinion, had "no estate or interest either at law or in equity," in the land in question which made it a proper or necessary party to the mechanics' lien action under the judgment in which the respondent derived his title. *Levy* v. *Gleason* (1907), 13 B.C.R. 357, *Goddard* v. *Slingerland* (1911), 16 B.C.R. 329. Nor had it any estate or interest of which the plaintiffs in that action or the present respondent should be deemed to have had "any notice express, implied or constructive."

The plaintiffs in the mechanics' lien action were "holders of a charge or incumbrance" on the registered land in question, their liens having been duly filed against it in the Land Registry Office on October 25, and action thereon commenced on October 31, 1912. Neither of the "title (or) interest" asserted by the appellant, nor of the "disposition" under which it claims, was "the registration . . . pending" the mechanics' lien arose, when they were registered, when action on them was brought, when judgment therein was recovered, when sale of the land was ordered, or when it was affected and conveyance thereof was made to the respondent. (May, 1912—March, 1914.) This I take to be the effect under s. 108 (2) of the final refusal of the appellant's two applications for registration made respectively on May 22, 1912, and October 31, 1913. They thereby became "cancelled and void" and questions of title must, as to "strangers," be dealt with as if they had never been made. The conveyance of March, 1914, transferred to the respondent whatever estate or interest in the lands in question any of the defendants to the mechanics' lien action had. One of

them, Passage, was the registered owner of an indefeasible fee and the holder of the only estate or interest in the lands in question of which, under the circumstances of this case, the Land Registry Act permits the Courts to take cognisance. By that transfer the respondent obtained "the right to apply to have such conveyance registered," which, by his application of June 26, 1914, he asserted prior (see sub-ss. 72-3) to the only application for registration of the appellant company now extant—that made on August 13, 1914. That company is, *quoad* the respondent, a "stranger," in the same position as if the instrument under which it claims had been executed on the date on which that application was made.

The authorities cited on behalf of the appellant appear to be readily distinguishable from the case at bar. It has no equity such as was recognised in *Barry* v. *Heider, et al.* (1914), 19 Commonwealth Law Rep. 197. There was no fraud such as formed the ground of relief in *McEllister* v. *Biggs* (1883), 8 App. Cas. 314, and in *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C.R. 334. The unregistered conveyance on which it founds its claim was not made prior to July 1, 1905, as was that recognised in *Howard* v. *Miller*, 22 D.L.R. 75, [1915] A.C. 318. S. 104 (1) applies to it and not s. 105 (formerly s. 75).

Moreover, although the appellant holds a transfer absolute in form, the interest which it asserts is only that of a chargee or mortgagee. The advance in respect of which that interest is claimed was made on May 18, 1912—the date of the transfer. The work for which the mechanics' liens were claimed began between May 1 and May 15, 1912. Although it is somewhat obscurely framed, the probable purpose of clause (a) of s. 9 of the Mechanics' Liens Act, R.S.B.C., 1911, c. 154, would seem to be to postpone the claim of a mortgagee in respect of advances made subsequently to the commencement of the works to the rights of the lien holders. If the appellant had duly applied for registration it might nevertheless as a subsequent incumbrancee have been entitled to be given an opportunity in the lien action to redeem the lien holders. Any such right which it might otherwise have had, however, it lost through failure to make an effective application for registration until after the land had been sold to the respondent.

I would, for these reasons, dismiss this appeal with costs.

Appeal dismissed.

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ROYAL BANK OF CANADA v. ALLEN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Simmons and McCarthy, JJ. December 5, 1919.

BILLS AND NOTES (§ V B—130)—PROMISSORY NOTE—HOLDER FOR VALUE—ENDORSATION BY PAYEE—ALLEGED CANCELLATION—BURDEN OF PROOF.

Under s. 144 Bills of Exchange Act, R.S.C. 1906, c. 119, the party claiming to be the holder of a promissory note for value, which was alleged to be endorsed by the payee, whose signature was apparently cancelled, must prove that such cancellation was made unintentionally or by mistake, in order to be found the rightful holder of the note in question.

Statement.

APPEAL by defendant from the trial judgment in an action on a promissory note. Reversed. New trial ordered.

J. B. Barron, for appellant; *A. Macleod Sinclair*, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff sues as holder of a promissory note for $1,450 made by the defendant to the Riverside Lumber Co., payable November 29, 1915. The defence denies that the plaintiff is the holder, and alleges payment. It was established by the evidence and is admitted by plaintiff's counsel that as between the original parties to the note there is nothing due, but the plaintiff claims to be a *bonâ fide* purchaser for value of the note from the Quebec Bank to whom the note was discounted.

The main defence at the trial was payment.

It was established or admitted that the note was discounted with the Quebec Bank before maturity, and it was apparently a holder in due course, but at maturity the note was not paid and was charged to the account of the Riverside Lumber Co. who had endorsed it to the Quebec Bank for discount.

A renewal note was not given but the Lumber Co. drew on the defendant for an amount equal to the note. The draft was attached to the note and was discounted, the proceeds going to the credit of the Lumber Co.'s account to which the note had been charged.

This draft was not accepted and shortly after a settlement was arranged between the defendant and the Lumber Co. and the latter promised to return the note. This was not done and according to the admission of counsel other drafts were drawn to keep current the claim of the bank until some months later. At some still later time the plaintiff acquired all the assets of the Quebec Bank and among the discounts were found the note in question and a draft dated July 27 following.

The burden of establishing payment is on the defendant, and the argument advanced is that the method of dealing with the note constituted payment. Now it is well established that the taking of a new note by way of renewal is not a payment, and the trial Judge was of opinion that what took place in this case was of much the same character. I am of opinion, however, that if the unaccepted draft upon which the Lumber Co. alone was liable had been taken by the bank in substitution for the note, it would have been a payment. In other words, if the bank intended to take some other security in substitution it would have been payment. There is no evidence by any official of the bank to indicate the intention, and the keeping of the note and attaching it to the draft which was discounted by the bank is a circumstance against the view that it intended to discharge the note. If the lumber company's account had a sufficient credit after the note was charged up to meet the amount of the note without regard to the draft that might create payment, but the evidence is not sufficient to shew whether that was the fact. There is a circumstance, however, which has some bearing on this which has only come to light since the argument on appeal was concluded. The note in question bears on its back the endorsement of the Riverside Lumber Co. but that endorsement has the appearance of having been cancelled by indelible pencil marks over it. This is some support to the view that there was an intention to discharge the liability under the note at some time. However, even with that I am not satisfied that sufficient has been shewn to warrant a finding of payment, but this apparent cancellation is a very important fact from another aspect.

Section 143 of the Bills of Exchange Act, R.S.C. 1906, c. 119, provides that "any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent," and s. 144 provides that:

> Where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

Now it is only by this signature that the note is payable to bearer, and with it cancelled it is only payable to the order of the Riverside Lumber Co., and the plaintiff is not the holder. The burden under the pleadings is on the plaintiff to shew that

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it is holder of the note, and to do that it must have the endorsement of the payee, and under s. 144 the burden is on it of shewing that this apparent cancellation was not intended to be a cancellation.

There is no evidence whatever on the point, but if attention had been called to it at the trial the trial Judge might have allowed the plaintiff to give the necessary evidence, and if it failed he would have dismissed the action. Counsel for the defendant never at any time seems to have called attention to it, if indeed he ever observed it. Before dealing with it, however, we have called counsel before us and heard what they have to say about it. In my opinion, the plaintiff cannot have judgment without establishing the existence of the endorsement by the Lumber Co., but on the other hand I think they ought not to have this action dismissed without an opportunity to do so.

It is, however, entirely through the failure of defendant's counsel that this point was not considered earlier, but for which no appeal would have been necessary. I think, therefore, that justice will be done by allowing the appeal, but at the cost of the appellant, and directing a new trial in the event of the plaintiff within 15 days electing a new trial by serving and filing a notice to that effect. In that event the costs of the former trial should be costs in the cause. In the event of the plaintiff failing to make such election the action should be dismissed with costs.

Stuart, J. McCarthy, J. Simmons, J.

STUART and MCCARTHY, JJ., concurred with Harvey, C.J.

SIMMONS, J. (dissenting):—The plaintiff's claim is upon a promissory note made by the defendant on September 27, 1915, at 60 days to the order of the Riverside Lumber Co., Ltd., for $1,450 and 8% per annum.

That the Quebec Bank was the holder of said note.

That on November 29, 1916, the plaintiff purchased said note whereby the plaintiff became the holder of said note.

That at maturity the said note was duly presented for payment and payment refused.

The defendant makes a general denial of making said note.

It denies that the Quebec Bank was at any time the holder of said note and in the alternative if it ever held the same, that the note was paid by the Riverside Lumber Co. to the Quebec Bank and the note was returned to the Riverside Lumber Co

The defendant denies that the plaintiff became the holder of said note by virtue of the alleged purchase of same from the Quebec Bank.

The defendant further says the Riverside Lumber Co. and defendant agreed that the liability of the defendant to the Riverside Lumber Co. was rescinded and the company agreed to return said note to the defendant, and further that at maturity the amount of said note was paid to the Quebec Bank by the Riverside Lumber Co.

At the trial the only defence offered was that this, through the dealings between the Riverside Lumber Co. and the Quebec Bank the note was actually paid and no property in the note or claim thereunder accrued in favour of the Quebec Bank and therefore no right or claim passed to the plaintiff under the alleged purchase of the note which was of course overdue at time of purchase by plaintiff.

At the trial the plaintiff did not establish presentment of the note.

At the trial it was apparently common ground that the note as it appeared at the trial was endorsed generally by the Riverside Lumber Co. with the result that it became payable to bearer in the hands of the holder.

On the appeal, Mr. C. C. McCaul, counsel for the defendant appellant, unequivocally made this admission.

The Chief Justice has called to my attention the circumstances that the note as it appears now some ten days after the argument, shews upon it certain pencil markings indicating that the endorsement generally of the Riverside Lumber Co. had been struck out.

I do not propose to take any further notice of this circumstance than to say that if the note was in this condition at the time of the trial and at the hearing of the appeal that defendant's counsel did not attach any importance to it, and further to remark that there was an application made for a new trial on the ground that the defendant had further evidence which inadvertently was not produced at the trial but no suggestion was made upon this application or in the material used in support of same that the endorsement was struck out. Indeed we are not asked upon this appeal to deal in any way with this circumstance. These

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pencil marks may have been there at the time of the trial, or they may have been placed there since that time. The marks are so plain that the most superficial observation of the document discloses them now. I fail to appreciate any duty or obligation upon me at this stage to make any assumption or provide for any investigation of this circumstance until someone concerned in the action signifies a desire that the Court should enter upon the same.

On November 30, 1915, the Riverside Lumber Co. drew a bill of exchange on the defendant for the $1,450, the amount of the note.

The following extracts from the appeal indicate clearly the issue which was tried:—

Mr. Sinclair: To shorten matters, I think I could make an admission that on each occasion that that draft was drawn, that when the draft for $1,450 was made and discounted, that the other one that was past due was charged up to the customer. *The Court*: I have not heard . . . you, yourself, stated it was renewed several times, or rather, drafts were put through on several occasions, but there has been no evidence to that effect. *Mr. Sinclair:* I understood we were agreed on that. *Mr. Chadwick:* Yes, I agreed. *Mr. Sinclair:* I can give the dates if you want them. If it is considered material. *The Court:* Ex. 7 shews how the amount charged up $20,081.10 was made up, does it? *Mr. Chadwick:* No, that is the point I was going to get at if my learned friend will admit this document as being correct. We can simply put it in. *Mr. Sinclair:* I will admit it includes the $1,450, the $20,000. *Mr. Chadwick:* Does that $20,081 which was charged back on November 30, include? *Mr. Sinclair:* The $1,450. *Mr. Chadwick:* The amount of the note in dispute? *Mr. Sinclair:* Yes, and so on from time to time. Whenever a renewal was put through, there is a corresponding entry, a corresponding cross-entry on each occasion. *The Court:* Was the note sued upon as part of the $20,081.10 charged to the customer's account? Was the note sued upon? *Mr. Sinclair:* Yes, on November 30, on the same date. At the same time there was a cross-entry crediting them with the proceeds of the draft, to which this note was attached. *The Court:* Is that right? *Mr. Chadwick:* Yes, my Lord, the only point there is . . . *Mr. Sinclair:* It is agreed between counsel, that when the note became due on November 29, 1915, it was charged to past due bills; that on November 30 this note was charged to the customer's account in the item of $20,081.10 appearing as a debit in the account on that date; and on the same date a draft for $1,450 was made by the Riverside Lumber Co. on the defendant, with the note attached. The draft was not accepted, but that the proceeds were credited on that date to the Riverside Lumber Co.'s current account, and debited to the Riverside Lumber Co.'s account in the liability ledger. The draft being part of the items which appear as discounts on November 30, items $15,933.85 and $5,090.63 credited to the Riverside Lumber Co. on November 30, in the current account. That from time to time thereafter the same procedure was adopted until August 30 when the amount of the

notes and bills falling due on this date were transferred to the loans on collateral account to the Riverside Lumber Co. with the Quebec Bank. *The Court:* If that is a fact it is an admission that should be made by Mr. Chadwick, because it is in your favour. *Mr. Sinclair:* We have agreed on the admission, the stenographer has taken down. Our agreement as to the admission while your Lordship was out. *Mr. Chadwick:* I would like to get his Lordship's point there. *The Court:* Mr. Sinclair admits that the $20,081.10 charged back on that date, included the note sued upon on the same date. The company was credited with the proceeds of the draft drawn on that date, is that right? *Mr. Chadwick:* Yes, my Lord. *The Court:* There was a cross-entry. *Mr. Chadwick:* I do not agree there was a cross-entry. No, I say there was a new discount. *The Court:* You make that admission do you, that on the same day, the day the note was charged up against the Lumber Co., they were credited with the proceeds of the new discount? *Mr. Chadwick:* Yes. *The Court:* And the draft which was made on the defendant for the amount? *Mr. Chadwick:* Yes, including that and which draft was not accepted. *The Court:* Is that right, the draft was not accepted? *Mr. Sinclair:* Yes. *The Court:* I suppose that is your defence, that that transaction on the 30th was a payment. *Mr. Chadwick:* Yes was payment, and that the drawing of the draft was a new transaction, and that the note had nothing to do with it. That it was then past due. *Mr. Sinclair:* That is my case, my Lord. *Mr. Chadwick:* I will call Mr. Allen then. *Mr. Sinclair:* I think Mr. Sereth should be excluded.

This occurs in the cross-examination by defendant's counsel of Hansen, a witness for the plaintiff. It is absolutely clear from this and from the judgment of the trial Judge that the issue was payment or non-payment of the note arising out of the transaction on November 29, 1915, and November 30, 1915, and the subsequent repetitions of this process until August 30, 1916, when the notes and bills falling due on that date were transferred to the loans or collateral account to the Riverside Lumber Co. with the Quebec Bank.

There was no suggestion that failure to present was intended to be raised as an issue at trial although it is raised on the pleadings. It is also clear that discussions took place between counsel, and examination of the books of record of the plaintiff, and as a result:

If the defendant asked for a new trial on the ground of inadvertence or mistake I think a *primâ facie* case might be made out as to the issues on presentment raised by the pleadings but certainly not raised at the trial.

Germ Milling Co., Ltd. v. *Robinson* (1886), 3 T.L.R. 71. But the defendant has not done so. Counsel for defence on the appeal, however, withdrew an application made on behalf of his client

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for a new trial, and it is not therefore necessary to consider this view of the case because it is clear from the material on his application that the alleged new evidence which was the basis of the application does not raise this issue, and was material within the knowledge of the parties and their solicitor at the date of the trial. *Anderson* v. *Titmas* (1877), 36 L.T. 711.

I agree with the conclusion of the trial Judge that the transaction of charging up the note to the Riverside Lumber Co., Ltd., and giving them credit for the unaccepted draft upon the defendant, did not amount to a payment of the note in question.

Payment of a debt is not necessarily a payment in money but that is payment which the parties contract shall be accepted in payment. See Cyc. Title Payment, vol. 30, p. 1181.

The transaction in question according to the evidence of Hansen so far as it can be traced in the records of the bank indicates that it was a usual and customary method of extending credit to a customer on an unaccepted bill, and I do not see anything more in the transaction. I would, therefore, dismiss the appeal with costs. *Appeal allowed. New trial ordered.*

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Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 13, 1919.

LABOUR ORGANIZATIONS (§ I—10)—TRADE UNIONS—DISMISSAL OF NON-UNIONISTS—INTIMIDATION—QUESTION OF DAMAGES—LIABILITY OF INDIVIDUAL MEMBERS OF COMMITTEE—PRACTICE.

When intimidation is resorted to by a local trade union to prevent the employment of non-unionists, the members of the local committee taking the message of intimidation to the employer are held as liable for damages suffered by the discharged parties. No action can lie against the Union itself as it is an unincorporated and unregistered body.

Statement.

APPEAL by defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1919), 45 D.L.R. 150, 14 Alta. L.R. 251, affirming, the Court being equally divided, the judgment of the trial Judge, Simmons, J. (1918), 41 D.L.R. 719, and maintaining the respondents', plaintiffs', action. Varied.

A. Macleod Sinclair, K.C., and *H. Ostlund*, for appellants.

E. V. Robertson, for respondents.

Idington, J.

IDINGTON, J. (dissenting):—This appeal is taken jointly by all the defendants, condemned by the formal judgment of the trial

Judge, and maintained on appeal therefrom, by an equal division in the Appellate Division of the Supreme Court for Alberta.

The respondents' statement of claim presents several causes of action and prays for relief in more ways than one.

The first of these causes of action as stated, and in respect of which relief was sought, seemed to raise the question of a legal right of each of the respective respondents to become a member of the said Union but nothing has been determined in regard thereto, or raised by this appeal, save indirectly.

The second cause of action is framed as if against half a dozen members of the said Union for conspiracy with each other and other persons to wrongfully, unlawfully and maliciously injure the plaintiffs, now respondents, by depriving them and each of them of their employment and to induce the dismissal of each from the employment of the Rose-Deer Mining Co., Ltd., a mining company in Alberta.

It is further charged that pursuant to such conspiracy and combination they, by intimidation of the company and threatening to go on strike and tie up the mine, succeeded without lawful reason or excuse in having respondents dismissed and deprived of employment.

There is ample evidence to support these claims against some, at least, of these parties. Hence they should not succeed herein.

Seeing that the money has been paid into Court to meet the judgment for damages without regard to any distinction between or amongst these several appellant parties and hence if the judgment appealed against stands against a single one of the defendants the judgment will be satisfied, it seems to me the rest of the appeal becomes somewhat academic.

In deference to the views of others whereby elaborate argument was heard, notwithstanding the admission of the payment thus made, I have examined the various questions presented.

In view of the following several considerations: that the misleading use by the appellant of a seal which presumably would be supposed to indicate a corporate capacity in the Union, and of the fact that no steps were taken to remove such impression, save by a formal denial in the pleadings; that the proceedings for discovery, and examinations for discovery, and indeed the whole trial were each allowed to proceed as if the Union was at least registered and

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thereby liable to be sued as a corporation, and that the parties defendant all joined in one defence, and no motion at any time to set aside such clearly erroneous proceedings if, as now contended, the Union was not a legal entity, I think the trial Judge should at once, when asked by counsel for the plaintiffs (now respondents), have allowed the amendment of the pleadings to make them conformable to the case presented by the evidence adduced without objection. Then he should, if the defendants (now appellants) so desired, have given them an opportunity to answer the case so made, I presume as no objection made to amendments or claim to adduce further evidence, appellants must have concluded nothing further in way of evidence for defence thereto was available.

Notwithstanding the case of *Walker* v. *Sur*, [1914] 2 K.B. 930, relied upon by appellant, I think the action of a representative character will still lie against an unincorporated union, for wrongs such as complained of. That case is easily distinguishable from the numerous other authorities relied upon by the respondents herein.

I agree with the view of Lord Macnaghten in the *Taff Vale* case, [1901] A.C. 426, at p. 438, where he says:—

> I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body,

and also with what Lord Lindley says in the same case on the same subject.

And I may add that the obvious reason for the qualification of the representative persons chosen is to avoid the possibility of the Union being bound by a collusive action, or by one not properly defended by all the force it might officially choose to bring in its own defence if made a party.

The Union itself having taken part in the defence and being beyond doubt the party actively defending, cannot now be heard to set up such a mere technical objection occasioned by a slip in the pleading.

Surely at this time of day when we, sometimes at least, try to get at and grasp the realities instead of the mere formalities, such an objection comes too late.

The party that says it is not a legal entity had had the courage to proceed as if it were, whilst saying it was not.

It strikingly illustrates in doing so the course pursued in the circumstances, out of which this action arises, by its refusing on the one hand to admit the respondents as members, though well qualified to become such, and in no way disqualified except by reasons founded on the evidence of highly probable motives on the part of those possessed of obvious hate and malice, being permitted to direct such a course of conduct, and on the other at one and the same time, offering to let them work whilst creating an atmosphere that rendered the doing so an impossibility. I hope our law, begotten of freedom and justice, has not grown so feeble as to tolerate such injustice.

It is clear to my mind on the facts presented that such inconsistencies of conduct are attributable only to that malice in law by which the accused representatives of the Union are claimed to have been actuated.

Being moved thereby they cannot claim they were simply defending their honest legal rights in what they did.

And if the majority of the members of a union permit even a few of the master spirits to so illegally and improperly dominate the action of their union, then in law the union must suffer the consequences.

Added to this the intimidation of a strike which was threatened, regardless of the law as enacted in the Industrial Disputes Investigation Act, 6-7 Edw. VII., 1907, c. 20, s. 56, was evidently illegal.

The sooner that the mere offence of threatening to disregard such a law or any other is understood, the better for all concerned.

I think this appeal should be dismissed with costs.

DUFF, J.:—The view of the facts which I accept is that which is very fully and lucidly explained in the judgment of Stuart, J. (1919), 45 D.L.R. 150, at p. 151.

Three or four events are of capital importance. The lockout by Tupper in January, 1917, with the object, successful for a time, of destroying the weight of the Union; the ultimate decision of Tupper to live at peace with the Union for the security of his own interests and the consequent re-establishment of relations between them; the invitation given twice to the plaintiffs to become members of the Union and their refusal to do so; the application (the first) by the plaintiffs on December 21, and the answer of January 6, refus-

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ing to accept them as members but withdrawing the objection formally taken to them as co-workmen in the mine.

The case as presented in the Supreme Court was a case of conspiracy, it was tried as a case of conspiracy and as such it must succeed or fail.

Looking at the course of events broadly and especially noting those just mentioned, the evidence of actionable conspiracy seems to be too slight to support an affirmative finding.

For the principle to be applied it is my habit in these cases to resort to the charge of the trial Judge in *Quinn* v. *Leathem* (Fitz-Gibbon, L.J.), [1901] A.C. at 500:—

> I told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests.
>
> . . . . . .
>
> To constitute such a wrongful act for the purposes of this case, I told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade.

This statement of the law received the approval of the Lords of Appeal.

Subject to special legislation contained in the Industrial Disputes Act, as to which I shall have something to say presently, the union men were quite entitled to refuse as a body to work with non-union men and to advise their employer of their policy. Tupper appears to have been quite aware of the attitude of the union men and quite willing to take any course necessary to meet their views.

The whole weight of the case lies in the difficulties which are said to have been made regarding the reception of the plaintiffs as members of the Union. But the plaintiffs appear to have made no application until the end of December, the result being that the objection to them as miners was withdrawn.

The plaintiffs appear to have been reluctant to regularise themselves and I can see no ground for a finding that an earlier application would not have had the same effect as that of December 21.

I am quite unable to concur in a finding of intimidation or coercion. As already mentioned, Tupper had decided upon his course long before the incidents in question arose and I am convinced that Tupper's only concern was to know with certainty the attitude of the men. His course in consequence of that knowledge cannot fairly be attributed to anything which could properly be described as the imposition of their will upon his but should be ascribed to his deliberate choice of the policy of accepting the Union terms for the sake of peace and in his own interests.

The situation being quite well understood on both sides, I do not perceive the aptness of the description "threat" as applied to the communications made to Tupper.

The truth seems to be that the impulse behind those communications came from the men as a body and that the emissaries who interviewed Tupper were really the agents of the men and that in these communications they were faithfully imparting to Tupper (as he desired them to do) the facts as regards the terms on which the men could be induced to work. No authority so far as I am aware warrants the suggestion that such conduct exposes either the members of the Union or the Union officials to an action in the absence of the characteristic elements of the class of cases to which *Quinn* v. *Leathem*, [1901] A.C. 495, belongs, cases of criminal conspiracy to injure. Lord Lindley goes further perhaps than any other legal authority of his eminence has gone in countenancing the doctrine that threats when they result in coercion—threats, that is to say, of "serious annoyance and damage" as distinguished from threats to do something itself punishable by law (as threats of bodily harm) are in themselves *primâ facie* "wrongs inflicted upon the persons coerced"; but it is evident from his judgment at pp. 507 and 508, that Lord Lindley would not have considered what occurred here to be within the category of "coercion by threats."

As to the special legislation, the Industrial Disputes Act, the object of the statute is to interpose investigation and negotiation with a view to conciliation between the institution of a dispute and the culmination of it in a strike or lockout. But there is nothing illegal (notwithstanding the legislation) in an employer or his workmen deciding to pay no attention to outside advice or decision

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but to insist upon their or his terms and to enforce them by all legal means and nothing illegal in making this known to the other party to the dispute.

I am not satisfied that what was said necessarily meant that the men intended to act illegally. If the point had been taken at an earlier stage the facts would no doubt have been more closely investigated.

The appeal should be allowed and the action dismissed with costs.

ANGLIN, J.:—The history of the events out of which this litigation arose and the material facts are fully stated in the judgments of the trial Judge (1918), 41 D.L.R. 719, and of the Appellate Division of the Supreme Court of Alberta (1919), 45 D.L.R. 150. The plaintiffs hold a judgment against all the defendants for $100 for general damages and for $435.62 for loss of wages.

Local Union No. 1562, U.M.W., an unincorporated and unregistered Trades Union, was sued as a corporation and the six other defendants as individuals and not in any representative capacity. There appears to be some uncertainty whether the trial Judge intended that judgment should be entered against the Local Union. It would seem to have been his opinion that the assets of that body could be reached "only by suing the individual members"—presumably all of them or certain members properly selected as representatives of all treated as a class. But an amendment asked for by the plaintiffs at the close of the trial whereby the six individual defendants should be constituted representatives of all the members of the Local Union and authorised to defend as such, while not refused, does not appear to have been allowed and the formal judgment was entered against the Union as well as against the individual defendants personally. The appeal taken from that judgment to the Appellate Division stands dismissed by the order of that Court, which consisted of four members. Two of them (Stuart and Hyndman, JJ.) would have allowed the appeal, holding that no actionable wrong had been established. The Chief Justice of Alberta was of the opinion that the appeal should be dismissed with costs. Beck, J., "in view of the difference of opinion amongst the members of the Court," concurs in the disposition of the appeal made by the Chief Justice: but, if giving effect to his own view, he would have required the plaintiffs to elect to

take judgment (1) against the individual defendants in their individual capacity, or (2) against the individual defendants as representing the Union, or (3) against the Union by name.

The grounds of appeal to this Court are:—

(1) That no actionable wrong has been proved against any of the defendants; and (2) that the Local Union, as an unincorporated and unregistered Trades Union, cannot be sued.

To deal with the appeal satisfactorily it is necessary to appreciate the cause or causes of action as formulated in the statement of claim. Against the Local Union there are two distinct grounds of complaint: (1) that the plaintiffs were twice wrongfully refused membership in it contrary to the terms of its constitution and by-laws; and (2) that by wrongfully and maliciously objecting to their being employed by the Rose-Deer Mining Co. Ltd., and intimidating that company by threatening a general strike the Local Union induced it to dismiss the plaintiffs from its employment. Against the six individual defendants the cause of action set up is wrongfully and unlawfully and maliciously conspiring and combining to deprive the plaintiffs of employment and to induce their dismissal by the Rose-Deer Co. and in pursuance thereof intimidating that company by threats etc., resulting in the plaintiffs' discharge, etc.

It will be convenient to deal first with the case of the individual defendants. The trial Judge, as I read his judgment, makes no finding of conspiracy or combination. In this he may possibly have been well advised.

Stuart, J., 45 D.L.R. 150, at 170, says:—

> With respect to the matter of conspiracy or combination, there does not, in fact, appear to be any evidence at all against the defendants Stefanucci Gerew, Marcelli, Loranzo and Karmuckle that they took part in any way whatever in the matter. Whether they were present when any concerted arrangement or combination was made or not, or had anything to do with it in a meeting or otherwise, is not suggested anywhere in the evidence. I cannot assent to the contention that every member of the Union is individually liable for whatever the other members may have done quite apart from him and with no evidence at all of his connection or participation therein, unless of course, the Union were (what it is not) in itself an unlawful association with unlawful objects, in which case it might be otherwise.

Except probably as to the defendant Stefanucci, who accompanied the defendant Young and by one Rose (not made a party) on a mission to communicate the attitude of the Local Union to Tupper, the manager of the Rose-Deer Co., this statement of the

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effect of the evidence appears to be accurate. Redpath's evidence on discovery, as an officer of the Local Union, that Gerew and Karmuckle attended a meeting at which the plaintiffs' applications for membership were rejected is not admissible against them in their individual capacity. There appears to be no evidence that Marcelli attended any meeting and nothing except the silence of the statement of defence to shew that Loranzo was even a member of the Local Union.

As to Stefanucci and Young, apart from any question of conspiracy and combination, as delegates of the Local Union they personally conveyed the message of that body to Tupper. If the delivery of that message, having regard to all the circumstances, amounted to a coercive threat designed to bring about the dismissal of the plaintiffs and had that result, there is in my opinion no room to doubt the individual liability of these two defendants. That they acted as agents for the Union, or, to speak more accurately, of its members, of course affords them no answer in this action for tort.

Nor do I think they should be heard to set up that the only case alleged against them is one of conspiracy. As to them there is probably sufficient evidence to sustain a judgment on that ground also. But, at the trial, they made common cause with the Local Union, and the substantial defence of both was a justification of all that had been done by the Union and on its behalf. Moreover, they are charged with having actually intimidated the plaintiffs' employer by threats and thus procured their discharge. The allegation that this was done in pursuance of a conspiracy, if not proven, may be treated as surplusage. I would incline to hold them liable on both grounds—but, at all events, on that of participation in the actual commission of the wrong done the plaintiffs.

The trial Judge rests his judgment against the other four individual defendants solely on their responsibility as members of the Union for the authorised acts of its duly constituted agents. What he says as to the liability of these defendants is contained in the following passage from his judgment, 41 D.L.R., 719 at 722:—

> The officers of the Local Union were the agents for the individual members and the principal is bound by the authorised acts of the agent acting within the scope of his authority.
>
> The individual members of the association or Local Union were each liable for what was done by their agents.

The defendants do not deny membership in the Local Union during the period when the boycott took place. Two of them, Young and Stefanucci took an active part as officers of the Union.

With great respect, in the absence of some evidence, admissible against them, that they were at least present at the meetings when the acts complained of were authorised or approved of, or that they otherwise sanctioned them, I think a case has not been made against these defendants. Mere membership in the Union would not, in my opinion, render them personally and individually answerable in damages for the results of those acts. There is no evidence of any participation by them in the commission of the actual wrong done the plaintiffs.

The evidence, however, convinces me that, acting through authorised agents, the Local Union as a body brought about the dismissal of the plaintiffs by threatening a general strike should they be retained in the company's employment and I think it is a fair inference from the proven facts, that while subsequently professing willingness to allow them to be re-employed by the company, the Local Union in fact made their re-employment impracticable and that it fully intended to bring about that result. I am, with great respect, unable to appreciate how the complacency of the manager of the Rose-Deer Co., induced by various considerations which Stuart, J., emphasizes, affects the matter. It merely served to render easier the accomplishment of the Local Union's design. Nor do I perceive the force of the distinction which that Judge draws between the responsibility of the Union as a body for the threat of a strike and that of its members as employees of the Rose-Deer Co. The threat was made by the Union through its delegates on behalf of all its members who were the company's employees. It was the act of the Union (so far as such a body can be said to act) done by its instructions and for its purposes.

I think it is also a fair inference from all the circumstances in evidence that a desire to prevent the plaintiffs continuing in the employment of the Rose-Deer Co., and to punish them for remaining non-union men after the re-establishment of Local Union 1562, in 1916, and their refusal to join it when it was first suggested to them to do so actuated its conduct in seeking their dismissal rather than any genuine wish to promote the interests of trades-unionism generally or its own immediate welfare. Otherwise I find it very difficult to understand the Local Union's refusal to accept the

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plaintiffs as members even when urged to do so by the officers of the Union of District No. 18, to which it is in some degree subordinate.

On this view of the evidence the liability of the Local Union, if it be susceptible of being held responsible and be suable as a body, or the liability of all its members who participated in or sanctioned the steps taken to secure the dismissal of the plaintiffs, if the application made by the plaintiffs' counsel at the trial to amend by making the individual defendants defendants also in a representative capacity on behalf of its members should be granted, is, in my opinion, established. Injury to the plaintiffs has been proved. That injury was the direct and intended outcome of action of the Local Union's committee taken by its direction for that purpose. That action amounted to a coercive threat and was therefore an unlawful means taken to interfere with the plaintiffs' employment, the use of which, damage having ensued, constituted in itself an actionable wrong. The authorities bearing on this aspect of the case at bar have been so fully and carefully reviewed in the able judgment recently delivered by McCardie, J., in *Pratt* v. *British Medical Association*, [1919] 1 K.B. 244, that further reference to them seems unnecessary. See especially pp. 256-7, 260, 265-8, and 277-8.

Perhaps it may not be amiss, however, to mention as very closely in point Romer, L.J.'s, judgment in *Giblan* v. *National Amalgamated Labourers' Union of G.B. & I.*, [1903] 2 K.B. 600, 619, 620, and Lord Lindley's speech in *Quinn* v. *Leathem*, [1901] A.C. 495 at 534-5.

The Local Union's vindictive motive excludes any possible defence of "justification" or "just cause" in the present case, if, indeed, where unlawful means have been resorted to that defence would be open however innocent or even laudable the purpose may have been. This aspect of the case is fully discussed by McCardie, J., in the *Pratt* case, *supra*, at pp. 265 *et seq.* See too the *Glamorgan* case, [1905] A.C. 239.

I have reached the foregoing conclusions of fact without taking into consideration, except as against himself, the discovery evidence given by Albert Young, which, I agree with Stuart, J., 45 D.L.R. 150 at 169, would be inadmissible against the Local Union, even if it had been properly sued either as a corporation or quasi-corporation or is

estopped by its conduct from denying that it was so sued, or as against the other defendants either individually or in any representative capacity. Young was examined for discovery solely as an individual defendant and not in any sense as an officer selected to make discovery on behalf of the Union or its members. His evidence so given is not within the provisions of Alberta Supreme Court Rule 250. If the Local Union, though not a corporation, had been rightly made a defendant the evidence of Redpath would be admissible as against it, and, having regard to the provision of rule 3 of the Alberta Supreme Court that "as to all matters not provided for in these rules the practice, as far as may be, shall be regulated by analogy thereto," I incline to think it would also be admissible against the individual defendants if sued as representatives of all the members of the Union.

There remain for consideration the questions whether the Local Union was properly made a defendant in the first instance or is estopped from denying that it was so; and, if both these questions should be answered in the negative, whether the plaintiffs' application to amend should be granted.

I have no doubt that the Local Union, as an unincorporated and unregistered body, was not properly made a defendant and that service on it must have been set aside had application been made for that relief. *Metallic Roofing Co.* v. *Local Union No. 30* (1905), 9 O.L.R. 171 at 178.

While I should have thought it better, had the defence in addition to the bare denial of incorporation contained a plea that the Local Union is not registered, is not a partnership, and, as an entity not known to the law, cannot be sued by its adopted name (r. 93), I incline to think this issue was sufficiently raised by the explicit traverse of the allegation that the Local Union is a body corporate. But, if not, the objection to suing the Local Union being its non-existence as an entity known to the law, I confess my inability to understand how any conduct of those representing that body, such as that here relied on, can create an estoppel which would justify the granting of a judgment against it. A judgment should not wittingly be entered against a nonentity.

In *Krug Furniture Co.* v. *Berlin Union of Amalgamated Woodworkers* (1903), 5 O.L.R. 463, relied upon by the Chief Justice of Alberta and Beck, J., the defendant Union, sued as a corporation,

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appeared, apparently as such, unconditionally and its statement of defence did not contain the plea *nul tiel corporation* as required by the rules of Court. Its incorporation was accordingly presumed. The explicit denial of incorporation in the present instance precludes any such presumption. In my opinion the judgment against the Local Union in its adopted name cannot be maintained.

The question of representation presents more difficulty. The selection for that purpose of the six individual defendants before the Court was not happy. Four of them are admittedly persons of no importance in the Local Union and cannot fairly or properly be said to represent it. The remaining two were Young and Stefanucci. Young was an ex-secretary and both he and Stefanucci had "represented" the Union in discussions with the Rose-Deer management on several occasions and also had had interviews with the plaintiffs on its behalf. These are the only grounds on which it can be claimed that they would be proper representative defendants. Neither of them appears to have been an officer of the Union at the time the action was begun. Whatever funds or other property the Local Union may possess there is nothing to shew in whose name or names such funds or other property stand, and if, as is probable, these are held by trustees, the trustees are not before the Court; nor is it sought to add them as defendants. Yet the avowed purpose of suing the Local Union is to reach its funds. If the case were otherwise, one in which an order might be made for representation of the members of the Local Union by properly selected defendants, I strongly incline to the view that in the exercise of a sound judicial discretion the six individual defendants now before the Court, whom it is asked to approve for that purpose and to authorise to defend the action on behalf of the membership, should be held not to be proper representatives. See observations of Lord Macnaghten in the *Taff Vale* case, [1901] A.C. 426, at 438-9, and that on that ground, strengthened as it is by the fact that it was sought only at the close of the trial, the suggested amendment should be refused.

Moreover, notwithstanding what was said *obiter* in *Duke of Bedford* v. *Ellis*, [1901] A.C. 1 (a case of representative plaintiffs), in *Taff Vale R. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426 (where a Union was successfully sued in its registered name), and in *Cotter* v. *Osborne* (1909), 18 Man. L.R. 471; C.R. [1911] 1 A.C. 137,

and *Cumberland Coal & R. Co.* v. *McDougall* (1910), 9 E.L.R. 204, to which I refer in order to make it clear that they have not been overlooked, I am with respect, of the opinion that in two recent cases, *Walker* v. *Sur*, [1919] 2 K.B. 930, and *Mercantile Marine Service Association* v. *Toms*, [1916] 2 K.B. 243, the English Court of Appeal has made it clear that the rule of practice invoked in support of the application for an order for representation cannot properly be applied in such an action as this. Rule 20 of the Alberta Rules is an adoption, substantially *in ipsissimis verbis*, of English Order XVI., r. 9. All the objections to the applicability of that rule indicated by the Lords Justices in the *Walker* case, [1919] 2 K.B. 930, exist here, notably those mentioned by Kennedy, L.J., on p. 937. As is pointed out by Swinfen Eady, L.J., in the *Toms* case, *supra*, many members of Local Union 1562 might have defences not open to the proposed representative defendants, and there are many other reasons against applying the rule in cases of tort such as this. Lord Parker of Waddington, whose authority in regard to the scope and purview of an equity rule such as O. XVI., r. 9, is of the highest, in his speech in *London Association for Protection of Trade* v. *Greenlands Ltd.*, [1916] 2 A.C. 15, at 39, points out some of the serious difficulties which must be encountered in seeking to apply it to such a case as this. Fully as I realise the desirability of finding some method whereby bodies such as Local Union 1562 may be made answerable in the Courts for wrongs similar to that done to the plaintiffs, the two authorities to which I have referred seem to me to afford sound reasons for the conclusion that that desirable end cannot be attained by an application of r. 20. Nor does the other rule invoked, No. 31 (2), corresponding to English Order XVI., r. 32 (b), appear to advance the plaintiffs' case. Any attempt to apply it here is open to the same objections which preclude an application to r. 20. The caution with which r. 31 (2) should be applied is shewn by the course taken by Buckley, J., in *Morgan's Brewery Co.* v. *Crosskill*, [1902] 1 Ch. 898. Moreover, not a little may be said in favour of restricting the meaning of the word "class" in that rule by reason of its collocation with "heirs or next of kin." I cannot think it was ever intended to provide by it for such a case as that at bar.

In view of the fact that r. 20 is a reproduction of English Order XVI., r. 9, I am unable to accept the ingenious suggestion

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of Beck, J., that because law and equity have always been concurrently administered by the same Court in the Province of Alberta, r. 20 may be extended to a case held not to fall within its prototype in England. I should add that I have not overlooked Lord Atkinson's comprehensive observation in *London Association, etc.* v. *Greenlands, Ltd*, [1916] 2 A.C. 15, at 30. Neither the *Walker* case, [1919] 2 K.B. 930, nor the *Toms* case, [1916] 2 K.B. 243, however, appears to have been cited at their Lordships' bar.

Anglin, J.

In the result I am of the opinion that the action fails and must be dismissed except as against the defendants Young and Stefanucci, as to whom the appeal should be dismissed.

Brodeur, J.

BRODEUR, J.:—I concur with my brother Anglin. The appeal should be allowed and the action dismissed, except as to the defendants Young and Stefanucci. There should be no costs here or in the Court of Appeal.

Mignault, J.

MIGNAULT, J. (dissenting):—After carefully reading the evidence and considering the authorities, I can see no sufficient reason for disturbing the judgment of the trial Judge as to which the Judges of the Appellate Division were equally divided. The defence of the defendants that the acts done by them with reference to the plaintiffs were

> done solely with intent to further the legitimate objects of the organisation known as the United Mine Workers of America and not with the intent to injure the plaintiffs or either of them,

is not, in my opinion, made out. On the contrary, the defendants twice refused to admit the plaintiffs into their Union, and then notified the mine operator that they declined to work with them, so that the mine operator, who was told that he could choose between operating his mine with the two plaintiffs alone or with the members of the Union without the plaintiffs, considered it good business to choose the latter alternative and to refuse to employ the plaintiffs. It is unnecessary, under the circumstances of this case, to decide whether the conduct of the defendants would have been actionable had they allowed the plaintiffs to join their Union and refused to work with them if they did not join. But here the door was closed on the plaintiffs when they claimed admission to the Union and under the circumstances the refusal of the defendants to work with them—and no sufficient reason is shewn for refusing to admit them in the Union or to work with them—was in my

opinion a wrongful act and a deliberate and successful attempt to obtain their dismissal from the mine.

I feel some doubt whether the Local Union No. 1562, not being an incorporated body or a registered labour union, could be sued as has been done in this case. But throughout this litigation the Local Union has acted as if it had been validly sued, has joined with the other defendants in contesting the action by one and the same plea and has also united with the other defendants in appealing by one appeal from the judgments of the trial Court and the Appellate Division. I consider therefore that it should not now be heard to urge the objection that it could not be sued. Further, this is a matter of procedure on which I would not interfere with the judgment of the trial Court. *Appeal allowed in part.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. September 29, 1919.

AUTOMOBILES (§ III C—300)—INJURY TO PERSON BY DAUGHTER OF OWNER OF CAR—NEGLIGENCE—LIABILITY OF OWNER—MOTOR VEHICLES ACT, R.S.O. 1914, c. 207, s. 19, AMENDED BY 7 GEO. V. 1917, c. 49, s. 14.

The owner of a car is not liable for the negligence of his daughter, she not having possession of the vehicle with his consent, nor being a person in his employment.

Motor Vehicles Act, R.S.O. 1914, c. 207, s. 19, as amended by 7 Geo. V. 1917, c. 49, s. 14.

Statement.

APPEAL by the plaintiff from the judgment of MASTEN, J., 45 O.L.R. 504. Affirmed.

Shirley Denison, K.C., for the appellant.

George Lynch-Staunton, K.C., and *W. H. Barnum*, for the respondent.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The learned trial Judge did not find that the plaintiff's injury was caused by any violation of the Motor Vehicles Act, nor can I so find; and without such a finding this appeal fails.

The accident seems to have been caused by the too common faults of a young driver, a want of thought of pedestrians' difficulties and dangers, and a lack of regard for their rights. The driver could and should have let the plaintiff pass in safety; and

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she is, as I can but find, answerable in damages for the plaintiff's injuries altogether apart from any of the provisions of the Act.

But, if that be not so, then also I agree with the trial Judge that she alone is liable under the provisions of the Act.

The owner of the vehicle is not responsible for violations of the Act when the vehicle causing the injury is in the possession of some other person—not being a person in his employment—without his consent, expressed or implied.

I agree with the trial Judge that the daughter, 20 years of age, though living in her father's house, was not a "person in the employ" of her father. The enactment must be given the meaning which its words ordinarily convey; and I am sure that it would be a surprise to those who passed the Act, as well as to nearly all who are bound by it, to learn that every child is a person in the employment of his or her father, or in his service: the Act means some one really employed.

Nor can I differ from the trial Judge in his finding that here the daughter was driving the car without her father's consent: she and he and her mother testified that she was driving it not only without his consent but in disobedience to his orders. Some of the circumstances pointed to a consent, expressed or implied, but they are not enough to warrant a finding here contrary to that of the trial Judge. The appeal is dismissed.

Appeal dismissed.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. December 3, 1919.

DIVORCE AND SEPARATION (§ V B—50)—ALIMONY—COSTS—USUAL RULE—APPLICATION FOR BEFORE HEARING—VARIATION OF RULE—DISCRETION OF COURT.

In actions for alimony the usual rule is that the husband pays the wife's costs, whether she is successful in her action or not, but in order to obtain such costs she must apply for the same before bringing on her action to trial; otherwise if the case is lost, she is not entitled to costs.

[*Smith* v. *Smith et al.*, [1882] 7 P.D. 84; *Waudby* v. *Waudby* (1901), 84 L.T. 571; *Dewitt* v. *Dewitt* (1919), 46 D.L.R. 242, 12 S.L.R. 213, applied; *Board* v. *Board* (1919), 48 D.L.R. 13, referred to.]

Statement.

APPEAL by plaintiff from the judgment of Taylor, J., in an action for alimony. Affirmed by equally divided Court.

A. L. Gordon, K.C., for appellant; *H. E. Grosch*, for respondent.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—This is an appeal from a judgment of

Taylor, J., dismissing the plaintiff's action for alimony and refusing to allow her the costs of the action. So far as the appeal on the merits is concerned, I think it must fail. The trial Judge has made a finding on facts with regard to which there was distinct conflict between the evidence of the plaintiff and defendant. The only evidence to support either of the parties was, if anything, slightly corroborative of the defendant. Under these circumstances I do not see how we can disturb the finding of the trial Judge.

The plaintiff also appeals on the question of costs.

There is no doubt that in a number of cases decided in the Supreme Court of the North West Territories, in the Supreme Court of Saskatchewan and in the Supreme Court of Alberta it has been held that a wife is entitled to her costs of an unsuccessful suit for alimony unless she has separate means or unless her solicitor has not acted *bonâ fide* for her protection.

This was the practice followed in the Ecclesiastical Courts in England, and later on in the Court for Divorce and Matrimonial Causes established by An Act to Amend the Law relating to Divorce and Matrimonial Causes in England, 20-21 Vict., 1857 (Imp.), c. 85. S. 51 of that Act provided that "the Court on the hearing of any suit, . . . under this Act may make such order as to costs as to such Court or House respectively may seem just." This section gives an absolute discretion, and it may be broadly stated that "there is scarcely any order as to costs which the special circumstances of any case may demand which the Court could not and did not make." A wife, whether innocent or guilty, was always allowed a certain amount of costs unless she was shewn to have separate estate or unless her solicitor had not taken up her case *bonâ fide*. The practice with regard to costs was prescribed by rules. Under these rules a wife who was a petitioner or respondent might apply for costs or security for costs at certain stages of the proceedings, and as a rule she was only allowed such costs as were so secured. The wife who failed in her suit was as a rule granted costs against the husband not exceeding the amount secured. 16 Hals. 548, par. 1117 and cases cited thereunder.

The present rules in England applicable to this point are:

159. When on the hearing or trial of a cause the decision of the Judge Ordinary or the verdict of the jury is against the wife, no costs of the wife

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of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the Judge Ordinary, at the time of such hearing or trial.

201 (in part):

. . . a wife who is unsuccessful in a cause, and who at the hearing of the cause has, in pursuance of r. 159, obtained an order of the Judge Ordinary that her costs of and incidental to the hearing or trial of the cause shall be allowed against her husband to the extent of the sum paid or secured by him to cover such costs, may nevertheless proceed at once to obtain payment of such costs after allowance thereof on taxation.

Although r. 159 is very explicit in its terms, the Court will, under certain circumstances, grant costs on an application made after the time of hearing or trial. *Somerville* v. *Somerville and Webb* (1867), 36 L.J. 87, 16 L.T. 466.

In view of the provisions of r. 201:

Solicitors must therefore see that counsel ask for the wife's costs at the hearing when she is unsuccessful. The ordinary practice is for counsel to ask for "the usual order for the wife's costs." Such usual order is that the amount paid in or secured is ordered to be paid out after deducting any sum or sums that may be taxed off by the registrar . . . Sometimes under special circumstances, the full costs, or at all events an amount larger than the amount paid in Court and secured is asked for at the hearing or trial and obtained.

See *Smith* v. *Smith, et al.* (1882), 7 P.D. 84; *Robertson* v. *Robertson* (1881), 6 P.D. 119; Browne & Watt on Divorce (8th ed.), 550, 551.

While the general principle in favour of the wife is followed as a rule, the Court still has the absolute discretion given by the Act, and may and in some cases does refuse to give the wife any costs at all, and there is no appeal against its decision.

It has recently been decided by the Judicial Committee of the Privy Council that the English law of divorce, as established by the Divorce Act of 1857 applies to the Territories and, consequently, to Saskatchewan. *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956.

That case may also be held to decide that any right which was introduced into the substantive law of this Province under the Act in question may be enforced in the Court of King's Bench. The question of how the right to divorce should be pursued in the King's Bench is now before this Court in another case, in which we shall have to decide whether our present rules of Court apply to divorce proceedings or whether they should be taken according to the practice and procedure in England. That

question in my opinion does not arise in this case, because we do not look to the Divorce Act (Imp.), 1857, for jurisdiction in alimony cases. In that Act, alimony is only incidental to suits for restitution of conjugal rights or judicial separation.

By s. 21 of the King's Bench Act, 6 Geo. V., 1915, Sask., c. 10, it is enacted that the Court

> 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.
>
> (2) The Court may, after action brought, issue an order restraining the defendant in any action for alimony from transferring or otherwise disposing of or incumbering his land pending the final disposition of such action save subject to any interest which the wife may subsequently acquire in said land under any judgment of the Court.

In reference to a similar provision in a territorial ordinance, Wetmore, J., afterwards Chief Justice of Saskatchewan, held that it did not carry into it the practice and procedure under the Imperial Act, but simply conferred

> on this Court jurisdiction to grant alimony in the cases therein mentioned. And such relief must be sought for and obtained in the same manner that any other relief which such Court has jurisdiction to grant must be sought for and obtained, namely under the practice prescribed by the "Judicature Ordinance."

Harris v. *Harris* (2), (1896), 3 Terr. L.R. 416, at 417.

I most respectfully agree with that opinion and apply it to this case with some modification.

I do not see anything in such an action, or in the manner in which it should be conducted, to bring it within the exception mentioned in s. 18 of the King's Bench Act.

Rule of Court No. 709, which deals with costs, is as follows:

> 709. Subject to the provisions of the Judicature Act and these rules the costs of, and incident to, all proceedings in the Supreme Court, including the administration of estates and trusts and compensation or allowance to any executor, administrator, guardian, committee, receiver or trustee, shall be in the discretion of the Court or Judge.

Though that rule, which is identical in language with the English Rule Order 65, 2, 1, gives a very wide discretion, it was held by the Court *en banc* in *Edmanson* v. *Chilie* (1914), 7 S.L.R. 34, following *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501, and other cases cited, that where a plaintiff comes to enforce a legal

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right and completely succeeds and has been guilty of no misconduct, there are no materials upon which the Court can exercise a discretion.

A fortiori a successful defendant who has been guilty of no misconduct has a right to his costs. 23 Hals. 179, par. 324, and cases cited in note.

To enable a Judge to deprive a successful litigant of his costs or order him to pay the costs of the other side, there must be materials upon which the Judge can exercise his discretion, and if there are no such materials he is wrong in making such an order, *ibid*, p. 178-9, par. 324.

It is quite plain from the authorities that under r. 709 the defendant in this case could not have been ordered to pay the costs of the plaintiff. But a line of decisions by the territorial Court and the Alberta and Saskatchewan Courts has applied a different rule to actions for alimony, and to that extent the broad statement with regard to practice and procedure made above must be modified, so far, at least, as r. 709 is concerned. *Harris* v. *Harris*, *supra*; *Lloyd* v. *Lloyd* (1914), 19 D.L.R. 502, 7 Alta. L.R. 307; *Dewitt* v. *Dewitt* (1919), 46 D.L.R. 242, 12 S.L.R. 213.

All these cases adopt and apply the rule always followed in England in similar matters, that a wife unless her solicitor has not taken up her case *bonâ fide*, whether successful or unsuccessful is always allowed a certain amount of costs unless she is shewn to have separate estate. It does not appear that in any of these cases the English practice with regard to special applications for costs or security for costs has been followed or held applicable.

The rule above mentioned therefore must be held to apply to the present case, and it was so held by the trial Judge. His finding on the question of costs is as follows:

As to the question of costs, the ordinary rule is of course that the wife is entitled to her costs in such actions, but in this action it seems to me that the ordinary rule should not apply. The action should not in my opinion have been brought into Court.

This must mean that in the opinion of the Judge there was no reasonable ground for starting these proceedings, and the solicitor ought to have been aware of it.

I must say, with deference, that there is no material before us upon which to support such a conclusion. A comparison of the wife's evidence with the allegations contained in the statement of claim shew that she must have made statements in instructing her solicitors which she later on repeated under oath at the trial. If those statements were true and had been believed by the trial

Judge, she would have succeeded in her action. Her solicitors cannot reasonably be held to have brought the action *mala fide* because later on it is decided that she must have been quite untruthful in her instructions. There does not seem to have been any way in which they could have verified the statements which must have been made to them and which, if true, were a complete justification of the proceedings. For this reason I do not think that there was any reason for departing from the usual practice, and I would therefore allow the appeal with costs, and vary the judgment below by allowing the plaintiff her costs of action.

Newlands, J.A.

NEWLANDS, J.A. (dissenting):—This was an action for alimony in which the trial Judge found that plaintiff was not entitled to same and dismissed her action without costs. The plaintiff appeals, (1) on the question of fact that the trial Judge found against her that she was not entitled to alimony, and (2) on the question of costs, that in any event she should have been allowed her costs.

As to the first ground of appeal. The appellant claims that the trial Judge was wrong in holding that the witness Berg corroborated the evidence of the respondent. If he was wrong in so holding, then there was only the evidence of the appellant and respondent for him to decide the case upon, and as they directly contradicted each other there is no ground on which we can upset this finding.

As to the second ground of appeal. The ordinary principle in matrimonial actions is that the husband pays the wife's costs, but in order to get these costs she must apply for the same before the hearing. If she brings her case to a hearing without applying for costs and loses her case, then she is not entitled to costs.

In *Smith* v. *Smith, et al.* (1882), 7 P.D. 84, Lord Hannen, the President, at p. 87, said:

> In the Ecclesiastical Courts the wife was entitled to have her costs taxed *de die in diem*, so as to enable her to defend herself; but if her proctor neglected to take this precaution it was the invariable practice of the Court not to make any order for costs in favour of a wife who had brought her case to a hearing and had failed. This question was in 1858 brought to the consideration of the full Court, the then Court of Appeal consisting of Lord Chelmsford, Wightman, J., and Sir C. Cresswell, in *Keats* v. *Keats and Montezuma* (1859), 1 Sw. & Tr. 334, at 358. On an application for the wife's costs, the Court said, "You are too late for that now. Your application should have been

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made before the cause was heard. The foundation of the rule of the Ecclesiastical Court was that the wife should be enabled to bring her case to a hearing and defend herself, and so up to any time previous to the hearing the husband was generally liable to have the wife's costs taxed against him, and the Court has so far followed the rule, as in *Evans* v. *Evans and Robinson* (1859), 1 Sw. & Tr. 328, *but if the wife has brought her case to a hearing, howsoever, and fails, the husband has never then been made liable for her costs.*"

And in *Waudby* v. *Waudby and Bowland* (1901), 84 L.T. 571, Sir Francis Jeune, the President, at 572, said:

It is, however, the foundation of the peculiar practice of this division, with regard to a wife's costs, that the wife should be unable without assistance from her husband to bring her case to a hearing, evidenced as that is by her applying for payment of a security for such costs before the trial. As Lord Hannen pointed out in *Smith* v. *Smith* (*ubi sup.*) it was in 1858 expressly decided by the full Court . . . that if a wife brings her case to a hearing without having previously taxed her costs against her husband, and fails, the husband has never then been made liable for her costs. In the present case, therefore, if at the late trial the wife had failed, she could not have obtained any costs against her husband.

In this case there was no application for costs before the trial, at which she failed. She is therefore not entitled to her costs under the practice of the Probate and Divorce Division. Nor is she entitled to them under our rules, the costs being in the discretion of the trial Judge and he having for a good cause, *i.e.*, her non-success, refused them to her.

The fact that the solicitor for the wife is interested in the costs and that in a case where the wife is successful he can recover as necessaries from the husband his costs as between solicitor and client (*Ottaway* v. *Hamilton* (1878), 47 L.J.Q.B. 424), makes no difference to the above rule. This question was considered by Lord Hannen in *Smith* v. *Smith, et al., supra*, and in dealing with it he says, in reference to the wife's solicitor, at p. 90:

Can it be said that the protection of the solicitor is not thus amply provided for? He is, in fact, the most favoured of practitioners, for he can, whatever the merits of his case be, stay his adversary's proceedings until all the costs which he may shew can be reasonably anticipated have been paid or secured. If the solicitor does not take the necessary steps to obtain sufficient security or an order of the Court for his costs it is his own fault. Numerous instances might be cited in the practice of all Courts where costs are lost if not asked for at the proper time.

I therefore think the trial Judge was right and the appeal should be dismissed.

No costs should in my opinion be allowed to either party.

Lamont, J.A.

LAMONT, J.A. (dissenting):—The only question to which I need refer is the question of costs. The wife brought an action

for alimony and failed therein. The trial Judge deprived her of costs.

In *Dewitt* v. *Dewitt* (1919), 46 D.L.R. 242, 12 S.L.R. 213, this Court held that the practice of the English Courts as to costs in alimony actions prevailed here. The practice in England, as I gather from the cases in which alimony could be granted as an incident, is, that as a wife is entitled to have her action brought to trial, she may call upon her husband to provide her with sufficient money to bring the case to trial or secure the same to the satisfaction of the registrar. Her costs in such a case are considered to be not simply costs but necessaries and the rule applicable to costs does not apply. If she has sufficient separate estate to prosecute her action without assistance from her husband, she can not call upon him to provide for her costs. If she brings her action to trial without asking to have her costs paid or secured, she is only entitled to them in case she was successful in her action, in which case she gets them under the ordinary rule as to costs. If she is not successful, she is not entitled to have her husband pay her costs.

In *Waudby* v. *Waudby and Bowland* (1901), 84 L.T. 571, the practice is stated by Jeune, P., at 572, as follows:

> As a general rule, there can be no order as to the costs of a party in an abortive trial until by further proceedings the rights of the parties are ascertained. There is, however, in this division, as in the Ecclesiastical Courts which previously had cognisance of matrimonial matters, a well recognised rule that a husband must provide means for his wife to bring her case to a hearing if she is unable to provide such means for herself. This principle has given rise to several rules by which practical effect has been given to it. The practice is that, *pendente lite*, an application is made by the wife that the husband shall pay her costs incurred up to the time of the application, and further pay into Court, or secure, a sum estimated to be sufficient to cover her costs up to the hearing. A further practice once existed that during the trial the wife's costs were taxed *de die in diem* and provided by the husband, which has been modified into a practice that on application a wife is allowed to bring in her actual costs of the days of the trial as if the husband had been ordered to pay or secure them. Then after the hearing is concluded the Judge is to decide what costs shall be allowed to the wife, a practice embodied in the 159th rule. The usual practice undoubtedly has been, and is, to allow a wife who has been unsuccessful her costs, but only up to the limit of the amount paid into Court or secured, with the addition of such sum as may be added, above mentioned, on account of the prolongation of the trial,

and further on in his judgment, at 572-3, the Judge says:

> It is, however, the foundation of the peculiar practice of this division, with regard to a wife's costs, that the wife should be unable without assistance

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from her husband to bring her case to a hearing, evidenced as that is by her applying for payment of a security for such costs before the trial. As Lord Hannen pointed out in *Smith* v. *Smith* (*ubi sup.*), it was in 1858 expressly decided by the full Court, consisting of Lord Chelmsford, Wightman, J., and Sir Cresswell Cresswell, in the case of *Keats* v. *Keats and Montezuma*, *supra*, that if a wife brings her case to a hearing without having previously taxed her costs against her husband, and fails, the husband has never then been made liable for her costs.

In 16 Hals. 548, par. 1116, the rule is stated in these words:

Where the petition of a wife who has obtained no security for costs is dismissed, no order for costs is usually made against her husband.

Here the plaintiff brought her action to trial without asking for costs, which is *primâ facie* evidence that she was able to prosecute her action without assistance from her husband. I am, therefore, of opinion that the trial Judge was justified in depriving her of her costs.

The appeal should be dismissed.

Elwood, J.A.

ELWOOD, J.A., concurred with HAULTAIN, C.J.S.

Appeal dismissed by equally divided Court.

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HERON v. COLEMAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. October 3, 1919.

AUTOMOBILES (§ III C—315)—MOTOR CAR DRIVEN BY SERVANT—HIRED TO A THIRD PARTY—COLLISION—INJURY TO PASSENGER—DAMAGES—LIABILITY OF MASTER.

A servant, who is driving his master's motor car notwithstanding the fact that such car was with others supplied to a third party, the servant of his master, and the latter is responsible for his servant's negligence.

[*Quarman* v. *Burnett* (1840), 6 M. & W. 499, 151 E.R. 509 followed; *Consolidated Plate Glass Co.* v. *Caston* (1899), 29 Can. S.C.R. 624, followed.]

Statement.

APPEAL by defendant from the judgment of Logie, J., in an action for damages for injury sustained by the plaintiff by the overturning of the defendant's motor vehicle, in which the plaintiff was being carried as a passenger, by reason of the negligence of the driver, the servant of the defendant, as the plaintiff alleged. Affirmed.

One Culliton had agreed to furnish vehicles for the conveyance of guests from a wedding, and, not having vehicles enough of his own for the purpose, arranged with the defendant that the defendant should furnish some of the vehicles required. The plaintiff was one of the guests; the hire of the vehicle was to be paid for, not by her, but by her host. She was in one of the defendant's

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vehicles when it was overturned by a collision with another car. The trial Judge found that the accident was caused by the negligence of the driver of the defendant's car, and that the defendant was liable; he assessed the damages at $800, for which sum and costs judgment was entered in the plaintiff's favour.

William Proudfoot Jr., for the appellant.

G. S. Hodgson, for the plaintiff, respondent.

Middleton, J.

MIDDLETON, J.:—The plaintiff was a passenger in an automobile owned by the defendant, who carries on a livery business. The car came into collision with another automobile and was overturned, and the plaintiff suffered injury. The trial Judge has found, and we agree with him, that the accident was caused by the negligence of the driver of the car, the defendant's servant, and has awarded $800 damages and costs.

One Culliton, who was in the livery business, was called upon to supply vehicles to convey guests from a wedding. He had not sufficient vehicles of his own; and, under some general understanding with the defendant, as the defendant says, he "ordered these two rigs to go to that address and get those people." Coleman's drivers went with his cars, and it is not suggested that Culliton in any way assumed control of the cars or interfered with the drivers.

It is contended that the driver became the servant of Culliton, and that he, and not Coleman, must be held liable for the driver's negligence.

The leading case of *Quarman* v. *Burnett* (1840), 6 M. & W. 499, at 509, 151 E.R. 509 at 513, states: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey."

As pointed out in that case, the liability as master must cease when the relation of master and servant ceases; but, on the facts here, the defendant was always the master. He selected the driver, and the driver was to be paid by him, and he alone had the judgment as to his fitness and the right to dismiss. The driver went by his orders to aid Culliton in discharging the engagement

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to supply carriages for the wedding, but in so doing the driver was still Coleman's servant.

All this is in accordance with the earlier case of *Laugher* v. *Pointer* (1826), 5 B. & C. 547, 108 E.R. 204, where it is pointed out that in order that the master should escape it is not enough that some other person should have some limited right to give instructions—that other must actually be made the master. "The coachman . . . cannot be the servant of both. He is the servant of one *or* the other, but not the servant of one *and* the other" (p.208).

The Supreme Court of Canada in *Consolidated Plate Glass Co. of Canada* v. *Caston* (1899), 29 Can. S.C.R. 624, adopts these cases as a correct statement of the law, the Chief Justice saying (p. 627): "A fair and reasonable test to apply, is this: Could the hirer have himself taken absolute control of the vehicle, horse and harness, taking it altogether out of the possession of the driver?"

The answer may be found in *Donovan* v. *Laing Wharton and Down Construction Syndicate*, [1893] 1 Q.B. 629, where Bowen, L.J., says (p. 634): "If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage."

There seems to be no room for doubt upon these and many other cases.

In *Saunders* v. *City of Toronto*, (1899), 26 A.R. (Ont.) 265, relied on by Mr. Proudfoot, there was an attempt to make the city corporation liable for the negligence of a teamster employed to remove refuse from the streets. The man owned his horse and cart, and the finding was that he was an independent contractor, and not a servant. The question was quite distinct from that which here arises but the Court adopts as the test that proposed by Bowen, L.J., "the right to exercise the power of control."

The appeal should be dismissed with costs.

Riddell, J.
Latchford, J.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—I agree with my brother Middleton that this appeal should be dismissed on the grounds stated by him:

that the accident was caused by the negligence of the driver of the car owned by the defendant; that the driver was at the time the servant of the defendant; and that he owed to the plaintiff the duty to drive with care: but I desire, and feel bound, to add: that Mr. Proudfoot's thorough and persuasive argument caused some doubt in my mind as to the accuracy of the judgment appealed against in two respects; subsequent consideration has removed those doubts.

I am quite in agreement with him in his contention that it does not necessarily follow that because, in approaching each other, the defendant's car was on the left hand side of the other car, and that the other car had the right of way, the driver of the defendant's car is alone blamable for the collision of the cars. To entitle a driver to the benefit of the right of way he must be in the right place at the right time under proper conditions: if he is driving at an excessive rate of speed; and that negligence on his part is the real cause of the accident, a claim for the benefits of the right of way cannot help him: or if he fail to give warning of his approach, and that neglect is the cause of the accident, any claim to the benefits of the right of way is out of the question.

But, upon the evidence adduced at the trial, it cannot be found here, contrary to the findings of the trial Judge, that any such negligence was really the cause of the accident: that the other car was negligently at the place of the accident when it happened. It seems rather to have been, as the trial Judge found, a case of the driver of the defendant's car failing to observe the rule as to the right of way and thereby causing the accident.

The other question is always a troublesome one. I cannot think that any one could have intended to lay it down as a rule of law that in all cases of hiring of a cab the hirer has no control over the driver except as to the place whither he is to be driven; the very purpose of the hiring may prove a right in the hirer to give orders as to speed, stops, directions of travelling, and other things. But in the case of "cabby" and "fare" ordinarily there is no liability on the part of the fare for injuries caused by the cabby's negligence.

That, however, is not this case: it presents a more difficult question. Although the car in which the plaintiff was when

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injured was the defendant's car, driven by a servant employed by him as a driver, at the time of the accident it was being used by another cab-owner in the performance of his contract for the carriage of wedding-guests; and the case hinges upon the proper answer to the question: What were his rights over car and driver under the contract by which he had the use of them in the performance of his contract to convey the wedding guests?

If, as was said by some one in evidence, car and driver were "rented" to the other cab-owner, then he, and not the defendant should be held responsible for the negligent act of the servant, because in that case for the time of the "renting" the servant would be his, subject to his orders, his services paid for in the rent, and subject to discharge by the "tenant" from this limited service.

But I cannot find that that was really the nature of the contract between the two cab-owners: I look upon it rather as another cabby called in to do the work which the first cabby undertook and was not able to do altogether with his own cabs, but was able to do with his own and such others as he might be obliged to call to his aid: the usual course in such cases.

And, in such circumstances, the driver would be the cab-owner's servant, not temporarily the servant of the contractor for the carriage of the wedding-guests.

Then, it being, as I think it was, his duty to carry the plaintiff as she was being carried at the time of the accident, he is liable in damages for the injuries sustained by her through his servant's negligence: and none the less because her fare was not paid by herself, but was paid by the host of the wedding-party or for him paid by the contractor, who was repaid or to be repaid by him.

Whether liability exists also by reason of the ownership of the car alone, under sec. 9 of the Motor Vehicles Act, was not argued and need not be considered.

Appeal dismissed.

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ALEXANDER HAMILTON INSTITUTE v. McNALLY.

Nova Scotia Supreme Court, Harris, C.J., Longley and Drysdale, JJ., and Ritchie, E.J. December 6, 1919.

CONTRACT (§ IV C—351)—EDUCATIONAL COURSE—NON-PERFORMANCE BY DEFENDANT—PLAINTIFF READY AND WILLING—ACTION TO ENFORCE.

A party to a contract cannot by his own act or default defeat the obligations which he has undertaken to fulfil.

[*Sailing Ship "Blairmore" Co.* v. *Macredie*, [1898] A.C. 593, applied.]

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ALEXANDER HAMILTON INSTITUTE v. MCNALLY.

Harris, C.J.

APPEAL from the judgment of Mellish, J., in an action on an agreement in writing. Affirmed.

E. P. Allison, K.C., for appellant; *I. Oakes*, for respondent.

The judgment of the Court was delivered by

HARRIS, C.J.:—The defendant and plaintiff entered into the following contract:

Contract.

Alexander Hamilton Institute,
Astor Place.
New York.

Please enroll me for your two year course and service in accounts, finance and management, which includes:

Text.—Twelve bound volumes, forwarded immediately, express prepaid.

Lectures—prepared by eminent business men—one every month.

Talks—directing reading of text—one every two weeks.

Problems—presenting actual business situations—one every two weeks.

Service—answers to all inquiries in connection with the reading course; and four modern business reports.

In consideration of my enrollment for the above course and service I agree to pay to your order the sum of $96, as follows, $6 per month.

Signature, Thomas McNally. Business position, Salesman with Goodyear Tire and Rubber Co.

Business address, 152 Simcoe Street.

Residence address, 1918 Withrow Avenue, Date Dec. 9, 1914. Application with payment $8, received by

(Sgd.) A. J. FELTON,
Representative.

Note.—All payments (except first, which should be made to representative at time of giving application) are to be sent by mail to the order of the Alexander Hamilton Institute.

The plaintiffs delivered the 12 volumes to defendant and for some months sent the "lectures" and "talks" to the address of the defendant at 1918 Withrow Avenue, Toronto. The defendant made two payments only and then the papers sent were returned through the mail marked "refused." On a personal inquiry being made at the business address of the defendant, information was received that he had left Toronto and was in the employ of the same firm, the Goodyear Tire and Rubber Co., at Halifax, N.S. The plaintiffs thereupon wrote the defendant at Halifax that they would be glad to continue the course and service there, but they could get no reply. The plaintiffs were ready and willing to carry out their contract but were prevented from doing so by the acts of the defendant.

The whole of the instalments were due when the action was

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brought on the contract to recover the $96 less the two payments made. Mellish, J., gave judgment on the trial for the plaintiffs.

The only point argued on the appeal was whether an action could be maintained on the contract or whether it should not have been brought for damages for breach of contract.

I think the appeal must be dismissed.

In *Sailing Ship "Blairmore" Co.* v. *Macredie*, [1898] A.C. 593, at p. 607, Lord Watson said:

> The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil.

The trial Judge has found that if the defendant "has not received the full benefit derivable from the contract it would appear to be his own fault."

I agree that the fault is that of the defendant and having prevented the plaintiffs from carrying out the contract in its entirety and the contract being an entire one the plaintiff is entitled to recover.

In the case of the *International Correspondence Schools, Ltd.* v. *Ayres* (1912), 106 L.T. 845, 28 T.L.R. 408, the defendant entered into an agreement with the plaintiffs who carried on a system of tuition by correspondence for a course of instruction in telephone engineering. The fee fixed was to cover all instruction until the defendant was qualified for a diploma provided he completed the course of instruction in 5 years. The defendant paid two instalments and then gave notice to the plaintiffs that he did not propose to continue the course. The plaintiffs sued on the contract for an instalment due. The County Court Judge held that the plaintiffs could only recover the instalments due when the contract was broken and damages for breach of contract. On appeal this decision was reversed by the King's Bench Division and it was held that the plaintiffs could recover.

Bray, J., said, at 846:

> The plaintiffs have always been ready and willing to give the instruction, and consequently the defendant has had the consideration for which he bargained, namely, the right to receive the instruction, and if he does not choose to avail himself of it, so much the worse for him. It seems to me that the plaintiffs are entitled to sue for the instalments as they become due, whether the defendant refuses to receive the instruction or not, and that their remedy is not merely an action for damages for breach of contract. The appeal must therefore be allowed.

Phillimore, J.:—I agree.

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In *Price* v. *Wilkins* (1888), 58 L.T. 680, the defendant's son was a pupil at plaintiff's school and one of the rules of the school was that no permission to leave the school and remain away over night was allowed during Easter term.

During Easter term the defendant requested that his son might be allowed to come home and remain for the night, which the plaintiff refused to allow. Later on, the defendant repeated the request and sent a servant for the boy who was allowed to go home, the plaintiff writing the defendant at the same time that he let the boy go home on the understanding that he returned the same night.

When the boy reached home the defendant telegraphed plaintiff that it was not convenient to send the boy that day, but he would return the next morning. The plaintiff thereupon wired the defendant that unless his son returned that night he would not receive him back. In consequence of this telegram the defendant did not send the boy back.

The plaintiff sued for the school fees due on the first day of Easter term, of which term less than 3 weeks had expired when the boy left. The defendant denied liability and counterclaimed for damages.

It was held that plaintiff's contract was to board, lodge and educate the defendant's son for the term on the condition that he should be at liberty to enforce with regard to the boy the rules of the school or such of them as were known to the defendant; that this condition having been broken by the defendant, the plaintiff had the right to refuse to complete his contract and was consequently entitled to succeed both on the claim and the counterclaim.

The point of the decision is that the contract being an entire one for the school term and the defendant having broken the contract in a manner which justified the plaintiff in refusing to teach the boy any longer, the plaintiff was still entitled to recover on his contract.

The principle of that case applies here. The plaintiff there as here was willing and ready to carry out his contract and would have done so but for the act of the defendant. The defendant having done that which prevented the performance of the contract by the plaintiff, or justified him in refusing to perform it,

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could not thereby deprive the plaintiff of the advantage of his contract.

See also 13 Corpus Juris, 647 and 657, and 33 Cyc. 816.

On the other hand, *Hyland* v. *Harrison* (1915), 49 N.S.R. 75, is an illustration of the converse rule that if the contract is entire and is not fully performed by reason of the plaintiff's own default, he cannot recover anything under the contract even for work of which the defendant got the benefit.

As Brown, J., said in *Starr* v. *Liftchild* (1863), 40 Barb. (U.S.) 541, in a somewhat similar case, the contract being entire the plaintiff "must recover all or nothing," and whether he recovers all or nothing must depend upon whether the performance of the full contract has been prevented by the defendant or the plaintiff.

Here the performance of the contract in its entirety was rendered impossible by the fault of the defendant and it would be obviously unjust that the plaintiff should thereby be prevented from recovering.

I would dismiss the appeal with costs. *Appeal dismissed.*

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CATALANO & SANSONE v. CUNEO FRUIT AND IMPORTING Co

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. October 3, 1919.

SALE (§ III A—57)—REPRESENTATION AS TO QUALITY AND SIZE—WARRANTY—BREACH—DAMAGES—ALLOWANCE TO VENDEES AND TO SUBVENDEES ON RESALE—PAYMENT INTO COURT—RULE 308—COSTS.

Where there has been a representation and warranty the vendees are entitled to a reduction in the contract price for a breach of that warranty, the amount being the actual reduction in the value of the goods by reason of the breach. Allowances must also be made to subvendees who bought the goods on the same warranty. The vendees are not prejudiced by payment into Court and must have their costs in the action from the date of payment in.

[*Mondel* v. *Steel* (1841), 8 M. & W. 858, 151 E.R. 1288; *Dingle* v. *Hare* (1859), 7 C.B. (N.S.) 145, 141 E.R. 770, followed.]

Statement.

AN action for the price of goods sold and delivered; and a counterclaim by the defendants for damages for loss of profits.

The action and counterclaim were tried by KELLY, J., without a jury, at a London sittings.

R. S. Robertson, for plaintiffs; *D. B. Goodman*, for defendants.

Kelly, J.

KELLY, J.:—On the 30th August, 1918, the plaintiffs, whose business is in London, Ontario, sold to the defendants, who

carry on business in Toronto as wholesale fruit-dealers, 700 crates of peaches at $1.67 per crate, f.o.b. London. This was part of a car-load of peaches which the plaintiffs purchased in Detroit a day or two previously. Sansone, of the plaintiff firm, was in Toronto on the 30th August, and there made the sale to the defendants.

The unloading of the car in London was then in progress; and, on making the sale, Sansone telephoned to London and gave instructions that the car with 700 crates be sent on to Toronto for the defendants. The car arrived in Toronto on the afternoon of Saturday the 31st August, Sansone not having then returned to London.

The fact that the following Monday was a legal holiday, on which, as well as on the 1st September (Sunday), the fruit or a greater part of it would require to be held unsold, entered into consideration when the sale was made.

The action is to recover $1,169, the price of the consignment. The defendants in answer set up that the goods were not as represented and agreed by the vendors—that the plaintiffs failed to deliver peaches of the size and quality represented and contracted for.

I do not attempt to set out all the material parts of the evidence: while it is not altogether satisfactory from the standpoint of either of the parties, I nevertheless find that the plaintiffs represented and agreed that the goods were of a specified size and quality, and that what was delivered did not meet the specifications of the contract in these respects. Sansone may have been, and perhaps was, satisfied that what the car contained would correspond in size and quality with what he agreed to sell. He had not seen the fruit except from such observations as he had been able to make in an examination of the loaded car at Detroit. In the course of negotiations for sale at the defendants' place of business, the defendants drew Sansone's attention to and shewed him peaches of the defendants then in their possession; and the kind, size, and quality of what the plaintiffs agreed to sell were fixed by a reference thereto, in addition to their being otherwise described and represented by Sansone. The goods delivered fell far short of being up to the grade of those so shewn by the defendants or of those otherwise represented by Sansone. A very substantial part of the

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consignment was inferior in size: the fruit was black inside and of poor quality, and otherwise was so defective as to detract from its value and render it unsaleable to advantage.

Not a little importance was attached to an allegation by the defendants that when the goods arrived in Toronto the "bridging" or supports by which the crates were held in place while in transit from London (a large portion of the original consignment having been there taken from the car) were so broken and out of place as to permit of the crates being thrown around and broken and the contents thus damaged. There is no evidence imposing on the plaintiffs any liability for any such happening. The purchase was made f.o.b. London. There is uncontradicted evidence that when the car and its contents were made ready for shipment from London to Toronto the crates were properly supported and the "bridging" in good order. The defence cannot rest on the want of protection in not properly supporting the crates in the car. The condition of the fruit was not however due to that cause. On the day the car arrived in Toronto (Saturday the 31st August), the defendants sold several crates of the fruit to a customer who took delivery from the car. On Monday a smaller number was sold in a similar manner; and on the two days following other sales were made. The inferior quality and condition, not to speak of the objectionable size, became apparent as customers attempted to make use of their purchases, and from several quarters came demands upon the defendants to accept a return of the goods or to make an allowance for the inferior quality. The defendants then communicated to the plaintiffs at London their own dissatisfaction, and threatened to return the goods; they were met by a request not to do so; and an offer of an allowance was made, which the defendants considered inadequate. The goods were of perishable quality, and the defendants continued to dispose of the remaining part of the consignment as best they could, treating themselves as the plaintiffs' agents for sale and charging a commission for effecting sales. In their defence-affidavit they claim to be indebted in respect of this transaction to the extent of $813.08 only; and, being entitled to a credit of $32 from the plaintiffs in respect of another transaction (which the plaintiffs at the trial admitted to be correct), they brought into Court with their defence $781.08 (the difference between $813.08 and the said $32) in full satis-

faction of the plaintiffs' claim. The charges on which this sum is arrived at were made on the basis of the defendants having acted simply as the plaintiffs' agents for the sale of the goods; and by way of counterclaim they claim damages, to which at the trial it was argued that they were entitled, for profit they would have made had the goods answered in quality and size what was represented by the defendants. They cannot consistently play the double *rôle* of (1) agents for sale and entitled to a commission for making sales, and (2) purchasers entitled to damages for loss of profits they would have made had the goods been according to contract.

On the evidence I think their statement (exhibit 15) at the trial fairly represents their liability; and this is borne out by the evidence of the various sales and of the prices they procured from purchasers. It is probable that, if they were treated as purchasers outright, with a right to claim against the vendors for breach of contract in not supplying the goods according to contract and for consequent damage, the result might have been more favourable to the defendants. But they chose to treat themselves as agents for sale when the plaintiffs refused to take back the goods.

There will be judgment in the plaintiffs' favour for $746.37 and interest from the time of payment in by the defendants and costs of the action to that time; the defendants to have costs against the plaintiffs from that time, to be set off against the plaintiffs' judgment. The moneys in Court and any interest accrued thereon to be paid out on the plaintiffs' judgment, and the balance, if any, to the defendants.

The plaintiffs and the defendants both appealed from the judgment of KELLY, J.

R. S. Robertson, for plaintiffs; *D. B. Goodman*, for defendants.

RIDDELL, J.:—The plaintiffs are a firm of fruit-merchants, carrying on business in London, Ontario; the defendants are wholesale fruit-dealers, carrying on business in Toronto, who bought 700 crates of peaches from the plaintiffs in Toronto, the peaches to be of a specified size and quality. The plaintiffs sue for the price of the peaches, and the defendants set up as a partial defence that the peaches were not as agreed. The learned trial Judge gave effect to the contention of the defendants, and directed judgment to be entered for the plaintiffs for $746.37, a sum

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considerably less than the amount sued for. Neither party is satisfied with this adjudication, and both appeal.

I agree with the conclusion of my learned brother Kelly that the defendants are entitled to a reduction in the contract-price, that there was a representation and warranty, and that the warranty was broken; indeed this was not seriously contested in the argument. The whole question is as to the amount of the reduction to be allowed.

Whatever may have been the earlier rule, since *Mondel* v. *Steel* (1841), 8 M. & W. 858, 151 E.R. 1288, the decisions have been uniform that the abatement of the price to be allowed on a breach of warranty is the amount by which the subject-matter is worth less by reason of the breach of contract: *cf. Davis* v. *Hedges* (1871), L.R. 6 Q.B. 687.

Again, it is the actual reduction in value of the goods which must be considered, not an estimate made by either party, however cogent such an estimate may be as evidence against him who makes it. It cannot (in the absence of estoppel or special circumstances) determine the rights of the parties.

Admittedly the method pursued by the learned trial Judge is not the correct one, and it is our duty to find the true amount by the legal method.

While it may not be quite conclusive, the price obtainable for goods is strong evidence of the actual value, and in case of doubt may be practically conclusive.

The plaintiff Sansone admits that, had the peaches been good (as they were warranted to be), the defendants could have obtained $2.15 to $2.25 per box, or at the time he was able to market them some 10 or 15 cents lower. Consequently, according to this evidence, the value of the goods, if they were as they should have been, would be at least $2; the defendants' president says $2 to $2.15 or $2.25; the witness Saso says $2.15 to $2.25; Badalato, $2.15 to $2.25.

It is, I think, fairly proved that the selling price of these peaches, as they should have been, was at least $2 per box.

When the peaches arrived, Culotta, the president of the defendants, opened the car and found a number of broken boxes. He closed the car again, and notified Sansone, asking him to come over and examine the peaches with him. Sansone declined, said

he was busy, and, "You go ahead with the peaches . . . you will find the peaches all right." Culotta said, "I will go ahead with the peaches," and added, "If the peaches turn out bad, damaged, you have got to make it right." Sansone said, "Go ahead." Culotta did not go back to the car, but proceeded to sell the peaches, getting them out of the car, a load or two at a time, as they were needed. After selling a quantity, the quality and sizes were found wrong, and finally, after selling about 450 boxes, the defendants tried to sell the remaining 250 boxes by auction. Failing in that, they sold at from 40 to 70 cents a box.

There can be no pretence that the defendants did not use their best endeavours to sell the fruit to the best advantage; and the price realised may fairly be taken as the actual value, subject to what is said hereafter as to claims by purchasers from the defendants.

The gross amount realised was $1,023.60; but the defendants were obliged to make an allowance to certain of their customers by reason of the defects in the fruit, in all $69.35, making the net proceeds $954.25. Had the peaches been as they were represented, the amount would have been at least $1,400. The defendants then are damaged $445.75, but of this $17.75 is due to damaged boxes, for which the plaintiffs are not responsible: therefore, at least $428 must be deducted from the purchase-price.

Such cases as *Dingle* v. *Hare* (1859), 7 C.B.(N.S.) 145, 141 E.R. 770 and *Randall* v. *Raper* (1858), El.Bl. & E. 84, 120 E.R. 438 shew that a jury might give damages for the liability the purchaser has incurred by selling the goods on the same warranty as that on which he had bought, and that even if claims by purchasers from him had not been paid. As is said by Crompton, J., in *Randall* v. *Raper*, at pp. 90, 91: "It is quite clear to me that . . . the liability of the plaintiffs to pay their subvendees would be a proper item in estimating the damages. In an action for breach of contract you can recover only once; and the action accrues at the moment when the breach occurs. A liability to payment, which has been incurred by a plaintiff in consequence of the breach of a defendant's contract, may well form a part of the damages, though it may be difficult to estimate them."

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In a proper case that should or might be done, but here all claims made by the sub-vendees have been paid, and I have allowed them in determining the actual value of the peaches.

There does not seem to be any probability of further claims being made, and we have no evidence of any sales that might result in claims—we should, I think, not take anything purely hypothetical into account.

The method here pursued seems to meet the approval of Byles, J.: *Dingle* v. *Hare*, 7 C.B.(N.S.) at 160, 141 E.R. at 776.

The defendants are also entitled to an admitted set-off of $32, thus reducing the claim of the plaintiffs by $460, and making the amount to which they are entitled ($1,169 less $460) $709, which is $72.07 less than the amount paid into Court—this sum of $72.07 the defendants should have.

It remains to consider what, if any, effect should be given to an offer of the defendants which was refused by the plaintiffs.

When it became apparent that the peaches were not up to warranty, the defendants sent a sum of $740.25, asking the plaintiffs to accept it in full. It seems doubtful on the evidence whether this offer was formally without prejudice; but, in any event, it is evidence only—cogent evidence perhaps, but only evidence. Had the plaintiffs accepted this, as the result shews they should have, the matter would have been settled; but, having rejected it, they cannot claim that the defendants are in a worse legal position in fact than they would have been without it.

Then comes the affidavit on appearance and the statement of defence shewing that the defendants thought that they were liable for $781.08. If the plaintiffs had accepted these figures, the action would have ended; but, as they did not, the defendants are not bound by their estimate. Cogent evidence, indeed, but only evidence.

The amount, $781.08, was paid into Court, but that is not prejudicial to the defendants, not being accepted in full: Rule 308; *Barrie* v. *Toronto and Niagara Power Co.* (1905), 11 O.L.R. 48.

The plaintiffs have recovered less than the amount paid into Court—they should pay the costs of the action subsequent to the payment in: they were offered before action more than they were entitled to, and they should have no costs of the action before that time.

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As to the costs of appeal, it is true that the damages were estimated on a wrong principle, but an appeal is not an appeal against the reasons for a judgment, it is from the judgment itself. The respondent is always entitled to support a judgment on any ground. The plaintiffs fail on both the appeal and cross-appeal, the defendants succeed in both, and the plaintiffs should pay the costs of both.

The judgment should be that the defendants receive out of Court from the moneys paid in the said sum of $72.07, also the amount of their costs from and after the payment into Court and including the appeal and cross-appeal; if the amount in Court is not sufficient to pay the sum of $72.07 and these costs, the plaintiffs will pay the balance; if there be any balance in Court after the payment of $72.07 and these costs, the plaintiffs will receive it.

Powell v. *Vickers Sons & Maxim Limited*, [1907] 1 K.B. 71; *Best* v. *Osborne* (1896), 12 T.L.R. 419.

Latchford, J. Middleton, J. Meredith, C.J.C.P.

LATCHFORD and MIDDLETON, JJ., agreed with RIDDELL, J.

MEREDITH, C.J.C.P.:—I should have been better satisfied that justice had been done in the contest between the parties at the trial of this action, if the learned trial Judge had accepted, and given effect to, the defendants' own estimation and account of their damages set out in their affidavit filed in this action with their appearance in it, and upon which they were allowed to contest the plaintiffs' claim; and I should now be better satisfied if the judgment of this Court were to be based upon that estimation and account, instead of awarding them as damages an amount considerably greater; and the more so as the defendants, in the first place, voluntarily offered, and sent their cheque to the plaintiffs for, $908.50 in settlement of the whole matter.

There can be no doubt about the proper measure of damages in such a case as this: it is: "the estimated loss directly and naturally resulting in the ordinary course of events from the breach of the warranty."

The serious difficulty which the case presents on the question of damages is caused by the failure of the parties to adduce at the trial sufficient evidence to enable any one to assess the damages with any degree of certainty.

In these circumstances, it is impossible to demonstrate that any of the three estimations now before us—that of the defendants,

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that of the trial Judge, and that of my brother Riddell—is either accurate or inaccurate; and, being unable to do that, I do not dissent from, but join with the other members of the Court in accepting, the last-made estimation, and giving effect to the disposition of the appeal in the manner proposed by my brother Riddell in his written judgment, which we have all had the benefit of perusing and discussing.

Judgment below varied in the defendants' favour.

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Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. October 20, 1919.

DAMAGES (§ III K—207)—SUBWAY—CONSTRUCTION—REMOVAL OF APPROACH TO PROPERTY—INJURY—COMPENSATION—BUSINESS PROFITS.

Where land is injuriously affected by the removal of the approach to the premises by the construction of a subway by a railway company, the owner is not entitled to compensation for loss of business profits resulting therefrom where no part of the land is taken.

Section 155 of the Canadian Railway Act (R.S.C. 1906, c. 37) is taken from s. 16 of the English Railways Clauses Consolidation Act, 1845, and the English decisions are applicable thereto.

[*Albin* v. *Canadian Pacific R. Co.* (1919), 47 D.L.R. 587, 45 O.L.R. 1, reversed.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1919), 47 D.L.R. 587, 45 O.L.R. 1, setting aside the award of arbitrators and referring the case back for reconsideration.

The appellant company by constructing a subway on Yonge street, Toronto, so lowered the grade of the street in front of respondent's shop as to practically destroy access thereto. An arbitration was had to fix the compensation for such injury and the award gave appellant, *inter alia*, $4,500 for injury to her business. The Appellate Division held that she was entitled to indemnity for loss of business but that the arbitrators had estimated it on a wrong basis and referred the award back to be dealt with as stated in the judgment.

G. R. Geary, K.C., and *Colquhoun* for appellant; *H. J. Scott*, K.C., for respondent.

Davies, C.J.

DAVIES, C.J.:—I concur with my brother Anglin.

Idington, J.

IDINGTON, J. (dissenting):—The question raised by this appeal is confined to whether or not under s. 155 of the Railway Act, R.S.C. 1906, c. 37, which reads as follows:

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155. 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,

the compensation recoverable thereunder is limited by the exact market value of the property taken or, in the case of its being injuriously affected, by the exact difference in such market value before and after it has been so injuriously affected by the exercise of the power in question.

In view of the uniform approval heretofore of this and other Courts to the allowance of 10% generally added by arbitrators to the market value of the property taken, the proposition that the market price is the utmost limit seems a little startling.

Yet such a proposition seems to be the basis of this appeal which has one merit that it is confined to one exceedingly narrow point.

True this case in which the question is raised seems to be one in which the right of property which was invaded was a taking away in two places of the means of access to, and egress from, same to the public highway, and the incidental support an owner is entitled to for his buildings; and thus in one way of looking at the matter may be fairly arguable as a case of injuriously affecting the property.

I incline to agree with the arbitrator, as I understand him, that there has been taken from the owner a very substantial part of that which constituted her dominion over or ownership of the property as its owner and that the case is not merely an injurious affection such as might arise from a neighbouring nuisance.

We held in the case of *Canadian Northern Ontario R. Co.* v. *Holditch* (1914), 20 D.L.R. 557, 50 Can. S.C.R. 265, that where the railway company did not touch or legally injure, by the exercise of its powers, a parcel of land as defined by the plan of its survey, the owner could not recover any compensation on either ground and in this were upheld by the Court above, 27 D.L.R. 14, [1916] 1 A.C. 536. How that and numerous other well known cases cited here and below can affect the question to be resolved herein, I fail to see.

It is admitted that the respondent had a very substantial right to indemnity under the Act and all that is before us, as

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counsel for appellant frankly admitted, is whether or not a person so damnified as to be entitled to indemnity is confined to the difference between the market value of the property when the works touched it and when completed and is not entitled to have any consideration extended to her by reason of the forcible taking away of her rights in any way, such as in this case the disturbance of her business carried on in the premises in question.

We are not called upon to decide anything in relation to the measure of such damages, or the bearing of any of the elemental facts to demonstrate the cause of such loss or the extent to which they should be considered.

The bare right to any consideration of how injuriously or otherwise the exercise of the power may have affected the owner or her business is denied save as to diminution in market value of the land itself or buildings thereon.

I am and long have been of a different opinion, as evidenced by what I may be pardoned for shewing by quoting from my opinion in the case of *Dodge* v. *The King*, (1906), 38 Can. S.C.R. 149, at p. 155, as follows:—

> The market price of lands taken ought to be the *primâ facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

That opinion was concurred in by the majority of the Court.

It is fair to say that the exact question raised herein was not what was in fact under consideration therein and hence binds no one but myself; yet it was the result of much consideration of many decisions and other authorities.

The usual 10% allowance I therein referred to is intended to cover contingencies of many kinds. Experience teaches me it has served to prevent injustice in many cases and in most covers incidentally the loss for disturbance of business and possible removal. It is not a rule of law though sometimes it has been sought to be made so for the service of those who actually bought lands they expected to be expropriated and gain thereby. In such like cases it has been discarded by this Court when observing that its misapplication had been sought.

The rule now sought by this appeal to be laid down as the meaning of the s. 155 in relation to damages for which compensation is to be given certainly never could have been thought to be law or the allowance of such percentage should have been discarded long ago.

In the case of *Lake Erie and Northern R. Co.* v. *Schooley* (1916), 30 D.L.R. 289, 53 Can. S.C.R. 416, the question of business value came up in this Court in another way and the several judgments evidence how the question was viewed by the different members of this Court. I may say that was for many reasons an unsatisfactory sort of case.

The then Chief Justice aptly put the point by relying upon the decision of the Judicial Committee in the case of *Pastoral Finance Association* v. *The Minister*, [1914] A.C. 1083, from which, on p. 289, he quoted as follows:—

> The substantial ground on which the majority of the Court based their decision was that the appellants were not entitled to anything beyond the market value of the land . . . Their Lordships have no hesitation in deciding that the principle underlying this decision is erroneous. The appellants were clearly entitled to receive compensation based on the value of the land to them.

This last sentence illustrates what runs through all the cases where the question has fairly come up, and whether put under the name of "special adaptations" or designated by other like phrase, means nothing more nor less than that justice must be done the owner whose land is taken or affected.

In resorting to English authorities decided on the meaning of the Lands Clauses Consolidation Act, 8-9 Vict., 1845 (Imp.), c. 18, we must ever be on our guard; for, as has been often and well said, the provisions differ so essentially from our provisions in the Railway Act and other legislation dealing with compensation to be given parties damnified by the exercise of powers given to expropriate that little value is to be attached to most of these English decisions that are usually and herein cited for determining such questions as raised herein.

The difference is not to the casual reader quite evident. It is when one has to examine the process of reasoning and difference of opinion by which the result was reached in the earlier leading cases, such as *Hammersmith and City Ry. Co.* v. *Brand* (1869), L.R. 4 H.L. 171, and the consequences flowing therefrom in so

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many cases, that one feels we better observe the express terms of our own legislation which does not give occasion for the application of the same process of reasoning. It is idle to read only two sections, one from each Act, and compare the words when we know, or ought to know, that the said decision did not turn upon the consideration of only a single section in the English Act.

For this opinion I need not rely upon what a consideration of many such cases has impressed upon my mind but am content to submit the following quotation cited to us in argument herein by respondent's counsel from the judgment of the Court above in *Parkdale* v. *West* (1887), 12 App. Cas. 602, at p. 613:—

> There is a marked difference between the provisions of the Dominion Act and those of the English Land Clauses Consolidation Act, 1845, and that decisions upon the English Act . . . afford little or no assistance in the present case. In the Dominion Act the taking of land, and the interference with rights over land, are placed on precisely the same footing.

It is the last sentence of this that was important there and is herein for that was a case wherein deprivation of access as herein was the essential feature invoked.

Its due observance coupled with regard to the rule that it is the value of the land to him from whom it is taken for such purposes as he may have been using it that must be primarily observed.

In the great majority of cases of compensation the mere market value is decisive and in all cases must be had in mind, but it should never be forgotten that there are cases such as this where that rule is only to be taken in its *primâ facie* sense as the basis for whatever else is done in order to do justice.

I am not to be taken as expressing any opinion on the merits of the case or coinciding with what the arbitrator accepted as his guide for fixing damages.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The grade of the street immediately in front of the respondent's shop having been so lowered in the course of the construction of a subway ordered by the Board of Railway Commissioners as practically to destroy access to the premises, on an arbitration to fix compensation under the Dominion Railway Act she was awarded in all $10,866, which the arbitrator, in the written reasons delivered with his award, apportioned as follows:—$6,366 for injury to property and $4,500 for injury to business.

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On appeal to the Appellate Division the award as to the injury to property was upheld, but the majority of the Court being of the opinion that, while the claimant was entitled to compensation for the loss of business occasioned to her by the execution of the work in question in addition to compensation for depreciation in the value of her property, the three year basis on which the arbitrator had fixed the amount of her business loss "attributable to injury to the good-will of the property" as distinguished from injury "of a personal character" (about two-thirds of the whole net profits) was erroneous, judgment was pronounced so declaring and referring the matter back to the arbitrator to ascertain the entire compensation to which the claimant is entitled, including as a part thereof such compensation for loss of business as he may see fit to allow her having regard to the declaration of the Court (1919), 47 D.L.R. 587, 45 O.L.R. 1.

From this judgment the contestant appeals on two grounds:—

(1) That the plaintiff is not entitled to compensation for loss of business in addition to full compensation for depreciation in the value of her property occasioned by the lowering of the street level; and

(2) That the compensation allowed for the property itself should be reduced by $192, the arbitrator having in computing it deducted from the gross value of the property before the works were begun, ascertained by him to have been $9,274.00, not the $3,100 realized on the sale of it after the works were completed but only $2,908, the difference of $192 representing the claimant's costs incurred in effecting such sale.

Neither the right of the claimant to compensation for depreciation in the value of her property occasioned by the construction of the works nor the power of the Appellate Court to refer the matter back to the arbitrator instead of itself pronouncing the judgment which should have been given is contested by the appellant. As to the former the claimant's right would seem to be indisputable. There was "a physical interference with a right which the owner was entitled to use in connection with his property" which substantially diminished its value. *Metropolitan Board of Works* v. *McCarthy* (1874), L.R. 7 H.L. 243; *Caledonian R. Co.* v. *Walker's Trustees* (1882), 7 App. Cas. 259, at p. 303; *Wood* v. *Stourbridge R. Co.* (1864), 16 C.B. (N.S.) 222, 143 E.R. 1111; *Chamberlain* v. *West End of London and Crystal Palace R. Co.* (1863), 2 B. & S. 617, 121 E.R. 1202; *Bowen* v. *Canada Southern R. Co.* (1887), 14 A.R. (Ont.) 1, at pp. 8-9, and *Mason* v. *South Norfolk R. Co.* (1889), 19 O.R. 132. As to the latter—the power

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to refer back—the view which I have taken of the merits of this appeal renders it unnecessary to deal with that aspect of the matter. But see *Canadian Northern R. Co.* v. *Holditch* (1914), 20 D.L.R. 557, 50 Can. S.C.R. 265; 27 D.L.R. 14, [1916] 1 A.C. 536.

For the respondent it is contended that the cutting off of immediate access from the property to the highway on which it abuts is tantamount to taking part of the land itself and that compensation should therefore be assessed upon the footing that part of the claimant's lands had been taken. This appears to have been the opinion of the arbitrator based on the view that "all the rights which go to make the land available for use are part of the land itself."

I am clearly of the opinion, however, for the reasons indicated by Riddell, J., in the Divisional Court and upon such authorities as *Wadham* v. *North Eastern R. Co.* (1884), 14 Q.B.D. 747; (1885), 16 Q.B.D. 227; *McCarthy's* case, L.R. 7 H.L. 243; *Walker's Trustees'* case, 7 App. Cas. 259; *Mocey* v. *Metropolitan Board of Works*, (1864), 33 L.J. Ch. 377, and *Bowen* v. *Canada Southern R. Co.*, 14 A.R. (Ont.) 1, that the arbitrator's view is erroneous and that where no part of the owner's land is taken, but access to it merely is interfered with, however close the interference and however complete the destruction of the access, the case is one not of the taking of land but of injurious affection.

While, as is stated by the learned writers of the article on "Compulsory Purchase of Land and Compensation" in Halsbury, Laws of England, vol. VI., at p. 32, no clear principle can be deduced from the English authorities why the measure of compensation should be more liberal in the case of taking of land than in that of mere injurious affection, the distinction is too well established in England to admit of further discussion there. In the former case loss of good-will and loss of business in so far as they enhance the value of the land to the owner, including all that forms part of it in the eyes of the law, may be taken into consideration in estimating the compensation. The learned authors of Browne & Allen on Compensation, 2nd ed., p. 101, suggest that "this is because it is the owner's interest in the land that is to be assessed." But it is equally "the owner's interest," that is affected—it is the value of the land to him that

is diminished—in the case of injurious affection. Yet in the latter case to entitle the owner to any compensation the injury must be such as affects the land—lessens its value—apart from the use to which any particular owner or occupier might put it; and profits of a business carried on on the property can properly be considered only in so far as they indicate not any special or exceptional value to the present proprietor, but the value of the property as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put, including of course such a purpose as that for which the present proprietor makes use of it. *Wadham* v. *North Eastern R. Co.*, 14 Q.B.D. 747, 752; 16 Q.B.D. 227. This decision is very much in point because it deals with a case of injurious affection by cutting off access to a public highway. The street in which the house in question was built had been stopped up. See too *Beckett* v. *Midland* R. Co. (1867), L.R. 3 C.P. 82, at pp. 94-5. The English authorities are collected in Browne and Allen on Compensation, 2nd ed., *ubi sup.* and at p. 116; 6 Halsbury Laws of England, No, 36 and Nos. 49 and 53; and Cripps on Compensation, 5th ed.. pp. 107-8 and 146. Many of them are reviewed in the opinions delivered in the Divisional Court in the present case. Under English law an award for loss of business profits in a case of injurious affection cannot be maintained.

Counsel for the respondent further contended that under s. 155 of the Railway Act, R.S.C. 1906, c. 37, she is entitled to compensation for all injury occasioned to her by the exercise of powers conferred by that statute, and that owing to the difference between the provisions of the Dominion Railway Act and those of the English Railway Clauses Consolidation Act of 8-9 Vict., 1845 (Imp.), c. 20, and the English Lands Clauses Act the decisions upon the latter Acts do not govern the construction to be placed upon s. 155 of the Dominion Railway Act that under the Canadian Act the taking of land and the injurious affection of land are precisely on the same footing.

Prior to the enactment in 1888, as s. 92 of the Railway Act of that year, c. 29, of the provision now found in the Railway Act of 1906 as s. 155, Canadian Courts applying the provisions of the Consolidated Railway Act of 1879, c. 9, and the earlier Acts; 31 Vict., c. 68; C.S.C., c. 66 and 14 & 15 Vict., c. 51, had

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upheld awards of full compensation for all injury occasioned, whether ascribable to the construction of the railway or to its future operation, in cases where an entire parcel of land had been taken, or where part of a parcel had been taken and the injury to the remainder of it was ascribable to the operation of works constructed on the part taken. *Great Western R. Co.* v. *Warner* (1872), 19 Gr. 506; *Atlantic and North West R. Co.* v. *Wood* (expropriation in February, 1887) (1893), 2 Que. Q.B. 335, [1895] A.C. 257. But, following English decisions, they had refused to recognise the right of the owner to any compensation where neither his land itself nor a right incidental to its ownership had been physically interfered with so as to lessen the value of the land, *In re Widder and Buffalo and Lake Huron R. Co.* (1861), 20 U.C.Q.B. 638, (1864), 23 U.C.Q.B. 208; *Widder* v. *Buffalo and Lake Huron R. Co.* (1865), 24 U.C.Q.B. 520; or for injury due to operation as distinguished from construction where none of his land was taken; *In re Devlin and Hamilton and Lake Erie R. Co.* (1876), 40 U.C.Q.B. 160, or where the works, the operation of which caused the injury, had not been constructed on the portion of his land taken. In *Bowen* v. *Canada Southern R. Co.*, 14 A.R. (Ont.) 1, where the lowering of a street in front of two town lots affecting access to them and thus depreciating their value was held to be an injurious affection of land entitling the owner to compensation, Osler, J.A., at p. 8, speaking of s. 5 and sub-s. 5 of s. 11 of the C.S.C., c. 66 (the Railway Act preceding those of 1868 and 1879), says:

> These clauses are substantially similar to those in the Railway and Lands Clauses Consolidation Act (Imp.)

S. 155 of the Act of 1906, c. 37, takes the place of s. 5 of c. 66 of the C.S.C., and sub-s. 5 of s. 11 has its counterpart to-day in s. 191.

In *The Queen* v. *Buffalo and Lake Huron R. Co.*, (1864), 23 U.C.Q.B. 208, at p. 217, Erle, C.J., delivering the judgment of the Court of Queen's Bench, speaking of the English statute, 8 Vict., c. 18, and particularly of s. 68, and of the 6th section of the English statute 8 Vict., c. 20, said:

> We see no solid distinction between the language of these English statutes and that used in our own (C.S.C., c. 66).

The applicability of the English decisions establishing the distinctions between the measure of compensation in cases where

land is taken and that in cases of mere injurious affection would seem to have been fully recognised. See also *Widder* v. *Buffalo and Lake Huron R. Co.* (1869), 29 U.C.Q.B. 154; *Paradis* v. *The Queen* (1887), 1 Can. Ex. 191; *The Queen* v. *Barry* (1891), 2 Can. Ex. 333; *Le Blanc* v. *The King* (1917), 38 D.L.R. 632 at 634, 16 Can. Ex. 219; *Sisters of Charity* v. *The King* (1919), 46 D.L.R. 213 at 219, 18 Can. Ex. 385 at 394; *The King* v. *MacArthur* (1904), 34 Can. S.C.R. 570.

With the law in this position, s. 92 of the Railway Act of 1888, c. 29, was enacted as a new provision presumably to supply the omission from the Acts of 1868, c. 68, and of 1879, c. 29, of the express provision for compensation found in s. 5 of the former Railway Act, C.S.C., c. 66, into which it had been carried from 14 & 15 Vict., c. 51, s. 4; *Bowen* v. *Canada Southern R. Co.*, 14 A.R. (Ont.) 1, at p. 9. The right to compensation under the Acts of 1868 and of 1879 both in regard to land taken and land injuriously affected depended upon the general principle of the law that, unless the contrary clearly appears, legislative intention to authorise the taking away of, or injury to, property without payment of compensation will not be presumed and the almost irresistible inference to be drawn from the provision made for its ascertainment. Burton, J.A., thought the omission from the Act of 1879 of a provision similar to s. 5 of c. 66 of the C.S.C. quite immaterial. *Bowen* v. *Canada Southern R.*, 14 A.R. (Ont.) 1, at p. 4. S. 92 of the Act of 1888 was not meant to create new rights in regard to compensation. At least that was the view taken of it by the Courts notwithstanding the patent differences between its terms and those of s. 5 of the C.S.C., c. 66, and the difference between its collocation in the Canadian Railway Act, and that of the proviso in the English statute. S. 92 was certainly an adaptation of the proviso of s. 16 of the Railway Clauses Consolidation Act of 1845, c. 20 (Imp.), the language of that proviso being reproduced, with some additions immaterial in the present case. At the date of its introduction there was no provision in the Dominion Interpretation Act such as is now found in R.S.C. 1906, c. 1, s. 21, sub-s. 4.

The construction of this new section so far as applicable to cases of injurious affection was carefully considered in the Ontario Court of Appeal in *Powell* v. *Toronto, Hamilton and Buffalo R. Co.* (1898), 25 A.R. (Ont.) 209, at p. 215, Osler, J.A., says:

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The damage intended by s. 92 is some actual injury or damage to land occasioned by the exercise of the powers of the railway. It is, in short, damage of the same character as that for which compensation is recoverable under the English Acts where no land is taken . . . Under the Canadian Act . . . it must be held, as under the Imperial Acts, that, arising as it does from works authorised by the Legislature, it must be such as would apart from the statute have been the subject of an action, and it must also be such as to diminish the value of the property irrespective of any particular use which might be made of it.

Maclennan, J.A., at p. 218, refers to the identity of s. 92 with the proviso to s. 16 of the English Railway Clauses Act, 8-9 Vict., c. 20, and adds "our law is, therefore, substantially the same as the English law.

Moss, J.A., at p. 220, said:

The damage sustained for which compensation is to be made is damage to land either from taking materials or on account of its being injuriously affected by the exercise of any of the powers granted to the railway. And it is well settled that the compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the estate or land itself and not on personal inconvenience or discomfort to the owner or occupier.

A similar view had been expressed by Ferguson, J., in *Re Toronto, Hamilton and Buffalo R. Co. and Kerner* (1896), 28 O.R. 14, at p. 20. That Judge regarded as in point *Ford* v. *Metropolitan and Metropolitan Dist. R. Companies* (1886), 17 Q.B.D. 12, at p. 25, where Cotton, L.J., points out:

that the inconvenience or injury which arises solely from the particular use to which the particular occupier puts the building must not be regarded

and that "injuries sustained by them in carrying on their business" cannot be made the subject of compensation.

In *The St. Catharines R. Co.* v. *Norris* (1889), 17 O.R. 667, Galt, C.J., following English authorities, held that injury to trade as distinguished from injury to property did not entitle the owner to compensation for injurious affection.

With these decisions before it Parliament re-enacted s. 92 of the statute of 1888 in the Consolidated Railway Act of 1903, as s. 120, c. 58, and again re-enacted it in the revision of 1906 as s. 155, c. 37, in *ipsissimis verbis*. Although sub-s. 4 of s. 21 of the Interpretation Act, R.S.C. 1906, c. 1, in force since 1890, 53 Vict., c. 7, s. 1, declares that

Parliament shall not by re-enacting any Act or enactment or by revising, consolidating or amending the same, be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language.

"We cannot assume that the Dominion Legislature when they adopted the clause verbatim in the year 1888 were in ignorance of the judicial interpretation which it had received. It must on the contrary be assumed that they understood that s. 12 of the Canadian Act must have been acted upon in the light of that interpretation." *Casgrain* v. *Atlantic and North West R. Co.*, [1895] A.C. 282, at p. 300.

It is unreasonable to suppose that if Parliament were not satisfied that its intention had been thereby given effect to it would have re-enacted the section in the same terms. As already pointed out, when the proviso to the English s. 16 was first introduced into Canada we had no such interpretation provision as is now found in R.S.C. 1906, c. 1, s. 21, sub-s. 4. *Arnold* v. *The Dominion Trust Co.* (1918), 41 D.L.R. 107, at pp. 117-119, 56 Can. S.C.R. 433. Under these circumstances, although not bound by the dicta of the eminent Ontario Judges to which I have referred, even if I entertain doubts as to the meaning of s. 155 in the present Act, I "would have declined to disturb the construction of its language which had been (so often) judicially affirmed." *Casgrain* v. *Atlantic and North West R. Co.*, [1895] A.C. 282; *City Bank* v. *Barrow* (1880), 5 App. Cas. 664, at pp. 673, 679.

In *Canadian Pacific R. Co.* v. *Gordon* (1908), 8 Can. Ry. Cas. 53, the applicability of English decisions in regard to the right of compensation in cases of injurious affection under the Dominion Railway Act was again recognised by Clute, J., who delivered the principal judgment in the Appellate Division in the case now at bar.

The decision of the Privy Council in *Holditch* v. *Canadian Northern Ont. R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536, certainly overrules the view expressed by Armour, C.J., in *Re Birely and Toronto, Hamilton and Buffalo R. Co.* (1897), 28 O.R. 468, already "scotched" in *Powell* v. *Toronto Hamilton and Buffalo R. Co.* (1898), 25 A.R. (Ont.), 209, that the introduction of s. 92 into the Dominion Railway Act of 1888 had effected such a material change in the scope of the provisions for compensation in that Act that in cases where no land had been taken compensation might thereafter be recovered for injuries due to the operation of the railway. Their Lordships there point out (p. 544) that that

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section (now s. 155) is taken from s. 16 of the English Railway Clauses Consolidation Act, 1845, and they approve the application of the English decisions to determine its purview. Their earlier decision in *Grand Trunk Pacific R. Co.* v. *Fort William Land Investment Co.*, [1912] A.C. 224, points in the same direction.

Nothwithstanding the passage from Lord Macnaghten's judgment in *Parkdale* v. *West* (1887), 12 App. Cas. 602, at p. 616, in which he says—of course *obiter*—

> Their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that, as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted,

to which I allude merely to make it clear that it has not been overlooked, the utmost use that can be made of evidence of loss of business ascribable to the exercise of powers conferred by the Railway Act in cases of injurious affection is indicated in my opinion in the following passage from the judgment of Lopes, L.J., at p. 592, in *Howard* v. *Metropolitan Board of Works* (1888), 4 T.L.R. 591, quoted by Clute, J.:

> The plaintiff's house was injuriously affected by the execution of the works and the jury awarded compensation, not for the loss to trade, which would not, *per se*, be a legitimate head of damage, but for the deterioration in the value of the house as measured by the loss of trade.

It is as to the necessity for payment of compensation before interference with the right that cases of injurious affection are held by Lord Macnaghten to stand under the Canadian Act, on precisely the same footing as cases of actual taking, in that respect differing from the like cases under the English Lands Clauses Consolidation Act of 1845. *Parkdale* v. *West* (1887), 12 App. Cas. 602, at p. 613.

In *West et al.* v. *Parkdale et al.* (1888), 15 O.R. 319, the corporation was held liable as a wrongdoer not protected from the consequences of its tort by any statutory provision, and it was on that basis that Lord Macnaghten thought the municipality liable "to the full extent" and that damages were assessed against it.

I am, for these reasons, of the opinion that the construction of s. 155 of the Canadian Railway Act of R.S.C. 1906, is governed by the English decisions on the purview of the proviso of s. 16 of the Railway Clauses Consolidation Act of 1845, and that the

respondent is not entitled to compensation for loss of business occasioned by the execution of the works in question. The award should therefore be reduced by $4,500.

The respondent has been allowed the full benefit of evidence of loss of business in so far as it affected the value of her property as "a marketable article." The $9,724 found by the arbitrator to have been its value before the works were begun, represented a valuation on the same basis as the £1,550 allowed in *Wadham* v. *The North Eastern R. Co.* (1885), 16 Q.B.D. 227, *i.e.*, it included any special value which the premises had as a stand for the particular class of business carried on by the respondent.

There should also be a further reduction of $192 as claimed by the appellant from the $6,366 allowed for injury to the land for the reasons indicated by Riddell and Kelly, JJ., in the Court below. The award will therefore stand for the sum of $6,174—and costs.

The appellant is entitled to its costs in this Court and in the Appellate Division.

Brodeur, J.

BRODEUR, J. (dissenting):—This is an appeal from the Appellate Division of the Supreme Court of Ontario which referred back to the arbitrator an award concerning lands for which the respondent claims compensation.

The appellant company for the purpose of building a subway in the City of Toronto on Yonge street had lowered the level opposite the respondent's property and practically left it without access to the street.

The arbitrator to whom the question of compensation was referred awarded $6,366 for the bare depreciation of the land and $4,500 for loss of business based on an estimate of profits for three years.

The Appellate Division held that the respondent was entitled to compensation for the loss of business but that the amount had been arrived at by an erroneous principle and referred the case back to the arbitrator to ascertain the compensation which the respondent was entitled to in that regard.

There is no dispute as to the depreciation of the property itself. The only question then is whether some compensation should be given for the loss of trade or the diminution of the claim-

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ant's good-will in her business consequent on the destruction of the access to the premises in which the business was carried on. S. 155 of the Railway Act is the law under which the claim of the respondent to compensation is made. It reads as follows:

> 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.

There is no doubt that the respondent is an interested person, since the access to the street which she had before is virtually destroyed. Nobody disputes that she is entitled to damages. If some land had been taken, there is no doubt under the authority of the English cases that the measure of damages would be the difference between what the premises as a running concern would be worth to the expropriated party and the value of the land afterwards, and would include compensation for loss of business.

But a distinction is made in England as to the measure of damages in the case of lands taken and in the case of lands injuriously affected. When under the former a full compensation including loss of business would have to be given, in the case of lands injuriously affected the compensation should not include personal inconvenience.

Caledonian R. Co. v. *Ogilvy* (1856), 2 Macq. 229; *In re The Stockport Timperley and Altringham R. Co.* (1864), 33 L.J.Q.B. 251; *Chamberlain* v. *West End of London and Crystal Palace London R. Co.* (1862), 2 B. & S. 605, 121 E.R. 1197; *Brand* v. *Hammersmith and City R. Co.* (1865), L.R. 1 Q.B. 130; *Beckett* v. *Midland R. Co.* (1867), L.R. 3 C.P. 82; *Ricket* v. *Metropolitan R. Co.* (1867), L.R. 2 H.L. 175; *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418.

Those decisions in England are somewhat conflicting and not very satisfactory. The Lord Chancellor in *Ricket's* case, *supra*, stated that it was a hopeless task to attempt to reconcile the contradictory decisions which have been rendered on the questions at issue.

But should those decisions be invoked here in Canada concerning our Canadian legislation?

I do not hesitate to say no, because our own legislation differs from the English statutes and I rely in that respect on the views expressed by Lord Macnaghten in *Parkdale* v. *West*, 12 App. Cas. 602, where he said at p. 613:

There is a marked difference between the provisions of the Dominion Act and those of the English Lands Clauses Consolidation Act, 1845, and that decisions upon the English Act, such as *Hutton* v. *London and South Western Railway Co.* (1849), 7 Hare. 259, which was referred to in the argument afford little or no assistance in the present case. In the Dominion Act the taking of land, and the interference with rights over land, are placed precisely on the same footing.

Brodeur, J.

In view of that decision in the *Parkdale* case, *supra*, I say that we should not refer to decisions rendered under English statutes, but we should find whether the provisions of s. 155 might cover the loss of trade in cases where lands have been simply injuriously affected.

Section 155 enacts that compensation should be made for all damage caused. There is no distinction in this section in case of lands taken and in case of lands injuriously affected. We have to revert to the ordinary rule governing torts and find whether the damage is the necessary result of the injury done.

When the clause of the statute applies, the party is entitled to recover full compensation for all damage in respect of the diminution in value of his property, *Buccleuch's* case, L.R. 5 H.L. 418.

The loss to an owner includes not only the actual value of the lands but all damage directly consequent on the taking thereof under statutory powers. The arbitrators called upon to fix the compensation should take into consideration the probable diminution in the value of the claimant's good-will in his trade.

See decisions quoted by Cripps on Compensation, 4th ed., pp. 98 and 99. *Re Davies and James Bay R. Co.* (1913), 13 D.L.R. 912, 28 O.L.R. 544; *Caledonian Railway Co.* v. *Walker's Trustee* (1882), 7 App. Cas. 259, at p. 276.

I am unable to find that the Appellate Division was in error in stating that the respondent was entitled to compensation for loss of business.

The appeal should be dismissed with costs.

Mignault, J.

MIGNAULT, J.:—I have had the advantage of reading the very full and carefully considered reasons for judgment of my brother Anglin, and with some hesitation, caused by the very wide language of s. 155 of the Railway Act, R.S.C. 1906, c. 37, I have finally come to the conclusion that my brother Anglin is right in his construction of this section. Section 155, if I may use the term,

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is a condition of the grant of extensive powers to a railway company. It is taken almost verbatim from the proviso of s. 16 of the English statute, the Railway Clauses Consolidation Act, 1845, and if it is to receive the same construction as the English Courts have given to the latter section, damages for loss of business carried on on lands not taken but merely injuriously affected by the construction of the railway cannot be granted. There appears to be no escape from the conclusion that the wide language of s. 155 must receive some limitation, and this has been done with respect to damages caused by the operation of the railway as distinguished from its construction, *Holditch* v. *Canadian Northern Ont. R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536, which would be damages caused by the exercise of the powers of the company. And if s. 155 be construed as s. 16 of the Railway Clauses Consolidation Act, 1845, has been construed, damage for loss of business in respect of land not taken but injuriously affected cannot be awarded. This does not mean that I can appreciate the reason for the distinction which has been made between cases where land is taken and cases where land is not taken but merely injuriously affected, but this distinction is now clearly and authoritatively established, and, as I have said, no damages are granted for loss of business where lands are not taken but only injuriously affected. There is no doubt much force in the contention of the respondent that the construction of s. 16 of the English statute has been influenced by other provisions of the Imperial statutes, but looking at our own Railway Act and its enactment—perhaps rules of procedure—governing the taking and using of lands and compensation and damages (ss. 172 to 214 inclusive, and more especially ss. 191 and 193), it seems to me that these sections can be compared to the other provisions of the English statutes referred to by Clute, J., as having influenced the construction of s. 16. So we have a construction authoritatively placed on the proviso of s. 16 which has been copied into the Canadian Act, and after due consideration I feel that this construction should be adopted here.

I would, therefore, allow the appeal with costs here and in the Appellate Division, and restrict the compensation to the sum of $6,366 awarded by the arbitrator for damage caused to the respondent's property, deducting, however, the sum of $192

expenses of the auction sale effected by the respondent after the construction of the appellant's works. The arbitrator valued the respondent's property as it stood before the construction of the works and deducted from this gross value the net proceeds of the auction sale. It is obvious that if the respondent had sold her property at the higher valuation before it was injuriously affected, she would have incurred the necessary expense of the sale, so that it seems to me a fallacy to compare the gross value before the construction of the works to the real value, less expenses of sale, after the property had become depreciated. The deduction of this sum of $192 reduces the compensation to $6,174, and costs.

Appeal allowed.

Re LYONS AND McVEITY.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell and Latchford, JJ., and Ferguson, J.A. October 3, 1919.

LANDLORD AND TENANT (§ II C—22)—LEASE FOR 14 MONTHS—OVERHOLDING TENANT—RENT PAID MONTHLY—TENANCY FROM YEAR TO YEAR—TAXES IN ARREAR—RENT TO MUNICIPALITY.

When a tenant under a lease for a fixed term of fourteen months at a fixed rental payable monthly remains in possession on the ending of the term, and still pays rent monthly he becomes a tenant from year to year.

The taxes being in arrear the landlord is considered to have knowledge of this fact, and to have agreed that payments of rent to the municipality be the same as payments to himself.

[*Right* v. *Darby* (1786), 1 Term. Rep. 159, followed.]

Statement.

APPEAL from an order of the Judge of the County Court of the County of Carleton, dismissing the appellant's application, under the overholding tenants provisions of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, for a summary order for possession of premises demised to McVeity for a term of 14 months. McVeity continued in possession after the expiry of the term; and the question was, whether, as held by the County Court Judge, McVeity was a tenant from year to year, or, as the landlord contended, from month to month. Treating McVeity as a tenant from month to month, the landlord gave him notice to quit at the end of a month, and then proceeded against him as an overholding tenant.

S. Clark, for appellant.

T. R. Ferguson, for respondent.

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Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The question involved in this case is whether the overholding tenant became a tenant from month to month or from year to year.

The origin of the tenancy was a term of 14 months, of residential property, the rent payable monthly; and during the overholding —of nearly three years—the rent has been paid monthly, or on a monthly basis, "to, and with the consent of, the landlord."

The law in the case of overholding seems to be yet that pronounced by Lord Mansfield in the case of *Right* v. *Darby* (1786), 1 Term. Rep. 159, 162, in these words: "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year:" see also *Dougal* v. *McCarthy*, [1893] 1 Q.B. 736; *Oakley* v. *Monck* (1866), L.R. 1 Ex. 159; *Wedd* v. *Porter*, [1916] 2 K.B. 91; and *Croft* v. *William F. Blay Limited*, [1919] 1 Ch. 277.

But, it need hardly be said, the supposition does not hold good against proof, direct or circumstantial, to the contrary. It is the agreement of the parties, not the dictation of Court or Judge, which governs.

The mere fact that the rent was payable, and was paid, monthly, is met by the fact that it was so when the term was one of more than a year—14 months; and the character of the property and length of possession are rather against than in favour of the contention for a monthly tenancy.

The presumption of a tenancy from year to year is not displaced, but seems to me to be strengthened rather, by the evidence.

I am, accordingly, in agreement with the County Court Judge in his ruling against the landlord's contention, and in favour of dismissing this appeal.

Ferguson, J.A.

FERGUSON, J.A., agreed with MEREDITH, C.J.C.P.

Riddell, J.

RIDDELL, J.:—This appeal is solely upon a question as to what tenancy McVeity has in the lands in question.

Under a lease made by the landlord, Lyons, to McVeity, for a term of 14 months, at a fixed sum per month for rent, McVeity went into possession of the lands in question. The lease coming to an end, he remained in possession without assent or dissent of the landlord, and without any agreement for a continuation of

his lease—this, of course, made him a tenant by sufferance: *Simkin* v. *Ashurst* (1834), 1 C.M. & R. 261, 149 E.R. 1078; Woodfall on Landlord and Tenant, 19th ed., p. 270.

The taxes being left unpaid, the municipality, exercising its right under the statute, called upon the tenant to pay his rent to the municipality, and the tenant did pay one or more instalments of rent based upon the amount payable monthly under the lease.

Two questions would arise: first, whether this compulsory payment of rent had the same effect as though the rent had been paid and accepted by the landlord; second, assuming that this first question is answered in the affirmative, what is the result?

First: I have no doubt that the landlord, allowing the taxes to be in arrear, must be held to have known that the rent might be paid to the city, and that he must be held to have impliedly agreed that such payments should be considered as payments to himself.

Second: it is clear law that when a tenant holds over after the expiration of his lease the acceptance of rent by the landlord makes him a tenant—he is now no longer a tenant at sufferance nor a mere tenant at will.

There have been many *dicta* as to the position of a tenant so overholding after his payment of rent. For example, Lord Denman in *Johnson* v. *Churchwardens of St. Peter, Hereford* (1836), 4 A. & E. 520, 111 E.R. 883, at 526, says: "Where premises are held on by the same tenant of the same landlord, after the expiration of a lease of them, granted to the former by the latter, without a new contract, the law will imply an agreement to hold on the same terms." Lord Kenyon in *Doe dem. Rigge* v. *Bell* (1793), 5 Term Rep. 471, at p. 472, says: "So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms."

But these are general statements. It is not doubted that there is another general rule, and that is where a tenant holds over after a term of years. There on payment of rent he becomes a tenant from year to year, and the question arises whether that rule applies in the present case. I think it does. In *Young* v. *Bank of Nova Scotia* (1915), 23 D.L.R. 854, at p. 856, 34 O.L.R. 176, at p. 179, the important cases are cited, and a quotation is made from the judgment of Lord Ellenborough in *Doe dem. Brune* v. *Prideaux* (1808), 10

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East 158, where he says (p. 187): "If no other tenancy appear, the presumption is that that tenancy was from year to year." This decision of Lord Ellenborough's has never been questioned, so far as I can find. The latest case which I have found is *Morgan* v. *William Harrison Limited*, [1907] 2 Ch. 137, at p. 143.

Had the lease in the present instance mentioned a yearly rental, although payable monthly, the case of *Young* v. *Bank of Nova Scotia* would be conclusive in favour of the tenant, as in that case the term was 18 months. In order to have a "term of years" it is not necessary to have a year, nor, I think, any part of a year, mentioned. Littleton, in speaking of a tenant for years, says: "Tenant for terme of yeares is where a man letteth (*lou home lessa*) lands or tenements to another for terme of certaine yeares, after the number of yeares that is accorded between the lessor and the lessee:" Co. Litt., book 1, 43. b. But, in discussing the rights and duties of a tenant for years, he includes the case of a lease for half a year, or a quarter of a year, etc.; and I think, so long as the term is certain, it is what is technically called a "term of years." I am unable to distinguish the case of *Young* v. *Bank of Nova Scotia* and the present case in any real essential.

The case of *Croft* v. *William F. Blay Limited* (1919), 35 T.L.R. 265, [1919] 1 Ch. 277, contains a discussion which is helpful in some particulars, but which cannot be called conclusive. Some stress was laid on *Richardson* v. *Langridge* (1811), 4 Taunt. 128, 128 E.R. 277 which was supposed to lay down the principle that the tenant must pay rent referable to a year or some aliquot part of a year; but, when that case is examined, it is plainly not upon the present point at all, but it is upon the point as to the original tenancy, which was agreed. I am unable, without making too subtle a distinction, to recognise a real difference between such a case as the present and other cases which have been cited, and am of opinion that this appeal should be dismissed with costs.

Latchford, J.

LATCHFORD, J. (dissenting):—In cases without number from *Right* v. *Darby* (1786), 1 Term Rep. 159, it has been held that where a tenant in possession of land under a lease for a year or a number of years, or a year and an aliquot part of a year, holds over at the expiration of his term, by the lessor's consent or with his acquiescence, there is, in the absence of express agreement, or circumstances from which a new agreement can properly be inferred, a renovation of

the original lease, so far as its provisions are applicable, with the result that a new tenancy from year to year, with all the incidents of such a tenancy, is regarded as subsisting. Nor, as pointed out by Buller, J., in *Right* v. *Darby*, at p. 163, is this rule of law applicable to lands only, and not to the case of houses. "There is no ground," he says, "for that distinction. The reason of it is, that the agreement" (the lease) "is a letting for a year at an annual rent; then if the parties consent to go on after that time, it is a letting from year to year."

Dougal v. *McCarthy*, [1893] 1 Q.B. 736, relied on by the respondent, merely restates the law. The lease in that case was for a year at a yearly rental, payable quarterly. It was held by implication that the tenants had consented to remain in possession as tenants from year to year.

No case was cited on behalf of the respondent, and I venture to say that no case of authority can be found, where an original term of a definite number of months, at a monthly rental payable month by month, as in the present case, has, when the tenant overheld and rent was paid and accepted monthly, been held to have constituted a tenancy from year to year. A letting even by the quarter has not been regarded as extended into a tenancy from year to year.

In *Wilkinson* v. *Hall* (1837), 3 Bing. N.C. 508, 132 E.R. 506, an allegation that the defendant held premises as a tenant for a term of years was declared not to be made out by proof that he held by the quarter. Vaughan, J., observes (at 533): "Looking at this agreement, I can see nothing in it that points to a yearly taking; on the contrary, the reservation of rent, and other stipulations, plainly shew that the letting was by the quarter only."

No word used in the lease to the respondent points to a yearly tenancy. On the other hand, the term itself is expressly measured in months. The rental fell due at the end of each month, and was paid month by month. To imply a renewal from year to year would be to assume a continuation of a characteristic that never had existence. The tenancy being by the month, only a term from month to month could be properly implied by the learned County Court Judge. The notice to quit served was therefore effective to put an end to the tenancy: *Doe dem. Parry* v. *Hazell* (1794), 1 Esp. 94—"since the universal understanding:" O'Brien, J., in

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Beamish v. *Cox* (1885), 16 L.R. Ir. 270, 276, affirmed by the Lords Justices of Appeal, *ib.* 458.

I would therefore allow the appeal with costs.

Appeal dismissed

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UNION BANK v. BALLARD.

Alberta Supreme Court, Walsh, J. November 18, 1919.

COSTS (§ I—2d)—WAR RELIEF ACT, 8 GEO. V. 1918, ALTA., c. 24—TECHNICALITY—COSTS TO DEFENDANT—SET-OFF IN FAVOUR OF PLAINTIFF—NEW ACTION TO BE BROUGHT—UNPAID COSTS OF DEFENDANT'S SOLICITORS—LIEN—APPEAL.

Costs in an action under the War Relief Act, 8 Geo. V. 1918, Alta., c. 24, dismissed because of a technicality, should be awarded to the defendant, but as the plaintiff's right of action is unaffected, these costs should be set off against any costs which may be awarded him in a new action. Any claim by the defendant's solicitors to a lien for costs will not interefere with such setoff.

[*Puddephatt* v. *Leith* (No. 2), [1916], 2 Ch. 168 followed; *Automatic Weighing Machine Co.* v. *Combined Weighing & Advertising Machine Co.* (1889), 58 L.J., Ch. 647, distinguished.]

Statement.

APPEAL from a Master's order as to costs, in an action under the War Relief Act. Dismissed.

H. C. Macdonald, for plaintiffs.

Russell W. Speers, for defendant.

Walsh, J.

WALSH, J.:—The Master at Edmonton on the defendant's application dismissed this action with costs because it was brought in respect of a cause of action within the War Relief Act, 8 Geo. V. 1918, Alta. c. 24, without the leave required by that Act. He directed however that payment of the defendant's costs should be postponed until judgment in or other final disposition of a proposed new action between the same parties upon this same cause of action and that they should be set off against the plaintiff's costs of that action if they succeeded as to costs in it and if not that they should be disposed of on application in Chambers. Rule 20 as to costs provides that a set-off for costs between parties may be allowed notwithstanding the solicitors' lien for costs in the particular cause or matter in which the set-off is allowed. The defendant's solicitors who claim a lien for their unpaid costs submit that this rule does not apply so as to justify a set-off of costs in one action against those in another.

Under the judgment of the Appellate Division in *Sutherland* v. *Rural Municipality of Spruce Grove* (No. 2) (1919), 44 D.L.R. 375, 14 Alta. L.R. 292, I must hold that the making of this order was

within the discretionary right of the Master. The only question for me is whether or not his discretion was rightly exercised.

I understand that the question of the solicitors' lien was not before the Master. On this appeal I allowed an affidavit to be filed in support of that lien. It merely shews that the defendant has not paid the costs of this action or any part of them to his solicitors nor has he advanced any moneys whatever in respect of the same. There is nothing to shew that he is not good for these costs or that his solicitors cannot recover the same from him. There is the bald fact of their non-payment and that is all. In *Puddephatt* v. *Leith* (No. 2), [1916] 2 Ch. 168, 114 L.T. 1159, Younger, J., in allowing the costs of two actions between the same parties to be set off against each other in the face of a solicitor's claim to a lien upon one set of them, after a most careful review of the authorities finds the result of them to be:—

that *primâ facie* a set-off should not owing to such a lien be refused if as between the parties themselves it would be fair and just to allow it and if no fraud or imposition has been practised upon the solicitor by collusion between them.

Applying that principle to the facts of this case I do not think that the solicitors' lien should be allowed to interfere with the set-off thus ordered. It may be for aught that appears to the contrary that the defendant is perfectly good for his solicitors' costs and that he is ready and willing to pay on demand in which case of course the lien would be asserted not for the protection of the solicitors but of the client.

Then as between the parties themselves is it fair and just that this set-off should be allowed? It struck me at first as an impropriety to direct that the costs to which the defendant had been declared entitled by an order which ended the action in which they had been incurred should be set off against the costs of another action between the same parties which had not then even been commenced and with respect to which it was problematical whether or not any costs would in the result be payable by the defendant. The facts of the case must however be considered before it can be said that this is so.

The defence which ended this action was a highly technical one. While it effectually stopped this action it did not in the slightest degree affect the plaintiff's cause of action. He was entitled, upon procuring the necessary leave to start a new action and in

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due course to get it advanced to the stage at which this one ended. All that the ending of this action meant therefore, assuming that the necessary leave was procured was delay and expense. I fancy that it must have been recognised that this leave would be given as a matter of course because on the day on which this appeal was argued the defendant acting by the solicitors who represented him in this action consented before me that an order should be made giving the plaintiff leave to commence a new action. From what was said before me in argument I am satisfied that the Master realised all of this. He would perhaps have been justified under these circumstances in dismissing the action without costs, but recognising as he doubtless did that the objection raised though technical and without merit or lasting benefit to the defendant was taken in the exercise of his undoubted legal right be decided that in the final result of this litigation whatever it might be, but not until then, the defendant should get his costs in some form or another. He practically stayed the execution of his order as to costs until the proposed new litigation was over. That he had the right to do this is I think clear from the judgment of the Court of Appeal in *Automatic Weighing Machine Co.* v. *Combined Weighing and Advertising Machine Co.* (1889), 37 W.R. 636, 58 L.J. Ch. 647. Though the Court refused to stay the taxation there of costs which had been awarded against the plaintiff in that action until the trial of a cross-action it did so simply because the plaintiff delayed too long in his application. The Court did not say in so many words that if he had applied in time the order would have been made, but the plain inference from what was said is that it would have done so even though it was doubtful what the result of the cross-action would be. It is true that that was a case of action and cross-action whereas this is a case of two actions by the same plaintiffs against the same defendant on the same cause of action. It is also true that there the application simply was to stay the taxation while here the costs are ordered to be set off. Though in form these cases are different in these two respects in substance they are the same, the object in each being to delay the payment of the costs of one action until the trial of another action between the same parties with a view to having them set off against any costs that might in that later action be awarded against the party to whom these costs are payable. I am unable to say that the Master exercised his discretion in the matter improperly.

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I think that the order was objectionable in form inasmuch as the plaintiffs could have delayed indefinitely the payment of these costs by not bringing their new action and if necessary I would have amended it in that respect. The new action has now been brought and so the need for an amendment has ceased as the defendant can if he wishes force the plaintiffs to a speedy trial.

The appeal is dismissed with costs which will be set off against those payable to the defendant under the Master's Order.

I have not considered carefully Mr. Macdonald's objection that this appeal is too late. My off-hand opinion is that it is well taken but I do not so decide. *Judgment accordingly.*

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Re WILEY AND WILEY.

Ontario Supreme Court, Middleton, J. October 8, 1919.

DIVORCE AND SEPARATION (§ V A—45)—PROCEEDINGS UNDER DESERTED WIVES MAINTENANCE ACT, R.S.O. 1914, c. 152—ORDER FOR PAYMENT—DEFAULT—ACTION FOR ALIMONY IN SUPREME COURT—DISMISSAL—FURTHER ORDER UNDER ACT—MOTION FOR PROHIBITION BY HUSBAND—JURISDICTION.

A woman who has taken proceedings under Deserted Wives Maintenance Act, R.S.O. 1914, c. 152, and been granted alimony, and who subsequently brings an action in the Supreme Court for alimony which fails, cannot succeed in new proceedings under the statute, as these proceedings must be deemed abandoned or superseded by reason of her Supreme Court action.

[*Craxton* v. *Craxton* (1907), 23 T.L.R. 527, applied and followed.]

Statement.

MOTION by William Thomas Wiley for an order prohibiting three Justices of the Peace for the County of Bruce and a constable of the same county from enforcing a certain order, dated the 2nd August, 1917, made by the Justices, and a certain order, dated the 18th September, 1919, made by two of the Justices, and a seizure made by the constable on the 20th September, 1919, in proceedings under the Deserted Wives' Maintenance Act, R.S.O. 1914, ch. 152, on the ground of want of jurisdiction.

H. S. White, for the applicant.

C. S. Cameron, for the respondent.

Middleton, J.

MIDDLETON, J.:—The wife, deeming herself to have been deserted by her husband within the meaning of the Deserted Wives' Maintenance Act, took proceedings before Justices of the Peace, which resulted in an order, bearing date the 2nd August, 1917, directing the husband to pay to his wife $8 per week for the support of herself and family, together with the costs of the proceedings before the magistrates.

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The husband, being dissatisfied with the decision, appealed, and his appeal was dealt with by the County Court Judge, who, on the 2nd October, 1917, dismissed the appeal and affirmed the order, and directed the appellant to pay the costs of the appeal.

Pursuant to this order so affirmed, the husband paid the alimentary allowance to the wife for a considerable time, but eventually made default.

Instead of taking proceedings under the Act for the enforcement of her right by the machinery which it affords, the wife brought an action in this Court to recover alimony. The writ was issued on the 9th March, 1918.

In due course this action was tried before Mr. Justice Masten —on the 19th and 20th days of November, 1918—and he found that the plaintiff had failed to establish her right to alimony, and dismissed her action. An appeal was had from this decision, but the judgment was affirmed by a Divisional Court.

The wife, thereupon, on the 8th September, 1919, took proceedings before the same Justices, alleging that there was then $720 due to her under the order made by the Justices: these proceedings resulted in an order directing payment forthwith of the sum mentioned, together with $23.50 for costs, and directing the same to be levied by distress and sale of the goods and chattels of the husband, and in default of sufficient distress adjudging that the husband be imprisoned in the common gaol for the term of three months, unless these sums and further costs should be sooner paid.

Upon this application the wife has filed an affidavit in which she states that in the month of July, 1919, she went with her children to her husband's house and lived with him for over a month. She alleges that the husband then misconducted himself in such a way as to justify her leaving him, and that thereupon she left him.

The husband now moves for prohibition, contending in the first place that, the wife having resorted to this Court for the purpose of having her rights determined, and it having been adjudged that, under the circumstances shewn to exist at the trial, she was not entitled to alimony, the proceedings before the magistrates must be deemed to have been abandoned or to be superseded, and that the magistrates have no jurisdiction to make the order for the issue of the distress warrant and the committal of the husband to gaol.

In this, I think, the husband's contention must prevail.

The provisions of our statute are similar to the provisions of the English Summary Jurisdiction (Married Women) Act, 1895, 58 & 59 Vict. ch. 39, although there are many minor differences between the two statutes. In the case of *Craxton* v. *Craxton* (1907), 23 T.L.R. 527, the husband had taken proceedings in the Divorce Court, and had been ordered to pay alimony *pendente lite* to his wife. The divorce proceedings were stayed by reason of the failure of the husband to obey this interim order. The wife then applied to the magistrates for a separation order and maintenance, alleging desertion on the part of the husband. The magistrates took the view that the husband, by his default, must be taken to have abandoned the divorce suit. An appeal being taken under the provisions of the English Act, which are not found in our statute, the Justices of the Probate and Divorce Division, who heard the appeal, thought that the divorce action had not been abandoned, but was still pending, and that once that Court was seised of the matrimonial dispute, the jurisdiction of the Justices was ousted, Mr. Justice Bargrave Deane stating (p. 528):—

"It could not be too well known that once a suit had started in the Divorce Court each party was protected against the other, and it was contempt of Court for either to approach the other in any way. There could, therefore, be no desertion when a suit was pending. . . . In his view, once the Divorce Court was seised with a matrimonial dispute, Justices had no right to interfere in the matter. In this case the President had actually made an order; how, then, could the Gravesend Justices claim to overrule that order? He assumed that in the future Justices would hold their hands in such cases."

In my view, the wife, having chosen to submit her status and rights to the determination of this Court, must be taken to have abandoned any rights that she had acquired under the earlier order of the magistrates, and when once this Court was seised of the matter the Justices had no right to interfere in any way. It would certainly be an extraordinary situation if, after this Court had solemnly adjudicated that the wife was not entitled to alimony from her husband, the Justices should be at liberty to direct a distress upon his property and send him to gaol if sufficient distress could not be found.

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But on another ground also I think the wife must fail. According to her own statement, she returned to her husband. This put an end to the earlier order made by the Justices. If she was justified by the husband's misconduct in leaving him in July last, this may give foundation to new proceedings before the Justices or in this Court, but the earlier proceedings had ceased to have any operative effect. This was determined in the case of *Haddon* v. *Haddon* (1887), 18 Q.B.D. 778: there an order had been made under the English statute, sec. 4 of the Matrimonial Causes Act, 1878, upon the conviction of a husband for an aggravated assault on his wife, for payment of an allowance for maintenance. Upon his release the wife resumed cohabitation with him for a time, and then again left him. She then sought to enforce payment of the arrears, and applied to the Justices for an order, which was granted. It was held that the resumption of cohabitation had annulled the order, and not merely suspended its operative effect, Hawkins, J., saying (pp. 780, 781):—

"In my opinion the effect is to put an end to the legal existence of the order, and to render it no longer operative. . . . If before acting upon the order she thinks fit to abandon it—to become reconciled to her husband and to continue to cohabit with him—she may do so. So, also, after separation for a time she may return to cohabitation. But in either of these events the validity of the order ceases, just as a decree for judicial separation would under similar circumstances. . . . If, after resumption of cohabitation, fresh assaults of an aggravated character are made by the husband, so as again to imperil her safety, the wife must apply for a new order, and cannot again avail herself of that which by her own act in returning to cohabitation she has exhausted."

For these reasons, I am of opinion that the order sought should be granted—no costs. *Order granted.*

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Re ARTHUR L. BUCKLEY

Nova Scotia Supreme Court, Harris, C.J., Drysdale, J., Ritchie, E.J., and Mellish, J. December 2, 1919.

INFANTS (§ I C—11)—CUSTODY—NEGLECTED CHILD—CHILDREN'S PROTECTION ACT, 7-8 GEO. V. 1917, N.S., c. 2—APPLICATION BY FATHER—FATHER UNSUITABLE PERSON—INTERESTS OF CHILD.

An infant who has been declared a neglected child and sent under the authority of the Children's Aid Society to a suitable home, will not be allowed to return to the custody of his father, when the latter has been found to be an unsuitable person.

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Harris, C.J.

APPEAL from the judgment of Longley, J., in an application by the father for custody of his child. Affirmed except as to costs.

T. R. Robertson, K.C., for the applicant; *W. J. O'Hearn*, K.C. for the society.

HARRIS, C.J.:—Arthur Leslie Buckley is an infant eleven years of age and an application was made to Longley, J., by his father, Edward Buckley, for the custody of his son who had been declared a neglected child by S. S. Strong, a stipendiary magistrate for the county of Kings, and who had ordered his delivery to the Superintendent of Neglected and Dependent Children of the Children's Aid Society of Kings county under the provisions of the Children's Protection Act, 7-8 Geo. V., 1917, N.S., c. 2.

After the order was made the society had placed the child in a suitable family and he was being educated and brought up under proper conditions religiously and otherwise, and Longley, J., refused the application of the father, holding that he was not a fit and proper person to have the custody, and the welfare of the infant would be best promoted by leaving him where he then was. The Judge heard evidence *viva voce* and had an opportunity of seeing the father and I do not think his findings should be disturbed.

The principal argument before the Court was as to the validity of the proceedings before the stipendiary magistrate and it was said that the father was not served with the notice of these proceedings and they were not binding upon him. The proceedings before the stipendiary magistrate were sent up and it appears that there was an affidavit of service on the father of the notice put in before the stipendiary magistrate. The order of the stipendiary was made with jurisdiction and cannot be questioned on a motion of this kind.

The appeal should, I think, be dismissed without costs here or before the Chambers Judge.

DRYSDALE, J., concurred with Harris, C.J.

Drysdale, J.

Mellish, J.

MELLISH, J.:—This is an appeal from a decision of Longley, J. refusing the father's application for the custody of his child. He heard the evidence, much of it *viva voce*, and I do not feel at liberty to interfere with his finding that the father is not a fit person to have the custody of the child. I think, therefore, the appeal

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must fail. The Court, however, in an application of this kind should I think, consider whether the child is in fact in proper custody, apart from the father's rights. It may very well be, as often happens, that the mother as well is unfit to have such custody. The child in question is, or rather was when this application was made before Longley, J., living with the family of one Schofield, under conditions which as found by him, and as disclosed by the evidence, would seem to leave little if anything to be desired for the welfare of the child. The child at this place was nominally under the care of his mother, but really in Schofield's charge under the oversight of the Children's Aid Society, its statutory guardian under c. 4, 2 Geo. V., 1912, N.S. Since the application before Longley, J., and pending this appeal, it appears, as stated by Mr. O'Hearn, who appeared before us in behalf of this society, that Blois, an officer of this society, had without his (Mr. O'Hearn's) knowledge removed the child from Schofield's to some Roman Catholic home on the ground that as the child was a Roman Catholic, the Act under which the society derives its authority could not legally leave the child under the care of a Protestant, which Schofield appears to be. This belated compliance with the Act* (1912, c. 4, s. 27), if it be such, would appear more genuine if made before these proceedings were taken. We have now no evidence as to the precise conditions under which the child is living, but are, I suppose, bound to believe that this society is a proper guardian.

Taking the view I do as to the father's fitness to be the child's custodian, I think it perhaps unnecessary to consider the validity of the proceedings by which the Children's Aid Society became the guardian of the child. It is, however, my opinion that the order of the Justice cannot be considered invalid by reason of the fact that the notice of the proceedings was not served on the father. He denies being served and denies being in the country when the proceedings were taken. If this be so, I think the service on the mother, who was a parent and *de facto* guardian of the child within the jurisdiction, was sufficient to satisfy the statute requiring service on the parent or guardian.

Longley, J., ordered the applicant to pay the costs of James Schofield and Blanche Schofield in the proceedings before him.

*7-8 Geo. V. 1917, c. 2, schedule 1.

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Ritchie, E. J.

As I understand the facts, these parties did not appear before him, but the Children's Aid Society did appear by counsel, which facts were not disclosed until the hearing of the appeal. Under these circumstances I think there should be no costs here or below, and that the order appealed from be varied accordingly.

RITCHIE, E.J., concurred with MELLISH, J.

Appeal dismissed.

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JEWHURST v. UNITED CIGAR STORES LIMITED.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. October 10, 1919.

MALICIOUS PROSECUTION (§ II B—16)—RESPECTIVE FUNCTIONS OF JUDGE AND JURY—JUDICATURE ACT, R.S.O. 1914, c. 56, s. 62—REASONABLE AND PROBABLE CAUSE—FINDINGS OF JUDGE AND JURY—DAMAGES —NO MISDIRECTION—NO MISCARRIAGE OF JUSTICE SHEWN.

The question of reasonable and probable cause in an action for malicious prosecution is to be determined by the Judge, R.S.O. 1914, c. 56, s. 62. The function of the jury is to determine the following only:

1. Whether the defendant prosecuted the criminal charge against the plaintiff as alleged before a tribunal into whose proceedings the civil Courts are competent to inquire.

2. Whether the proceedings complained of terminated in the plaintiff's favour.

3. Whether the defendant instituted or carried on the proceedings maliciously.

4. The damages sustained by the plaintiff.

Statement.

APPEAL by the defendant company from the judgment of BRITTON, J., upon the verdict of a jury, in favour of the plaintiff, for the recovery of $1,700 damages with costs, in an action for malicious prosecution. Affirmed.

W. A. Henderson, for the appellant.

George Lynch-Staunton, K.C., for the plaintiff, respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 17th December, 1918, which was directed to be entered by Britton, J., on the verdict of the jury at the trial, at Cayuga, on that day.

The action is for malicious prosecution of the respondent on the charge of the theft of $423.11.

The respondent was the manager of a cigar-store of the appellant, at Dunnville. The terms of his engagement are contained in an agreement between the parties, dated the 2nd February, 1917, by which the respondent was appointed manager of the store. The appellant undertook to furnish him on consignment a stock of cigars, cigarettes, tobacco, and other articles which the

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appellant should deem advisable; the goods were to remain the property of the appellant; the respondent was not to purchase from others goods of the class furnished by the appellant or have such goods on the premises. The respondent was to take all proper means for separating and keeping separate the cash received from the sale of the appellant's goods and to deposit it in a bank, to be named from time to time by the appellant, to the credit of the appellant, "not later than three o'clock of the above mentioned day of the week," and a duplicate deposit-slip was to be forthwith mailed to the appellant's head office; the respondent was to be paid a commission of 15 per cent. on deposits calculated on the retail sales of the preceding week; the appellant agreed to purchase the "existing stock if any of cigars, cigarettes and tobacco and smoker's sundries," which, in the opinion of the appellant, was in a saleable condition, at a price not exceeding "the prevailing wholesale cost."

The agreement also provides that:—

"Inventories at the discretion of the company shall be taken by the company and all shortages in the stock of goods or coupons due to pilfering or any such cause excepting burglary by a person or persons other than the branch manager, his assistants, employees or persons connected with him, shall be charged against the branch manager and paid by him and so far as it is possible deducted from the commission of the branch manager as above set out and if such commission is insufficient the balance shall forthwith be paid by the branch manager."

Several inventories of the stock on hand were made by the appellant, which, according to the contention of the appellant, shewed that the respondent had failed to account for his stock to the extent of $539.96, and it was claimed that after crediting the respondent's commissions he was indebted to the appellant in the sum of $423.11, and for that sum a sight draft was drawn on the respondent, which he did not accept. This draft was drawn on the 23rd March, 1918, and on the 26th of that month the respondent's solicitor wrote a letter to the appellant in which he said, referring to the shortage claimed, that the respondent "was nonplussed, as a careful account had been kept by him of his cash sales and rebates, and, so far as he knew, this deficit was due to no fault of his own;" and insisted that it must be shewn to his and the respondent's satisfaction that the amount claimed was owing, before any payment would be made.

A subsequent letter was written to the appellant's solicitors by the respondent's solicitor in which he told them that if they could satisfy him that there was no mistake in the appellant's book-keeping methods he would advise the respondent to pay any deficit which might be charged to him, and he asked to have all the statements from the beginning of the respondent's transaction with the appellant sent to him, and said that if this were done it would expedite matters.

This request was not complied with, and no attempt was made to investigate or adjust the accounts between the parties; but, on the 1st April following, the appellant's secretary-treasurer, Percy Tilston, made a demand on the respondent for the payment of $423.11; and, the request not having been complied with, he on the following day laid an information charging the respondent with the theft of that sum.

Before laying the information, Tilston consulted the Crown Attorney, McArrell, and on such facts as were laid before him McArrell advised that it was a proper case for laying the information. A summons was issued and served upon the respondent, and he appeared before a magistrate to answer to the charge; and, after hearing the evidence adduced on the part of the informant, the magistrate dismissed the charge, McArrell declining to ask for a committal.

There was evidence which, if believed, warranted a finding that the respondent was always ready and willing to pay what on a proper accounting was owing to the appellant. He contended all along that the shortage, if it existed, was not due to any fault of his, and that he was unable to understand how there could be such a shortage as was claimed to exist. All this was known to the appellant's agents.

It is quite possible that a shortage might have occurred owing to pilfering by others than the respondent, and that errors may have been made by salesmen, and that the shortage claimed may have been due to other causes not involving dishonesty on the part of the respondent. Indeed the agreement itself recognises that such shortages may arise, and provides that, however they may happen, unless by burglary committed by outsiders, they are to be made good by the respondent.

It was shewn that many mistakes, involving in some cases

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considerable sums, had been made by the appellant in making up the respondent's account.

It was also shewn that sales had been made on credit, and that a considerable sum was owing in respect of them, and these were not taken into account or credited to the respondent against the apparent shortage.

A settlement of accounts was arrived at between the parties, and the respondent paid to the appellant $347.85, which was the balance owing by him according to the terms of the settlement; this payment was made shortly after the dismissal of the charge.

McArrell, who was examined as a witness at the trial, testified that if the facts as they appeared in the prosecutor's case before the magistrate had been disclosed to him he would not have advised the laying of an information.

Tilston frankly admitted, in answer to a question by the appellant's counsel, that his object in taking criminal proceedings was to collect the debt which the respondent owed to the appellant.

It appeared in evidence that Hallett, an employee of the appellant, had called upon the respondent and asked him if he was going to make a settlement of the appellant's claim, and that the respondent had told him that he did not think that he owed the appellant "that much money;" that Hallett replied that, according to the appellant's figures and the figures in the books, the claim appeared to be correct; that the respondent then said that there had been many mistakes, and the claim was "a great amount, and there must be something wrong," and that at the same interview Hallett was told that the respondent did not want "to beat the United Cigar Company out of a cent, every dollar shall be paid," and that he would "try to and would pay the United Cigar Stores."

It appeared in evidence that, testifying before the magistrate, Hallett swore that the respondent said he would pay when he found out what was right.

Proctor, an employee of the respondent, who took an inventory of the stock, testified that he had told the respondent that he did not think that the respondent had deliberately stolen anything; that the stock might have been taken out by shop-lifters; that there might be a shortage by pilfering; and at the trial Proctor testified that he did not think that the respondent was dishonest.

The jury was not asked to answer any questions, but gave a general verdict for the respondent for $1,700.

The learned trial Judge ruled that the respondent had established want of reasonable and probable cause, and no objection was made to his charge to the jury.

To constitute the crime of theft in such a case as this there must be a fraudulent and without colour of right conversion of the property of another; and, in my view, the evidence fully warranted the learned trial Judge in ruling that there was an absence of reasonable and probable cause for the criminal proceedings taken against the respondent: the admission of the witness Proctor that he did not believe that the respondent had acted dishonestly, and that the shortage which he found in the stock may have been the result of causes other than an appropriation of it or its proceeds to the use of the respondent, though not conclusive against the respondent, agrees with the conclusion to which any reasonable man having knowledge of the facts would come.

The respondent was, no doubt, liable to pay for the shortage, if it had not arisen from the excepted cause mentioned in the agreement, but that is a very different thing from his being liable to the charge of theft because it existed or because he could not or would not pay for the shortage.

The appellant, until the decision was reached to lay the information, evidently viewed the matter in that light, for the amount of the shortage was treated as a matter of account between it and the respondent; as I have said, an account was sent to him for it, and a draft was drawn on him for the amount of the account. The account is in the form of an ordinary account between debtor and creditor, and it contains the information that interest will be charged on all overdue accounts.

It is clear that the appellant knew that the position of the respondent was that he could not understand how such a shortage as was claimed could exist, and that he desired an investigation of the accounts, and was ready and willing to pay any sum which was found to be really owing by him.

I am unable to see upon what ground, having regard to the facts I have mentioned, the finding of the trial Judge as to reasonable and probable cause can be disturbed. In his charge to the jury the learned trial Judge made some observations which related

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to the issue as to reasonable and probable cause, with which, under our present law, the had jury nothing to do.

According to the provisions of sec. 62 of the Judicature Act:—

"In actions for malicious prosecution, the Judge shall decide all questions both of law and fact necessary for determining whether or not there was reasonable and probable cause for the prosecution."

Before this legislation was enacted, the question was a mixed one of law and fact, the province of the jury being to find the facts unless admitted, including the inferences from them; and that of the Judge to say whether those facts amount to reasonable and probable cause; and, if there was no other evidence of malice than what, in the Judge's opinion, established a want of reasonable and probable cause, the jury upon the question of malice were not bound by that opinion, but might determine for themselves whether there was reasonable and probable cause.

As I understand the provisions of sec. 62, the question of reasonable and probable cause is to be determined for all the purposes of the trial by the Judge, and the jury cannot now disregard that finding, but must give effect to it when determining the question of malice.

If that be the case, the functions of the jury in such a case as this are to determine the following matters, and these only:—

1. Whether the defendant prosecuted the criminal charge against the plaintiff as alleged before a tribunal into whose proceedings the civil courts are competent to inquire.

2. Whether the proceedings complained of terminated in the plaintiff's favour.

3. Whether the defendant instituted or carried on the proceedings maliciously.

4. The damages sustained by the plaintiff.

In determining the third question, the jury may but are not bound to imply malice from the absence of reasonable and probable cause. The jury must, in this case, have found malice, and there was not only the implication from the absence of reasonable and probable cause, but express evidence that the prosecution was instituted for indirect or improper motives, viz., for the collection of the debt which it was alleged the respondent owed the appellant, to support their finding.

It was argued that the appellant had laid all the facts fully

and fairly before the Crown Attorney, and had acted on his advice in laying the information. If whether or not that had been done was relevant on the question of reasonable and probable cause, or if it had been done and the appellant had in good faith acted upon the advice he had received, it could not be said that it had acted without reasonable and probable cause.

The view of the trial Judge was that the appellant had not done this, but had withheld from the Crown Attorney material facts which, had they been disclosed, would have led the Crown Attorney to advise against the laying of an information; and in that view I agree. It was not sufficient for Tilston to have laid before the Crown Attorney all the facts that were then within his own knowledge. Other facts which would have led the Crown Attorney to advise against laying the information were known to the appellant, and they should have been laid before the Crown Attorney. It surely cannot be the law that a person desiring to prosecute another on a criminal charge may entrust the laying of it to an agent who does not know all the material facts, and can then find shelter behind the fact that the agent has disclosed all the facts that were within his knowledge.

Although, as I have said, no objection was made at the trial to the Judge's charge, it was objected to on the argument before us. In order to reach a proper conclusion as to whether there was misdirection entitling the appellant to a new trial, there must be borne in mind the fact which I have mentioned, that the learned Judge in his charge to the jury dealt with matters which had to do only with the question of reasonable and probable cause, and in the parts of the charge most objected to the learned Judge was but stating the reasons which led to his finding that there was an absence of reasonable and probable cause.

Upon the issues which the jury were to decide, there was no misdirection. That the appellant had instituted the prosecution and that it had terminated in favour of the respondent was not disputed; in the direction as to malice there is nothing to complain of; and with the direction as to the damages the appellant certainly has no reason to find fault.

Although no objection has been taken to the charge, if it appears that misdirection has resulted in a miscarriage of justice, a new trial will be granted. This rule of practice cannot help the

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appellant, even if, which I do not think, there was misdirection, because, in my opinion, there has been no miscarriage of justice.

The damages are large, much larger than I would have given, but not so excessive as to warrant the Court's interference with the award of them by the jury.

I would dismiss the appeal with costs.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice.

I only wish to add that there is a difference made, in the written agreement under which both parties were acting, between the amounts received from sales of stock and the moneys chargeable to the respondent for shortages in the stock due to pilferage or any such causes by persons other than the branch manager and his assistants, employees, and persons connected with him.

The amounts of these shortages are treated as due by the respondent, not because he had received and failed to account for their proceeds, but because he had agreed to make them good. They are treated as a debt to be "deducted from the commission of the branch manager . . . and if such commission is insufficient the balance shall forthwith be paid by the branch manager."

As the whole question turned on shortages apparently arising from the causes mentioned, and not upon the proceeds of sale of the appellant's goods not accounted for in the way provided for in the agreement, the charge of theft could not be supported and was properly dismissed. If the appellant claimed for sales of stock not accounted for, it is strange that the evidence does not disclose it.

The damages seem large, but I do not think we can interfere with the verdict on that account.

Ferguson, J.A.

FERGUSON, J.A. (dissenting):—I am unable to agree with my Lord the Chief Justice, whose reasons and opinion I have had the benefit of considering.

Had the learned trial Judge considered the issue between the parties in the way it has been dealt with by the Chief Justice, or as it was presented on the pleadings and evidence, and come to the conclusion that, at the time Tilston induced the Crown Attorney to charge the plaintiff with theft, Tilston and the defendant

corporation had no reasonable ground for believing that the plaintiff, as their employee, had committed theft, and had the learned trial Judge instructed the jury that, in arriving at a conclusion on the question whether or not the defendant corporation, acting through its agent, was actuated by malice, and in assessing damages, they should keep in mind that the relationship of the parties was that of employer and employee, I might have been more inclined to agree in the opinion of my Lord; but, on my reading of the charge to the jury, no such case was presented for their consideration, nor was it, I think, present to the mind of or considered by the learned trial Judge. On the contrary, the learned trial Judge based his opinion and charge on what seems to me to be an erroneous conclusion, that the parties had, by some act or acts not pointed out by him, changed the relationship created and established by the written agreement, i.e., employer and employee, to that of debtor and creditor. He instructed the jury as follows:—

"If any of you gentlemen or myself have an article of furniture put in our residence, give a note for it, and then refuse to pay for it, saying it was not to be paid in that way, that man would have no right to lay an information charging us with theft of the furniture. That seems to be the position of the defendants here. They had property in the possession of the plaintiff, they treated the matter as debtor and creditor, and so the arrangement went on. The disputes were in regard to adjustments.

"Then, leaving all disputes aside and not dealing with the attempt to obtain settlement by a short cut in the laying of a charge of theft—I may be wrong; if I am, the Court of Appeal will correct me; but I say it is not good law where a person changes his ground from that of debtor and creditor and attempts to enforce the criminal law. I think then that an action is actionable. I think the jury, in dealing with the question of malice, may consider such an act as being malicious."

That charge does not present, to my mind, the true issue between the parties. It certainly did not present to the jury for their consideration the claim and theory of the defence; and, unless and until that is done, I cannot think there has been a fair trial.

The learned Chief Justice feels able to affirm the judgment

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appealed from on a paragraph of the agreement quoted by him which creates between the plaintiff and the defendant the relationship of debtor and creditor, in respect of "*shortages in the stock of goods or coupons due to pilfering or any such cause*," and by assuming that the shortages were clearly the result of pilfering. The learned trial Judge does not appear to have considered that provision of the agreement, or to have presented such a view to the jury; but, even if he had, it does not seem to me that the defendant or its servants acted unreasonably in thinking that an apparent shortage of $437, equalling more than 10 per cent. of the whole stock, was not due to pilfering by persons other than the plaintiff.

The plaintiff was not arrested; he was merely summoned to the police court; and, upon one of the defendant's employees, who was sent to Dunnville merely to take an inventory for the purpose of moving the stock from the plaintiff's premises pursuant to his notice given under the agreement, admitting to the magistrate that he did not believe that the plaintiff had stolen, and also that the plaintiff had expressed to him his willingness to pay, the charge laid by the Crown Attorney, at the request of another employee of the defendant corporation, was dismissed, but the plaintiff subsequently admitted a shortage of $347, and paid that sum.

If the plaintiff, under such circumstances, is entitled to recover anything, the amount of damages awarded—$1,700—strikes me as excessive; this result was, I think, due to the charge which I have quoted, and which, on my reading, is not supported in evidence. It is established beyond doubt that the plaintiff was the defendant's servant, and in that capacity had received the defendant's goods; that he had, at the time the charge was laid, signed and approved stock-sheets shewing a shortage of $437; that he was then unable to account for the shortage or any part of it. His only answer was to tell Hallett that he could not account for the shortage, at the same time protesting his innocence and willingness to pay.

I am not prepared to say that an employee purges himself, not only of wrongdoing, but of all appearance of evil, when, without explanation, he announces that he will pay his master the value of his goods, which he should have in his possession, or that he will

repay moneys received from the sale of his employer's goods, when he had no right to use the moneys, but should have always treated and dealt with these moneys not as his own, but as those of his employer.

To my way of thinking, these are questions which should have been considered and dealt with by the trial Judge and the jury.

The defendant is entitled to have the opinion of the trial Judge on whether or not, considering the relationship of the parties as that of employer and employee, there was reasonable and probable cause for the defendant corporation and its officers believing that the plaintiff had been guilty of theft, and to have the jury, keeping the relationship established by the agreement in mind, determine whether or not the defendant did actually believe in the charge of theft, or made the charge maliciously and without such belief, and also to have the jury assess the damages on such a view of the facts.

In other words, the defendant is entitled to have its contentions considered and presented, and to have the action tried and the damages assessed according to the true issue presented by the pleadings and evidence of the parties.

I would direct a new trial. *Appeal dismissed.*

COBB v. SCHATTNER.

Alberta Supreme Court, Walsh, J. November 26, 1919.

VENDOR AND PURCHASER (§ I E—27)—MISREPRESENTATION—ACTION FOR RESCISSION—DELAY IN BRINGING ACTION—PAYMENT OF TAXES BY PURCHASER—RIGHT TO RESCIND.

A purchaser induced by misrepresentation to purchase a piece of land will succeed in an action to rescind the contract. The contract is not affirmed merely by delay in bringing the action on the part of the purchaser nor by payment of the taxes on the property for which he was personally liable.

ACTION for rescission of a contract to purchase land on account of misrepresentation. Statement.

H. C. Macdonald, for plaintiff; *H. R. Milner*, for defendant.

WALSH, J.:—I must hold that the statement made by Willich to the plaintiff and the description given to the land in the agreement, together constituted a representation that this land was within the city limits if indeed each one of these two things did not in itself amount to such a representation. That this was a Walsh, J.

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material representation is quite clear and that it was untrue is admitted. The real doubt that I have felt is as to whether or not this representation really induced the contract. It is, of course, an easy matter for the plaintiff to say now, as he does, that it did, and that if he had known that the land was beyond the city limits he would not have bought it. I am never disposed to pay a great deal of attention to assertions of that character, but I look rather to the circumstances surrounding the matter and try to make out from them whether or not such a representation was an inducing factor in the purchase. My own view is that a man would ordinarily be much better disposed towards the purchase of such property if it was without than within the city limits, because of its comparative immunity from taxation if beyond the reach of a city assessor and a city tax rate. However, the fact is that the plaintiff realised that there was a difference between city and suburban property as shewn by the enquiry which he made of the agent, and that it was after being shewn by the agent on the map that this sub-division was within the boundaries of the city that he agreed to buy. The reason that he gives for wanting city property is one which might properly appeal to him and so, I think, I must hold that this representation induced him into this purchase.

I am the more inclined to take this view of the matter because of the entire absence of explanation from the defendant of the fact that in the agreement this subdivision is described as being in the City of Edmonton. The fact that this agreement is on a special printed form with the description as above printed in it, betrays considerable care in its preparation. It looks to me like an inducement deliberately and unwarrantably held out by the defendant to people ignorant of the situation to buy these lands for unquestionably such people, buying for speculation at any rate, would be much more favourably disposed towards the purchase of land described as being in the city than of land simply described as being a part of a certain quarter section. This agreement was signed by the defendant personally, and he was a witness at the trial of this action, but no explanation of this admitted untruth in his printed agreement was vouchsafed and, so I fancy, no satisfactory one exists.

I do not think that under the circumstances the delay in bringing this action, after the plaintiff became aware of that of which he now complains, amounts to an affirmation by him of the contract. He knew for the first time in November, 1916, that the land is not in the city, and this action was brought in July, 1918. The excuse that he gives for this delay seems reasonable. The agents through whom he bought and the defendant, all of whom are Germans, had left Alberta shortly after the outbreak of war. The agents have never come back, and the defendant only returned after the commencement of this action. The plaintiff seems to have made some effort to find them but failed. The mere starting of the action earlier would, of course, have evinced a greater determination to end the contract, but unless followed by prompt service of the statement of claim would not have done the defendant any good. I do not think any harm has resulted to him from the mere delay, and as nothing took place between the parties in the meantime that savours of affirmation of the contract, I think that I cannot hold it affirmed merely by reason of this delay.

I accept the plaintiff's explanation of the payment by him of the taxes in 1913. I have had some doubt as to the effect of the payment made by him of the taxes in 1916. This was done when he knew that this land was without the city. It was, however, a thing transacted, not with the defendant but with another. This property appears to have been assessed to him, and so he was personally liable for and could have been made to pay these taxes. If they had not been paid by him and as a consequence the land had been sold, that fact might have stood in his way when he sought rescission of the contract, as it would then have been impossible to restore the parties to their original positions. I think, therefore, for all of these reasons, that this payment cannot avail the defendant.

The plaintiff is entitled to rescission, to repayment of the sums paid by him with interest at the contract rate of 8% upon each payment made by him, to a lien on the lands for the amount so payable to him, and his costs. If the parties cannot agree as to the amount the clerk will fix it; the payment made subsequent to the initial payment and the dates being those endorsed upon Exhibit 1. *Judgment accordingly.*

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DAVIS v. BEGGS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. October 3, 1919.

PRINCIPAL AND AGENT (§ II A—8)—COMMISSION ON EXCHANGE OF PROPERTY —STATUTE OF FRAUDS—6 GEO. V. 1916, c. 24, s. 19—AMENDMENT —8 GEO. V. 1918, c. 20, s. 58—STATUTE UNSATISFIED—FAILURE OF ACTION.

An agreement for commission must satisfy the Statute of Frauds, 6 Geo. V., c. 24, s. 19, as amended by 8 Geo. V., c. 20, s. 58, and be in writing separate from the sale agreement. It is a question whether the statute as amended requires the agreement to be on a separate piece of paper from the sale agreement.

Statement.

APPEAL by defendant from the judgment of Denton, Jun. Co. Ct. J., in an action to recover commission. Affirmed.

In the written offer addressed to the defendant by the other party to the exchange, there was this clause: "I agree to pay the regular commission on execution of agreement hereof on total sale of my property herein mentioned, and the same shall form part of the purchase-money." This offer was not signed by the defendant, but only by the other party to the exchange. Below the offer was written an acceptance and the words: "I agree to pay a commission on $26,000 at 2½% my property herein mentioned on execution of this agreement to T. E. Davis, and the same shall form part of the purchase-money, and also provided sale is not closed for any reason whatever no commission is to be paid or charged . . ." This was signed by the defendant; and upon this the action was brought.

Section 13 of the Statute of Frauds, R.S.O. 1914, ch. 102, enacted by 6 Geo. V. ch. 24, sec. 19, reads as follows:—

13.—(1) No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorised.

(2) This section shall come into force on the 1st day of January, 1917.

By sec. 58 of the Statute Law Amendment Act, 1918, 8 Geo. V. ch. 20, the above sec. 13 (1) was amended by inserting, after the word "writing," the words "separate from the sale agreement."

J. Singer, for the appellant.

A. A. Macdonald, for the plaintiff, respondent.

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MEREDITH, C.J.C.P.:—The statute-law of this Province provides that no action shall be brought in such a case as this unless the agreement upon which the action is based is in writing, separate from the sale agreement, signed by the party against whom the claim is made or by some one authorised by him: and it is not without significance that this legislation is all part of the Statute of Frauds, the purposes of which must be borne in mind.

In this case the agreement is for the exchange of lands, the defendant receiving boot in the shape of mortgages, bonds, and money; and the agreement, as reduced to writing, is in a printed form on one side of one sheet of paper, but in two parts, the one called the offer and the other the acceptance, the one being placed immediately above the other: the lower part only is signed by the defendant, and the upper is signed only by the person with whom the exchange was to be made.

The upper part contains the words: "I agree to pay the regular commission on execution of agreement hereof on total sale of my property herein mentioned, and the same shall form part of the purchase-money:" and the lower part contains the words: "I agree to pay a commission on $26,000 at 2½ per cent. my property herein mentioned on execution of this agreement to T. E. Davis, and the same shall form part of the purchase-money, and also provided sale is not closed for any reason whatever no commission is to be paid or charged . . ."

This action is brought upon this latter agreement; the defence is the statute-law before mentioned: and from that defence I can see no way of escape, although it is quite clear that the agreement to pay the commission sued for is in writing signed by the defendant, and that she must have been well aware of the nature and effect of the agreement, the consideration for which she received and retains.

But that is not enough: the statute-law requires that the agreement to pay the commission shall not only be in writing, but shall be in writing "separate from the sale agreement;" and that this agreement is not; and so the action is brought in contravention of the law.

It is contended that the upper part of the writing is really, or sufficiently to answer the purposes of this legislation, the sale

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agreement; that the lower part is merely an acceptance of an agreement to sell contained in the upper part; and, therefore, that the agreement to pay the commission in question may, having regard to the purposes of the Statute of Frauds, be deemed to be in writing separate from the sale agreement: but there is no actual sale agreement without the acceptance, as well as the offer; and the character of the enactment, and the words "separate from the sale agreement," indicate that a greater protection of defendants, in such cases as this, than merely having the promise to pay in writing, was meant.

It is also contended that the agreements need not be what was called by counsel "physically separate;" that they may not only be upon the same piece of paper, but that they may be so connected that the one signature answers both purposes: and in a County Court case, very much like this case as to the character of the writing, it was held that the statute-law in question was not a bar to the action; and that view of the law was given effect to in this case; but whether with approval, or merely because the trial Judge felt bound to follow the ruling of a Judge of co-ordinate jurisdiction, does not appear.

In this case it is true that there are two separate agreements in the one form of acceptance—the one with the seller accepting his offer and the other with the land agent agreeing to pay to him a special commission; but they are, in print and in writing, closely connected with one another, and indeed coupled together by the conjunctive word "and"; and the commission in question is to form part of the purchase-money, a fact which, in my opinion, brings this case within the statutory prohibition, whatever other means there may have been for obtaining payment of the otherwise just debt.

In the view of this case which I take, it is not necessary that any question whether or not the two agreements may be upon the one piece of paper, or even in the one document, should be considered; and therefore it is better for me to express no decided view upon any such question; but it may be pointed out: that there is nothing in the legislation against putting the offer and the acceptance and the agreement to pay a commission all upon the one piece of paper, whether on the same side or on different sides of it. The injunction is not expressly against an action unless

upon a different document; the legislation requires only that the agreement to pay the commission shall be in writing, not that it shall be in *a* writing in the sense of a document, and that this agreement shall be in writing separate from the agreement to sell, which the same statutes provide shall be in writing; that is, both shall be evidenced in writing, and the one separated from the other.

The most recent addition to the statute-law in question, introducing the words "separate from the sale agreement," was probably made because of the difficulty much discussed in this Court in a somewhat recent case in which the agreement to pay a commission was embodied in the "sale agreement," but it was not expressly stated to whom the commission was to be paid, though the land agent's name appeared in some part of the agreement. This Court, four Judges only sitting, directed a re-argument of the case, being equally divided in opinion upon the question of liability, which a County Court Judge had decided in the land agent's favour. The case was not re-argued, having been afterwards settled between the persons concerned, out of court. One of the learned counsel in the case happened to be a member of the Provincial Legislature.

In this case, the land agent's name is expressly given, and the agreement is to pay to him.

Yet in this case, for the reasons before stated, I cannot consider that the statute-law in question in this action has been complied with so as to enable the plaintiff to recover in this action from the defendant the commission in question; and, therefore, I am in favour of allowing this appeal and directing that the action be dismissed.

RIDDELL, J.:—The plaintiff, a real estate agent, sues the defendant for commission on an exchange of properties, brought about by him (the plaintiff). Riddell, J.

A document is produced containing an offer by another to exchange, this contains a clause: "I agree to pay the regular commission on execution of agreement hereof on total sale of my property herein mentioned, and the same shall form part of the purchase-money." This is the usual clause inserted in a real estate contract, and is intended to place the liability to pay a commission beyond doubt. The offer is not signed by the defendant, but by the other party to the exchange.

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Below this offer, so signed, is a type-written clause containing an acceptance and the words: "I agree to pay a commission on $26,000 at 2½% my property herein mentioned on execution of this agreement to T. E. Davis, and the same shall form part of the purchase-money, and also provided sale is not closed for any reason whatever no commission is to be paid or charged . . ." This is signed by the defendant.

On an action brought for the commission, Judge Denton, of the County Court of the County of York, decided in favour of the plaintiff, and the defendant now appeals.

No doubt by reason of the many claims made by real estate agents for commission, some of them of an extraordinary character, and almost all of them giving rise to hopelessly contradictory evidence, the Legislature, in 1916, by the Act 6 Geo. V. ch. 24, sec. 19, amended the Statute of Frauds by adding the following:—

"No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorised."

In this state of the law, an action was brought in the County Court for commission, the action being based upon a clause in the sale agreement, agreeing to pay a commission; the agent's name appeared in the document but he was not a party to the contract in any way. The County Court Judge decided that this was a sufficient compliance with the statute. On an appeal to this Court (differently constituted) the Court was equally divided; a re-argument was ordered before five Judges, but the case was settled out of Court.

It is probable that it was due to the division of opinion on that occasion that the Legislature amended the section in 1918 by (1918) 8 Geo. V. ch. 20, sec. 58, so that it is now necessary that "the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party," etc.

I do not think that there can be any doubt as to the meaning of this enactment. The agent to succeed must have (1) an agreement, (2) in writing, (3) separate from the sale agreement. An

agreement, not a mere understanding; not merely an oral agreement, but an agreement in writing; and that agreement separate from the sale agreement. In the present case, I do not think that the plaintiff has any agreement at all in writing; the agreement—if there is an agreement—is made with the other party to the exchange. I do not however proceed on that ground in this judgment, but assume that the plaintiff has an agreement in writing.

The statute requires that this shall be separate from the "sale agreement;" the "sale agreement" is the offer to exchange and the acceptance of the offer. The agreement to pay commission is not separated from the acceptance, i.e., from the sale agreement; it is complicated with it in such a way that the signing of the one is the signing of the other.

It is argued that the agreement to pay commission is separate from the sale agreement because the signature of the defendant was to one writing which constituted two separate and distinct agreements, but this could be said of any agreement to pay commission. The statute must be given a common sense interpretation, and that can only be that the agreements must be so separate that the land-owner is not obliged to sign both when signing one, and he is not obligated to pay a commission on penalty of not having a contract for sale.

It is not at all necessary to decide here that the agreements must be on separate sheets of paper; a land agent who fails so to separate them will, however, have no cause of complaint if a Court should so hold. There can be no possible objection to separate papers, the one for the parties to the sale, etc., and the other for the agent; and a contrary course would, to my mind, be indicative of a desire to get round the statute. An agent who so acted in sailing close to the wind might find that he had not succeeded in rounding the cape.

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

MIDDLETON, J., agreed with RIDDELL, J. Middleton, J.

LATCHFORD, J.:—Two evils were sought to be remedied by the statute. One was that actions could be brought for commissions, sometimes for very large amounts, and successfully maintained, although not evidenced by any agreement in writing. The other Latchford, J.

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was that an agreement to pay a commission was frequently, indeed usually, made part of an agreement for sale, purchase or exchange, and so escaped, as often happened, the notice of the person signing.

In enacting the later statute the Legislature manifestly desired that any agreement to pay a commission on a sale or purchase should be a separate agreement from that entered in to regarding the sale or purchase.

No such separate agreement was made in the present case. I therefore think the appeal should be allowed.

Appeal allowed.

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WESTERN TRUST Co. v. CANADIAN NORTHERN R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 3, 1919.

EXECUTORS AND ADMINISTRATORS (§ I—3)—ACTION BY ADMINISTRATOR—PROPER PARTY DID NOT BRING THE ACTION—SURROGATE COURTS ACT, R.S. SASK. 1909, c. 54, s. 77—COSTS.

An administrator, who is not a proper one under the Surrogate Courts Act, R.S. Sask. 1909, c. 54, s. 77, cannot succeed in an action for compensation. The Court cannot assume that the action will succeed on the merits, as the issues, apart from the right to bring the action, were never determined. Costs must be awarded to the defendant.

[*Forster* v. *Farquhar* (1893), 1 Q.B. 564, distinguished.]

Statement.

APPEAL by plaintiff and cross-appeal by defendants from the judgment of Taylor, J., in an action for compensation. Varied as to costs.

P. M. Anderson, K.C., for appellant; *J. N. Fish*, K.C., for respondent.

The judgment of the Court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—This is an action brought by the plaintiff as administrator of the estate of John F. Thomson, deceased, and is for the benefit of the wife, child and mother of the said John F. Thomson under an Act respecting Compensation to the Families of Persons killed by Accidents, being c. 135 of R.S. Sask. 1909.

It was alleged in the pleadings that the said Thomson, who was a fireman in the employ of the defendant company, met his death through the negligence of the defendant company, and the action is brought for damages in connection with such negligence.

At the conclusion of the plaintiff's case, defendant moved for non-suit and dismissal of the action on the ground that no negli-

gence had been shewn, and on the further ground that the plaintiff is not the administrator of the estate and effects of the said John F. Thomson and not entitled to bring the action.

From the evidence it appears that the plaintiff's claim to act as administrator is pursuant to the provisions of s. 77 of the Surrogate Courts Act, R.S. Sask. 1909, c. 54. That section is as follows:—

77. Whenever a person dies upon the filing of an affidavit with the clerk of the Surrogate Court of the judicial district within which he had his last known place of abode that as far as can be ascertained he has not left a will or testamentary disposition and that his estate does not exceed in value the sum of $200 the official administrator shall at the expiration of sixty days after the decease of such person or within that time if the Judge so orders (unless some other person has appled for the grant to him of letters of administration or letters testamentary and such grant has been made) be the administrator of such estate to all intents and purposes as if letters of administration or letters testamentary had formally issued to him and the formal grant of probate or administration to him shall not be necessary.

The affidavit which was filed by the plaintiff under that section clearly shewed that the deceased at the time of his death had his fixed place of abode at Brandon, in the Province of Manitoba, and that there were no assets of the said deceased in the Province of Saskatchewan, and that the sole object of taking out the letters of administration was to prosecute the present action. The trial Judge accordingly dismissed the plaintiff's action on the ground that the affidavit so filed by the plaintiff in support of its administration did not disclose facts to entitle the plaintiff to administration, because the deceased's last known place of abode was outside of the Province and there were no assets in the Province.

The trial Judge then proceeded to deal with the question of costs, and held that the defendant by a search in the office of the clerk could have discovered the affidavit in question and could have then moved to have the action dismissed, and that, by not doing so, it permitted the plaintiff to proceed to trial of the action and in consequence incur costs that could have been avoided. The trial Judge further expressed the opinion that the admissions in examinations for discovery of the defendant's own servants, shewing the manner in which the accident caused the death of the deceased, established a cause of action, and, under the circumstances, did not allow costs to either party.

From the judgment on the claim the plaintiff appealed, and from the judgment as to costs defendant cross-appealed.

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On the appeal coming on for hearing, the plaintiff abandoned its appeal, and the whole argument before us was on the cross-appeal.

The trial Judge in giving the judgment for costs as he did, states in part as follows:

> To compel the plaintiffs to pay the costs on a trial of the issues of fact on which as I have stated it seems to me they would have succeeded, would place on the plaintiffs a burden which they ought not to bear, and the rule appears to be settled (see *Forster* v. *Farquhar*, [1893] 1 Q.B. 564) that whenever it is unfair and unjust as between the parties that costs should follow the event, that constitutes good cause for depriving the successful party of costs. The issue on the facts relating to the cause of action has never been determined. The defendants might have avoided all the costs of the trial by moving promptly for a stay on the ground that the plaintiffs were not in fact administrators of the party as alleged.

With deference, I cannot agree with the conclusion the trial Judge has arrived at with respect to costs.

In the first place, I do not think he was justified in assuming that the plaintiff would have succeeded in the action on the merits. It is quite true that portions of an examination for discovery of one of the defendant's servants, which were put in by the plaintiff, and the evidence of a former servant of the defendant standing by themselves might shew negligence on the part of the defendant. I take it, however, from the appeal book, that the balance of the examination for discovery should be read as explanatory of the portions put in. This balance was not included in the appeal book.

But however this may be, if the action had proceeded to a conclusion on the merits, the defendant would have had the right to produce evidence by way of defence and also in support of the allegations of contributory negligence contained in the statement of defence, and I am of opinion that it is impossible to say with absolute certainty that, had the action so proceeded to a conclusion, the plaintiff must undoubtedly have succeeded.

The next point is, was there any duty cast upon the defendant to have made search as to the right of the plaintiff to bring the action, and, secondly, if such a duty was cast upon the defendant, is there any rule by which the result of such search could have been adjudicated upon before the action came on for trial?

Again with great deference to the trial Judge I am of the opinion that there was no duty cast upon the defendant to make search

as to the plaintiff's right to bring the action, at any rate with a view other than to obtain evidence for use at the trial.

The information as to the plaintiff's right to bring the action was, at least, as available to the plaintiff and its solicitors as it was to the defendant. From the defence the plaintiff knew that it would have to prove the plaintiff's right to bring the action, and a search by the plaintiff or its solicitors would have disclosed just as much as a search woud have disclosed to the defendant, and I am of the opinion that the defendant was not under any obligation to disclose to the plaintiff, before the trial, its evidence.

The only rule that my attention has been called to on behalf of the plaintiff as to the right to have determined before the trial the question of the right of the plaintiff to sue, is r. 219 of our rules.

In my opinion that rule is not applicable. That rule deals with questions of law raised by the pleadings. This was not a question of law raised by the pleadings; it was a question of fact raised by the pleadings, and, in my opinion, like all other questions of fact, was one to be disposed of at the trial.

My attention has not been called to any rule permitting a question of fact raised by the pleadings to be disposed of before the trial. Possibly an examination for discovery might have disclosed that the plaintiff was not entitled to sue, and then, possibly, a motion for judgment on admissions might have been launched; but I, at any rate, would not go so far as to hold that because the defendant might, by an examination for discovery and a subsequent motion for judgment on admissions, have disposed of the action before the trial and did not do so, it is therefore to be deprived of its costs of defence. Even if the defendant had so proceeded, it would undoubtedly have been entitled to its costs of the action up to and including the disposition of the action by motion.

In my opinion it would be most unfair to defendants, and dangerous and far reaching in consequences, to hold that defendants must, at the earliest possible moment and before the trial, bring before the Court facts which shew that the plaintiff is not entitled to proceed with the action, under the penalty of being deprived of their costs if they do not so proceed.

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The case of *Forster* v. *Farquhar*, *supra*, cited by the trial Judge, in my opinion, is no authority for the disposition as to costs by the trial Judge. The head-note to that case is, in part, as follows:

> In an action for breach of a contract to put the drainage of a house into good condition, which was tried with a jury, the plaintiff claimed as special damage certain items in respect of expenses incurred by him in consequence of an illness which broke out in his family. The plaintiff did not make this claim oppressively or vexatiously, but was acting on the opinion expressed by his medical man that such illness was occasioned by defective drainage. The jury gave a verdict in the action for the plaintiff, but found, with regard to the special damage claimed as above mentioned, that the illness in plaintiff's family did not arise from the defects in the drainage.
>
> *Held*, that there was "good cause" for making an order that the plaintiff, though successful in the action, should pay to the defendants the costs of the items of special damage in respect of which he had failed.

The facts of that case easily distinguish it from the present one. There, the plaintiff had been unsuccessful as to certain causes of action, and, with respect to those unsuccessful causes, the plaintiff was ordered to pay the costs. In the case at bar the plaintiff has been totally unsuccessful. Its right to bring the action went to the root of the whole matter.

The plaintiff has not been successful on any issue for two reasons: (1) In order to succeed it must be the proper person to bring the action, and it was not the proper person; (2) As I have stated above, the issues, apart from the right of the plaintiff to bring the action, were never determined. The defendant had never tendered his evidence in answer to that of the plaintiff.

I do not think that any leave for appeal was necessary in this case, because, in my opinion, the trial Judge proceeded upon a wrong principle. There was no principle, in my opinion, that would justify the disposition he made as to costs. See *Edmanson* v. *Chilie* (1914), 7 S.L.R. 34, 23 Hals. par. 324 and cases there referred to.

In my opinion, therefore, the plaintiff's appeal should be dismissed with costs, the cross-appeal allowed with costs, and the judgment below varied by ordering that the plaintiff pay the defendant's costs of the action. *Judgment accordingly.*

STEVENSON v. TORONTO BOARD OF EDUCATION.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Latchford and Middleton, JJ. September 29, 1919.

THEFT (§ I—7)—LOSS OF GARMENT FROM SCHOOL CLOAK ROOM—NEGLIGENCE —BOARD OF EDUCATION—LIABILITY.

Boards of Education are not responsible for loss or injury of school children's clothing except where it is shewn that they have been negligent in not exercising reasonable care.

Statement.

APPEAL by the defendants from the judgment of the First Division Court of the County of York in favour of the plaintiff, the father of a pupil at one of the schools (the Jarvis Street Collegiate Institute) under the defendants' control, in an action to recover damages for the loss of a coat which was placed by the pupil in one of the cloak-rooms of the school and taken therefrom by some person unknown. Reversed.

E. P. Brown, for the appellants.

G. T. Walsh, for the plaintiff, respondent.

At the conclusion of the argument for the respondent, the judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Boards of Education are not insurers of school children's clothing: they are responsible for its loss or injury only when the loss or injury is caused by their negligence; that is, their want of reasonable care, the care which is ordinarily taken under similar circumstances.

There was no want of reasonable care proved in this case.

The Board provided two rooms, the one for girls and the other for boys, conveniently situated, where they respectively might leave their over-clothing during school-hours.

The plaintiff's daughter hung her overcoat in the girls' room, on going into school: it was gone when she sought it on going out.

There is no evidence of any kind shewing how or when or by whom the coat was taken from the cloak-room. That it was taken by a thief, not connected with the school in any way, seems improbable.

The cloak-room in which it was put by the girl was well within the school-building. An outer door, and in one way a vestibule and an inner door, had to be passed through, then a hall, and then another hall had to be entered, and the cloak-room door passed through; and doors opening from class-rooms in one of the halls

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had also to be passed, before the cloak-room could be entered from without.

No one has suggested any better feasible means of accommodation for the pupils in this respect.

The case would be different if experience had proved the cloak-room in question an unsafe place. To the contrary it was said that only one similar loss had occurred in 15 years, and that very few thefts had been committed in all Toronto's public schools at any time. Very petty thefts of a few street-car tickets or "small change" do not bear materially on the question involved in this case: it may be that such things are to some extent inseparable from such congregations of many children; it may be that there must always be some who lack the moral power to resist an impulse to take such things when opportunity tempts them. The remedy is not in costlier cloak-rooms or detectives or watchmen, it is in taking more care of the coppers and car-tickets, not needlessly putting them in the double danger of loss and of temptation to the weak. There was no evidence of any better or other method in use in other schools; and that which was adopted in the school in question, every one knows, is that which has long been in general use.

I cannot find negligence of the defendants in any of the facts proved; and so, whether the cloak in question was stolen by some one not connected, or by some one connected, with the school, or was first taken by some other pupil by mistake or otherwise without intention to steal it, I cannot find that the defendants are answerable in damages for its loss; and, therefore, would allow this appeal and direct that this action be dismissed.

Appeal allowed.

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U.S. FIDELITY & GUARANTEE Co. v. CRUIKSHANK and SIMMONS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 3, 1919.

BILLS AND NOTES(§ I C—28)—ILLEGAL CONSIDERATION—PLAINTIFF NOT A HOLDER IN DUE COURSE—FAILURE OF ACTION.

A holder of a promissory note given for an illegal consideration cannot succeed in his action to recover on the note.

The holder cannot set up the claim that he is a holder in due course, when the note in question is obtained by his agents, and with his knowledge as to the circumstances under which it was obtained.

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Elwood, J.A.

APPEAL by plaintiff from the dismissal by Taylor, J., of an action upon a promissory note. Affirmed.

H. E. Sampson, K.C., for appellant; *G. H. Barr*, K.C., for respondent Simmons.

The judgment of the Court was delivered by

ELWOOD, J.A.:—This is an action on a promissory note for $500, dated October 25, 1915, made by the defendants, payable 12 months after date to the order of the Northern Crown Bank and by it endorsed to the plaintiff. Judgment was obtained by default against the defendant Cruikshank, and the action proceeded against the defendant Simmons, and at the trial, judgment was given in his favour dismissing the plaintiff's action as against him.

In 1915, the defendant Cruikshank was the manager of the Northern Crown Bank at Balcarres and had permitted certain unauthorised overdrafts, amounting to some $7,400, and to conceal such overdrafts he falsified his returns to the head office of the bank. In addition to this he had collected rent belonging to the bank amounting to about $160, which he had misappropriated. In the latter part of September, 1915, the bank inspector discovered the overdrafts. It is not quite certain when he discovered the misappropriation of the rent, but from a report to the plaintiff company in October, 1916, it would appear that all of these matters were discovered on September 27, 1915. At any rate, in consequence of the discovery of the falsifying of returns, the bank notified the plaintiff company, which had executed a bond upon the defendant Cruikshank in favour of the bank. In consequence of such notification the plaintiff investigated the matter. Cruikshank was brought into Winnipeg, and taken to the office of a detective agency that was employed by the plaintiff to recover what was termed "salvage" in matters of this kind. While in Winnipeg Cruikshank was practically in charge of the detective agency, and subsequently proceeded to Balcarres with a representative of the detective agency and subsequently obtained the signature of the defendant Simmons to the note in question in this action. This note was handed to a representative of the detective agency, and was subsequently endorsed by the bank and handed back to the plaintiff. The precise date that the plaintiff received it does not appear. The plaintiff subsequently

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admitted its liability and paid the bank. The first payment was made after the maturity of the note.

It was contended on the part of the respondent that the note was given for an illegal consideration, namely, the stifling of a criminal prosecution and was therefore void in the hands of the plaintiff.

For the appellant it was contended that, in order to render the note illegal and void four requisites are necessary, and that these requisites are set out by Vaughan Williams, J., in *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587, as follows, pp. 596 and 597:

> (a) So far as the persons giving the security are concerned, they must be cognizant of the crime which the person whom they seek to help has committed . . . (b) The persons coming forward and taking upon themselves the debt must have been actuated by the desire to prevent a prosecution . . . (c) On the other side there must be, in the first place either an intention to prosecute or threats to prosecute . . . (d) The person receiving the promise or the security must be aware that the person giving the promise or the security would not have come forward but for the threat or the probability of the prosecution.

The first matter to consider is, was there in fact a crime committed by Cruikshank? So far as the misappropriation of the rent is concerned, there undoubtedly was a crime, and I am of the opinion that, under s. 153 of the Bank Act, 3-4 Geo. V., 1913, c. 9, the falsifying of his returns to head office was a criminal act such as would render a security given for the purpose of stifling a prosecution for such offence illegal. I am of the opinion that s. 153 is quite broad enough to cover a return such as this one.

It was suggested on the argument that the return in that section is meant to embrace only a return to the Minister or to the Government. The preceding 8 sections refer to returns to the Minister, and in every instance the words "the Minister" are used. In s. 153 they are omitted, I assume intentionally, so as to cover every return, whether made by the bank to the Minister or whether made by a subordinate to a higher officer of the bank.

If then a crime was committed, were the four requisites referred to above present in the transaction respecting the taking of the note sued on?

So far as Cruikshank himself is concerned, the first requisite was undoubtedly present, because he, of course, was fully aware of what he had done, and his whole evidence goes to shew that he

was aware that he had done something which would render him liable to arrest and imprisonment. So far as Simmons is concerned, the evidence does not, to my mind, shew that he undoubtedly knew of the precise crime, but it does shew that he was aware that Cruikshank had committed some crime in his position as manager of the bank, in connection with the funds of the bank, which rendered him liable to a criminal prosecution. It is also to my mind abundantly apparent from the evidence that both Cruikshank and Simmons signed the note through a desire to prevent a prosecution. Simmons' evidence at pp. 35 and 36 shews this very clearly. At one place he says: "Well, he said it was so that he would not be arrested and put in jail."

So far as the third requisite is concerned, there probably was not a threat in actual words to prosecute, but we must read all the evidence, and what was running through all of the evidence, to my mind, was a desire on the part of the plaintiff and the detective agency employed by it to impress upon Cruikshank the idea of his liability to prosecution, and that, if he got friends to assist him, nothing would be done. The bank inspector said that the matter was at once turned over to the plaintiff. It was, and could only be turned over to the plaintiff if Cruikshank had committed a criminal offence, because it was only in the event of a criminal offence that plaintiff was liable on his bond, so that the bank, at any rate, was of the opinion that a criminal offence had been committed. The plaintiff was aware that the bank was complaining that a criminal offence had been committed. A representative of the plaintiff went to Balcarres, brought Cruikshank to Winnipeg and practically placed him in charge of the detective agency. He was told that it was not the idea of the bond company to prosecute if they could get around it any other way. He was told of a few cases where steps of a similar nature had been taken, and the matter had been squared up to the satisfaction of the different parties. He was told it was necessary for him to remain in the custody of the detective agency for the time being. There are other portions of the evidence that one might refer to, but my understanding of the whole evidence is, that it was impressed upon the mind of Cruikshank that he would be prosecuted unless he got friends to come to his assistance, and that, if he did so get friends, he would not be prosecuted. I

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think that an agreement of that sort can be implied from the evidence. In the same way I think that the plaintiff must have been aware from the whole of the circumstances that Cruikshank, at any rate, only gave the note on account of the threat or probability of prosecution, and while it is true that there is no evidence that the bank or the plaintiff knew definitely what it was that actuated Simmons in signing the note, yet from all of the circumstances I feel quite certain that the bank, or at any rate the plaintiff, must have been of opinion that it was the threats of prosecution which were made that had been used as a lever to obtain Simmons' signature.

But even if all of the four requisites were not present so far as Simmons is concerned, they were present so far as Cruikshank is concerned. While it is true that Simmons signed the note as a maker, yet, in fact, he was merely a surety for Cruikshank, and in my opinion if it was void as against Cruikshank it was also void as against Simmons.

It was urged that the plaintiff was a holder in due course. I am of opinion that that is not so. The representatives of the detective agency were the agents of the plaintiff. It was through these representatives of the detective agency and what I might term the direct employees of the plaintiff, that the note in question was obtained. The persons who obtained the note, or who were instrumental in obtaining it, had knowledge of the circumstances under which it was obtained, and that knowledge is the knowledge of the plaintiff.

I am therefore of the opinion that the plaintiff cannot succeed, and this appeal should be dismissed, with costs.

Appeal dismissed.

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THE KING v. BOBYCK.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. October 16, 1919.

CRIMINAL LAW (§ II B—49)—ACCUSED COMMITTED FOR TRIAL—ONE CHARGE —AT TRIAL FOUR COUNTS SUBMITTED BY CROWN—GENERAL VERDICT OF GUILTY—STATED CASE—APPEAL.

Under the Criminal Code, s. 834, as amended by 8-9 Ed. VII., c. 9, s. 2, the consent of the Judge and the prisoner is necessary before the latter can be tried upon a charge other than the charge upon which he has been committed to jail for trial.

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CASE stated for the opinion of the Court of Appeal in a criminal action.

O. R. Regan, for appellant; *H. E. Sampson*, K.C., for the Crown.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The following case is stated for the opinion of the Court by the District Court Judge of the Judicial District of Moose Jaw.

The accused was committed for trial, for that he did on May 20, 1919, at Moose Jaw, in the Province of Saskatchewan, for the purpose of gain, exercise control over the movements of Sadie Kulbab, a girl, in such a manner as to shew that he was aiding or compelling her prostitution generally, contrary to the Criminal Code, R.S.C. 1906, c. 146.

On the day of his committal he appeared before me and elected a speedy trial on the charge aforesaid.

On the day of his trial the charge presented against him by the Crown was as follows:—

Mike Bobyck, of the City of Moose Jaw, in the Province of Saskatchewan, stands charged by direction of the Attorney-General for the Province of Saskatchewan by Richard James Dickinson, acting agent of the said Attorney-General in and for the Judicial District of Moose Jaw.

1. For that he the said Mike Bobyck at the City of Moose Jaw, in the said Province of Saskatchewan, on or about May 21, 1919, did for the purpose of gain exercise influence over the movements of a woman, to wit, Sadie Kulbab in such a manner as to shew that he aided her prostitution generally contrary to the Criminal Code of Canada, s. 216 (1). See 3-4 Geo. V. 1913, c. 13, s. 9.

2. In the alternative for that he the said Mike Bobyck, at the City of Moose Jaw, in the said Province, on or about May 21, 1919, did for the purpose of gain exercise influence over the movements of a woman to wit, Sadie Kulbab in such a manner as to shew that he abetted her prostitution generally, contrary to the Criminal Code of Canada, s. 216 (1).

3. In the further alternative, for that he, the said Mike Bobyck, at the City of Moose Jaw, in the said Province of Saskatchewan, on or about May 21, 1919, did procure the said Sadie Kulbab to have unlawful carnal connection with a male person contrary to the Criminal Code of Canada, s. 216 (a).

4. In the further alternative, for that he the said Mike Bobyck, at the City of Moose Jaw, in the said Province of Saskatchewan, on or about May 21, 1919, did keep a disorderly house, to wit, a bawdy house, contrary to the Criminal Code of Canada, s. 228.

Upon arraignment and before plea counsel for the accused objected that the accused did not elect for speedy trial on counts,

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2, 3 and 4, of the indictment, and that the consent of the Court had not been applied for or granted to add such additional counts.

I stated that my consent to add such counts had not been applied for and no consent on my part had been given and on the Crown undertaking responsibility therefor, the accused, subject to such objection, pleaded "Not Guilty" to all the counts, individually, and the trial proceeded.

At the close of the case for the Crown and after verdict counsel for the accused moved in arrest of judgment that the charge or indictment on which the accused was found guilty was bad in the law, and null and void, and insufficient to support a conviction because the same was laid and preferred by an "acting agent" of the Attorney-General instead of an "agent" as provided by s. 873 (a) of the Code. See 6-7 Edw. VII., c. 8, s. 2.

I overruled this objection.

Counsel for the accused then moved for a stated case on the following points:

1. That the charge is bad because the prisoner elected a speedy trial on the charge for which he was committed, that being under s. 216, "I" of the Code, whereas the charge contains other counts and said other counts were not added by consent of the Judge, nor was application for his consent made, nor was the prisoner put to his election on said counts, and he did not consent, and the prisoner did not consent to be tried by the Judge in respect thereof.

2. That evidence of acts of conversations of what took place in the Moose Rooms was improperly admitted in evidence.

3. That the decision of the trial Judge was bad in law and against the weight of evidence inasmuch as there was not corroboration implicating the accused as required by s. 1002 of the Code.

4. That there was no valid charge or indictment against the prisoner because the so called charge was laid, preferred and signed by one R. J. Dickinson, as "acting agent" of the Attorney-General of Saskatchewan, whereas s. 873a (2) requires that the charge shall be preferred by the agent of the Attorney-General and there is no authority to delegate the right of preferring a charge to any person or class of persons other than those specifically mentioned in the said section.

I find the facts as follows: (a). That on application by the accused for particulars the Crown limited the scene of operations to the Brunswick Hotel, but afterwards submitted as evidence, acts of prostitution and immorality on the part of Sadie Kulbab and Julia Babyck on the same and following day at the Moose Rooms, another rooming house across the street from the Brunswick Hotel. To this evidence counsel for the accused objected.

I overruled his objection and admitted the evidence. (b). The evidence against the accused (who is a returned soldier) consisted entirely of the evidence of Sadie Kulbab, a girl over whom the accused was charged with having control, and of procuring, and she was corroborated in so far as what occurred in the Brunswick Hotel except by the statement of one witness, who stated that the accused took him to this room and pointed out Sadie Kulbab and Julia Babyck, and that he then had unlawful intercourse with Julia Babyck but Sadie Kulbab was not then in the room. Beyond this there was no corroboration unless what took place at the Moose Rooms was properly admitted to evidence.

I therefore state the following question for the opinion of the Court of Appeal:

(a) Was there sufficient corroborative evidence implicating the accused to warrant his conviction?

(b) Was the evidence of what took place at the Moose Rooms properly admitted in evidence?

(c) Was I right in proceeding with the trial of the accused on counts 2, 3 and 4 of the indictment when he had not elected for a speedy trial thereon, and they had not been preferred with my consent?

(d) Was the charge bad by reason of it having been preferred by an acting agent of the Attorney-General and if bad, should the objection therefore have been taken before plea?

It only appears by implication that the accused was found guilty and it is not stated whether the accused was convicted on all or only some or one of the counts. It was stated, however, by counsel on the argument before us that the trial Judge made a general finding of "guilty" which I shall assume means guilty on all the counts in the charge.

As to the first question (a): I am of the opinion that the evidence of the witness mentioned in clause (a) of the statement of facts is amply corroborative of the evidence of Sadie Kulbab in support of the first and second counts. This question (a) will therefore be answered in the affirmative.

As to the second question (b): As there appears to be sufficient evidence to support the charge as restricted by the particulars, no substantial wrong was done to the accused by the admission of the evidence referred to in this question, even if the evidence was improperly admitted, and s. 1019 of the Criminal Code applies. In any event, I should be inclined to the opinion that the evidence might properly be adduced on the authority of, and for the purpose

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mentioned in, *Makin* v. *Att'y-Gen'l for New South Wales*, [1894] A.C. 57, at p. 65. The question (b) is therefore answered in the affirmative.

As to the third question (c): S. 834 of the Criminal Code as amended by s. 2 of the Criminal Code Amendment Act, 8-9 Edw. VII., c. 9, 1909, requires both the consent of the Judge and of the prisoner before a prisoner can be tried upon a charge other than the charge upon which he has been committed to jail for trial.

The prisoner in this case was committed to jail and elected a speedy trial on a charge

that he did on May 20, 1919, at Moose Jaw, in the Province of Saskatchewan, for the purpose of gain, exercise control over the movements of Sadie Kulbab, a girl, in such a manner as to shew that he was aiding or compelling her prostitution generally contrary to the Criminal Code.

In my opinion the first and second counts of the charge are practically the same as or at least are included in the charge for which the accused was committed for trial and therefore neither his consent nor the consent of the Judge was required.

With regard to the 3rd and 4th counts, the new s. 827 enacted in 1909 provides that upon the election by the prisoner for speedy trial the prosecuting officer shall prefer the charge against him for which he has been committed for trial, and as has already been pointed out s. 834 provides that the prisoner cannot be tried upon another charge without his consent and the consent of the Judge.

I would, therefore, answer the third question (c): As to count 2, in the affirmative; as to counts 3 and 4, in the negative. As to the 4th question (d): S. 827 of the Criminal Code provides that upon a prisoner consenting to a speedy trial the "prosecuting officer" shall prefer the charge against him for which he has been committed for trial. "Prosecuting officer" is defined as including, in the Province of Saskatchewan, "any local registrar, registrar, clerk or deputy clerk of the Supreme Court of the Province or any clerk or acting clerk of a district or any person conducting under proper authority the Crown business of the Court."

The objection upon which this question was founded and the argument addressed to us on this question were evidently based on the mistaken idea that the provisions of s. 873A of the Criminal Code apply to speedy trials, whereas they only apply to trials which in other Provinces would follow an indictment by the grand jury.

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The charge in this case is preferred and signed by Dickinson as "Acting Agent for the Attorney-General in and for the Judicial District of Moose Jaw." It must be presumed, therefore, that Dickinson was conducting the Crown business of the Court under proper authority, that is, the authority of the Attorney-General.

The result of the foregoing questions is that the conviction so far as the 3rd and 4th counts are concerned will be quashed and the conviction on the first and second counts is sustained.

As there seems to have been only a general finding of "guilty" and sentence of 3 years' imprisonment in the Prince Albert Penitentiary without any reference to the counts of the charge the case will be remitted to the trial Judge with the direction to pass such sentence as justice may require on the conviction on the first and second counts.

Judgment accordingly.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

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RICHARDS v. BAKER.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. 1918.

LEVY AND SEIZURE (§ III A—40)—*Practice and procedure—Assignment—Notice to sheriff—His refusal to withdraw—Poundage.*]—Appeal by defendant from the judgment of the Court of Appeal for British Columbia (1918), 40 D.L.R. 351, affirming the judgment of the trial Judge, Clement, J., and maintaining the respondent's (plaintiff's) action. Affirmed.

F. H. Chrysler, K.C., for appellant; *Bethune*, for respondent.

The sheriff of Victoria seized certain goods on the premises of one Neston in the forenoon, and on the same day Neston made an assignment for the benefit of his creditors under the Creditors' Trust Deeds Act. Notice in writing of this assignment was served upon the sheriff about 3.30 p.m. of the same day. The sheriff agreed to withdraw his bill including an item for poundage, which item the respondent refused to pay. The sheriff remained in possession until ordered to withdraw by an order of Clement, J. The question in issue is as to whether the sheriff was entitled to poundage.

The defendant appealed to the Supreme Court of Canada which, after hearing counsel on its behalf, and without calling on counsel for the respondent, dismissed the appeal.

Appeal dismissed.

STOWE v. GRAND TRUNK PACIFIC R. Co.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. 1918.

EVIDENCE (§ X A—680)—*Hearsay—Admissibility—Railways—Animals killed by train—Negligence of owner.*]—Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1918), 39 D.L.R. 127, reversing the judgment of Scott, J., at the

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trial and dismissing the appellant's (plaintiff's) action. Affirmed.

C. H. Grant, for appellant; *D. L. McCarthy*, K.C., and *N. D. Maclean*, for respondent.

The appellant, living in the same house with his parents and brothers, was the owner of several horses which were accustomed to run and were looked after in conjunction with the animals of his father and brothers within the boundaries of his own and his father's and brothers' land, there being openings between the sections. Four animals of the appellant got upon the right of way of the respondent company and were killed by a passenger train. The appellant knew nothing of the accident except from what was told him by his brother. In his evidence, the appellant stated that his brother told him that he had "left the gate open." The trial Judge held that this statement was merely hearsay and not admissible; and it being the only account of the accident, the Court held the respondent liable. The Appellate Division held that this testimony should be regarded as an admission or declaration by the appellant himself and therefore entirely proper evidence; and it reversed the judgment of the trial Judge and dismissed the action.

On the appeal by the plaintiff to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs, Idington, J., dissenting. *Appeal dismissed.*

MALONE v. THE KING.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. 1919.

TIMBER (§ I—10)—*Expropriation—Public lands—Provincial grants—Right of way—Timber license—Compensation.*]—Appeal from the judgment of the Exchequer Court of Canada (1918), 42 D.L.R. 520, 18 Can. Ex. 1, maintaining the appellant's (suppliant's) action. Affirmed.

L. S. St. Laurent, K.C., for appellant; *Eugene Lafleur*, K.C., for respondent.

The appellant, by his petition of right, seeks to recover the sum of $40,080 and, at the conclusion of the evidence, reduced his claim to $29,466, as representing the value of timber alleged to

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have been cut by the respondent's officers and servants while engaged in the construction of the National Transcontinental Railway. In 1907, the Quebec Government granted to the commissioners of this railway the Crown land they required for their right of way, and later on the Crown Lands Department of that Province sold to the appellant the timber limits which comprised this right of way. The appellant took action against the respondent for the value of the trees cut by it for the construction of the railway on the right of way and on each side of it.

The Exchequer Court disallowed any claim as to the trees on the right of way and awarded $1,000 for the trees cut outside of it.

The Supreme Court of Canada, after argument, reserved judgment and eventually affirmed this judgment.

Appeal dismissed.

LEBRUN v. GRUNINGER.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. 1918.

SPECIFIC PERFORMANCE (§ I D—26)—*Contract—Transfer of shares.*]—Appeal by defendant from the judgment of the Court of King's Bench, appeal side, (1917), 27 Que. K.B. 210, varying the judgment of the Superior Court, District of Three Rivers, and maintaining the respondent's, plaintiff's, action. Affirmed.

E. F. Surveyer, K.C., and *L. S. St. Laurent*, K.C., for appellant; *N. A. Belcourt*, K.C., and *P. Bigué*, K.C., for respondent.

The respondent entered into an agreement with the appellant whereby, in consideration of $5,000, the former undertook to sell and deliver to the latter 27,450 shares in the "Gold Mine Huronia" company. The appellant, who is a notary and also secretary-treasurer of this company, was acting on behalf of parties who were desirous of obtaining control of the company. Later on, the appellant, having asked the respondent to agree to cancel the agreement, which he refused to do, wrote across his copy of the agreement: "This contract is cancelled." Then the respondent served on the appellant a notarial protest to carry out his obligations under the contract and later brought this action for specific performance.

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The trial Court gave judgment against the appellant for $5,000 with interest and costs; and this judgment was affirmed by the Court of King's Bench, though with some modifications.

The defendant appealed to the Supreme Court of Canada, which, after hearing counsel for the respective parties, reserved judgment, and, on a subsequent date, dismissed the appeal with costs.

Appeal dismissed.

ISITT v. GRAND TRUNK PACIFIC R. Co.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. 1919.

TRESPASS (§ I A—5)—*Railways—Taking gravel—Consent of owner.*]—Appeal from the judgment of the Court of Appeal for British Columbia, affirming, on equal division of the Court, the judgment of the trial Court, and maintaining the appellant's, plaintiff's, action for $755.30. Affirmed.

A. Bull, for appellant; *A. Alexander*, for respondent.

The appellant is the owner of certain land situate near the townsite of Prince George. The respondent was then constructing its main transcontinental line and had a right of way through the above property of the appellant. While a steam shovel, operated by the respondent, was removing gravel on their right of way, the appellant's agent visited the property. Later on, the respondent removed some gravel from the appellant's property. The appellant, by his action, claimed damages, alleging trespass by the respondent on his land and taking away gravel.

The trial Court held that there had been no trespass and condemned the respondent to pay $755.30, value of the gravel removed.

On the appeal to the Supreme Court of Canada the Court heard counsel for the appellant and, without calling upon counsel for the respondent, dismissed the appeal with costs.

Appeal dismissed.

De FELICE v. O'BRIEN.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. 1919.

APPEAL (§ VII L—470)—*Sale—Acceptance—Defects—Destruction of the goods.*]—Appeal from the judgment of the Court of

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King's Bench, appeal side (1918), 45 D.L.R. 295, 27 Que. K.B. 192, affirming the judgment of the Superior Court, District of Montreal, and dismissing the appellant's, plaintiff's, action. Affirmed.

Edmond Brossard, K.C., for appellant; *H. J. Kavanagh*, K.C., and *J. H. Gérin-Lajoie*, for respondent.

The appellant is a manufacturer of cigars and ordered from the respondent the delivery of tobacco which was accepted. The appellant then made 70,000 cigars. Later on his clients complained that the tobacco would not burn and a certain part of these cigars were returned to the appellant, of which fact he advised the respondent. On May 26, 1916, the appellant offered to return to respondent 40,000 out of the 70,000. On June 17, the appellant advised the respondent that these cigars had been destroyed. On July 18, the appellant took this action in damages for $4,879.

The trial Court dismissed the action; and the Court of King's Bench affirmed this judgment.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the Court reserved judgment, and, on a subsequent date, dismissed the appeal with costs, the Chief Justice and Mignault, J., dissenting.

Appeal dismissed.

U.S. FIDELITY AND GUARANTEE Co. v. DEISLER.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. October 15, 1917.

CONTRACTS (§ II D—152)—*Suretyship—Principal and surety—Bond—"To pay all damages"—Costs.*]—Appeal by defendant from the judgment of the Court of Appeal for British Columbia (1917), 36 D.L.R. 29, 24 B.C.R. 278, varying a judgment of Murphy, J., at the trial and maintaining the respondent's action. Affirmed.

J. W. de B. Farris, K.C., for appellant; *F. H. Chrysler*, K.C., for respondent.

The respondent having applied for an *interim* injunction, an order was made that the Spruce Creek Co., sued by him, give security to cover any damages that may be awarded him. That company with the appellant became parties to a bond to pay such damages. The judgment in the damage action gave the respondent

$14,490 damages, $3,025.08 costs and $1,532.57 interest. The trial Judge, in the present action, gave judgment on the bond, against the appellant in favour of the respondent for the full amount. The Court of Appeal, Martin, J., dissenting, varied this judgment and held that the bond was not covering the costs.

On the appeal by the defendant to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs. *Appeal dismissed.*

RAYMOND v. THE KING.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. 1918.

EXPROPRIATION (§ III C—140)—*Compensation—Water-lot—Compulsory taking.*]—Appeal from the judgment of the Exchequer Court of Canada (1916), 29 D.L.R. 574, 16 Can. Ex. 1, awarding the sum of $23,560 to the suppliant, appellant.

E. Belleau, K.C., and *L. S. St. Laurent*, K.C., for appellant; *A. R. Holden*, K.C., for respondent.

A petition of right was brought by the appellant to recover the sum of $390,000 as representing the value of certain land or part of a beach-lot, expropriated by the Crown, and the damages resulting from such expropriation.

The Exchequer Court awarded the sum of $23,560, being four cents a square foot for 589,000 square feet of land expropriated. The suppliant appealed asking that the amount of compensation should be declared insufficient; and the Crown cross-appealed urging that this amount should be decreased.

The Supreme Court of Canada, after argument, reserved judgment, and, at a subsequent date, dismissed the appeal with costs; and the cross-appeal was allowed with costs, the Chief Justice dissenting. *Appeal dismissed; cross-appeal allowed.*

LEFEBVRE v. THE KING.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. 1919.

CONTRACTS (§ II D—170)—*Sale of land—Option—Privity—Expropriation.*]—Appeal from the judgment of the Exchequer

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Court of Canada (1917), 38 D.L.R. 674, 16 Can. Ex. 241, dismissing the appellant's, suppliant's, action with costs. Affirmed.

E. A. D. Morgan, K.C., for appellant; *A. Bernier*, K.C., and *V. A. de Billy*, for respondent.

It is a petition of right to recover compensation, under an option, with respect to certain land taken by the Crown for the construction of a barrier or dam on the River St. Charles, P.Q.

The Exchequer Court held that, under the circumstances of the case, the suppliant was not entitled to any portion of the relief sought by his petition of right.

The suppliant appealed to the Supreme Court of Canada, which, after hearing counsel on its behalf, and without calling on counsel for the respondent, dismissed the appeal.

Appeal dismissed.

THE KING v. BONHOMME.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. 1918.

PUBLIC LANDS (§ I C—15)—*Crown grant—Indian lands—Adverse possession.*]—Appeal from the judgment of the Exchequer Court of Canada (1917), 38 D.L.R. 647, 16 Can. Ex. 437, dismissing the action of the plaintiff appellant.

F. J. Bisaillon, K.C., and *P. St. Germain*, K.C., for appellant; *F. L. Beique*, K.C., and *N. A. Belcourt*, K.C., for respondent.

It is an information of intrusion exhibited by the Attorney-General of Canada, whereby it is claimed that the Island of St. Nicholas, situate in navigable waters of the River St. Lawrence, in Lake St. Louis, be declared a portion of the Caughnawaga Indian Reserve and that the possession of the island be given the Indians. On the other hand, the Province of Quebec, claiming the ownership of the island, sold it in 1906 to the respondent.

The Supreme Court of Canada, after argument, reserved judgment and eventually affirmed the judgment of the Exchequer Court.

Appeal dismissed with costs.

THE "WAKENA" v. UNION S.S. COMPANY OF BRITISH COLUMBIA.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. 1918.

COLLISION (§ I—3)—*Admiralty law—Narrow channel—Fog.*]—Appeal from the judgment of the Exchequer Court

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of Canada (1917), 37 D.L.R. 579, 16 Can. Ex. 397, reversing the decision of Martin, L.J.A. (1917), 35 D.L.R. 644, 24 B.C.R. 156, in the British Columbia Admiralty Division of the Exchequer Court of Canada and maintaining the respondent's action. Affirmed.

Aimé Geoffrion, K.C., for appellant; *R. C. Holden*, K.C., for respondent.

This is an action brought by the respondent, owner of the steamship "Venture," against the motor vessel "Wakena" for damages caused by the collision of the two vessels near the entrance to Burrard Inlet, in the First Narrows. The "Venture" was then on the south or proper side of the channel; the "Wakena" had got away to the north side and was trying to get back to the south which was also her proper side. It was common ground that the collision happened in a narrow channel and that the weather was calm but foggy at the time of the collision.

The Vice-Admiralty Judge of British Columbia held the "Wakena" to be without fault; but on appeal to the Exchequer Court, Admiralty side, Audette, J., with the assistance of a nautical adviser, held that the "Wakena" was the sole cause of the collision and that there was no mutual fault of the two vessels.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal with costs, Idington, J., dissenting.

Appeal dismissed with costs.

RUTTER v. ORDE.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. 1918.

MISTAKE (§ III C—35)—*Timber licenses—Application—Description—Sufficiency of—Forest Act, B.C.S., (1912) c. 17, s. 17.*]—Appeal by defendant from the judgment of the Court of Appeal for British Columbia (1917), 39 D.L.R. 456, affirming, on an equal division of the Court, the judgment of the trial Judge, Clement, J., and maintaining the respondent's (plaintiff's) action. Affirmed.

O. C. Bass, for appellant.

A. H. Macneill, K.C., and *R. M. MacDonald*, for respondent.

The question in issue turns upon the construction of s. 17 of the Forest Act of British Columbia. The representative of the appellant was the first locator of certain timber claims; and having found

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on a tree the words "Clyde River," he made his application for a timber license on that river. Later on, the respondent staked the same timber limits, calling the same river as "Swede River," the name under which it was known in the locality. The provincial authorities dealt with these applications as covering different localities. The license applied for by the respondent was first issued, and later on the one in favour of the appellant was issued.

The trial Judge held that the respondent's license, being first issued, vest in him all rights of property in the timber limits against any claim of the appellant.

On appeal to the Supreme Court, the judgment of the Court of Appeal, affirming on equal division the judgment of the trial Court, was affirmed. *Appeal dismissed.*

THE KING v. QUEBEC GAS CO. AND QUEBEC RAILWAY, LIGHT HEAT & POWER CO.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. 1918.

EXPROPRIATION (§ III B—10)—*Compensation—Market value—Special adaptability.*]—Appeal from the judgment of the Exchequer Court of Canada (1917), 42 D.L.R. 61, 17 Can. Ex. 386, in favour of the defendants (respondents).

G. F. Gibsone, K.C., for appellant.

Eugene Lafleur, K.C., and *E. A. D. Morgan*, K.C., for respondent, Quebec Gas Co.

L. G. Belley, K.C. for respondent, Quebec R.L.H. & P. Co.

It is an information by the Attorney-General of Canada, whereby certain lands, belonging to the defendants, were taken and expropriated for the purposes of the National Transcontinental Railway. The Crown offered $144,400 and the defendants claimed $1,682,880.90. The Exchequer Court awarded the sum of $219,675, of which $32,000 represented the value of the buildings and $187,675, the value of the land at $3 a foot. The Crown appealed, asking that the last amount should be reduced to $2.25 and the respondent cross-appealed asking a sum of $800,000.

The Supreme Court of Canada, after argument, reserved judgment, and, at a subsequent date, rendered the following judgment: appeal dismissed with costs to the Quebec Gas Co. and no

costs to the Quebec R.L.H. & P. Co., (Davies and Idington, JJ., dissenting) and the cross-appeal dismissed with costs.

Appeal and cross-appeal dismissed.

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BERG v. CARR.

Supreme Court of Canada, Fitzpatrick, C.J., Idington, Anglin and Brodeur, JJ. March 5, 1918.

CONTRACT (§ II D—150)—*Breach of—Performance—Impossibility.*]—Appeal by defendant from the judgment of the Court of Appeal for British Columbia (1917), 38 D.L.R. 176, 24 B.C.R. 422, affirming the judgment of the trial Judge, Morrison, J., and maintaining the respondent's (plaintiff's) action. Affirmed.

H. S. Wood, for appellant; *Eugene Lafleur*, K.C., and *Charman*, for respondent.

The appellant was general manager of the Hudson Bay Insurance Co. with head office in Vancouver. The respondent was the company's general agent in Alberta, where he wrote up "hail" insurance policies. The premiums on these policies were paid partly in cash and partly by notes. Another firm, Anderson & Sheppard Co., entered into an option with appellant to sell him $50,000 worth of notes at a discount. Later on the appellant asked the respondent to resign; and as an inducement to him he offered him to take up the above option and hand over the notes to respondent for collection at half the profit he was to obtain. The respondent accepted the offer and resigned. But only $10,000 odd of unpaid notes were in the hands of Anderson & Sheppard Co. on the date of their delivery. The respondent brought action for the amount he would have received in profits if the agreement had been carried out, or in the alternative, damages for breach of contract.

The trial Judge found in favour of the respondent for $5,500 damages; and the Court of Appeal affirmed this judgment. McPhillips, J.A., dissenting in part.

On an appeal by the defendant to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed.

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CURRIE v. RUR. MUN. OF WREFORD AND LASHER.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Brodeur, JJ. November 18, 1918.

PRINCIPAL AND AGENT (§ III—32)—*Contract—Municipal corporation—Agent's signature followed by "councilman"—Personal liability.*]—Appeal from the judgment of the Supreme Court of Saskatchewan (1918), 38 D.L.R. 516, reversing the judgment of Newlands, J., at the trial, 10 S.L.R. 117, and dismissing the action of the plaintiff (appellant).

P. M. Anderson, for appellant.

J. F. Frame, K.C., for respondent municipality.

J. A. Allan, K.C., for respondent Lasher.

The appellant sued for $6,986.90 for work done on the roads of the municipality respondent under a written agreement entered into between him and respondent Lasher, a councillor of said municipality. The agreement was signed: "J. T. Lasher, councilman." The appellant made alternate claims against the municipality on the ground that the contract was their contract and against Lasher on the ground that he was personally liable.

The trial Judge held that the municipality was not liable but that Lasher was. Lasher appealed from this decision and Currie cross-appealed against the municipality. The Supreme Court of Saskatchewan allowed the appeal and dismissed the action against Lasher; it also allowed the cross-appeal and entered judgment against the municipality for $374.34.

The plaintiff, now appellant, appealed to the Supreme Court of Canada, and the municipality, now respondent, also cross-appealed. After hearing counsel for the respective parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs, Brodeur, J., dissenting, and allowed the cross-appeal with costs, Idington and Brodeur, JJ., dissenting.

Appeal dismissed; cross-appeal allowed.

STEWART v. THORP.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington and Brodeur, JJ. 1918.

MONOPOLY AND COMBINATIONS (§ II B—16)—*Contract—Restraint of trade—Unduly lessening competition—Art. 498 Cr. C.*]—

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Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1917), 36 D.L.R. 752, 11 Alta. L.R. 483, reversing the judgment of Walsh, J., at the trial, and dismissing the appellant's (plaintiff's) action with costs.

F. H. Chrysler, K.C., for appellant; *A. H. Clarke*, K.C., and *M. Macleod*, for respondent, Canmore Coal Co., and other respondents.

The defendant, respondent, the Canadian Anthracite Coal Co. Ltd., was the owner of large coal areas in the Canmore District in this Province, of which the defendant the Canmore Coal Co. Ltd., was the lessee. The plaintiff, appellant, was a shareholder in both of these companies. The individual defendants, respondents, were directors, some of them, of one of these companies, and some of them of the other, and some of them of both. By agreement dated Sept. 15, 1916, the former company agreed to buy from the defendant, respondent, the Georgetown Collieries, Ltd., a rival concern operating in the same district, all of the assets of that company, for the sum of $100,000 plus the cost price of all its supplies and stock in trade. This agreement has been executed by the Anthracite Coal Co., but the execution of it by the Georgetown company was prevented by an injunction in this action restraining it from doing so, and it is for that reason still unexecuted by it. $2,500 has been paid for the supplies, but the payment of anything further under the contract was stopped by the same injunction. The plaintiff, appellant, sought a declaration that this agreement was "unlawful, illegal and *ultra vires*," an injunction restraining each of the defendant, respondent, companies from entering into "any other agreement, arrangement, conspiracy or combine with the defendant the Georgetown Collieries, Ltd., forbidden by s. 498 of the Criminal Code," from paying over any moneys under the impeached agreement or from doing any further act or thing in the carrying out of the same, and an accounting by the individual defendants for any moneys of either the Anthracite company or the Canmore company, paid to the Georgetown company under the same and judgment against them for all moneys so paid.

The action was tried by Walsh, J., who dismissed the action at the close of the plaintiff's case as against the defendants,

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respondents, the Georgetown Collieries, Ltd. He, however, after hearing the evidence of the defence, directed judgment to be entered and a formal judgment was entered accordingly, declaring that the arrangements between the other two companies for the purchase by them of the coal deposits of the Georgetown Collieries, Ltd., are illegal, tending to unduly prevent or lessen competition in the production, sale and supply of an article which may be the subject of trade or commerce as provided in s. 498 of the Criminal Code, but not otherwise in contravention of the said section, and also declaring that the directors of the Canmore Coal Co., Ltd., are liable to the said company for any moneys paid by that company in respect of the agreement in question. A reference was ordered to ascertain the amounts and the judgment ordered the defendants, Thorp, Neale, Thorne, Weyerhaeuser, and Ingram, to repay the amount so found, to the said company; otherwise the action was dismissed and no injunction was granted.

From this judgment the plaintiff appealed and the defendants, Thorp, Ingram, and Neale, and the two first-mentioned companies cross-appealed. The Appellate Division held that the provisions of s. 498 of the Criminal Code are clearly intended to apply to agreements among persons who remain in a particular business as to the method and plan by which they will carry it on and as to regulations and rules among themselves so as to lessen competition in the sale, etc., of any article of commerce, and not to an arrangement to buy out and out the property of a competitor, consequently the Appellate Division dismissed the appeal of the present appellant, allowed the cross-appeal of the present respondent and dismissed the action with costs.

On appeal by the plaintiff to the Supreme Court of Canada, the Court, after hearing counsel for all parties, reserved judgment, and, at a subsequent date dismissed the appeal with costs.

Appeal dismissed.

McCORD v. ALBERTA AND GREAT WATERWAYS R. Co.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. October, 21, 1918.

WATERS (§ II G—125)—*Negligence—Construction of ditch—Surface water—Draining of higher land—Liability of owner.*]—

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Appeal from the judgment of the Supreme Court of Alberta, Appellate Division (1918), 41 D.L.R. 722, 13 Alta. L.R. 476, reversing the judgment of Simmons, J., at the trial and dismissing the appellant's (plaintiff's) action with costs. Reversed.

N. D. Maclean, for respondent.

The appellant claimed that the respondent, by its servants or agents, wrongfully dug or caused to be dug a drainage ditch from its right of way through certain lands and thereby wrongfully flooded the appellant's lands, causing him damages. The respondent, amongst other defences, denies that it constructed the ditch.

The trial Judge gave judgment in favour of the appellant for $480; but this judgment was reversed by the Appellate Division, Hyndman, J., dissenting.

On the appeal by the plaintiff to the Supreme Court of Canada, the Court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, allowed the appeal with costs, Davies, J., dissenting. *Appeal allowed.*

PULOS v. LAZANIS AND KLADIS.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Brodeur and Mignault, JJ. 1919.

HUSBAND AND WIFE (§ II D—74)—*Partnership—Parol evidence.*]—Appeal from the judgment of the Court of King's Bench, appeal side (1918), 24 Rev. Leg. 482, reversing the judgment of the trial Court, and dismissing the intervention filed by the appellant. Affirmed.

Aime Geoffrion, K.C., and *Thomas Walsh*, K.C., for appellant.

J. O. Lacroix, K.C., for Lerikos.

O. Sénécal, K.C., for Kladis.

The appellant Pulos sought to recover payment of a debt due to him by Denis Lazanis, the husband of the intervenant Mary Kladis, out of the one-third interest in a theatrical business carried on in Maisonneuve, which, according to the documentary evidence produced, belonged to Mary Kladis, but which appellant alleged was in truth the property of her husband using her name to shield him from his creditors.

The trial Judge maintained the allegations of the appellant and dismissed the intervention filed by Mary Kladis. The Court of King's Bench reversed this judgment.

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The plaintiff appealed to the Supreme Court of Canada, which, after hearing counsel on behalf of both parties, reserved judgment, and, at a subsequent date, dismissed the appeal.

Appeal dismissed.

MACPHERSON v. BOYCE.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. 1919.

COMPANIES (§ V F—313—*Winding-up—Assets transferred to new company—Petition—Status of petitioner.*]—Appeal from the judgment of the Court of Appeal for British Columbia (1918), 43 D.L.R. 538, affirming the judgment of the trial Court, 25 B.C.R. 214, and confirming the order for the winding-up of the Dominion Trust Co. Affirmed.

Geo. F. Henderson, K.C., for appellant.

Eugene Lafleur, K.C., for respondent.

Under an agreement, ratified by legislation, between two companies called "The Dominion Trust Co.," the "old" and the "new," the assets of the "old" company were vested in the "new;" the shareholders in the "old" were entitled to exchange their shares for shares in the "new." A shareholder in the "old" company, who had not made such application, was placed upon the list of contributories on the assumption that he had exchanged his shares. The shares of that shareholder were not fully paid up and he petitioned, under the B.C. Companies Act, for the winding-up of the "old" company.

The trial Court and the Court of Appeal held that, even if the "old" company had no assets, it was "just and equitable" within the meaning of the Act that the "old" company should be wound up and that the petitioner had a status to present the petition.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal.

Appeal dismissed.

MILLER v. STEPHEN.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. 1919.

EXECUTORS AND ADMINISTRATORS (§ IV C 2 — 110) — *Remuneration — Estate — Disbursement.*] — Appeal from a judgment of the Court of Appeal for British Columbia (1918),

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40 D.L.R. 418, 25 B.C.R. 388, varying the judgment of the trial Court. Affirmed.

R. Cassidy, K.C., for appellant; *Wallace Nesbitt*, K.C., for respondent.

The appellant was appointed trustee of the estate of William Stephen, deceased. The Court, upon application, settled an allowance for administration of 5% of the gross value of the estate. On a petition by the beneficiaries upon coming of age, the appellant was discharged from trusteeship and accounts were ordered to be taken. The registrar by his report allowed two items in the accounts to which the respondent objected.

The trial Judge affirmed the registrar's report, from which judgment both appellant and defendant appealed. The Court of Appeal dismissed the appellant's appeal and allowed the respondent's appeal.

The Supreme Court of Canada, after hearing counsel for the appellant and, without calling on counsel for the respondent, dismissed the appeal. *Appeal dismissed.*

STRAINS LIMITED v. NOTT.

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Manitoba King's Bench, Macdonald, J. October 18, 1919.

COMPANIES (§ I D—15)—*Corporate name—Superseded—Not abandoned—Adoption of by new company—Fraud.*]—Motion for an injunction to restrain the use of a company name. Injunction granted.

E. D. Honeyman, for plaintiff.

E. K. Williams and *R. M. Fisher*, for defendant.

MACDONALD, J.:—Motion for injunction to restrain defendants from using name of "Winnipeg Optical Company," and from other acts specifically referred to in the notice of motion, all of which acts, with the exception of the use of the name "Winnipeg Optical Company," the defendants undertake to refrain from using, and consent to an injunction to that end should the plaintiff so desire.

Up to the year 1912, and for many years previously, W. J. Mabee carried on business as "Winnipeg Optical Company" and in that year he sold out his business to the firm of Strain & Tulloch, who continued the business under the name "Winnipeg Optical Company." The memorandum of agreement by which the said business was transferred contains the following:—

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The vendor doth hereby assign and transfer to the purchasers the goodwill of the said business heretofore carried on by him as aforesaid, together with all the rights (if any) of the vendor in and to the use of the name "Winnipeg Optical Company."

Strain & Tulloch then carrying on the business under the name and style of "Winnipeg Optical Company" in April, 1913, sold and assigned all the business, assets and goodwill of the Winnipeg Optical Company to the plaintiffs. At the time of the purchase by the plaintiffs of the Winnipeg Optical Company, they also purchased the business of the defendant H. A. Nott, who, at the time carried on business as an optician and dealer in optical goods, and was the possessor and owner of a large number of prescriptions, the sale of the business including such prescriptions and the said defendant Nott immediately after said sale entered into the employ of the plaintiffs and so continued until the present year (1919).

The telephone directory up to 1917 contained the name "Winnipeg Optical Company" followed by the words "See Strains Limited."

In 1917 they dropped the name "Winnipeg Optical Company" from the directory, but many business cards of the company were outstanding in the hands of customers with the number of their prescriptions noted on the card and the card also giving the number of the company's telephone.

In 1919 the defendant Nott resigned from the plaintiffs' employment and opened up business on his own account as H. A. Nott, optometrist, and also as an optician. At the same time, his wife, the defendant Clara Ethel Nott, caused herself to be registered as carrying on business as an optometrist under the name of the Winnipeg Optical Company, and the defendant H. A. Nott made application for, and secured, the telephone number formerly in use by the Winnipeg Optical Company, and appearing on the outstanding business cards in use by the plaintiffs under the name of the Winnipeg Optical Company.

It seems a reasonable conclusion that the object in securing that telephone number was to get control of business through the cards outstanding among the customers of the Winnipeg Optical Company bearing that name with the numbers of the telephone and prescription.

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The contention of the defence is that the name "Winnipeg Optical Company" has been abandoned by the plaintiffs.

The evidence of Robert Strain, the manager of the plaintiff company, shews that after the incorporation of the plaintiff company, the business was conducted in that name, but to some extent the name "Winnipeg Optical Company" was, and is now used, and by arrangement with postal authorities, all communications so addressed are delivered to the plaintiff company, and the use of that name by the defendants, or either of them, is in contravention of the rights of the plaintiff company, and in my opinion on the evidence before me should be restrained and the order for injunction should go. *Judgment accordingly.*

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CASES—*continued.*